THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 60

Alternatives to Cautions

WORKING PAPER

AUGUST 1975

INTRODUCTION

The Law Reform Commission has been asked to consider alternative ways of dealing with offenders charged with offences which, in the past, may have attracted a caution.

The Commission having completed its first consideration, of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms on individual issues raised in the working paper, on the paper as a whole or on any other aspect coming within the terms of reference, are invited. *The Commission has been asked to give priority to this project, and asks that comments be submitted by 18 September 1975.*

Copies of the paper are being sent to the -

Chairman and members of the Parole Board
Chief Justice and Judges of the Supreme Court
Chief Probation and Parole Officer
Citizens Advice Bureau
Commissioner of Police
Community Welfare Department
Department of Corrections
Institute of Legal Executives
Judges of the District Court
Law School of the University of W.A.
Law Society of W.A.
Magistrates' Institute
Solicitor General
Under Secretary for Law
Western Australian Alcohol and Drug Authority
Law Reform Commissions and Committees with which this Commission is in correspondence.

The Commission may add to this list.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of the paper and to submit comments.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.

CONTENTS

TERMS OF REFERENCE AND COMMENTS THEREON

1. "To consider alternative ways of dealing with offenders charged with offences which, in the past, may have attracted a caution."

2. The project was referred to the Commission as a result of a judgment of the Full Court of Western Australia in *Walsh v. Giumelli; White v. Gifford*, delivered on 3 April 1975. The Court held that a court of petty sessions had no power to impose a caution on a convicted offender. A copy of the judgment is reproduced as Appendix I to this paper.

3. It had long been a practice of Magistrates or Justices, if they found a charge proved but considered that there were extenuating circumstances of some kind, to convict an offender and merely "caution" him. This was usually 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, unless the offender was ordered to pay the complainant's costs or some other order was made against him, he was unconditionally discharged.

4. The cases which were the subject of the Full Court's decision concerned convictions for selling an obscene paper, contrary to s.2(1) of the *Indecent Publications Act*. The Magistrate had in each case convicted and cautioned the defendants. In deciding that the Magistrate had no power to impose a caution, the Full Court reasoned as follows. First, a caution is in no sense a penalty. Second, the powers of courts of petty sessions as to the disposition of complaints is derived solely from statute: they possess no inherent jurisdiction such as is possessed by superior courts of unlimited jurisdiction. Third, there is no statute authorising courts of petty sessions unconditionally to discharge a convicted person without penalty. Fourth, to convict and not to proceed to impose a penalty, or any other form of statutorily authorised order instead of a penalty, is to fail to complete the exercise of the jurisdiction vested in the court; mandamus would accordingly be available to compel the court to do so.

5. The cases were accordingly remitted for rehearing to the Magistrate, with a direction that he should proceed to impose such penalty as he considered appropriate or to make such order in lieu thereof as he was authorised by law to do.

DISCUSSION

Use of the caution in the past

6. It is not possible to ascertain with precision how often the caution has been used in this State in the past. The figures of the Australian Bureau of Statistics contain, with regard to proceedings in courts of petty sessions in Western Australia, a category which covers cautions, discharges under s.669 of the *Criminal Code*, discharges under s.26 of the *Child Welfare Act 1947* and orders under s.146 of the *Liquor Act 1970*. In 1970, 6,305 convictions out of a total of 79,899 were dealt with under this heading; in 1971, 7,849 out of 93,548; in 1972, 9,654 out of 95,673, and in 1973, 10,803 out of 101,972 (see the *W.A. Crime Statistics*, available at the Western Australian office of the Bureau). It can thus be seen that up to about 11% of convictions may fall within this category. It seems likely that a substantial proportion of these figures have been made up of cautions, because the other modes of disposition apply only in limited categories - viz.: s.26 of the *Child Welfare Act* applies only to children, s.669 of the Code applies only to first offenders, and orders under s.146 of the *Liquor Act* prohibit the supply of liquor to a person who "….by reason of excessive drinking, is likely to impoverish himself to such an extent as to expose himself or his family to want, or seriously to impair his health…".

