



CRIMINAL JUSTICE COMMISSION

**Police Cautioning of Adults:
Drug and Other Offences**

A briefing paper

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Research and Prevention Division



*To promote integrity in the
Queensland Public Sector and an
effective, fair and accessible
criminal justice system.*

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Introduction

This briefing paper summarises the results of preliminary research carried out by the Research and Prevention Division of the Criminal Justice Commission (CJC) on police cautioning of adult offenders. The paper has been prepared for the purpose of information only and does not contain any specific recommendations about the use of adult cautioning in Queensland.

There are two parts to this paper.

Part A contains a brief discussion of the cautioning programs that are currently operating (or being trialled) in various States of Australia and in the United Kingdom. Part B flags a number of issues that are commonly raised in discussions of the merits of a cautioning program.

This paper includes a detailed consideration of adult cautioning programs that target drug offenders. This reflects the fact that drug offences (particularly offences involving cannabis) constitute a major focus of most cautioning programs currently operating (or being trialled) in Australia. In addition, a number of different groups in Queensland have recently expressed an interest in the use of cautioning for minor drug offences. For example, the Lord Mayor's Illicit Drugs Taskforce,¹ which was established by the Brisbane Lord Mayor in July last year, is proposing to recommend that the Queensland Police Service (QPS) conduct a pilot cannabis cautioning program similar to the one that was conducted by the Victorian Police Service in Melbourne in 1997 and 1998.²

1 Members of this taskforce include representatives from the QPS, the QCSC, Ethnic Affairs, Queensland Health, the Department of the Premier & Cabinet and the Queensland Alcohol and Drug Foundation and various academics, community representatives (including Drug Aid and Kids Helpline) and business and media representatives.

2 The CJC has had a number of informal discussions with a representative of the Lord Mayor's Illicit Drugs Taskforce. See the discussion on 'Victoria' for further information about the Victorian cannabis cautioning program pilot.

Part A — Cautioning programs in Australia and the United Kingdom

What is cautioning?

A cautioning program can be described as a diversionary program because, like other diversionary schemes, cautioning aims to divert offenders away from further involvement with the criminal justice system. A caution is like a warning: a person who is cautioned by police is not charged with an offence.

Proponents of cautioning see two main advantages to police cautioning (as opposed to prosecution). Firstly, cautioning is a cheaper and more efficient way of dealing with offenders because offenders who are cautioned do not appear before a court (unless they breach conditions attached to a caution). Secondly, cautioning is seen as an effective strategy for reducing recidivism rates, in part because it helps to avoid minor offenders being labelled and stigmatised as a result of acquiring a criminal record. It is difficult to prove either claim because very few police cautioning programs have ever been properly evaluated.

Typically, a caution cannot be administered unless the following three conditions are satisfied:

- a prima facie case must be established against the person
- the person being cautioned must admit to having committed the offence
- the person must consent to being cautioned.

Another feature of most cautioning programs is that there are restrictions on who is eligible to be cautioned. For example, under some cautioning programs, a person cannot be cautioned if he or she has already been convicted of the same (or a related) offence.

It is important to keep in mind that police cautioning is not the only diversionary option operating within the criminal justice system. Diversion or intervention can take place at different stages of the criminal justice/prosecution process, namely:

- before arrest
- before trial
- before sentence
- after sentence.

There are five main types of diversionary schemes or practices in Australia:³

- informal police diversion — where individual officers exercise their discretionary powers not to proceed against offenders
- formal police diversion — where programs are in place which involve formal cautioning of offenders by senior police
- statutory diversion — where programs (regulated by legislation) are in place which aim to avoid the progression of offenders into the criminal justice system by directing them to other kinds of interventions

3 See NSW Parliamentary Library Research Service, March 1999, Briefing Paper No 4/99, *The illicit drug problem: drug courts and other alternative approaches*, at 7 (citing Australian Bureau of Criminal Intelligence, *Australian Illicit Drug Report 1996/97*, December 1997 at 10).

