



The Attorney General of the
Falkland Islands

AGG10

THE ATTORNEY GENERAL'S GUIDANCE ON CONDITIONAL CAUTIONING

1. Definitions

In these Guidelines:

“the Ordinance” means the Criminal Procedure and Evidence Ordinance 2014;

“Prosecutor” means an individual responsible for the conduct, on behalf of the Crown, of criminal prosecutions, and is authorised by the Attorney General to make decisions about whether there is sufficient evidence to give a conditional caution;

“the offence” means one or more offences.

“the offender” means either an adult or youth offender where the context admits.

Conditional cautions were introduced by Part 8 of the Ordinance. These Guidelines govern the use of both Adult and Youth conditional cautions and apply equally to both types of conditional caution except where variations for youth offenders are specifically set out.

2. Aim and Purpose of a Conditional Caution

A conditional caution allows a police officer to recommend or a prosecutor to authorise that a caution should be given to an offender with one or more conditions attached.

When a conditional caution is given for an offence, criminal proceedings for that offence are halted while the offender is given an opportunity to comply with the conditions. Where the conditions are complied with, the prosecution is not normally commenced. However, where there is no reasonable excuse for non-compliance, criminal proceedings may be commenced for the original offence and the conditional caution will cease to have effect.

Youth conditional cautions can only be given to an offender aged 10 to 17 years old inclusive. Offenders aged 18 and over, irrespective of their age when the offence was committed, should be given a conditional caution rather than a youth conditional caution.

Conditional cautions provide an opportunity, in appropriate cases, to achieve an early, positive response for those people who are willing to admit their offending and to comply with certain conditions. They allow:

- The ability to offer a proportionate response in appropriate cases to low level offending;
- For offenders to make swift reparation to victims and communities;

- For offenders to be diverted at an early opportunity into rehabilitative services thereby reducing the likelihood of re-offending; and
- To compensate financially for injuries sustained or loss suffered as result of the offending behaviour.

Youth Conditional Cautions support the principal aim of preventing offending by children and young people. Youth conditional cautions are intended as a more robust response to offending than a Youth Caution in circumstances where public interest in the case can be met by offering a conditional caution rather than by prosecuting an offender. It is the duty of key agencies who work with youths to put in place arrangements to make sure that they take account of the need to safeguard and promote their welfare. It is also the duty of government and public services, private and voluntary organisations to cooperate to improve outcomes for youths. Agencies involved with youth offenders should ensure that a youth conditional caution or specific conditions should not be offered if they jeopardise the welfare and safeguarding of the youth offender or any other young person.

**A conditional caution will very rarely be offered
for an offence involving Domestic Violence or a Hate Crime**

3. The Five Requirements

Sections 126 and 128 of the Ordinance set out five requirements that must all be met before a conditional caution may be given. These requirements should be addressed in order:

1. the prosecutor must have evidence that the offender has committed an offence;
2. the prosecutor must determine that there is sufficient evidence to charge the offender with the offence. The prosecutor must also determine that a conditional caution should be given to the offender in respect of the offence;
3. the offender must admit that he has committed the offence;
4. the police officer must explain the effect of the conditional caution and warn the offender that failure to comply with any of the conditions may result in prosecution for the offence. Where the offender is aged below 18 years, the explanation and warning must be given in the presence of an appropriate adult.

5. the offender must sign a document containing: details of the offence, an admission that the offender committed the offence, consent to be given a conditional caution and details of the conditions attached to the conditional caution.

4. Grounds for giving a conditional caution

In deciding if there is sufficient evidence to charge the offender with the offence the prosecutor must apply the evidential stage of the Full Code Test set out in the Attorney General's Code for Prosecutors (AGG2).

The Full Code Test – evidential stage

The prosecutor must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction in respect of each offence.

Admissions

In determining whether there is sufficient evidence to provide a realistic prospect of conviction in respect of each offence, the prosecutor should take into account all available evidence including any admission made by the offender. A prosecutor must not offer a conditional caution in order to secure an admission that could then provide sufficient evidence to meet the evidential stage of the Full Code Test.

The Full Code Test - public interest stage

Where there is sufficient evidence to provide a realistic prospect of conviction the prosecutor must go on to consider whether it is in the public interest to offer a conditional caution in respect of the offence.

