THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 60

Alternatives To Cautions

REPORT

NOVEMBER 1975

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

The Commissioners are -

Professor R.W. Harding, Chairman
Mr. E.G. Freeman
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TO: THE HON. N. McNEILL, M.L.C.
MINISTER FOR JUSTICE

TERMS OF REFERENCE

1. The Commission was asked to consider alternative ways of dealing with offenders charged with offences which, in the past, may have been dealt with by way of a caution.

WORKING PAPER

2. The Commission issued a working paper on 22 August 1975. The names of those who commented on the working paper are set out in Appendix I, and the paper itself is reproduced as Appendix II.

DISCUSSION

Reason for reference

3. The project was referred to the Commission as a result of the judgment of the Full Court of Western Australia in *Walsh v. Giumelli; White v. Gifford* [1975] W.A.R. 114. The Court held that a court of petty sessions had no power to impose a caution on a convicted offender. The text of the judgment is reproduced as Appendix I to the working paper.

Past use of the caution in Western Australia

4. It had long been the practice of magistrates or justices, if they found a charge proved but considered that there were extenuating circumstances, to an offender and merely "caution" him. This was done simply by uttering the words "convicted and cautioned"; it was not considered necessary actually to rebuke the offender or warn him against further offending. The purported legal effect of a caution was therefore that, whether or not the offender was ordered to pay the complainant's costs or some other order was made against him, he was unconditionally discharged.

5. Cautions were used in a significant number of summary cases in this State. Its principal use appeared to be in connection with the offence of being found drunk in a public

place (s.53 of the *Police Act*), although it was by no means confined to that offence. Paragraphs 6 to 9 of the working paper contains a discussion about the past use of the caution.

Present alternatives to the caution

6. Paragraphs 10 to 19 of the working paper outlined the other ways of dealing with an offender which could be used at present to deal with those cases which, because of their triviality, or some characteristic of the particular offender or other extenuating circumstance, do not seem to merit the, imposition of a penalty. Briefly, these ways are -

(a) imprisonment for a nominal period (e.g. until the rising of the court);
(b) imposition of a small fine;
(c) dismissal of the charge under s.137 of the *Police Act*;
(d) conditional discharge under s.19(7) or (8) of the *Criminal Code*;
(e) dismissal or conditional discharge under s.669 of the *Criminal Code*;
(f) probation under s.9 of the *Offenders Probation and Parole Act 1963*;
(g) binding over to keep the peace under ss.172 to 182A of the *Justices Act*.

7. The Commission considered the foregoing alternatives in detail, and concluded that none of them, nor any combination of them, could adequately replace the caution in the sort of case where predominantly it had previously been used: see paragraph 23(i) of the working paper. No one who commented on the working paper disagreed with this conclusion.

In the working paper, the Commission did not refer to certain Code provisions relating to the powers of courts of petty sessions to discharge convicted persons without penalty in some cases of assault and certain offences relating to property: Code, ss.321, 467 and 671. However, these specific provisions are also too limited to take the place of a general power to caution.

The law elsewhere

8. Appendix III of the working paper sets out in tabulated form the statutory powers which exist elsewhere in Australia, in England and New Zealand for dealing with offenders by means of some non-punitive device. Recent trends elsewhere have been to extend the

range of judicial powers in this regard, and to lay down criteria for the exercise of these powers which are comprehensive enough to give the courts considerable flexibility. The existing procedures in this State appear to be more restricted in some or all respects than those available in the other jurisdictions studied.

RECOMMENDATIONS

9. In the Commission's view the administration of justice is likely to be facilitated if courts have available to them as wide a range of powers of dealing with offenders as is reasonably practicable.

10. In paragraphs 23 to 25 of the working paper the Commission set out its tentative views on the powers courts should have to discharge offenders without penalty (whether with or without conviction) and the circumstances in which they should be able to do so.

Some commentators considered that the opportunity should be taken in this project to deal with the question of suspended sentences - i.e. a mode of disposition where a court actually imposes a sentence but suspends its operation conditionally upon the offender being of good behaviour. Consideration of this question is not clearly within the Commission's terms of reference. The Commission in any case considers that its complexity is such that it would require in itself a separate working paper. Implementation of the recommendations in this report need not, however, wait upon the outcome of any investigation into suspended sentences.