- prosecutorial diversion — where prosecutors intervene and direct offenders away from the court system
- judicial diversion — which is based on the discretionary power of magistrates and judges.

This paper focuses on the second type of diversionary scheme, namely formal police diversion — more commonly known as police cautioning. The other four types of diversionary schemes will be mentioned, but only briefly.

Cautioning in Queensland

This paper has been prepared principally for the benefit of a number of different groups and agencies in Queensland. Although the subject of this briefing paper is police cautioning of adult offenders (as opposed to all offenders), some information on police cautioning of juveniles in Queensland has been included so that readers will have a complete understanding of the cautioning programs that are currently operating in Queensland. This paper does not contain any information about juvenile cautioning programs in jurisdictions other than Queensland.

Cautioning of juveniles

The QPS has been cautioning juveniles for over 35 years. Prior to 1992, the juvenile cautioning scheme was regulated by the QPS's internal policies. Since 1992, the scheme has also been regulated by the *Juvenile Justice Act 1992* (Qld).

The *Juvenile Justice Act* does not impose any limitations on the type of offence that a juvenile can be cautioned for. However, the QPS Operational Procedures Manual (OPM) states that a juvenile cannot be cautioned for certain 'serious offences' such as murder or rape (see section 5.5.3).

Juvenile offenders are frequently cautioned instead of arrested and charged. In fact, juveniles are more likely to be cautioned than arrested. For example, QPS CRISP data for the period 1 July 1998 to 30 September 1998 shows that 3659 juveniles were cautioned but only 2030 juveniles were arrested. During the same period, 2853 juveniles were served with a court attendance notice.⁴

A juvenile can only be cautioned by an authorised police officer; an unauthorised police officer in the presence of an authorised officer; or, if the juvenile is a member of an Aboriginal or Torres Strait Islander community, by a respected person of the community at the request of an authorised officer (see sections 13 and 14 of the *Juvenile Justice Act*). Section 5.5.6 of the QPS OPM says (in effect) that an officer cannot be authorised to administer a caution unless he or she is either in charge of a station, branch or establishment or attached to a Juvenile Aid Bureau. In practice, most police officers are not authorised to administer cautions to juveniles.

Under section 18 of the *Juvenile Justice Act*, a charge made against a juvenile may be dismissed by the Children's Court if:

- the juvenile pleads guilty before the court; and
- the court is satisfied that the juvenile should have been cautioned instead of being charged.

⁴ Under s. 23 of the *Juvenile Justice Act*, a police officer may serve a notice on a juvenile requiring the juvenile to appear before a Children's Court magistrate in relation to a specified offence. Court attendance notices allow police officers to initiate proceedings against juveniles without having to use their arrest powers and without having to issue a complaint and summons.

Cautioning of adults

There is no legislation that authorises or regulates police cautioning of adults. However, section 6.5.1 of the QPS OPM authorises officers in charge of a station or establishment to caution elderly people (65 years or more) or intellectually disabled adults 'for minor criminal offences such as petty theft'.

Section 6.5.1 contains the following policy:⁵

Before a caution may be administered:

- (i) the offender must
 - (a) admit the offence; and
 - (b) have no criminal record for dishonesty and no substantial record for other offences;
- (ii) the property stolen should be in a fit condition to be returned to the complainant, or alternatively, the administration of a caution may be conditional on payment for the item taken;
- (iii) there must be sufficient admissible evidence available to prove a prima facie case.

The number of adults that are cautioned is very small compared to the number of juveniles — no doubt because the QPS adult cautioning policy has limited application to a small proportion of the adult population. For example, QPS CRISP data for the period 1 July 1998 to 30 September 1998 show that only 36 adults were cautioned whereas 16,135 adults were arrested.

