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### Formal cautions - hse guidance

This OC gives practical guidance for inspectors when considering the issue of a formal caution (FC), in the exceptional circumstances set down in the HSE policy on FCs. It should be read in conjunction with [OC 130/6](#) which gives guidance on the [HSC Enforcement Policy Statement](#).

#### introduction

1 This OC for inspectors in England and Wales provides details of the procedure for the use of a formal caution (FC) in exceptional circumstances, in accordance with HSE policy.

#### HOME OFFICE GUIDANCE

2 [Home Office Circular 18/1994](#) *The Cautioning of Offenders* describes an FC as one appropriate course of action where there is evidence of a criminal offence but the public interest does not require a prosecution. The OC sets out how an FC should be administered and states the criteria for its issue, namely that it depends on:

(1) there being sufficient evidence to provide a realistic prospect of conviction;

(2) the offender admitting the offence; and

(3) the offender agreeing to being cautioned.

These principles are consistent with HSC's Enforcement Policy Statement concerning the use of an FC.

3 An FC is used widely within standard enforcement procedures by other enforcement bodies and has been adopted for health and safety cases by some local authorities. Its use is now endorsed by HSE as an additional procedure for dealing **with certain offenders in limited circumstances** where a prosecution might otherwise be taken. These formal cautioning arrangements are consistent with the Home Office advice.

#### Enforcement policy statement (eps)

4 Paragraphs 3 and 6 of the [EPS](#) refer to 'formal cautions', and say that they, and prosecutions, are important methods for bringing dutyholders to account. EPS para 3 footnote 1 states that:

"A formal caution is a statement by an Inspector, that is accepted in writing by the dutyholder, that the dutyholder has committed an offence for which there is a realistic prospect of conviction. A formal caution may only be used where a prosecution could be properly brought. 'Formal cautions' are entirely distinct from a caution given under the Police and Criminal Evidence Act by an Inspector prior to asking questions of a suspect concerning an alleged offence. Enforcing authorities should take account of current Home Office guidelines when considering whether to offer a formal caution".

5 EPS para 39 states that repetition of a breach that was subject to an FC should be treated in the same way as failure to comply with an IN or PN, ie HSE would normally prosecute.

#### Use of Formal Cautions in HSE

6 The issue of an FC - and this OC - applies to England and Wales only: inspectors in Scotland should neither issue nor recommend it.

7 Although the EPS now makes specific mention of an FC as an enforcement option, it is not intended that it will replace prosecution other than in exceptional circumstances. In particular it should not be used as a 'let off' where there are some mitigating circumstances, where there is doubt about the 'public interest', or where either the prosecutor's office or the court is 'too busy'. Also, it should not be confused with other forms of formal or informal warning.

8 [HO Circular 18/1994](#) says that an FC is not appropriate for the more serious offences/offenders. Since the EPS indicates that HSE prosecutions are taken where the risk, breach and outcome are usually serious, then an FC is not normally appropriate in circumstances where an HSE case could be properly brought.

9 HSE Board has confirmed that inspectors may consider an FC in a case which ordinarily would meet the public interest test but where there are specific circumstances that weigh firmly against it. The Board considered in particular the [Code for Crown Prosecutors](#) 'public interest factors against prosecution' (6.5(f) and (g)). These relate to when an FC might be appropriate, for example when a court appearance would be likely to have a seriously adverse effect on a victim's health, or the accused is elderly, or was suffering significant physical or mental ill health at the time of the offence. This needs careful judgement because there may be cases which are so significant that a prosecution is warranted despite these factors being present.

10 The EPS states that 'a formal caution may only be used where a prosecution could be properly brought'. It is therefore important that, before even considering if a FC might be appropriate, inspectors follow existing procedures for considering prosecution. Evidence should be obtained and a prosecution report prepared in the usual way, with full evaluation of the evidence and possible charges. The prosecution approving officer should confirm that it meets the evidential test. In addition, for a case to be properly brought, they also need to confirm that, apart from the exceptional circumstances described in para 11 below, the public interest is in favour of prosecution.

11 Whilst the officer may be then minded to approve prosecution, there may be specific, personal and very exceptional factors which outweigh the general public interest factors set out above. If, because of these exceptional circumstances, the approving officer considers an alternative to prosecution may be appropriate, then an FC may be an option. In such a case the reasons for considering the offer of an FC should be explained on the prosecution papers and the case file passed to the approving officer's line manager for authorisation (see para 14). If the offer of a formal caution is authorised the investigating inspector should be instructed to proceed with offering it. The prosecution papers should be returned to the Inspector marked as 'not approved, subject to acceptance of a caution'.

12 [Home Office Circular 18/1994](#) states that the issue of a caution depends on the offender agreeing to being cautioned. If an offender refuses to agree a caution by failing to sign the 'standard' letter (see **Appendix 1 a / b**), prosecution should normally follow immediately. The prosecution approving officer should arrange for the file to be brought forward in one month to confirm that the information can be signed off as 'not approved', or to approve the prosecution.