7. Further evidence that cautions were used in a significant number of summary cases is found in figures taken out by the Department of Corrections at the East Perth Court of Petty Sessions during twelve consecutive court days in September 1974 and one day a week during six consecutive weeks in January and February 1975. The total number of convictions during those periods was 653. Sixty-six cautions were given in respect of them, which amounts to 10.1% of those convictions.

8. The Commission understands that the predominant use of the caution was with regard to the offence of being found drunk in a public place (s.53 of the *Police Act*). This understanding is partly derived from the impressions of magistrates and legal practitioners, and partly from the East Perth data referred to in paragraph 7 above. In that sample, all the cautions (66) were given in respect to convictions under s.53 of the *Police Act*. Since there were 257 convictions under s.53, cautions were given in over 25% of those cases.

Additional evidence that the caution was used frequently in cases under s.53 of the *Police Act* appears from figures taken out for another purpose by the Commission with regard to the Midland Court of Petty Sessions for 1972. Of 2,201 charges heard during that year, 956 were charges under s.53 of the *Police Act*. Of those 956 charges, 203 (that is 21%) were dealt with by way of caution. By contrast, only six charges under s.53 of the *Police Act* (that is 0.63%) were dealt with under s.669 of the Code.

9. The Commission is not aware of a power to caution having been exercised by the Supreme Court or the District Court, nor is it entirely clear whether these courts possess such a power. The Full Court in *Walsh v. Giumelli* seems to have recognised that the Supreme Court may possess such a power as part of its inherent jurisdiction (see Appendix I at p.15), but the case cannot be regarded as clear authority on this point. If it were held that the Supreme Court possessed such a power, it would follow that the District Court likewise possessed it (see the *District Court of Western Australia Act 1970*, s.42).

Existing alternatives to the caution

10. From the material set out in paragraphs 6 to 8 above, it seems clear that the practical implications of the decision of the Full Court in *Walsh v. Giumelli* must be considerable. The Commission understands that, in place of cautions, courts of petty sessions have sometimes committed offenders to custody until the rising of the court, that is, for a maximum of two hours or so. However, this device is extremely artificial and must be assumed to inconvenience the police, who are obliged to take charge of those so sentenced during that period. No doubt also the power to impose a small fine has been more frequently utilised. Insofar as convictions for drunkenness are concerned, powers exist under the *Convicted Inebriates' Rehabilitation Act 196*3 to order that any inebriate so convicted be placed in an institution under that Act. However, there is only one small institution available to deal with those offenders who might benefit from such an order.

11. The question arises: in the absence of the caution, what other alternatives are available to courts, particularly courts of petty sessions, to deal with cases which, because of their triviality, or some characteristic of the particular offender, or some other extenuating circumstance seem to merit only nominal punishment? These possible alternatives are examined in paragraphs 12 to 19 below.

A. *Section 137 of the Police Act*

12. This section provides that a court of petty sessions -

> "…shall not be bound to convict if the offence proved shall, in the opinion of [the court] , be of so trivial a nature as not to merit punishment".

However, the section is in no sense an adequate alternative to a caution in that -

(a) It does not appear to apply to cases where, although the offence is not trivial, punishment is not merited because of some characteristic of the offender or of some other extenuating circumstance.

(b) It applies only to offences under the *Police Act* itself (see *Durham v. Ramson* (1907) 9 W.A.L.R. 76). Although the caution has been used mainly in regard to drunk charges under s.53 of the *Police Act*, it would not be necessarily correct to assume that an alternative is needed only in regard to offences under that Act.

13. Further, the formulation of s.137 raises a fundamental problem in that its application is only possible if the court is prepared to refrain from entering a conviction. There are cases where a conviction has a potential bearing on the formulation of subsequent criminal offences and the penalties available. For example, under s.66(1) of the *Police Act* a person committing an offence under s.65, having previously been convicted as an idle and disorderly person, is liable to imprisonment for twelve months. It may in some cases be proper to record a conviction under s.65, though not to impose any punishment, so as to render the offender liable to the heavier penalty under s.66 should he offend again.