Cautioning of adults re drug offences

There is presently no adult drug-cautioning program in Queensland. However, the police currently deal with some minor drug offenders in a way that minimises their formal contact with the police and the courts currently deal with minor drug offenders (especially first time offenders) in a way that minimises the consequences of their formal contact with the criminal justice system generally.

Prior to 1998, the police in Queensland could only deal with an alleged drug offender by either arresting and charging the person or by issuing a complaint and summons. Under the new *Police Powers and Responsibilities Act 1997 (Qld)*,⁶ the police can now issue an alleged offender with a notice, similar to an infringement notice, called a Notice to Appear (NTA). Like a complaint and summons, the NTA requires the person named in the notice to appear in a nominated court by a designated time; however, unlike the complaint and summons, the NTA can be issued on-the-spot.

During the period 6 April 1998 to 30 September 1998, 6010 NTAs were issued where the primary offence was a drug offence. These accounted for 69 per cent of the total proceedings commenced for drug offences during that period.

⁵ The QPS OPM contains three different categories of instructions, namely a procedure, policy and an order. These three terms are defined in the QPS OPM as follows:

A 'procedure' outlines generally how an objective is achieved or a task performed, consistent with policies and orders. A procedure may outline actions which are generally undertaken by persons or organisations external to the Service.

A 'policy' outlines the Service attitude regarding a specific subject and must be complied with under ordinary circumstances. Policy may only be departed from if there are good and sufficient reason(s) for doing so. Members may be required to justify their decision to depart from policy.

An 'order' requires compliance with the course of action specified. Orders are not to be departed from.

⁶ The Act came into operation on 6 April 1998.

The use of NTAs for such a large proportion of drug offences tends to suggest that the majority of those offences involved less serious offences such as possession of small quantities of cannabis or other dangerous drugs and possession of drug paraphernalia. At the very least, it can be inferred that in the large majority of criminal proceedings where the primary offence is a drug offence, the police were of the view that the circumstances of the case did not warrant the use of the arrest power. It should, however, be pointed out that a significant proportion of NTAs are issued to people who are already in police custody (that is, to people who have either been arrested, been detained but not arrested, or accompanied police voluntarily without having been arrested or detained).⁷ It goes without saying that NTAs are more likely to minimise the extent to which minor drug offenders have formal contact with the police if they are issued on-the-spot (as opposed to after a person is taken into police custody).⁸

In its 1994 report *Cannabis and the Law in Queensland*, the CJC reported that in 59 per cent of all cases where a person was found guilty in the Brisbane Magistrates Court of a drug possession offence, no conviction was recorded (pp. 42–43). The CJC also found that it is routine not to record a conviction where the person before the court is a first offender charged with a minor drug offence (pp. 42 and 87). The proportion of all guilty cases that result in a decision not to record a conviction is still approximately 59 per cent. These offenders typically receive a fine of about \$390.⁹

Cautioning in Victoria

Drug offences

Cannabis

The Victorian Police Service recently piloted a cannabis cautioning program. The pilot was conducted in the Broadmeadows district in Melbourne over a six-month period from 21 July 1997 to 21 January 1998.

Before a police officer involved in the pilot could caution a cannabis offender, he or she had to satisfy a number of criteria, including:

- the offender must be 18 years or older
- there must be sufficient evidence that the offender is using or is in possession of a small quantity of cannabis
- the person must not have been involved in any other criminal or traffic offence at the same time
- the cannabis must have been for personal use and must not exceed 50 grams
- the person must admit the offence and consent to being cautioned
- the person must not be cautioned on more than two separate occasions.

7 According to figures obtained by the CJC, during the period 6 April 1998 to 30 June 1998, 56% of all NTAs issued (for all offences, including drug offences) were issued to a person who had already been taken into police custody.

8 For further information on NTAs, see the CJC's research paper *Police Powers in Queensland — Notices to Appear* (Vol. 5 No. 2, May 1999).