After taking into account the views of those who commented on the working paper, the Commission's recommendations are as set out in paragraphs 11 to 39 below. Courts of petty sessions and superior courts are dealt with separately.

Courts of petty sessions

(a) Unconditional discharge of convicted person

11. The Commission considers that courts of petty sessions should possess a general power to discharge convicted offenders unconditionally and without penalty, and it so

recommends. This would give them the power thought to have been possessed by them before the decision in *Walsh v. Giumelli.* The power to caution was never thought to be limited to first offenders, and the Commission recommends that the statutory power to discharge a convicted offender should likewise not be so limited.

The criteria which the Commission considers should be applied in the exercise of such a power are discussed in paragraphs 22 to 26 below.

(b) Conditional discharge of convicted person

12. If courts of petty sessions are to be empowered to discharge convicted persons unconditionally, as suggested above, it follows that they should also possess the power to discharge conditionally. Such a power already exists under s.19(7) and 19(8) of the Code; see paragraph 14 and Appendix II of the working paper.

Section 19(7) provides that the court may discharge an offender upon his entering into a bond, with or without sureties, in such amount as the court thinks fit, that he will keep the peace and be of good behaviour for a term not exceeding one year. Section 19(8) is to a similar effect, except that the bond is conditional upon the offender appearing for sentence when called upon.

Section 669 of the Code also empowers a court to discharge a convicted offender conditionally: see paragraphs 15 to 17 and Appendix II of the working paper. Although there is some over-lap between this provision and s.19(7) and 19(8), there are important differences, namely that s.669 applies only to first offenders and only to offences punishable by no more than three years imprisonment.

The Commission has received no criticism of the existence of the power to discharge conditionally under s.19(7) and 19(8) and recommends that it continue to exist. Such a power should continue, as at present, to be available with regard to all offenders, not just first offenders. However, as with the case of a good behaviour bond, the maximum period for which the offender should be liable to be called up for sentence should be one year. The criteria for the exercise of the power are discussed in paragraphs 22 to 26 below.

(c) Dismissal without conviction

13. There are two provisions which at present provide for dismissal without conviction, even though the charge is proved, namely s.137 of the *Police Act* and s.669 of the *Criminal Code*.

(a) Section 137 of the *Police Act* is confined to offences under that Act (see paragraph 12 of the working paper), and can be exercised only if the court considers the offence is trivial. It is not limited to first offenders.

(b) Section 669 of the Code is confined to first offenders, and is exercisable only in respect of offences carrying not more than three years imprisonment: see paragraphs 15 to 17 of the working paper. However, it may be exercised on grounds other than triviality of the offence.

14. The Commission suggested in paragraph 23(iv) of the working paper that power to dismiss without conviction should not be confined to first offenders. The Law Society, Mr. R.H. Burton, S.M., Mr. G.L. Fielding, S.M. and the Department for Community Welfare agreed. The Crown Prosecutor and the Parliamentary Commissioner for Administrative Investigations, on the other hand, considered that it should generally be so confined. However, the Crown Prosecutor thought that s.137 of the *Police Act* should remain in force.

15. After reconsidering the matter the Commission recommends that the power to dismiss without conviction should not be confined to first offenders. The fact that a person has previously been convicted of an offence should not, *ipso facto*, prevent the court from exercising the power to dismiss without conviction. The previous conviction could have occurred many years previously, or could have been for a minor offence of a character completely dissimilar to the present charge. A court would, of course, take into account the fact that an accused was not a first offender in deciding whether or not to convict on a subsequent occasion.

16. More difficult is the question whether the power to dismiss without conviction should be confined to offences carrying no more than a specified maximum term of imprisonment.

In paragraph 23(v) of the working paper, the Commission suggested that in the case of offences only triable summarily with the consent of the accused, dismissal without conviction should only be possible where the offence is such that, if tried on indictment, it would be punishable by no more than three years imprisonment.

17. It is unclear whether the powers of courts of petty sessions to dismiss without conviction under s.669 are at present limited, as the Commission tentatively suggested should be the case. The limitation in that section to offences punishable by no more than three years imprisonment might be considered to refer either to the maximum term of imprisonment that could be imposed if the offence were tried on indictment or to the maximum term that could be imposed where the offence is actually tried summarily. There are no reported decisions on the point.

