



HOME OFFICE

THE REHABILITATION OF OFFENDERS ACT 1974 AND CAUTIONS, REPRIMANDS AND FINAL WARNINGS

A Consultation Paper

August 1999

Chapter 1: **Summary**

1.1 This consultation paper seeks views on the Government's proposals to include cautions, reprimands and final warnings within the ambit of the Rehabilitation of Offenders Act 1974 (ROA).

1.2 After a careful review of the current situation, the Government have concluded that it is anomalous for cautions, reprimands and final warnings to be disclosable in circumstances where convictions are not. It is the Government's view that this should be tackled by bringing them within the scope of the ROA. The Government, therefore, propose that when there is a legislative opportunity these disposals should be brought within the ambit of the Act.

1.3 The Government propose that these disposals should become spent immediately, i.e. that there should be no rehabilitation period for the purposes of the Act.

1.4 This paper also discusses whether the exceptions order to the Act should apply to cautions, reprimands and final warnings. The effect of the exceptions order is that the protections of the Act do not apply in certain circumstances, for example, where employment with children and the vulnerable, administration of the law, questions of financial probity and the integrity and efficiency of licensing schemes are in question. The Government propose that the exceptions order to the ROA should apply to cautions, reprimands and final warnings.

1.5 The slightly different position with regard to "prostitutes' cautions" is considered in Annex B and it is argued that they too should be brought within the Act with immediate rehabilitation.

1.6 The Government invite views on these proposals:

(a) cautions, reprimands and final warnings should be brought within the ambit of the ROA;

(b) the rehabilitation period should be nil: cautions, reprimands and final warnings should be immediately spent;

(c) the exceptions order should apply to cautions, reprimands and final warnings.

(d) "prostitutes' cautions" should also be brought within the Act with immediate rehabilitation.

1.7 Responses should be received no later than 1 October 1999 and should be sent to:

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1.8 Further copies of this paper may be obtained from Neil Underwood at the above address on 0171 273 2204. This document is also available on the Internet
@:<http://www.homeoffice.gov.uk/index.htm>.

1.9 Unless confidentiality is requested, it will be assumed that responses can be made available to others.

Chapter 2: **Background**

The Rehabilitation of Offenders Act 1974

2.1 The aim of the ROA is to help offenders to reintegrate into society by ensuring that, in certain circumstances, their criminal conviction should, in effect, be expunged.

2.2 The basic principle of the Act is that, following a certain period of time, all convictions (except those resulting in prison sentences of over 30 months) are regarded as “spent” and the offender is a “rehabilitated person”. This period of time depends on the sentence imposed and may be extended by subsequent convictions. A rehabilitated person is treated largely as though they had not committed, been charged with, prosecuted for, convicted of or sentenced for the offence. The convicted person does not have to reveal the conviction or admit its existence in most circumstances. Moreover, an employer is not allowed to refuse to employ someone or to dismiss them because they have a spent conviction.

2.3 The Act spells out specific immunities and privileges. A rehabilitated person is entitled to ignore spent convictions in reply to questions about his past, whether put to him in court or out of court. The existence of a spent conviction should not prejudice him in getting or keeping a job. There are civil and criminal sanctions against the unlawful dissemination of information about spent convictions. A malicious reference to a spent conviction can give rise to an action for damages. It is a criminal offence to disclose a spent conviction from official records other than in the course of official duties. It is also an offence corruptly to obtain details of a spent conviction.

2.4 However, the legislation recognises that there are certain circumstances where the wider public interest outweighs the interests of the individual and justifies some exceptions to these rules. In particular, the Act provides a power for the Secretary of State (the Home Secretary) to make an order exempting certain professions, occupations and activities. The existing

exceptions order covers those working in specified circumstances where matters such as national security, the care of the young and vulnerable, the administration of justice and issues of financial probity are concerned. The effect of the exceptions order is to limit the protection afforded to those convicted of offences. For example, a person may be questioned about his spent convictions in order to assess his suitability for specified offices or occupations or for admission to specified professions. A spent conviction may be relied on as a ground of dismissal of such persons from office or employment, or for dismissal or exclusion from their profession. Examples of the professions and occupations so affected include the legal, medical, accountancy and teaching professions, the police, judges, probation officers and others concerned with the administration of justice.