9 During 1997–98, no conviction was recorded in 58.3% of all cases where a person was found guilty of a drug possession offence in the Brisbane Magistrates Court. In those cases where no conviction was recorded, the fine range was between \$100 and \$1500, with the median fine being \$390.50. In those cases where a conviction was recorded, the median fine was \$609.60, with the range being from \$100 to \$1500 (Department of Justice and Attorney-General unpublished data for 1997–98).

An evaluation report on the pilot program, prepared by the Strategic Development Department (within Victoria Police), was released in May 1998. According to that report, a total of 97 people were cautioned during the six-month pilot. The mean age of those who were cautioned was 21.6 years. Of these 97, only eight re-offended during the pilot period. However, more than half of the total number cautioned had no prior offence and it has been suggested that the pilot specifically targeted first time offenders.¹⁰

Ninety-three per cent of police officers surveyed believed that the cautioning pilot resulted in a saving of police resources (in terms of time and paperwork). The Victorian pilot has, however, been criticised for focusing on the issue of police resources and for not addressing offender issues such as health and education.

On 1 September 1998, the cannabis cautioning program was implemented statewide.

The cannabis cautioning program is not regulated by any legislation. Before the pilot got under way, Victoria Police obtained legal advice to the effect that there was no need to give police officers legislative power to issue cautions. According to this advice, the cautioning program 'represents a legitimate utilisation of prosecutorial discretion and the checks and balances built into it (including the accountability measures) ... [put] its legality ... beyond question'.¹¹

Other drug offences

On 1 September 1998, Victoria Police commenced a second cautioning program pilot — this time for all illicit drugs other than cannabis. This pilot, which is known as the drug diversion pilot, is due to be completed on 1 May 1999 and is being conducted in the Broadmeadows and Footscray districts.

The pilot is targeted at first time drug offenders caught with small non-traffickable amounts of drugs such as heroin and amphetamines. To be eligible to be cautioned, a person must not have a prior conviction (or prior caution) for a drug offence. A prior conviction for an offence other than a drug offence does not affect a person's eligibility to be cautioned. Unlike the cannabis cautioning program, officers involved in the drug diversion pilot cannot issue a caution unless the offender agrees to be assessed for treatment and to attend one treatment session at a drug treatment centre.

As at 19 March 1999, only 46 people had received a police caution. The main reason this figure is so low is that most people detected by the police do not fit within the definition of a first time drug offender; that is, they already have a prior drug conviction or caution. Half of those cautioned were aged 21 or under at the time of offending and 37 were males. All but four of the 46 first time offenders were caught using or possessing heroin and many of these were found to be early heroin users. Approximately 10 per cent of those cautioned have breached the terms of their caution by failing to visit a drug treatment centre within five working days of being cautioned: these offenders will be charged with their original drug offence.¹²

An evaluation of the pilot program, which is being compiled by an external agency, will be released some time after 1 May 1999. The evaluation report is likely to be available to the general public.

10 Select Committee into the *Misuse of Drugs Act 1981* (WA), August 1998, *Finding the Right Balance — Working Together as a Community to Prevent Harm from Illicit Drugs and to Help Individuals and Families in Need* at 249.

11 Strategic Development Department, Victoria Police, May 1998, *Evaluation of the Cannabis Cautioning Program Pilot* at 15.

12 Gray D., 19 March 1999, 'Police caution 46 under new trial', *The Age*. The CJC has also had a number of informal discussions with the Inspector from Victoria Police who is managing the pilot program.

At the same time as this briefing paper was being finalised, the Prime Minister announced that the Commonwealth government was proposing to fund a national drug diversion program to be modelled on the Victorian drug diversion cautioning pilot. At this stage, further information about this proposal is not available. However, according to informal advice from Victoria Police, detailed information about the proposal is unlikely to be available until some time after the Victorian drug diversion cautioning pilot has been evaluated.

Shoplifting and other offences

Victoria Police has been cautioning adult shoplifting offenders since 1985.