In most cases a conditional caution should not be given where a court, if the offender were convicted, would be likely to impose a significant community sentence or a period of imprisonment for the offence.

In addition to considering the public interest test in deciding whether to give a conditional caution the prosecutor will take into account:

- the seriousness of the offence;
- the circumstances of the case;
- the age of the offender, particularly in respect of a youth offender;

- any views expressed by the victim;
- any wider neighbourhood or community considerations or concerns;
- the background, circumstances and previous offending history of the offender;
- the willingness of the offender to comply with possible conditions;
- the likely effect of the conditional caution on preventing offending;
- the likely outcome if the offender was prosecuted;
- any other relevant guidance issued by the Attorney General.

Where a number of offences are related (either by arising out of the same incident or related to the same underlying problem) and an out-of-court disposal is considered suitable for all of them, the prosecutor may decide to group the offences and deal with them using one conditional caution. Before making this decision the prosecutor should consider whether the number of offences increase the gravity of the offending behaviour to a level where the public interest requires prosecution.

Previous convictions, simple cautions and other out of court disposals in relation to earlier offences do not preclude the use of a conditional caution; however, the prosecutor should consider whether the new offence is part of a pattern of offending that requires a more serious response such as a prosecution. A conditional caution may still be appropriate where:

- there has been a sufficient lapse of time to suggest that a previous caution or conviction has had a significant deterrent effect;
- where the current offence is low level;
- the current offence is not similar or is unrelated to any previous offence;
- it is likely to be the best outcome for the victim and offender dependent on the circumstances of the individual case;
- the offender is willing to comply with possible conditions and has previously complied with interventions or another form of out of court disposal. For example previous compliance with voluntary interventions as part of a warning or youth caution;

A conditional caution is unlikely to be appropriate where the offence forms part of a pattern of offending. The prosecutor may consider that a different form of resolution, such as a prosecution, would be a more appropriate alternative for dealing with the offence.

A second conditional caution should not generally be given for the same or similar offence unless there are exceptional circumstances indicating that it may be appropriate; for example, where the previous conditional caution was more than two years earlier. Generally, it will not be appropriate to give a second conditional caution where the offender failed to comply with the conditions of the previous conditional caution.

If the youth offender reaches 18 years of age before the youth conditional caution can be given, an adult disposal (including an adult conditional caution) may be considered.

5. Conditions

Type of conditions

The conditions that can be attached to a conditional caution must have one or more of the following objectives:

- **Rehabilitation** – conditions which help to modify the behaviour of the offender, serve to reduce the likelihood of re-offending or help to reintegrate the offender into society;
- **Reparation** – conditions which serve to repair the damage done either directly or indirectly by the offender;

Rehabilitative conditions

Rehabilitative conditions may include attendance at substance misuse programmes, or any of a range of interventions available for addressing offending behaviour or tackling other addictions or personal problems, such as gambling or debt management courses, if available.

Reparative conditions

Reparative conditions may include apologising, repairing or otherwise making good any damage caused, provided this is acceptable to the victim. Specific financial compensation may be paid, for example, to a victim. Where the offending has resulted in damage to community property, reparation may take the form of:

- reparative activity to repair that damage;
- reparative activity within the community more generally; or
- a payment to an appropriate local charitable or community fund.

Selection of appropriate, proportionate and achievable conditions

Conditions attached to a conditional caution must always be:

- Appropriate;
- Proportionate; and
- Achievable.

In the case of a youth, factors such as the young person's age, maturity and personal circumstances should be taken into account when considering appropriate conditions.

When deciding on the conditions that should be attached to a conditional caution the prosecutor may draw on the views of others. This may include those involved with restorative justice processes, the Customs and Immigration department where the offender is a foreign national, the probation officer or an allocated social worker, for example.

Appropriateness

The prosecutor should seek to apply a problem-solving approach aimed at changing an offender's behaviour and, if possible, providing redress to the victim of the offence. For most offenders these two aims will be regarded as the priority.