Cautions (and reprimands and final warnings)

2.5 The system of rehabilitation set out in the ROA applies to convictions of a court, whether in this country or abroad. For the most part these are the key part of a criminal record: they represent the outcome of the due process of law. Changes since 1974 in the way in which the criminal justice system deals with offenders who admit their guilt but are not taken to court mean, however, that the Act may no longer deal appropriately with some of the circumstances which may arise. An increasing use has, for example, been made of police cautions. These are formal police warnings, which may be given to those who have committed an offence and have admitted their complicity but for whom it is considered that action short of prosecution would be likely to prevent re-offending. Over time cautions have been formally regulated by Home Office circulars. The Crime and Disorder Act 1998 introduced a statutory system for young people under 18: reprimands and final warnings. Cautions for recordable offences (i.e. broadly those which carry a sentence of imprisonment) are

now kept on the Police National Computer; those which are not recordable are, nevertheless, retained in local police records. The same will apply to reprimands and final warnings.

The Issue

2.6 This has resulted in an anomalous situation. A criminal conviction, which follows a full trial of an offence and an admission or finding of guilt can become spent and hence not have to be declared in most job applications, whereas a formal caution (which is regarded as being a less serious disposal) may never become spent and would form part of a police record for as long as it was retained there. Amending the ROA to include cautions, reprimands and final warnings within its ambit could rectify this situation. This paper discusses the issues surrounding this proposal and invites response to a number of key questions on the subject.

Chapter 3: **Cautions**

Purpose

3.1 The purposes of a police caution are:

- to deal quickly and simply with less serious offenders;
- to divert them from unnecessary appearance in the criminal courts; and
- to reduce the chances of their re-offending.

Determining whether a caution is an appropriate way of dealing with an offender therefore involves the police making a judgement as to the nature of the offence and the offender. In general a caution should never be considered for the most serious offences (several forces have adopted a system of gravity factors suggested by the Association of Chief Police Officers (ACPO) - see Annex A below) nor where there can be no reasonable expectation that this will curb offending.

Pattern of Usage

3.2 The latest available figures show that 282,100 persons were cautioned in 1997. This compares to 1,386,000 persons who were found guilty in the courts.

Requirements

3.3 Home Office circular 18/1994 stipulates that the following conditions must be met before a caution can be administered:

- there must be evidence of the offender's guilt sufficient to give a realistic prospect of conviction;
- the offender must admit the offence; and
- the offender must understand the significance of a caution and give informed consent to being cautioned.

3.4 In explaining the significance of the caution the police must ensure that the offender understands the implications. These are as follows:

- The caution will be recorded and may influence the decision whether or not to prosecute if the person should offend again. (ACPO guidance recommends that the caution should be disregarded for such case disposal purposes once it is five years old.)
- If the offender should subsequently be convicted of another offence the caution may be cited in court for the purposes of sentencing.

3.5 Existing Home Office Guidance is silent as to any obligation on the offender to disclose the caution when applying for a job. Whether and, if so, how this omission is rectified will depend very much on the outcome of this consultation.

Chapter 4: **The final warning scheme**

Purpose

4.1 The Crime and Disorder Act 1998 abolishes the use of cautions for children and young people (aged 10-17) and introduces a new final warning scheme. A young offender may be given a reprimand if (a) he or she has not previously been reprimanded or warned and (b) the offence is not so serious as to require a warning. A young offender may be warned if (a) he or she has not previously been warned and (b) the offence is not so serious as to require a charge to be brought. A final warning will also involve referral to the youth offending team a programme of intervention.

(a) the seriousness of the offence and (b) the young person's offending history.

4.2 Pilots of the new scheme began in October 1998, and will run for 18 months. Subject to the outcome of the pilots, the Government's aim is to bring the scheme into force nationally during the course of 2000-2001. In the meantime, many areas outside the formal pilots have introduced non-statutory schemes which follow the same pattern.