B. *Section 19(7) & (8) of the Criminal Code*

14. These provisions (see Appendix II) authorise a court of petty sessions (and in the case of s.19(8) a superior court), having convicted a person, to put him on a bond. Under subsection (7) the bond is to keep the peace and be of good behaviour for up to one year; under subsection (8) it is to appear for judgment when called on. In comparison with the caution, the bond is not a widely used device in Western Australia. In 1970, 767 out of 79,899

convictions were dealt with in this way; in 1971, 782 out of 93,548 convictions; in 1972, 816 out of 95,673 convictions and in 1973, 1,296 out of 101,972 convictions (see the *W.A. Crime Statistics* referred to in paragraph 6 above).

It has been doubted whether these provisions apply to offences not under the Code (see *Davissen v. Skavlos* [1942] Q.S.R. 219). However, even if they are of wider application, it would be quite inappropriate to use the bond in those cases where the caution was most often used formerly, namely, convictions for drunkenness under s.53 of the *Police Act*. The Commission does not consider that it is a realistic alternative in the vast majority of cases where cautions were formerly administered.

C. *Section 669 of the Criminal Code*

15. This section applies both to summary proceedings and to trials on indictment, provided the offence charged is not punishable by more than three years imprisonment. If, the accused having pleaded guilty or the offence having been proved,

> "...it appears to the Court that regard being had to the youth, character, or antecedents of the offender, or the trivial nature of the offence, or to any extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment, and provided that no previous conviction other than his conviction, as a child, by a children's court, is proved against the offender..."

the court can either -

(a) "...without proceeding to conviction, dismiss the indictment or complaint… " or ,

(b) "...convict the offender and discharge him conditionally on his entering into a recognisance with or without sureties, and during such period as the Court may direct, to appear and receive judgment when called upon, and, in the meantime, to keep the peace and be of good behaviour...".

The full text of the section is set out in Appendix II.

16. As an alternative to a caution, the principal limitation of this section is that it is only for the benefit of first offenders. A high proportion of the offenders who were previously cautioned (that is those convicted of drunkenness under s.53 of the *Police Act*) would probably have had many previous convictions, and it would therefore be unrealistic to regard

s.669 of the Code as an alternative to a caution with regard to that type of offender. There is the further general point that where a caution was formerly administered it was unconditional, whereas under s.669 a discharge following conviction would be conditional (see paragraph 15(b) above).

17. Section 669 possesses, however, two features which the Commission considers desirable. First, it gives the court, in deciding how to deal with an offender, a choice between conviction and acquittal. Second, apart from the restriction to first offenders, the criteria under which the section can be invoked are wide-ranging and flexible.

D. *Probation under s.9 of the Offenders Probation and Parole Act 1963*

18. Although probation is an alternative to sentencing an offender, it is not in any sense an alternative to a caution. The basis of probation is that the particular offender may be able to be rehabilitated in a non-custodial setting with the help of skilled supervision. Cautions have previously been administered either where the offence is trivial (in which case the notion of rehabilitation, by whatever means, is immaterial) or where, as in the case of repeated offending under s.53 of the *Police Act*, it may be futile to impose any custodial or non-custodial penalty at all. In such circumstances, the notion of rehabilitation is also immaterial. It would be incorrect, therefore, to regard probation as a true alternative to a caution, and to impose it in such cases would place an intolerable strain upon the resources of a probation system designed for a different type of offender.

E. *Binding over to keep the peace under ss.172 to 182A of the Justices Act*

19. The very special circumstances in which order may be made and the fact that it is not necessarily based upon proof of an offence in the ordinary sense (see ss.172 and 173 in Appendix II) means that these provisions are not truly an alternative to a caution,

THE LAW ELSEWHERE

20. Appendix III sets out in tabulated form the statutory provisions in Australian jurisdictions, in England and New Zealand relating to the power to discharge without penalty. In order to present a complete picture, information is included not only about provisions

which authorise the unconditional discharge of an offender following conviction, (that is, where a caution was formerly used in Western Australia) but also provisions which authorise the conditional discharge of an offender following conviction, and provisions which authorise the dismissal of a charge (whether conditionally or unconditionally) even though the offence is proved.