In considering the appropriate conditions to achieve one or more of the objectives set out above, a prosecutor should also consider whether any of the following are applicable to the case:

- opportunities to provide reparation or compensation to any victim or relevant neighbourhood or community;
- use of conditions to reflect and secure the interests of the victim and neighbourhood or community (for example, by requiring the offender to stay away from a specific area);
- use of restorative and reparative processes to have a positive impact on the community or individuals affected by the offending behaviour;
- opportunities to provide reparative unpaid work that benefits the community;

Proportionality

When determining the conditions to be attached to a conditional caution, the prosecutor should consider the totality of the conditions and seek to achieve proportionality to the offending behaviour. The objectives sought ought to be achieved by the attachment of the minimum number of conditions.

Achievability

Offenders must be able to complete the conditions satisfactorily and within a reasonable time period. The prosecutor should take into account the offender's circumstances, physical and mental capacity, and ensure that any financial conditions are commensurate with the means of the offender.

Conditions should avoid any conflict with the offender's religious beliefs and any interference with the times, if any, at which he or she normally works or attends school or any other educational establishment or attends other specialist services.

Time limits for completing conditions

In deciding on the time period within which conditions must be completed, a prosecutor must take into account any time limits affecting the commencement of proceedings for the original offence and must ensure that the option of prosecuting the original offence in the event of non-compliance remains available.

All rehabilitative, reparative and punitive conditions must be capable of being completed within 6 months and ideally be set at a shorter period of about 16 weeks. Such longer periods must still be appropriate, proportionate and achievable. Periods of time are calculated from the date the conditional caution was given.

General considerations

Conditions which impose restrictions on an offender may only be used where they contribute towards one or more of the aims of rehabilitation and reparation. Such conditions could be used to prevent the offender from contacting individuals, visiting certain locations or participating in particular activities.

Conditions may include reference to the future behaviour of an offender, such as an agreement not to commit further offences for a specified period.

An offender with sufficient means may be expected to pay the reasonable costs associated with a condition attached to a conditional caution in order to render the conditions effective, and a requirement to do so might be an additional condition. This is subject to the offender having the means to pay and must be appropriate, proportionate and achievable. Where a condition cannot be given to an offender because they cannot afford to pay the reasonable costs, every effort should be made to identify an alternative condition provided that it is appropriate, proportionate and achievable.

Conditions with a financial element

Conditional cautions with a financial element include:

- a compensation payment as part of a reparative condition (for example a payment to a victim or to a community fund);
- costs associated with reparative, rehabilitative, conditions.

Conditions with a financial element will not be subject to enforcement procedures by the court. Failure to make payment in relation to any condition with a financial element without reasonable excuse will amount to non-compliance with the condition of the caution which may lead to prosecution for the original offence.

Any financial conditions must specify to whom the offender must make payment.

When considering any conditions with a financial element that may be attached to a conditional caution, particularly where the offender is of limited financial means, the prosecutor should always prioritise compensation for the victim ahead of any costs associated with other conditions.

In the case of a youth offender, the responsibility for payment of the financial penalty rests with the young person who accepts the caution and there is no obligation for parents or carers to pay this penalty. It is particularly important to consider the means of the young person and not the means of their parent or guardian.

A conditional caution may contain more than one financial element. For example it may contain a requirement to pay compensation to a victim as part of a reparative condition together with a cost associated with complying with a rehabilitation condition. However the total amount of the financial element must be within the means of the offender, be within the limit set in Section 130(2) of the Ordinance and must be capable of being paid within a reasonable period of time.

The extent of any financial loss suffered by the victim may mean that the full amount of any compensation sought is beyond the means of the offender or in excess of the limit in Section 130(2). This does not preclude the use of a conditional caution in such circumstances where it is appropriate and meets the justice of the case as the total amount of compensation to be paid may be reduced to take into account the means of the offender particularly a youth offender.

Where multiple conditions involving financial payment are attached to a youth conditional caution, the total required to be paid must be commensurate with the individual's financial means and be capable of being paid within a reasonable period of time. Before giving a conditional caution in such circumstances the prosecutor should consider whether a court order for compensation (which can be paid over a longer period of time) would be a more suitable response taking into account all the circumstances of the case.

6. Considering the views of others

The prosecutor will have in mind, where appropriate, the views of others, for example, victims, the investigating officer, social workers, probation officer, community workers.