Requirements

4.3 The responsibility for making decisions under the final warning scheme resides solely with the police. The options are to give a reprimand, a final warning, or to charge. Before considering a reprimand or a final warning, the police officer must be satisfied that the following conditions are met:

- There must be evidence of the young person's guilt sufficient to give a realistic prospect of conviction if he or she were to be prosecuted
- The young person has admitted the offence
- The young person has not previously been convicted of an offence
- It is not in the public interest for the young person to be prosecuted

4.4 The key factors relevant in deciding whether to reprimand, warn or charge a young person are

Chapter 5: **Cautions administered by other prosecutors**

5.1 There are other systems for administering cautions, which exist independently of police action. In some cases, e.g. those imposed by trading standards officers and Benefits Agency staff, they are analogous to police cautions - involving the requirement that there be evidence of guilt sufficient to give a realistic prospect of conviction and an admission of guilt on the part of the offender. In such cases, they are unlikely to reach an individual's police record, but they would be recorded by the relevant prosecuting authority for future reference. Offenders deserve the same protections in relation to these cautions as for police cautions. Accordingly, the Government propose that they should be treated in the same way as police cautions for the purposes of the ROA.

Chapter 6: **The Criminal Records Bureau**

6.1 The Home Secretary announced in December 1998 that a Criminal Records Bureau is to be established under the management of the United Kingdom Passport Agency. This will facilitate implementation of Part V of the Police Act 1997. This Part of that Act makes provision for three different levels of criminal record check and the issue of three types of certificate:

- **a criminal conviction certificate** which will be issued only to individuals, who will be able to choose whether to show it to employers or anyone else who wishes to see it. A criminal conviction certificate will show all convictions held at national level which are not “spent” under the ROA but will not show “spent” convictions or any cautions;
- **a criminal record certificate** which will be available for posts or purposes which are exceptions to the ROA (see paragraph 2.4 above). The certificate will include details of convictions, including convictions “spent” under the ROA and cautions held at national level;
- **an enhanced criminal record certificate** which will be available more narrowly than the criminal record certificate. It will be available in respect of those applying for positions which involve regularly caring for, training, supervising or being in sole charge of persons aged under eighteen, for certain statutory licensing purposes and for those being considered for judicial appointments. Like the criminal record certificate, an enhanced criminal record certificate will contain information on spent and unspent convictions and all cautions held at national level but in addition will include information from local police records including relevant non-conviction information. The Act also contains provisions for these certificates to be made available for those caring for vulnerable adults.

6.2 To ensure a smooth transition from the current arrangements for employment vetting checks of police records, the Bureau will phase in

the issue of the three types of certificate provided for under the Act, in line with the Government’s objective of strengthening the safeguards for the protection of children. Top priority will be given to the issue of certificates for those seeking positions which involve regularly caring for, training, supervising or being in sole charge of persons aged under 18. The Government are no less concerned about the need to provide similar safeguards to protect vulnerable adults; extending these arrangements to this area will require careful consideration and consultation.

6.3 The envisaged scheme makes no provision for cautions, reprimands and final warnings to be included within the criminal conviction certificate. In practice, therefore, there will be many situations where the protection of the ROA for these disposals might appear unnecessary. For example, where an individual applies for a job and provides a criminal conviction certificate, there is little danger of discrimination on the grounds of the presence of a caution, reprimand or final warning since the prospective employer is unlikely ever to become aware of its existence. Moreover, in the event that it is decided to include cautions, reprimands and final warnings within the ambit of the ROA (see discussion in chapter 7 below), criminal conviction certificates will not show “unspent” cautions, reprimands or final warnings. However, there is nothing to stop employers from asking for information about cautions (where a prospective employee has no legitimate basis for refusing to disclose it) even though this cannot be checked against a criminal conviction certificate.

Chapter 7: **Inclusion of Cautions, Reprimands and Final Warnings in the Act**

7.1 It is only fair that those receiving cautions, reprimands or final warnings should not be in a worse position as regards rehabilitation than those being convicted. A caution is a lesser creature than a conviction. The offender must have admitted guilt before he can be cautioned (or given a reprimand or final warning). However, the evidence relating to the alleged offence has not been tested in the courts and he has not been convicted of it. It is arguable that such an individual should have the protection of the ROA to ensure that he is not disadvantaged in this way.

7.2 This is particularly important given that it is young people who are disproportionately likely to receive cautions and, by definition, reprimands and final warnings. The omission of these disposals from the provisions of the ROA could have an effect on the prospects for these youngsters of obtaining work and gaining a meaningful and fulfilling place in society, which could in turn affect their likelihood of re-offending.