21. All these jurisdictions have legislation permitting various courts in specified circumstances not to penalty on an offender. Although the details of the provisions reveal no uniform pattern, recent trends, particularly in New South Wales, Queensland, England and New Zealand, are towards extending the powers of all courts to deal with offenders found guilty of a wide range of offences by means of some non-punitive device. Moreover, the criteria to be applied are comprehensive enough to give the courts concerned a great deal of flexibility in exercising their jurisdiction.

TENTATIVE RECOMMENDATIONS

22. The Commission considers that the administration of criminal justice is likely to be facilitated if courts have available to them as wide a range of powers of disposition as is reasonably practicable.

It should be noted that the available procedures in this State appear to be more restricted in some or all respects than those available in the other jurisdictions studied by the Commission (see paragraph 21 and Appendix III).

23. The Commission's tentative views with regard courts of petty sessions are as follows -

(i) The alternatives to a caution presently available cannot adequately take the place of that device, and there is a need for some legislative provision by which a convicted offender may be discharged unconditionally and without penalty.

(ii) There is likewise a need for convicted offenders to be able to be discharged conditionally but without penalty (see at present Code, ss.19(7), 19(8) and 669(1)(b)).

(iii) There is also a need for such courts to be able to dismiss a charge without conviction, even though the charge is proved, and to do so either conditionally or unconditionally (see at present Code, s.669(1) (a) and *Police Act*, s.137).

(iv) The modes of disposition referred to in (i), (ii) and (iii) above, should be available with regard to all offenders, not just first offenders.

(v) The modes of disposition referred to in (i), (ii) and (iii) above should be available with regard to all offences tried in courts of petty sessions, except 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. An example of such an "offence" is that contained in s.407 of the Code (being found armed with intent to commit a crime).

(vi) In deciding whether or not to dispose of a case according to (i), (ii) or (iii) above, the court should have regard to -

(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. (cf. Code, s.669(1), which does not include (d) above).

(vii) Whenever the court disposes of a case as set out in (i), (ii) or (iii) above, it should be without prejudice to the right of the court to order the defendant to pay the costs of the prosecution or, where applicable, damages. Moreover, any new provision should be so drafted as to ensure that a defendant against whom a charge is dismissed under (iii) is not entitled to his costs under the *Official Prosecutions (Defendants' Costs) Act 1973*.

(viii) Any new provision should be drafted so as to ensure that its application does not bar civil proceedings arising from the same cause (cf. Code s.669(2)).

24. With regard to the superior courts, the Commission's tentative views are as follows -

(i) The power to discharge a convicted offender unconditionally and without penalty should be made explicit by legislation.

(ii) The foregoing power, and the powers to discharge a convicted offender conditionally but without penalty or to dismiss a charge without conviction, even though the charge is proved, either conditionally or unconditionally, should generally be exercised according to the same criteria as set out with regard to courts of petty sessions.

25. The Commission has no firm views as to whether in the case of superior courts such modes of disposition should be restricted to offences punishable by no more than three years imprisonment. At present, power to dismiss a charge under s.669 of the Code is so restricted. Power to convict and discharge conditionally is also so restricted if done pursuant to s.669 of the Code, but not if done pursuant to s.19(8) of the Code. As regards the power to convict and discharge unconditionally, this power - if it exists (see paragraph 9 above) - is also not so restricted.

The Commission would particularly welcome comment upon this matter.

26. The Commission would also welcome comments on any of the views expressed in paragraphs 23 and 24 above, or on any other question arising out of this working paper or within the terms of reference.

WORKING PAPER APPENDIX I

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

Heard: 20 March, 1975

Delivered: 3 April, 1975

THE FULL COURT -

CORAM: JACKSON C.J., BURT J., JONES J.

Appeals Nos. 132 to 152 of 1974

B E T W E E N:

PETER JAMES WALSH
Appellant (Complainant)

-and-

WILLIAM GIUMELLI and OTHERS
Respondents (Defendants)

AND

RONALD ALLAN WHITE
Appellant (Complainant)

-and-

SHIRLEY GIFFORD and OTHERS
Respondents (Defendants)

Mr. M.J. Murray (instructed by the State Crown Solicitor) appeared for the appellants.