Towards the end of 1998, the Strategic Development Department (within Victoria Police) completed an evaluation of the entire Victoria Police cautioning program (including cautioning for shoplifting). The evaluation report is understood to recommend that Victoria Police consider expanding its cautioning program. The proposed criteria for selecting additional offences is:

- the offence should be ‘victimless’
- cautioning should be likely to reduce the recidivism rate
- a high proportion of offenders should be first offenders.¹³

Cautioning in Western Australia

Drug offences

On 1 October 1998, the Western Australia Police Service commenced a 12-month trial cannabis-cautioning program. The trial is being conducted in the Mirrabooka police district and the Bunbury police sub-district and is to be reviewed after the first six months.

At this stage, the scheme only covers adults. However, if the trial is extended, it is the government’s intention to extend the scheme to include juveniles.¹⁴

The trial is based on the Victorian cannabis cautioning program but, unlike the Victorian program, offenders can only be cautioned on one occasion and must agree to attend an educational and intervention session conducted by a community drug service team within two weeks of being cautioned.

As in Victoria, the cannabis cautioning pilot in Western Australia is not regulated by any specific legislation.

Other offences

The Western Australia Police Service has been cautioning adults for a range of offences (including indictable offences) for a number of years. Police cautioning of adults is not regulated by legislation but is based on the discretionary power of a constable. This general cautioning program has not been evaluated.

13 This evaluation report will be available when it has received the formal approval of the Victoria Police executive.

14 Select Committee into the *Misuse of Drugs Act 1981* (WA), August 1998, *Finding the Right Balance — Working Together as a Community to Prevent Harm from Illicit Drugs and to Help Individuals and Families in Need* at 254.

15 See s. 45A of the *Controlled Substances Act 1984* (SA).

Cautioning in Tasmania

Drug offences

In July 1998, the Tasmanian Police Service commenced a 12-month trial cannabis-cautioning program. The trial is based on the Victorian cannabis cautioning pilot. At this stage, further information about the Tasmanian trial is not available.

Other offences

The Tasmanian Police Service has been cautioning adults for a range of offences for a number of years. Although it is possible for police officers to caution for indictable offences, it is apparently not very common. Most police cautioning that takes place is for simple offences such as shoplifting. Again, police cautioning of adults is not regulated by legislation but is based on the discretionary power of a constable. This general cautioning program has not been evaluated.

Other drug diversionary schemes in Australia

At the beginning of this paper, it was pointed out that diversion or intervention can take place at numerous different stages of the judicial process and that police cautioning is just one of a number of different strategies that are currently being used in Australia to divert drug offenders away from the criminal justice system. Some examples of alternative strategies are as follows:

- Both South Australia¹⁵ and the Australian Capital Territory¹⁶ have cannabis expiation notice schemes. Under these schemes minor cannabis offenders are issued with an infringement notice (which is a type of ticket) and can ‘expiate’ their offence by paying the amount specified in the ticket. Where an offender pays his or her fine, no court appearance is required and no conviction is recorded.
- In South Australia, a person who is alleged to have committed a minor drug possession offence (not involving cannabis) must be referred to a drug assessment panel. The panel decides whether the offender should be dealt with by a court or by the panel. The panel cannot deal with a matter unless the alleged offender admits the offence and consents to the panel dealing with his or her matter. An offender who is dealt with by the panel is usually required to give an undertaking that he or she will undergo treatment and/or participate in an educational program. No conviction is recorded for those offenders who comply with their undertakings to the panel.¹⁷
- In the Australian Capital Territory, there are special provisions in the *Drugs of Dependence Act 1989* which authorise Magistrates to make treatment orders for certain drug offenders.¹⁸ An offender who is given a treatment order will only be sentenced if he or she fails to comply with the treatment order.
- In New South Wales, Magistrates have been referring drug offenders to drug treatment programs since the late 1970s. The current pre-sentence drug diversion program in New South Wales is known as the Drug and Alcohol Intervention Program (DAIP). Under this program, offenders are placed on a recognizance which requires them to be of good behaviour, to accept the supervision and guidance of the Probation

¹⁶ See s. 171A of the *Drugs of Dependence Act 1989* (ACT).