In practice, the question can arise only in the case of two offences of the breaking and entering type (Code, ss.403, 404 and 407A), various stealing and cognate offences (Code, s.426), two offences of the forgery type (Code, ss.478, 479 and 489A) and one offence of the injury to property type (Code, ss.452 and 465(1) (b)). If the former interpretation is correct, such of those offences as, if tried upon indictment, carry a maximum sentence of more than three years imprisonment would not be able to be dismissed under s.669 when tried summarily, despite the fact that at that trial they would only be punishable by less than three years imprisonment.

18. Those who commented on the working paper were generally in favour of the limitation which the Commission had tentatively suggested. Some, including the Law Society, said they were not opposed to it. However, after reconsidering the matter, the Commission now considers that the power to dismiss without conviction under s.669 should be related to the maximum penalty actually able to be imposed in the particular proceedings and not to the penalty potentially available in different proceedings. The Commission accordingly recommends that a court of petty sessions should have power to dismiss without conviction whether or not the offence, if tried on indictment, would carry a maximum penalty of more than three years imprisonment. This recommendation is, of course, limited to situations where the court of petty sessions is not itself empowered to impose a penalty of more than three years imprisonment.

19. In the particular context of summary trial of offences against ss.403 or 404 of the Code, this recommendation is supported by the fact that, under s.407A, there are statutory safeguards to ensure that only relatively minor examples of the offences are dealt with summarily. Thus, in cases where stealing is involved, the property must be of a value of not more than $500; generally, there must have been no violence involved; the court of petty sessions must itself consider that the particular offence can adequately be dealt with summarily (i.e. with a maximum penalty of six months imprisonment), and the accused himself must elect that mode of trial. If a case meets all the criteria that make it permissible for it to be tried summarily, there seems no reason to treat it any differently from any other case which is tried summarily. Comparable safeguards also apply under ss.426 (stealing and cognate offences), 452 (injury to property) and 478 and 479 (forgery).

(d) Dismissal without conviction but upon a bond

20. The Crown Prosecutor suggested that it was inappropriate for a dismissal without conviction to be able to be accompanied by a requirement that the defendant enter into a bond. The Commission can see no incongruity in such a possibility. Dismissal without conviction where an offence has been proved is a concession to the defendant. If the court considers that it may be useful or appropriate to accompany its order with a good behaviour bond there seems no reason why this should not be able to be done, as can be done at present following a conviction: see Code, s.19(7). The maximum period of such a bond is at present one year, although there is no limitation on the period under the present s.669. The Commission considers that the purpose of dismissal without conviction upon a bond in cases tried summarily can be adequately met by a maximum period of one year, and it so recommends.

21. The Commission considers, however, that breach of a good behaviour bond should not be a basis for re-opening the original criminal proceedings in such cases. The Commission takes the same view with regard to good behaviour bonds upon discharge following conviction: see paragraph 12 above. If the original situation was such as to be deserving of a bond, it is undesirable to leave in suspense the possibility of the imposition of a greater punishment, such as imprisonment, at some future date. In such cases, if the condition of the bond is breached, the recognisance should be estreated (cf. *Justices Act*; ss.181, 182), and the Commission so recommends. Consequentially, the Commission also recommends that a bond

in such circumstances should not be able to be accompanied by a condition that the defendant must appear for sentence for the original conduct when called upon to do so.

(e) Criteria to be applied

22. The criteria which the Commission tentatively suggested in paragraph 23 (vi) of the working paper as those to which the courts should have regard in deciding whether to dismiss a charge without conviction (whether conditionally or unconditionally), or to convict and discharge without penalty (whether conditionally or unconditionally) were as follows -

(a) the character, antecedents, age, health and mental condition of the offender;
(b) the trivial nature of the offence;
(c) any extenuating circumstances under which the offence was committed; and
(d) any other matter the court thinks it proper to consider.

The suggested criteria, which are part of the Queensland and New South Wales legislation, are wider than those laid down in s.669 of the Code, in that -

(i) the court is expressly authorised to take into account the age of the offender (and not only his "youth"), his health and mental condition;
(ii) the court could have regard to any other matter it thinks proper to consider.