Mr. T.A. Hartrey (instructed by Tom Hartrey & Co.) appeared for G.W. Gleeson (Appeal No. 149 of 1974)

Mr. G.F. Scott (instructed by Graeme F. Scott) appeared for all other respondents.

Authorities cited -

Durham v. Ramson (1907) 9 W.A.L.R. 76
R. v. Highate J.J. ex parte Petrau (1954) 1 W.L.R. 485

THE COURT DELIVERED THE FOLLOWING JUDGMENT:

In July 1974, in the Court of Petty Sessions at Perth, twenty-one complaints against a number of newsagents and one shop assistant were by consent heard together. The complainant was either Police Sergeant White or Police Constable Walsh. Each complaint charged an offence or offences of selling an obscene paper, contrary to s.2(1) of the *Indecent Publications Act, 1902-1972*. By that section "any person who sells… any obscene book, paper, newspaper shall be liable to a penalty not exceeding two hundred dollars, or to imprisonment not exceeding six months, with or without hard labour". Each prosecution was instituted with the

consent of the Minister - s.13(1). Some complaints charged one offence; others charged several offences (up to nine) alleged to have been committed on the one day. The papers were identified in each complaint by name and issue number, the names being *Ribald, Screw, Sexy Swingers,; King's Cross Venus, Bawdy, Searchlight, Fury, Cocksure* and *Witchcraft*. The offences were said to have occurred on various dates between July 1973 and January 1974.

Before the Magistrate, all defendants were represented by the same counsel. Each defendant pleaded not guilty, admitted the sale, but denied that the paper sold was obscene. All but four of the defendants gave evidence. The evidence for those called was, for the most part, that the papers were placed at the rear of the shop, thus being restricted in display, and were not sold to children. In three cases, Gleeson, Fong and Gifford, the evidence differed somewhat from the normal pattern. After being addressed by counsel, the Magistrate found each paper to be obscene and convicted and "cautioned" each defendant on each charge. In respect of each complaint, the defendant was ordered to pay costs of $17.10. This was irrespective of the number of charges in each complaint.

His Worship's reasons for not fixing any penalty were given orally and noted by counsel. They appear to have been as follows: that there was no public complaint received by the defendants about these papers, that they were supplying a limited public demand, that sales were restricted to adults and then only on request, that the papers were not openly displayed, that there was general confusion as to community standards of obscenity and confused criteria as to the basis of any decision. It will be seen that some of these reasons could have had no application to those defendants who did not give evidence.

The complainant in each case appealed by way of order nisi to review under s.197 of the *Justices Act*, the order being obtained on two grounds, viz.: 1. The Magistrate erred in law in cautioning the respondent (defendant); 2. The Magistrate erred in law in that in the circumstances of the case the penalty (if any) imposed by him on the respondent (defendant) was manifestly inadequate. The order was made returnable before a single judge and it came on for hearing before Burt J. Counsel for the appellants presented no argument in support of the first ground of appeal and wished to concede for the purpose of the appeals that each "caution" was a "penalty or sentence" within the meaning of s.197(1) (a); and he proposed accordingly that each "caution" should be regarded as a nominal fine which he could then submit was inadequate. After considering the matter, his Honour refused to regard each "caution" as a penalty and raised the question of the source of the power in the Magistrate to refrain from passing sentence or making some other permitted form of order in lieu of sentence. His Honour contemplated directing that the first ground of appeal be argued before the Full Court under s.43 of the *Supreme Court Act*, but then decided, at the request of the parties, to refer the order to review for hearing and determination by the Full Court under s.206A of the *Justices Act*. It is accordingly for this Court now to exercise the powers conferred by s.205 of the latter Act upon the return of the order to review.

The first ground of appeal raises a question of general public importance. It has undoubtedly been the practice for many years for Magistrates and Justices of the Peace sitting in Petty Sessions to discharge a defendant without a penalty where the circumstances are thought to justify so doing, and this is generally expressed on the charge sheet by the word "caution". There is no need to research how long the practice has existed. Mr. T.A. Hartrey, appearing before us for one respondent, said that he could remember this having been done in the Eastern Goldfields by the end of the first decade of this century, so that his memory "runs longer than that of the present members of this Court. So far as we are aware the practice" has never been challenged and, as Burt J. said in his reasons for referring the order nisi to this

Court, it may well be a very sensible and just thing to do in appropriate cases. But whether a Magistrate is entitled to do so is another matter. It is now conceded, as indeed we think is obvious, that a "caution" is in no sense a penalty.