7.3 It is clear from the figures available for the administration of cautions that they are frequently used. As indicated above, it is probable that there are a substantial number of individuals who are cautioned once but never subsequently cautioned or convicted. It is in their interests and that of the wider community that they should be fully rehabilitated after an appropriate period. It seems likely that these same factors will also apply over time to reprimands and final warnings.

7.4 In the absence of any other means to achieve this equality as between convictions and cautions, reprimands and final warnings in relation to rehabilitation, the obvious vehicle for doing so is the ROA.

7.5 However, it might be argued that it is not appropriate to include cautions, reprimands and final warnings within the ROA because its provisions are cast squarely in terms of criminal convictions. Unlike all other disposals covered by the ROA, cautions, reprimands and final warnings

are not imposed by a court and do not result from convictions. Thus, to import these disposals into the Act is not in keeping with its basic rationale. Whilst this presents some difficulties in theoretical terms, the Government is not persuaded that it provides sufficient grounds to justify not taking this opportunity to bring cautions, reprimands and final warnings within the protections of the Act.

7.6 *The Government would be grateful to receive views, in the light of the foregoing discussion, on whether it is appropriate to make provision for cautions, reprimands and final warnings to become spent and whether the Rehabilitation of Offenders Act 1974 is the best vehicle for achieving this.*

Chapter 8: **Rehabilitation periods**

8.1 If it is agreed that cautions, reprimands and final warnings should be included within the provisions of the Rehabilitation of Offenders Act, it remains to be decided what the relevant rehabilitation periods should be. In the light of the earlier discussion in relation to the provisions of the Police Act 1997 and the position of cautions, reprimands and final warnings (falling short of a sentence of a court following a finding of guilt), it is evident that the relevant period must be short.

8.2 The rehabilitation periods for particular sentences are set out in the leaflet “Wiping the Slate Clean”, which is available from the Home Office. The longest period is 10 years. This applies for a sentence of imprisonment of between 6 months and 30 months. For a sentence of six months or less, the rehabilitation period is 7 years. These periods are halved for an offender under 18 sentenced to detention in a young offenders institution for an equivalent period. At the other end of the range of rehabilitation periods, that for an absolute discharge is 6 months. The Youth Justice and Criminal Evidence Bill, currently before Parliament, includes provisions for referral orders (a new disposal for young offenders), which may be as short as three months and for which the rehabilitation period under the ROA will be the length of the order (i.e. in some cases only three months).

8.3 There are good arguments for placing the rehabilitation period for cautions, reprimands and final warnings at the bottom end of the range of available periods. As pointed out throughout this document, they do not follow a finding of guilt in a court of law and do not contain any immediate sanction in themselves. In the latter respect they are similar to an absolute discharge. This would suggest a rehabilitation period of, perhaps, three months for cautions, reprimands and final warnings. Any more than this in the case of reprimands and final warnings would be in danger of being more punitive than referral orders (where the latter followed conviction before a court of law and the former did not).

8.4 There is an argument that it is in the immediate aftermath of a caution (which would invariably have been administered sooner after the offence in question than a conviction would have been) that there is some justification for people other than the law enforcement agencies being aware of its existence. A prospective employer could be seen to have an interest in the question of whether the person whom they are considering has admitted to guilt of an offence within the past year or less, since this might be indicative of likely future behaviour. One of the reasons for the rehabilitation period in the ROA is to provide a period during which an offender’s ability to stay on the right side of the law can be tested. If cautions were to become spent immediately, no such opportunity would be available.

8.5 On the other hand, since cautions, reprimands and final warnings are further down the scale of responses by the criminal justice system to offending than convictions in that there is no appearance in court or finding of guilt there, it might be argued that an even shorter period should be adopted, perhaps immediate rehabilitation. This seems particularly appropriate in that it ties in with the policy in Part V of the Police Act 1997. Cautions, reprimands and final warnings will not appear on the criminal conviction certificate and will, thus, effectively enjoy some of the protections catered for by the Act regardless of when they become spent. Immediate rehabilitation would have no direct bearing on the period for which records of them would be kept on the PNC and need in no way hinder the process of ensuring that appropriate responses are made to further offending. It would, however, mean that the recipient of a caution, reprimand or final warning need not refer to this when asked, perhaps by a prospective employer, whether they have a “criminal record” or “police record”.

