

Unlock response to Ministry of Justice consultation the Diversionary and Community Cautions Draft Code of Practice

Introduction

Unlock is a national independent advocacy charity that supports, speaks up and campaigns for people facing stigma, prejudice and discrimination because of their criminal record. A core mission for Unlock is to provide advice for people in respect of their criminal record, including help overcoming the barriers they're facing. Our website provides vital information and guidance for people with criminal records, but we also have a helpline provided by dedicated staff and volunteers, which deals with specific queries. People can [contact the helpline](#) in various ways, including via email, WhatsApp or our free phone line.

This document sets out our response to the [Ministry of Justice consultation](#) on the Code of Practice for the new two-tier system of cautions brought into being by the Police, Crime, Sentencing and Courts (PCSC) Act 2022, diversionary and community cautions. The Code of Practice ([here in draft form](#)) is aimed at those making "operational use" of the new cautions. Our interest in this document at Unlock lies in where it deals with the criminal records implications of these cautions.

The new system creates two types of cautions replacing a myriad of existing out of court disposals. Broadly, we welcome this new scheme as it provides some clarity regarding out of court disposals. However, we do have some concerns about the implications that they may have for criminal records and whether the Code of Practice is sufficiently clear on this issue. Specifically, these cautions could impact more people from a criminal records perspective if, as seems to be suggested in the Code of Practice, they both merit inclusion on the Police National Computer (PNC). This issue has been dealt with more fully in our response to the consultation below.

Issues

Unlock response to Question 17 of the consultation survey: “In your view, are there any parts of the Code of Practice (not already covered in previous questions) that need greater clarification?”

There are over 12 million people in the UK with a criminal record¹, and criminal records contribute to various barriers people face in society, notably the ability to find work and housing amongst other things. As such, it is important that anyone being offered the chance to accept a caution understands whether this will be included on their criminal record, and if so, what might be the impact of that. We are, therefore, pleased to see that this Code of Practice lays out the implications of these cautions for an individual’s criminal record and makes it clear that the person administering the caution has a duty to outline those implications to an individual.

We are pleased to see that the Code of Practice includes a dedicated section (Part 10) on the impact of the new cautions on an individual’s criminal record and that criminal records are explicitly referenced elsewhere in the document. We believe that this understanding of the long-term impact of these cautions is vital to their being used fairly and effectively. We are encouraged, therefore, by the fact that the document also states that “consideration should therefore be given by the decision maker to whether a less formal response is more appropriate”; this makes clear that these cautions should be used proportionally and with consideration of the long-term impact they may have on individuals.

The code of practice appears to suggest, at 10.10, that these cautions will all lead to an entry on the Police National Computer (PNC). This has a number of potential implications related to criminal records and, therefore, the long-term impact on individuals of receiving a caution. It is our understanding (from both previous interactions with His Majesty’s Courts and Tribunals Service and from the relevant legislation itself²) that only recordable offences should lead to cautions appearing on the PNC. The Code of Practice would be strengthened by clarity around how the cautions interact with the PNC. If our understanding is correct, that only cautions relating to recordable offences would be entered onto the PNC, the Code of Practice could be clarified to ensure that this is clear to those administering cautions and, as a result, communicated clearly to those receiving cautions.

However, if it is the case that all cautions administered under this new system, and to which this Code of Practice relates, will be entered onto the PNC, this should be both made explicit and be supported by reference to the legislative changes that underpin this. Such a change is potentially very significant and the Code of Practice should make that clear. There is either a significant policy shift here regarding what can be added to the PNC or the Code of Practice, in its current form, fails to make it clear that only cautions for recordable offences should be added.

The impact such a policy shift would have on individuals’ criminal records is profound. If it is the case that cautions for non-recordable offences would be included on the PNC, this runs two specific risks. Firstly, that mistakes in the production of DBS certificates could lead to these offences being revealed erroneously. And secondly, if an individual made a subject access

¹ [Figures for nominal records on Police National Computer - 2022 - a Freedom of Information request to Home Office - WhatDoTheyKnow](#)

² <https://www.legislation.gov.uk/ukxi/2000/1139/made>

request to better understand their own criminal record, they may lack the specific knowledge to appreciate which entries to the PNC displayed there might then be disclosed to employers or others via a DBS check; this could lead to them over-disclosing when asked about convictions by employers. In both cases, this highlights the complexity of the criminal records system. As such, clarity in the Code of Practice here is crucial to ensure that individuals receiving cautions have a clear understanding of the criminal records implications associated with that.

There are points in the document where criminal records and Part 10 of the Code of Practice are referenced. These points could be strengthened with the addition of more explicit information being provided. For example, in Part 9, when dealing with “offering and explaining” (9.17) and “administering” (9.19) a caution, readers are directed to Part 10 for full information to support the requirement to ensure the person being offered the caution understands the implications it will have on a criminal record. This could be clarified and strengthened were a little more detailed explanation offered at those points in addition to directing the reader to Part 10. For example, more clarity on the various spending periods attached to the different levels of cautions and their conditions could be made explicit here; given the long-term impact this has on individuals, this detail may act to increase the likelihood of the reader making careful reference to Part 10.

Similarly, there are points in the document when a similar reference to Part 10 and an explicit mention of criminal records would enhance the Code of Practice and ensure it maximises its clarity. In Part 4 of the document, concerning an individual’s eligibility for a caution, the requirement for the person administering the caution to “explain the effects of the caution” (4.1) is outlined. This focuses on the immediate effects around compliance with conditions, and does not mention the effect it would have on that individual’s criminal record; there is no reference here to Part 10. Similarly, in Part 5 there is discussion of the need for an individual to make an “admission” in order to then receive a caution and that they are entitled to receive legal advice before doing so (5.25-5.34), where a reference to criminal records might demonstrate where such advice might be of value.

Conclusion

In conclusion, we welcome the general clarity afforded to the issue to criminal records in the draft Code of Practice. The impact of criminal records on individuals is profound and the need, therefore, to give the criminal records implications of cautions prominence here is crucial. Part 10 of the draft Code of Practice addresses this and is referenced elsewhere in the document. However, we feel that greater clarity overall would be achieved if those other references to Part 10 were widened as outlined above.

However, potentially the most significant issue raised by the draft Code of Practice concerns whether all cautions will end up on the PNC. Clarity about whether it is indeed the case that all cautions, or merely those for recordable offences, will be placed on the PNC is needed, both in the context of this document and more widely. The implications of a shift in policy that would mean all cautions, for recordable offences or otherwise, would have on individuals and their criminal records are significant. Either the Code of Practice needs to make this shift clear and make reference to the basis for it, or it needs to make clear that it is the case the only recordable offences can lead to cautions being on the PNC. Either way, transparency is required.