13 An FC should not generally be considered where the offender has already received a caution. Multiple cautioning brings this disposal into disrepute: cautions should not be

administered to an offender in circumstances where there can be no reasonable expectation that this will curb their offending. More than one caution should be considered only where there has been a sufficient lapse of time since the first caution to suggest that it had some effect. If the HSE Board policy on use of the FC is followed, repeat cautioning should be a rare occurrence (and see para 15 below).

14 Since an FC should only be used in rare and exceptional circumstances it is particularly important that full consideration is given to the matter and that HSE is seen to be consistent in its approach. A decision to issue an FC should not therefore be taken without prior written authority of a senior officer, e.g. the approving officer's manager, who may wish to discuss with their directorate legal section (this refers to the usual contact within directorates for discussion of legal matters) before authorising a caution.

15 It is important to make clear to the offender that if the FC is accepted then it will be considered, and may influence the decision to prosecute, should they subsequently re-offend in relation to any health and safety matter. If the subsequent matter is the same as that relating to the FC we will prosecute (provided there is sufficient evidence etc). In different matters the issue of an FC may be considered as an aggravating factor. The FC may also be referred to in court if there is a further prosecution within the next 5 years.

16 Details of the FC may also be made publicly available. These details are set out in the model letter to the offender but should also be explained to the individual or corporate representative. Note that HSE will not normally cite an FC in court, nor make information about it publicly available, in relation to an offence committed more than 5 years after the offence for which it was issued.

#### Procedure for issue of a formal caution

17 An FC should normally be served following standard procedures for a legal document, eg by hand or recorded delivery post (see paras 19-23). In some circumstances inspectors may prefer to caution the offender in person (see [paras 24-27](#)).

18 If the FC is to be signed on behalf of a company, the inspector should ensure that the 'appropriate senior officer of the company' supplies adequate proof of their authority.

#### SERVICE BY LETTER

19 A covering letter ([Appendix 2](#)) is sent to the offender offering the FC procedure as a means of dealing with the alleged offence(s). The letter advises of the consequences of acceptance and seeks the offender's agreement to the procedure and admission of the offence(s). Appendix 2 may be adapted to suit particular situations.

20 The letter is accompanied by 2 copies of the same form of caution (Appendices 1 [a / b](#)). The appropriate form is dependent on whether the offender is a company ([Appendix 1a](#)) or an individual ([Appendix 1b](#)).

21 A letter to a company should be taken or posted to the company's registered office (if in the UK) or any place in the UK where the corporation trades or conducts its business. It should be addressed to the managing director or company secretary. The EPS (para 20) requires that issue of an FC should be notified to a senior officer, at board level, of the dutyholder. If the registered office is not the place where the MD or company secretary is likely to be found, inspectors are advised to copy the offer of an FC to the address at which they expect the MD to be. Where a board does not exist (e.g. a university or local authority) the letter should be copied to a person of equivalent standing.

22 A nominated, appropriately responsible individual should be asked to receive the FC on behalf of the offender. In the case of a company, for example, the individual should be authorised by the board of directors to accept service (the caution should, of course, be recorded against the company and not its representative).

23 The offender is asked to sign both copies of the caution, retain one and return the other to HSE within 14 days (although in exceptional circumstances a longer time period may be appropriate). The original signed caution should be retained on file and a copy sent to the directorate legal section which will maintain a central library of FCs for future reference.

#### cautioning in person

24 The Home Office National Standards set down a preference for administration of cautions in person. This may be a preferred option when the person being cautioned is an individual but could also be used for bodies corporate, where we might want to see a director (or equivalent) face to face.

25 A manager (in consultation with the officer) may decide that an FC should be issued personally because of the impact it will have on the particular organisation or individual, or because it may allow more effective communication with the offender. In some cases it may be appropriate for a senior officer (e.g. above the level of the approving officer) to meet with the offender.

26 The model letter ([Appendix 2](#)) should be amended to invite the relevant person to attend a meeting with HSE so that the implications of accepting an FC can be explained etc. The recipient should be invited to have a legal adviser present whilst the caution is offered.

27 The person administering the caution should satisfy themselves that the recipient

understands its nature, the consequences of acceptance and agrees to the procedure and admission of the offence(s). It should be explained that the caution may be referred to in court if further offences are committed, and it may influence the decision to prosecute should they subsequently re-offend. The offender should be invited to sign 2 copies of the FC and retain one of them.

#### failure to accept a caution

28 Failure to accept the procedure within the specified time limit should result in the institution of legal proceedings. The file should be returned to the approving officer with the recommendation to this effect. The directorate legal section should be informed of failure to accept an FC (for purposes of central records).

#### Recording issue of a formal caution

29 The value of properly recording an FC lies not only in its citability in court but also that we can take it into consideration when considering our action in the event of further offences (related or not) by the same dutyholder.

30 The inspector should follow directorate procedures to record details of an FC on the computer record (e.g. FOCUS, CIS).

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