8.6 *Accordingly, the Government propose that cautions, reprimands and final warnings should be spent immediately and invite comments on that proposal.*

Chapter 9: **Exceptions Order**

9.1 If it is agreed to place cautions, reprimands and final warnings within the ambit of the ROA, it must be considered whether the exceptions order to the Act should apply to them (see paragraph 2.4 above). It would certainly be conceptually possible to include these disposals within the Act but to provide that the exceptions order should not apply to them.

9.2 It could be argued that, were an offence so serious that it warranted someone being effectively excluded from employment in a particular field, it would be unlikely to be appropriate to be dealt with by way of a caution in the first place. From this, it might be felt that it was not appropriate for cautions, reprimands and final warnings to be covered by the exceptions order.

9.3 On the other hand, although the circumstances of the case might mean that a caution is an appropriate disposal, the nature of the offence might mean that the existence of a caution is directly relevant for the purposes of employment in some cases, for example working with children. This would be an argument for making the exceptions order apply to cautions, reprimands and final warnings.

9.4 In practice, moreover, it might prove rather impracticable not to apply the exceptions order to cautions, reprimands and final warnings. The provisions of Part V of the Police Act envisage that these disposals would all appear on both the criminal record certificate and the enhanced criminal record certificate. It would be strange if certain organisations had the right to access to information about cautions, reprimands and final warnings but could not justifiably use it to inform their decisions without falling foul of the protections under the ROA.

9.5 *Accordingly, the Government propose that the exceptions order to the ROA should apply to cautions, reprimands and final warnings, and invite comments on this proposal.*

Annex A: **Background information**

Cautions

Gravity factors

1. This system classifies offences on a sliding scale of seriousness. This is a starting-point; the system also establishes a list of general and offence-specific mitigating and aggravating factors. The most serious offences will almost always lead to prosecution, regardless of these factors, and the least serious offences will generally lead to action short of prosecution, depending on these factors. The mitigating and aggravating factors will naturally have the greatest bearing in relation to mid-range offences.

2. The list of gravity factors is too lengthy to detail here but it operates on common-sense grounds. The vulnerability of the victim, the degree of damage done or loss suffered and the level of sophistication involved are all important factors. So too is the offender's record, including previous cautions. In the absence of any other factors, a record of a recent caution will tend towards a decision to prosecute whereas a clean record will tend away from prosecution.

Reprimands and Final Warnings

Gravity factors and eligibility for particular disposals

3. The new scheme was introduced to end the practice of repeat cautioning and to provide a progressive response to offending behaviour by young people. The scheme will also ensure both that appropriate and effective action is taken when a young person starts to offend to prevent that pattern of behaviour from developing and that those who do re-offend following a final warning are dealt with quickly and effectively by the court system.

4. Guidance issued to the police includes a version of the gravity factors devised by ACPO, revised to support this particular scheme. Using this guidance, decisions can be taken swiftly and consistently. The seriousness of the offence will be assessed and the following factors will be taken into account in respect of the previous offending history:

- First time offenders should normally receive a reprimand for a less serious offence
- Second time offenders who have been reprimanded previously cannot be given a further reprimand - they would normally receive a warning. Second time offenders who have already received a warning cannot receive a further warning - they will be charged (there is an exception to this rule in that a second warning may be given where the new offence is committed more than two years after the date of the previous warning and the offence is not so serious as to require a charge to be brought).
- Those offending for a third time, who have already been given a reprimand and a final warning, cannot be given a further reprimand and cannot normally be given a further warning. They will be charged.
- Those offending for the fourth time, or more, cannot receive a reprimand or a warning. They will be charged.

Written notification

5. Police officers will give reprimands and final warnings orally, usually at the police station. This will always be supplemented with written information, which explains clearly the implications of the reprimand or warning. The written notice must make clear that:

- It is a serious matter
- Any further offending will result in a more serious response
- Where one or more of the offences is recordable, the reprimand or final warning will constitute a criminal record and may be cited in any future criminal proceedings
- Whether the offences are recordable or not, a final warning may be cited in any future criminal proceedings (in the same circumstances as previous convictions)

- If a young person is convicted of a further offence within two years of a final warning, the option of a conditional discharge will only be available to the courts in exceptional circumstances. The young person can expect, in most circumstances, a more serious sentence

- 6. In the case of a final warning the written notice will also advise the young person that they have been referred to the local youth offending team for assessment. The youth offending team will assess the young person in terms of the risk factors that have led to the criminal behaviour. Unless it is considered inappropriate, the youth offending team will use this assessment as the basis for a rehabilitation programme designed to tackle the reasons for the young person's offending behaviour and to prevent any further offending.