The general jurisdiction, powers and authority of magistrates or justices sitting in Petty Sessions in this State for the hearing and determination of complaints of simple offences is to be found in the *Justices Act 1902-1972*. Further powers and jurisdiction have been conferred by other statutes, notably the *Criminal Code* and the *Police Act*. But their jurisdiction is statutory, and they have no inherent jurisdiction such as is possessed by superior courts of unlimited jurisdiction. It is probable that in the early days after the foundation of the colony, justices of the peace exercised the jurisdiction and powers of justices in England; acts or ordinances such as 7 Vic, No.12 (1844), 8 Vic. No.12 (1845) and 14 Vic. No.5 (1850) were passed merely "to regulate summary proceedings" before justices, "to remove doubts as to (their) power to inflict penalties" and "to facilitate the performance of the duties of justices… with respect to summary convictions and orders". But after self-government, the present Act of 1902 was passed to consolidate and amend the laws relating to Justices of the Peace and their powers and authorities" and the savings provision in s.5 was limited to the power and authority conferred on justices by "any other Act", i.e. of Western Australia - *Interpretation Act* s.4. Accordingly the extent and limits of a magistrate's jurisdiction and powers to punish or refrain from punishing a person convicted summarily of a simple offence is to be found within the *Justices Act* or other statutes of this State, either expressly or by necessary implication.

In South Australia and in England, there is a statutory power in certain circumstances for a court to discharge an offender either absolutely or conditionally - see the *Criminal Justice Act 1948* (U.K.) s.7(1) and the *Justices Act 1921-1936* (South Australia) s.75(2). No similar general provision is to be found in the Justices Act or in any other statute of this State, Section 137 of the *Police Act* permits justices not to convict if the offence is so trivial as not to merit punishment, but this has been held by the Full Court to apply only to offences under that Act - *Durham v. Ramson,* (1907) 9 W.A.L.R. 76. In any case, the Magistrate here convicted the defendants. There is power under s.669 of the *Criminal Code* for a court, including a court of summary jurisdiction, after finding an offence proved against a first offender either to dismiss the complaint or to convict the offender and discharge him conditionally if having regard to the circumstances to which the section refers it is inexpedient to punish the offender. But this section does not authorise a "caution" without more, nor did the Magistrate purport to act under it. Subsections (7) and (8) of s.19 of the Code permit an offender to be discharged on his recognisance; it has been doubted whether these provisions apply to offences not under the Code - *Davissen v. Sklavos,* 1942 Q.S.R. 219 - but in any case none of the defendants were required to enter into a recognisance. Section 671 of the Code enables a Court of Petty Sessions to discharge an offender without punishment but only for an offence relating to property. The defendants were not placed on probation, in lieu of being sentenced, under s.9 of the *Offenders Probation and Parole Act*. Section 166 of the *Justices Act* permits justices to mitigate punishment by reducing the prescribed period of imprisonment or the prescribed amount of a fine; but a power to reduce a penalty does not justify fixing no penalty at all; a "power to reduce involves a direction to leave something, and therefore entire abolition is not an exercise of the power granted" - *Eastern Extension Australasia & China Telegraph Co. Ltd. v. The Commonwealth,* (1908) 6 C.L.R. 647 per Barton J. at p.668; see also per Griffith C.J. at p.664 and O'Connor J. at p.678.