Restorative Justice

Restorative Justice processes and initiatives may be used to help inform decisions as to the conditions to be attached to a conditional caution. However such initiatives cannot give or administer a conditional caution. Before any conditions that are proposed as a result of these processes or initiatives are attached to a conditional caution, the prosecutor must ensure that they are appropriate, proportionate and achievable in accordance with the requirements of the Ordinance, these Guidelines and any other relevant guidance issued by the Attorney General.

In particular the prosecutor should ensure that the offender has admitted the offence and agrees to accept the conditions attached to the conditional caution.

Involvement of the victim

The views of the victim should be obtained wherever possible. These should be taken into account in deciding whether a conditional caution is appropriate and in determining suitable conditions.

The victim's consent must be obtained in any case where direct reparation or restorative justice processes are being considered or where the victim is directly involved in some way. If the victim does not consent to such conditions, the prosecutor may still consider giving a conditional caution with other conditions attached that do not directly involve the victim.

The views of the victim will be important but cannot be conclusive. The decision as to whether to give a conditional caution and the conditions to be attached lies with the prosecutor who will take into account the views of the victim wherever possible. In some circumstances the prosecutor may consider that proportionality with the level of the offence requires the inclusion of conditions that may be more or less onerous than those the victim wants. Care must be taken not to raise the expectations of the victim whilst seeking their views.

Where the conditions attached to a conditional caution have a direct impact on the victim, the victim should be informed of the conditions given to the offender and the intended outcome. The victim should be informed of any changes to the expected outcome, for example, if the offender has failed to comply with the conditional caution and will not be completing the conditions.

Victims who are not directly affected by the conditions should also be informed of the outcome of the case where possible, including whether the conditional caution was completed or whether the offender was prosecuted for the original offence as a result of non-compliance.

7. Process to follow

Administration of a conditional caution

The conditional caution may be administered in a police station, court building, the Attorney General's chambers or any other suitable location consistent with achieving the appropriate impact on the offender.

It will not generally be appropriate for a conditional caution to be delivered in public (for example, in the street) or in the offender's home. However, in exceptional circumstances such as when dealing with a disabled, an elderly or vulnerable offender, the conditional caution may be administered in the offender's home or similar place, providing the correct procedure for administering the conditional caution is adhered to.

The conditional caution must be administered by a police officer in uniform.

Admissions of guilt

The offender must admit the offence. The Ordinance does not require an admission to be made by the offender before the prosecutor decides whether a conditional caution is an appropriate disposal. However, the offender must make an admission at the time the conditional caution is given that he has committed the offence (or all the offences) for which the conditional caution is being given. This is the case irrespective of whether a previous admission has been made by the offender.

A conditional caution cannot be given to an offender who does not make a clear and unambiguous admission to committing the offence when the conditional caution is administered. This is particularly important where there is any doubt at all about the mental state or capacity of the offender. The police officer should be particularly careful about accepting an admission in these circumstances.

Explaining the effect of the conditional caution

Before administering a conditional caution the police officer must ensure that the offender has the opportunity to receive independent legal advice in relation to the criminal offence.

In accordance with section 128(4) of the Ordinance the effect of a youth conditional caution must be explained in the presence of the offender's parent, guardian or an appropriate adult if the offender is aged below 18.

The police officer must also ensure that an appropriate adult is present in the case of any offender where there is reason to doubt the capacity or ability of the offender to fully understand the nature and requirements of a conditional caution.

In addition the police officer must:

- inform the offender that he or she has the right to legal advice at any time during the process;

- inform the offender of the evidence against them and the decision made by the prosecutor;
- explain the requirements of a conditional caution including exactly what each condition requires the offender to do;
- explain the requirement for and consequences of making an admission to the offence, including the fact that the admission may be used in evidence should the case result in prosecution;
- make it clear to the offender that an admission should never be made merely to receive a conditional caution;
- explain the implications of accepting the conditional caution, including any circumstances in which it may be disclosed;
- explain that the conditional caution will form part of the offender's criminal record and may need to be disclosed in certain circumstances including to an employer or prospective employer. It must also be explained that there may be circumstances where the acceptance of a conditional caution means that the offence may be taken into account in determining whether an offender is prevented from working with children or vulnerable people;
- explain that a conditional caution given in relation to an offence in Schedule 3 of the Crimes Ordinance 2014 will require the offender to comply with the notification requirements in that Ordinance;
- explain that the offender may decide at any stage to withdraw from the conditional caution whether it is before, during or after it has been administered;
- explain the process for contacting the police (or other agency monitoring compliance) should any problems arise in complying with the conditions or if the offender decides to withdraw from the conditional caution process;
- explain that if the offender does decide to withdraw from the conditional caution the offender should inform the police officer as soon as possible. The prosecutor may then decide that the offender should be charged with the original offence and prosecuted;