¹⁷ See ss. 34–40 of the *Controlled Substances Act 1984* (SA).

¹⁸ See ss. 122–129 of the *Drugs of Dependence Act 1989* (ACT).

and Parole Service, to participate in DAIP programs and to report within seven days.¹⁹

- The New South Wales Drug Court, which was established at the Parramatta District Court in February this year, is probably the most recent drug diversionary scheme to be introduced in Australia. It should be noted, however, that a person is not eligible to be dealt with by the New South Wales Drug Court unless:
 - they have been charged with an offence (other than a drug offence that must be dealt with on indictment, or an offence that involves violent conduct or sexual assault)
 - it is likely that the person will, if convicted, be sentenced to imprisonment
 - the person appears to be dependent on a prohibited drug.²⁰

The New South Wales Drug Court does not, therefore, deal exclusively (or even typically) with drug offences. The types of offences that a person will commonly have been charged with, before being referred to the New South Wales Drug Court, include stealing, shoplifting and break and enter.

United Kingdom schemes

In the United Kingdom, adults have been cautioned for a range of offences (including indictable offences) since at least the 1970s.

Although the Royal Commission on Criminal Justice recommended in 1993 that the police powers to caution should be governed by statute and that regulations should govern the keeping of records and cautions,²¹ police cautioning of adults, as well as juveniles, remains unregulated.

The Home Office has attempted to establish national standards for police cautioning by issuing a number of circulars on cautioning, the first in 1985 (14/1985) and the most recent in 1994 (18/1994). However, most observers seem to agree that ‘despite [Home Office] calls to improve the degree of consistency, there are still significant differences between forces [in England and Wales] on almost all aspects of cautioning policy and the decision-making process’.²²

The 1994 Home Office circular departs from previous versions of the circular in a number of respects. For example, the 1994 circular seeks to discourage:

- the use of cautions in inappropriate cases (for example, offences which are triable on indictment only)
- the use of multiple cautioning (because it brings cautioning into disrepute).²³

One of the objectives behind the 1990 Home Office circular (59/1990) was to make it clear that the national standards for cautioning should apply equally to all age groups,

19 For further information regarding drug diversion programs in New South Wales, see: NSW Parliamentary Library Research Service, March 1999, Briefing Paper No 4/99, *The illicit drug problem: drug courts and other alternative approaches* at 10–13.

20 See s. 5 of the *Drug Court Act 1998* (NSW).

21 Cm. 2263 (1993), chapter 5, para 57.

22 Evans R & Ellis R, 1997, *Police Cautioning in the 1990s*, Home Office Research and Statistics Directorate, Research Findings No 52 at 3–4.

23 Note that one of the key commentators on cautioning in the United Kingdom is very critical of the government’s stance against multiple cautions: see Evans R, ‘Cautioning: Counting the Cost of Retrenchment’ [1994] *Criminal Law Review* 566.

that is, to adults as well as juveniles. However, according to some statistics, the rate of cautioning for juveniles remains very much higher than for other groups.²⁴

It is important to point out that police in the United Kingdom are able to issue cautions for some, quite serious, offences, for example, sex offences (including rape).²⁵

A number of police forces in the United Kingdom have introduced cautioning programs known as ‘caution-plus’ programs. An offender is given a ‘normal’ caution but is also invited to participate (on a voluntary basis) in an intervention scheme designed to show offenders the consequences of their actions and to improve the ability of offenders to resist re-offending in the future. Most caution-plus schemes are restricted to juveniles.²⁶