23. Mr. G.L. Fielding, S.M., favoured both extensions. However, the Crown Prosecutor did not favour any extension, and considered that the second extension above would have the effect of "making uncertain the basis upon which the power is to be exercised." The Law Society regarded (d) as inappropriate, having regard to the criteria set out in (a), (b) and (c).

24. After reconsidering the question, the Commission adheres to its view that the court should be authorised to have regard to an offender's age, health and mental condition, and it so recommends. These factors may already be included in the meaning of "antecedents" (see *Cobiac v. Liddy* (1969) 119 C.L.R. 257 at 277), but it seems desirable to resolve any doubt in this regard by making this explicit in the legislation.

25. However, while it considers that there may be criteria that should be taken into account other than those falling under (a), (b), or (c), the Commission now believes that its earlier tentative suggestion that the court should be entitled to consider such other matters as it thinks proper goes too far. The effect of such a provision could be to confer upon the court a virtually uncontrollable discretion, inasmuch as no appellate criteria would seem to exist. The Commission is not aware of any criticism, judicial or otherwise, of the use of this criterion in New South Wales or Queensland. However, enactment of the relevant provisions has been relatively recent in each of those States, and the Commission considers that it would be desirable to await practical experience of the operation of this criterion before deciding whether it should be introduced in this State.

26. The sort of factor which the Commission had contemplated might have been taken into account under such a head, and which could not have been taken into account under heads (a), (b) or (c), did however reveal a common theme - that circumstances can exist where the mere fact of conviction is likely to produce consequences for the particular offender which are quite out of proportion to the offence itself. For example, loss of a job might sometimes follow upon conviction whilst not following upon a dismissal without conviction; eligibility for a profession might be affected, or visa requirements for Australia or some other country might be contravened. The Commission accordingly considers that the criteria should be of such a nature as to enable such exceptional circumstances to be taken into consideration by a court, and recommends that a court be empowered to consider the likely consequences of conviction upon the defendant.

27. Enacting criteria to which the courts should generally have regard in deciding whether to discharge an offender would, of course, limit the present exercise of a court's discretion under s.19(7) and 19(8) of the Code. The Commission considers that it is desirable to enact uniform criteria upon which all types of discharge, with or without conviction and conditional or unconditional, should be based.

Supreme and District Courts

(a) Unconditional, discharge of convicted person

28. The Commission, in paragraph 24 of the working paper, suggested that the power of these courts to discharge a convicted offender unconditionally and without penalty (i.e. to impose a caution) should be made explicit by legislation. It now confirms its tentative view, and recommends that legislation be enacted accordingly. The Commission is not aware of a power to caution having been exercised by these courts, but considers that such a power should be made explicit. As with the comparable power recommended to be given to courts of petty sessions, it should not be confined to first offenders, and should only be exercisable in accordance with the following criteria -

(a) the character, antecedents, age, health and mental condition of the offender;
(b) the trivial nature of the offence;
(c) any extenuating circumstances under which the offence was committed.

(See generally paragraphs 22 to 26 above.)

(b) Conditional discharge of convicted person

29. Superior courts have powers to discharge a convicted offender conditionally upon his entering into a bond. This bond may be either to be of good behaviour for such period as the court determines (Code, s.19(6)) or to appear and receive judgment when called upon (Code, s.19(8)). Superior courts also possess a power under s.669 to discharge a convicted offender conditionally: see paragraphs 15 to 17 and Appendix II of the working paper.

The Commission recommends that the powers to discharge a convicted offender conditionally upon his entering into a bond to be of good behaviour for such period as the court determines, or upon his entering into a bond to appear and receive judgment when called upon, should continue to exist, but should only be exercisable in accordance with the criteria specified in paragraph 28 above.

(c) Dismissal without conviction

30. Superior courts have power under s.669 of the Code to dismiss a charge without conviction. As pointed out earlier, however, the section limits the exercise of the power to first offenders, and to offences punishable by no more than three years imprisonment.

The Commission recommends that superior courts should have the power to dismiss without conviction, which should be exercisable in accordance with the following criteria -

(a) the character, antecedents, age, health and mental condition of the offender;
(b) the trivial nature of the offence;
(c) any extenuating circumstances under which the offence was committed; and
(d) the likely consequences of conviction upon the defendant.