It was contended for the respondents that the order for costs should be regarded in each case as a penalty, but this clearly is not correct - see ss.153 and 154 of the *Justices Act.*

In our opinion, the fact is that the Magistrate having convicted the defendants decided to impose no penalty or any other form of order in lieu of a penalty. There was thus, in each case, a conviction without a sentence. Unless authorised by statute, this means that the Magistrate has not finally determined the complaint and would be subject to mandamus to compel him to do so. Lord Kenyon C.J. said in *R. v. Harris*, (1797) 7 T.R. 238, following *R. v. Vipont*, (1761) 2 Burr. 1163, that a "conviction is in the nature of a verdict and judgment... and the judgment is an essential point in every conviction, let the punishment be fixed or not". See also *Oko's Magisterial Synopsis*, 14th Ed., p.84, *Paley on Summary Convictions*, 9th Ed., pp. 534-7, where these decisions are cited. In *Halsbury's Laws*, 3rd Ed. Vol. 11, p.97, it is said that "a mandamus will lie to magistrates who decline to adjudicate in matters within their province. They will be considered to have declined jurisdiction...when they have failed to pass ... sentence and thus have not disposed of a case". In *R. v. Norfolk Justices, ex parte D.P.P.*, (1950) 2 K.B. 558 at p.571, Humphreys J. said that "a court of summary jurisdiction does not complete the hearing of an information merely by convicting, because that leaves in the air, without any judgment upon the matter one way or the other, the most important part of a hearing, namely, the sentence of the court".

Where an appeal by order to review lies under s.197 of the *Justices Act*, it is unnecessary for the party aggrieved to seek the prerogative writ of mandamus because s.205 empowers the Court to exercise all or any of the powers or jurisdiction which the court possesses or might exercise upon certiorari, mandamus, prohibition or habeas corpus. The right of appeal is by s.197 conferred inter alia upon a person aggrieved as complainant by the decision of any justices who can show a prima facie case of error or mistake in law or fact. By definition in s.4, "decision " includes "a conviction order, order of dismissal; or other determination". Thus each conviction order, if defective for lack of a sentence, as it is in our opinion, is appealable. Furthermore, the Magistrate's decision or determination not to impose any penalty or other order in lieu is a "decision" from which an appeal lies.

For these reasons, we conclude that the order nisi should be made absolute, the appeal allowed upon the first ground taken, and the decision to impose no penalty should be set aside. The question which then arises is whether under the second ground of appeal this Court can now itself impose a sentence. By s.205 the Court is empowered to vary, reduce or increase the penalty or sentence imposed by the Magistrate, but this does not authorise us to fix a sentence in the first instance where none has been made below. There being no penalty, there is no room to contend that it was manifestly inadequate. It follows that each case should, pursuant to a further power in s.205, be remitted for rehearing to the Magistrate with a direction that he should proceed to impose such sentence or penalty as he considers appropriate or to make such other order in lieu thereof as he is authorised by law to do.

However, as we did hear argument upon the second ground, it is desirable that we should briefly express our views as to the nature and extent of the penalty to be imposed. It is the duty of all courts to give effect to the will and intention of Parliament as it appears from Acts passed by it. To impose no penalty (even if there were power to do so) or to fix only a nominal sum as a fine in respect to a large number of convictions for offences of selling an obscene paper is in our view to frustrate, not to enforce, the will of Parliament. While some of the reasons given by the Magistrate may justify a mitigation of penalty, at least in respect of those defendants who gave evidence that they had taken some steps to see that the sale of the papers was restricted, they do not remotely justify the refusal in globo, as it were, to penalise all defendants. It may well be true, as counsel put it, that the papers were run-of-the-mill obscenity and that the defendants were at the end of a chain of distribution. But the fact is that they knew or should be taken to have known the general quality of the offending material and

sold it deliberately and with intent to profit from the sale. In no sense (with perhaps one or two exceptions) were the offences trivial or blameless. It is not suggested that imprisonment was a necessary, penalty, and a just and sensible fine would in our view have been all that was required. If any defendant honestly believed that the paper sold was available for restricted sale, and if, as we were told, each defendant was a first offender under the Act, these matters would justify a considerable mitigation of the fine from the maximum of $200. There appear to be one or two instances - e.g. Gifford and Gleeson, - where the circumstances of the offence would seem to justify quite a small fine. But it is for the Magistrate to impose an appropriate penalty or order in lieu thereof according to the facts and circumstances of each offence as disclosed in the evidence.

WORKING PAPER APPENDIX II

Section 19(7) & (8) of the Western Australian Criminal Code
19….