Some other police forces in the United Kingdom are currently trialling a different form of cautioning known as restorative police cautioning. This type of cautioning, which is used for both adult and juvenile offenders, entails inviting those affected by an offence, most notably the victim, to attend and take part in the cautioning session.²⁷

Some recent statistics on police cautioning in the United Kingdom reveal the following:

- 282,000 adult and juvenile offenders were cautioned for all offences in 1997
- 189,000 adult and juvenile offenders were cautioned for indictable offences in 1997
- the cautioning rate for indictable offences (that is, the number of offenders cautioned as a percentage of those found guilty or cautioned) was 37 per cent in 1997
- 1,700 offenders were cautioned for the most serious (indictable only) offences in 1997 and the cautioning rate for these offences was 11 per cent.

24 For example, in 1995, the average cautioning rate for indictable offences for juvenile males was approximately 60 per cent, compared to approximately 30 per cent for 18–20 year old males and 20 per cent for males over 21 years: see Evans R and Ellis R, 1997, *Police Cautioning in the 1990s*, Home Office Research and Statistics Directorate, Research Findings No 52 at 2–3.

25 The percentage of offenders cautioned for rape is, however, quite small. ‘Around three-quarters of known offenders committing unlawful sexual intercourse with a girl under 16 are cautioned, while around five per cent of known offenders for rape are cautioned’: see Soothill K, Francis B and Sanderson B, ‘A Cautionary Tale: the Sex Offenders Act 1997, the Police and Cautions’ [1997] *Criminal Law Review* 482 at 483.

26 See, for example, the following evaluation of the Retail Theft Initiative scheme introduced by the Milton Keynes division of Thames Valley Police in 1994: McCulloch H, *Shop Theft—Improving the police response*, July 1996, Home Office Police Research Group, Crime Detection and Prevention Series Paper 76.

27 See, for example, the following evaluation of the Aylesbury Restorative Cautioning unit: Young R and Goold B, ‘Restorative Police Cautioning in Aylesbury—From Degrading to Reintegrative Shaming Ceremonies?’ [1999] *Criminal Law Review* 126.

Part B — Issues for consideration

Some issues commonly raised in any discussion of the merits of a cautioning program are:

Statutory regulation

It has been argued by commentators in the United Kingdom that the Home Office circulars on cautioning do not sufficiently safeguard the rights of an offender and that police cautioning should be subject to statutory control.²⁸ Commentators are particularly concerned that:

- the current system places undue pressure on an offender to admit an offence and submit to a caution in order ‘to have done with it’, rather than run the risk of a court conviction
- there are insufficient opportunities for an offender to take legal advice before deciding to make the necessary admission prior to the caution being administered
- the system for recording cautions is unsatisfactory
- the legal significance of a caution (as opposed to a conviction) in sentencing proceedings is unclear.

Consistency

An important issue about cautioning is the potential for a police service to make inconsistent decisions about whether or not to caution an offender. In the United Kingdom, the Home Office has attempted to alleviate this problem by issuing a number of national circulars on cautioning. It is somewhat alarming to note, however, that most observers seem to agree that:

despite [Home Office] calls to improve the degree of consistency, there are still significant differences between forces [in England and Wales] on almost all aspects of cautioning policy and the decision-making process.²⁹

Lack of clarity in the criteria required to be satisfied before a caution can be issued can permit police officers to intentionally or otherwise exercise bias in their decision-making, or to inconsistently interpret cautioning guidelines. This results in inequities and can bring a cautioning program into disrepute.

What are the benefits of such programs?

It is not clear whether adult offenders who are cautioned are less likely to re-offend than adult offenders who are dealt with in a more formal and traditional way (by being charged by the police and convicted by a court). Considering that the majority of first time offenders who are formally dealt with by the police and courts do not re-offend anyway, it is arguable that an adult cautioning program should only be adopted if it is likely to be a more effective strategy for reducing recidivism rates than the current, more formal system.