(See generally paragraphs 22 to 26 above.)

This power should be able to be exercised either unconditionally or conditionally upon the offender entering into a good behaviour bond: cf. paragraph 20 above. However, unlike courts of petty sessions, there should be no limitation on the period superior courts can specify as the term of the bond.

The Commission considers that the power of superior courts to dismiss without conviction should not be limited to first offenders. The reasoning applicable in this respect to courts of petty sessions, applies here also: see paragraph 15 above.

(d) Offences to which powers applicable

31. The question arises whether the power to discharge without penalty, whether conditionally or unconditionally, and whether or not without conviction, should be exercisable only in respect to offences punishable by no more than a certain period of imprisonment.

32. Some commentators, including the Director for Community Welfare, were of the view that there should be no such limitation. One legal practitioner, Mr. I. Temby, considered that there should be no limitation or that if there were to be such a limitation, the relevant period

of imprisonment should be substantially increased. The Law Society, the Crown Prosecutor and the Crown Solicitor were of the view that the power to dismiss without conviction should be confined to offences punishable by not more than three years imprisonment, in line with the present scope of s.669.

33. At the time of the issue of the working paper, the Commission had no settled views upon the question. It is now of the opinion, however, that the power to dismiss **without conviction** (a power which the Commission believes should be exercisable either conditionally or unconditionally) should, as at present, be limited to offences punishable by not more than three years imprisonment. There seems to be no clear reason for disturbing the body of judicial experience relating to this particular limitation.

With regard to discharge, whether conditional or unconditional, **following conviction**, the Commission considers that, as with the present s.19(6) and 19(8), it should be available for all offences for which there is no minimum or mandatory penalty prescribed. If the Commission's recommendation is adopted that this power be subject to clear criteria (see paragraphs 28 and 29 above), the scope of such a provision would not be unduly wide. At present there are no statutory criteria for the exercise of the powers conferred by s.19(6) and 19(8).

(e) Criteria to be applied

34. This has already been dealt with above, the Commission's basic recommendation being that the criteria it has recommended should be applicable in relation to powers exercisable by courts of petty sessions (see paragraphs 22 to 26 above), should also be applicable in relation to powers exercisable by the Supreme and District Courts.

Other matters

Civil proceedings

35. In paragraph 23(viii) of the working paper, the Commission suggested that any new provision be drafted so as to ensure that its application does not operate as a bar to civil proceedings arising from the same cause. All those who commented on this point agreed.

36. The present s.669(2) does operate as a bar to civil proceedings. *Hansard* does not contain any discussion of the reason for the introduction of this provision, which was first enacted in 1892: see the *Probation of First Offenders Act* of that year. Its exact scope is somewhat obscure, in that it has not been judicially determined what "arising from the same cause" means in this context. The Commission considers that the provision is anomalous. It cuts across the general principles of law and justice in that persons' rights are affected in proceedings to which they are not parties, and if courts are mindful of this it may in turn have an inhibiting effect upon their use of the powers to discharge a defendant under s.669. It is to be noted that the Western Australian legislature has over the years progressively removed restrictions elsewhere in the Code on the right to take civil proceedings: see e.g., s.323, amended in 1918 so as to enable the victim of an assault to sue his attacker and s.468, repealed in 1969 so as to enable a person whose property had been destroyed in such circumstances as to result in the laying of a criminal charge to sue the person responsible.

The Commission recommends that the exercise of any power to dismiss without conviction, or to discharge upon conviction, should not operate as a bar to any civil proceedings.

Costs

37. The Commission confirms the view it expressed in paragraph 23(vii) of the working paper that the discharge of a defendant, with or without conviction, under the foregoing provisions should not affect the powers of the courts to order the defendant to pay the costs of the prosecution.

By the same token, the dismissal of a charge without conviction in accordance with the Commission's proposals should not entitle a defendant to his costs as of right under the *Official Prosecutions (Defendants' Costs) Act 1973*. In relation to the Commission's proposals, the discretion of the court to refuse costs should be retained: cf. s.6 of the Act.