- explain any requirement to notify the police (or other agency monitoring compliance) immediately upon change of address.
- warn the offender that any failure to comply with the conditions will be investigated. The offender will be given an opportunity to explain the reasons for non-compliance with the conditions. The prosecutor will consider the report and the circumstances of the case including the extent of any compliance to date, and may decide that the offender should be prosecuted for the original offence;
- inform the offender that the victim(s) may be informed of the conditions agreed (unless there is good reason for this not happening) and may be provided with the details of the offender for any civil proceedings;
- confirm that the offender accepts the conditions and agrees to accept the conditional caution.

In the case of administering a Youth Conditional Caution it should be borne in mind throughout the process that the offender is aged below 18 years and is not an adult. Particular care must be taken to ensure that the youth understands what is happening and the options open to them. It is essential that appropriate time is allowed throughout the process so that the youth is able to engage in it as required.

The police officer must also bear in mind when explaining the caution and that the provisions of the Ordinance Code C (Detention, treatment and questioning of persons) concerning mentally disordered or mentally vulnerable offenders and the use of an appropriate adult apply.

When dealing with non-English speakers, the police officer must ensure that the provisions are explained in a language that the offender can understand.

8. Recording the caution

Section 128(5) of the Ordinance requires that the offender sign a document recording the conditional caution. The form for recording the conditional caution must:

- contain the details of the offence for which the caution is administered;
- clearly set out all the conditions to be complied with;
- set out the arrangements for monitoring compliance;

- specify the effect of the conditional caution and the consequences of any failure to comply with the conditions, including the possibility of future prosecution for the offence;
- record the offender's clear admission to the offence, consent to being given the conditional caution and agreement to and undertaking to abide by the condition. This admission must be made at the time the conditional caution is administered; and
- provide details of the person who will supervise completion of the conditional caution or department that the offender should contact in the case of non-compliance, or if they are unable or unwilling to comply with the conditions or wish to withdraw from the conditional caution.

In accordance with section 132(3) of the Ordinance, the offender should be warned that this document is admissible in criminal proceedings following failure by the offender to comply with the conditions.

9. Monitoring and compliance

Monitoring of conditions

When determining the conditions to be attached to a conditional caution, the prosecutor should consider the mechanism by which compliance with the conditions will be monitored and demonstrated.

The monitoring process must be made clear to both the offender and any organisation responsible for providing such information. Where reasonable and appropriate, the onus for providing confirmation of compliance may be placed specifically upon the offender. For all types of conditions the police will have overall responsibility for monitoring compliance with conditions.

A robust process for demonstrating compliance must be in place. This may include agreements with:

- organisations involved in delivering the conditions (such as substance abuse treatment or referral organisations);
- police officers and other police staff;
- probation and social services;

- The Courts Service (for collection of monies).

Compliance with conditions

The prosecutor will determine whether there has been non-compliance with the conditions and what action should be taken.

Compliance with the condition(s) attached to the conditional caution within the agreed timescale will normally preclude the possibility of prosecution for the original offence. Failure to comply with a condition is not an offence in itself, but may result in the offender being prosecuted for the original offence. Alternatively it may be appropriate to vary the conditions or, in some cases, take no further action.

Establishing non-compliance with conditions

Where it appears to the police or other agency monitoring compliance that an offender is failing to comply with one or more conditions, they should seek to give the offender the opportunity to explain and demonstrate compliance or to establish whether any reasonable excuse exists for non-compliance. If another agency is monitoring compliance a report of the non-compliance together with the offender's response must be given initially to the police. Having investigated the case the police must forward a report to the prosecutor for a decision regarding the future of the conditional caution.