Some supporters of cautioning argue that cautioning helps to avoid minor offenders being labelled and stigmatised as a result of acquiring a criminal record. However, it is also the case that some first time minor offenders are dealt with in a way that minimises their formal contact, or the consequences of their formal contact, with the criminal justice system. For example, it has already been pointed out that the vast majority of

²⁸ See, for example, May R, ‘The Legal Effect of a Police Caution’ [1997] *Criminal Law Review* 491.

²⁹ Evans R & Ellis R, 1997, *Police Cautioning in the 1990s*, Home Office Research and Statistics Directorate, Research Findings No 52 at 3–4.30.

first time minor drug offenders who are dealt with by a Brisbane Magistrate do not have a conviction recorded against them and only receive a fine of about \$390.

Of course, an adult cautioning program would result in a reduction in court and prosecution costs and cautioned offenders would be able to avoid having to pay a court fine. Having said this, an adult cautioning program would also lead to new costs, namely the cost of the QPS training officers in the use of cautioning procedures and the time involved in issuing and recording cautions.

Further, a cautioning process which also involved some other compulsory intervention such as referral to counselling or other rehabilitative program could result in some offenders having extended contact with the criminal justice system compared with that which would have occurred had they been formally charged and prosecuted. In the majority of cases involving first offenders who have committed minor offences (which are those considered most appropriate for cautioning), the offenders will have no further contact with the criminal justice system. Given this, it is questionable whether it is appropriate to use compulsory interventions of the type described — both in terms of whether the seriousness of the behaviour warrants such interventions and whether the costs of interventions targeted at a population generally considered to be unlikely to offend again, can be justified.

Multiple cautioning

The most recent Home Office circular on cautioning in the United Kingdom seeks to discourage police officers from cautioning an offender on more than one occasion because multiple cautioning is said ‘to bring [cautioning] into disrepute’. Under the Victorian cannabis cautioning program, a person must not be cautioned on more than two separate occasions. Under the Victorian drug diversion pilot (which applies to all illicit drugs other than cannabis), a person can only be cautioned on one occasion.

The benefits of a cautioning program that targets only first time offenders, the majority of whom will never re-offend regardless of whether they are cautioned or prosecuted, may be limited. Perhaps cautioning programs — particularly those that offer a unique form of intervention (such as the Victorian drug diversion pilot which requires cautioned offenders to attend a drug treatment centre) — should focus on offenders who have not responded to contact with the formal criminal justice system (that is, people with prior court convictions). In relation to the Victorian drug diversion pilot, it is also arguable that the pilot could have a greater impact on reducing addiction rates if it targeted more serious drug users who might be multiple offenders.

The role of victims

The role of victims in a cautioning program also needs to be considered. This will not be relevant in the case of so-called ‘victimless’ offences such as simple cannabis possession, but issues regarding the lack of a role for victims in the cautioning process would be more pertinent if an adult cautioning program were to extend to a wider range of offences.

It has previously been noted that some police forces in the United Kingdom are currently trialling a different form of cautioning known as restorative police cautioning. Under this type of cautioning, victims are invited to attend and take part in the cautioning session. This type of cautioning should be given consideration.³⁰

³⁰ It should perhaps be mentioned that, in some parts of Queensland it is possible for victims and juvenile offenders to attend what is known as a ‘community conference’. Like restorative police cautioning, community conferencing is also based on the notion of restorative justice. The three community conferencing pilots that were established in April 1997 have recently been evaluated: see Hayes, H. Prenzler T. & Wortley, R., November 1998, *Making Amends: Final Evaluation of the Queensland Community Conferencing Pilot*.

Future research

Police cautioning is just one strategy for diverting minor offenders (including drug offenders) away from the criminal justice system. The CJC is currently working on another briefing paper which will examine a whole range of different diversion strategies specifically targeted at drug offenders, including drug infringement notices, court diversion schemes and the New South Wales Drug Court.