Minimum penalties

38. The power to convict and discharge, conditionally or unconditionally, should in the Commission's view be subject to provisions relating to prescribed minimum penalties: see,

e.g., ss.63 and 64 of the *Road Traffic Act 1974*, s.19 of the *Marketing of Lamb Act 1971*, and s.12(2) of the *Fisheries Act 1905*.

On the other hand, the Commission considers that the power to dismiss without conviction should not necessarily be precluded by the fact that an offence carries a minimum penalty: see generally *Cobiac v. Liddy* (1969) 119 C.L.R. 257; *Aitken v. Wilson* [1974] W.A.R. 166. A court may, of course, take the existence of such a penalty into account in determining whether or not to exercise its power to dismiss without conviction.

Mode of implementation

39. The Commission considers that the foregoing recommendations could most appropriately be enacted by replacing the present s.669 with one provision applicable to all courts. At present, the applicable law is scattered in various places. The Commission's recommendation, if adopted, would involve the repeal of ss.19(6), 19(7), 19(8), 321, 467 and 671 of the Code and s.137 of the *Police Act*. In the special case of proceedings in the Children's Court, the implications of the Commission's decisions would have to be considered in the light of s.19(6) of the *Child Welfare Act.*

SUMMARY OF RECOMMENDATIONS

40. The Commission recommends that -

(i) Courts of petty sessions and superior courts should be able to dismiss a proven charge without conviction whenever the offence is one for which the maximum penalty, in the court actually dealing with the matter, does not exceed three years imprisonment.

(paragraphs 18, 30 and 33)

(ii) (a) Such a dismissal should be able to be either unconditional or conditional upon the defendant's entering into a good behaviour bond for a specified period.

(b) The maximum period which a court of petty sessions should be able to specify is one year, but there should be no limitation on the period which a superior court should be able to specify.

(paragraphs 15, 20, 21 and 30)

(iii) In deciding whether or not to dismiss a proven charge without conviction the court should be entitled to have regard only to one or more of the following -

(a) the character, antecedents, age, health and mental condition of the offender;
(b) the trivial nature of the offence;
(c) any extenuating circumstances under which the offence was committed;
(d) the likely consequences of conviction upon the defendant.

(paragraphs 22 to 26 and 34)

(iv) Courts of petty sessions and superior courts should be able to convict an offender and discharge him conditionally or unconditionally in respect of any offence actually tried by the particular court, except those offences where there is a mandatory or a minimum sentence.

(paragraphs 11, 12, 28, 29 and 38)

(v) (a) Such a discharge should be able to be either unconditional, or conditional upon the offender entering into a bond for a specified period either to be of good behaviour, or to come up for sentence if called upon.

(b) The maximum period which a court of petty sessions should be able to specify is one year, but there should be no limitation on the period which a superior court should be able to specify.

(11, 12, 21, 28 and 29)

(vi) The criteria for deciding whether or not to discharge an offender following conviction should be -

(a) the character, antecedents, age, health and mental condition of the offender;

(b) the trivial nature of the offence;

(c) any extenuating circumstances under which the offence was committed.

(paragraphs 12, 22 to 26 and 29)

(vii) The power to discharge offenders without penalty, whether with or without conviction and whether conditionally or unconditionally, should not be limited to first offenders.

(paragraphs 11, 12, 15, 28, 29 and 30)

(viii) Dismissal without conviction or discharge following conviction should not (as at present under s.669 of the Code) be a bar to civil proceedings.

(paragraph 36)

(ix) Dismissal without conviction or discharge following conviction should not affect the power of a court to make any other order, such as a compensation order or an order as to costs payable by the defendant.

(paragraph 37)

(x) A defendant against whom a proven charge is dismissed should not be entitled to his costs as of right under the *Official Prosecutions (Defendants' Costs) Act*.

(paragraph 37)

CHAIRMAN

MEMBER

MEMBER

13 November 1975

APPENDIX I
List of those who commented on the working paper

Burton, R.H. S.M.

Crown Law Department

Department for Community Welfare

Fielding, G.L. S.M.

Law Society of Western Australia

Parliamentary Commissioner for Administrative Investigations

Robinson, L.

Temby, I.D.

Western Australian Alcohol and Drug Authority

Australian Police Department