Record keeping

- 7. The effective operation of the final warning scheme relies on maintaining accurate records of previous reprimands and warnings in order to inform decisions in relation to future offending. Police records of cautions are generally weeded after 5 years if there is no further offending behaviour but:
 - The record of a young person who receives a reprimand or warning aged 10 or 11 must be kept, even in the absence of further offending behaviour, until he or she turns 17

 - The scheme applies to 10-17 year olds, but can also affect those aged 18 or 19 if they appear before a court within two years of receiving a warning. For those who receive a final warning at age 16 or 17, the record must be kept for a further two years.

Annex B: **Prostitutes' Cautions**

1. The Street Offences Act 1959 contains the provision that it is an offence “for a common prostitute to loiter or solicit in a street or public for the purpose of prostitution”. The Act goes on to refer to circumstances where a constable cautions a woman that, if she persists in such conduct, it may result in her being charged with an offence under the Act.

2. This system of “prostitutes’ cautions” is regulated by Home Office Circular 108 of 1959, which initially applied to the Metropolitan Police service. It refers to a system of cautioning whereby a woman, who has not previously been convicted of loitering or soliciting for the purpose of prostitution, will not be charged with that offence unless she has been cautioned by the police on at least two occasions and the cautions have been formally recorded.

3. The system was seen as a practical step to divert from prostitution women and girls who were taking to that way of life. Two officers would need to witness the activity and administer the caution. They would then ask the woman if she were willing to be put in touch with a “moral welfare organisation” or a probation officer. She would have the opportunity (but not be required) to attend a police station to speak to a female officer, who could make the arrangements for this. There is no requirement for the woman to admit to the activity alleged before she can be cautioned in this way.

4. Details of these “prostitutes’ cautions” are recorded at the local police station. However, these cautions are not a formal requisite of conviction and it is not normally necessary to mention them in court. The evidence necessary to prove that a woman charged for a first time is a common prostitute may include evidence of her recent antecedent behaviour, including the behaviour on the occasions when the cautions were administered. The cautions themselves are not relevant unless this evidence is challenged. It was proposed that these cautions should be removed from the register of cautions after a year.

There is, in any event, provision in the statute for appeal, within 14 days to the magistrates’ court, against the recording of a caution. In such an appeal the burden lies with the police to establish that the woman was, indeed, “loitering” or “soliciting” within the meaning of those terms as defined in the Act.

5. While there is no particular evidence that records of prostitutes’ cautions are remaining on local police records for longer than they should (or appearing on the Police National Computer), it is arguable that they also should be covered by the ROA.

6. The Government consider that prostitutes’ cautions should be “spent” under the Act immediately they are received (regardless of the rehabilitation period finally agreed for ordinary cautions, reprimands and final warnings). There are two respects in which they differ from ordinary police cautions, which make this even more desirable here for the sake of fairness. First, it is arguable as to whether the behaviour they follow actually amounts to a criminal offence, in that evidence from the circumstances attending the cautions is used to substantiate that the woman in question is a “common prostitute”, a definitional element of the offence itself. Secondly, there is no requirement for a woman to admit guilt before she may be given a “prostitutes’ caution”. The Government believes that these two factors combine to necessitate immediate rehabilitation. As with cautions, reprimands and final warnings, such a rehabilitation period does not affect the issue of retention of records of them by the police.

7. The arguments presented in paragraph 7.5 above (to the effect that the Rehabilitation of Offenders Act 1974 as originally conceived focuses on convictions, and so cautions do not sit so easily within its framework) apply with even more force here than in the case of ordinary cautions, since prostitutes’ cautions do not even follow the commission of an offence as such. Nevertheless, the Government are persuaded that

the arguments for prostitutes' cautions to be included within the ROA with immediate rehabilitation are strong, but would be interested to receive any views on this.

8. *The Government propose that prostitutes' cautions should be brought within the ROA and should be "spent" immediately, and invite comments on this proposal.*