Where police report that there is no response from the offender, or where the prosecutor concludes that there is no reasonable excuse for the failure, or that the non-compliance is likely to continue, a prosecution for the original offence should usually follow.

Whether any excuse given is reasonable or not is a matter for the prosecutor to determine on all the available evidence. The decision and the reasons for it should be recorded.

Withdrawal from conditions

An offender may choose to withdraw from any one or more of the conditions attached to a conditional caution after it has been administered. In any case where this occurs, the prosecutor should consider whether to treat this behaviour as non-compliance and whether the offender should be prosecuted with the original offence.

Where the offender wishes to withdraw from one or more of the conditions he or she should inform the police or agency responsible for monitoring compliance. The prosecutor should then consider whether to prosecute for the original offence in the same manner as any other failure to comply with the conditions.

Actions that may be taken following non-compliance or withdrawal

Where the prosecutor is satisfied that there is a reasonable excuse for the offender's failure to meet the conditions, or there has been substantial part compliance (For example, where the offender has substantially engaged with a drug rehabilitation condition but missed one appointment or struggled to provide payment for the scheme) the prosecutor will have to decide whether:

- the conditional caution should be regarded as completed;
- the conditional caution should be regarded as incomplete but that the public interest requires no further action;
- a new time limit should be set for completing the original conditions; or
- the original conditions should be revised.

Variation of conditions

Any changes to the conditions must be recorded and explained to the offender and any relevant victim. Any variation of conditions cannot take place without the consent of the offender. Any unreasonable refusal by the offender to agree to revised conditions should usually result in prosecution for the original offence. It will not usually be appropriate to revise conditions more than once.

A document clearly setting out any amendments to the conditions as they stand from that point forward should be produced and must be signed by a police officer and by the offender to indicate acceptance of the new conditions. Such a document must comply with the requirements set out in paragraph 8.1 of these Guidelines. Any non-compliance with the new or revised conditions must be dealt with according to the same process as applies for non-compliance with the original conditions.

Multiple offences

Where the conditional caution has been given for multiple offences, the prosecutor must also determine whether the offender should be prosecuted for one or all of the original offences. This is particularly relevant in cases of partial compliance, where the offender may have completed one of the conditions that related to a specific offence and so prosecution for that offence may not be appropriate whilst prosecution for those offences in relation to which the offender has not complied with the caution would still be appropriate.

10. Arrest and detention of offenders

Under section 133(2) of the Ordinance an offender can be arrested where a police officer has reasonable grounds for believing that the offender has failed without reasonable excuse to comply with any conditions attached to a conditional caution. As a matter of practice the power of arrest should only be exercised where considered necessary. In determining when arrest might be necessary regard should be had to the criteria in section 44(4) and (5) of the Ordinance. Once arrested, detention may be authorised where it is necessary to investigate whether the offender has failed, without reasonable excuse, to comply with any of the conditions attached to the conditional caution or to seek a charging decision from a prosecutor.

Offenders should only be detained for as long as is necessary to explore the reasons for any breach and/or to undertake any charging procedures. This should be done as soon as practicable after arrest or arrival at the police station. Where it is clear that this cannot be achieved in a short period of time, the offender should be released on an appropriately short period of bail in accordance with section 133(2)b) of the Ordinance for the prosecutor to reach a decision.

11. Prosecution following failure to comply

Where the prosecutor has determined that an offender has failed to comply with a conditional caution and is to be prosecuted, proceedings should be commenced as soon as possible. The police must ensure that the offender is notified and that any police records are amended accordingly.

Once proceedings are instituted, the conditional caution ceases to have effect. However, the fact that a conditional caution was given and not complied with will remain on an offender's record.

Where a prosecution for the original offence follows a failure to complete conditions attached to a conditional caution, the prosecutor should ensure that the court is made aware of this fact and provide details of the conditions that were attached to the caution and the extent of any partial compliance. This information may be used by the court when considering the case. In particular, section 132(3) of the Ordinance provides that the document recording the conditional caution (in paragraph 8.1) and signed by the offender is admissible in such proceedings.

12. Recording and citing conditional cautions

In regard to conditional cautions given by the police, records must be kept in accordance with relevant guidance.

Conditional cautions can be cited in any subsequent criminal proceedings subject to any relevant legislation regarding the rehabilitation of offenders.

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