(7) A person convicted of any offence upon summary conviction may, instead of being sentenced to any punishment to which he is liable, be discharged upon his entering into his own recognisances, with or without sureties, in such amount as the justices think fit, that he shall keep the peace and be of good behaviour for a term not exceeding one year;

(8) When a person is convicted of any offence not punishable with death, the Court or justices may, instead of passing sentence, discharge the offender upon his entering into his own recognisance, with or without sureties, in such sum as the Court or justices may think fit, conditioned that he shall appear and receive judgment at some future sittings of the Court, or when called upon.

Section 669 of the Western Australian Criminal Code

669. (1) When upon the trial of any person on a charge of any offence not punishable with more than three years imprisonment, with or without any alternative punishment, such person shall plead guilty, or the Court shall think the offence proved, if it appears to the Court that regard being had to the youth, character, or antecedents of the offender, or the trivial nature of the offence, or to any extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment, and provided that no previous conviction, other than his conviction, as a child, by a children's court, is proved against the offender, -

(a) The Court may, without proceeding to conviction, dismiss the indictment or complaint and make an order to that effect, and if the Court thinks fit may, upon such dismissal, order the offender to make restitution of any property in respect of which the offence was committed, or to pay compensation for any injury done to such property, or compensation for any injury done to any person injured, as the case may be, and may assess the amount to be paid by the offender in any such case with such costs of the prosecution as the Court may think reasonable, and may direct when and to whom and in what instalments the amount ordered to be paid is to be paid, and such order may be enforced in the same manner as orders made on summary conviction; or

(b) The Court may convict the offender and discharge him conditionally on his entering into a recognisance with or without sureties, and during such period as the Court may direct, to appear and receive judgment when called upon, and, in the meantime, to keep the peace and be of good behaviour, and either without payment of damages and costs as aforesaid, or subject to the payment of such damages and costs, or either of them, as the Court may think reasonable.

(2) Any order of dismissal or conviction and conditional discharge under the provisions of this section is a bar to all further or other proceedings, civil or criminal, for the same cause.

(3) (a) If it is proved to the Court having power to deal with the offender in respect of his original offence, or to any justices, that the offender has failed to observe any of the conditions of his recognisance, the Court or justices may forfeit the recognisance, and issue a warrant for his apprehension.

(b) The offender when apprehended on any such warrant if not brought before the Court having power to sentence him, is required to be brought before two justices who may either remand him by warrant until the time at which he was required by his recognisance to appear for judgment, or until the sitting of a Court having power to deal with the original offence, or may admit him to bail with a sufficient surety conditional on his appearing for judgment.

(c) The offender when so remanded may be committed to any prison near the place where he is bound to appear for judgment; and the warrant of remand must order him to be brought before the Court before which he was bound to appear for judgment, or to answer as to his conduct since his release.

(4) The term "Court" in this section includes a Court of summary jurisdiction.

Sections 172 & 173 of the Western Australian Justices Act 1902

172. When complaint in writing is made before a Justice that any person has threatened to do to the complainant, or to his wife or child, or any person under his care or charge, any bodily injury, or to burn or injure his house, or otherwise to commit a breach of the peace towards him or his wife or child, or such other person as aforesaid, or to procure others to commit such breach of the peace or do such injury, or has used any language indicating an intention to commit such breach of the peace or to do such injury, or procure it to be committed or done, and that the complainant is in fear of the defendant, and the complainant therefore prays that the defendant may be required to find sufficient sureties to keep the peace, such proceedings may be had as are in this Part of this Act mentioned.

173. When complaint in writing, on oath, is made before a Justice that any person is a person of evil fame, and the complainant therefore prays that the defendant may be required to find sufficient sureties to be of good behaviour, such proceedings may be had as are in this Part of this Act mentioned.

WORKING PAPER APPENDIX III

(1) Statutory Provisions Concerning Power to Discharge Without Penalty

Jurisdiction	Courts having power (a) to dismiss (b) to convict and discharge	Whether – (a) dismissal, (b) conviction and discharge, is conditional or unconditional	Offences for which there can be – (a) a dismissal, (b) a conviction and discharge.	Whether power to – (a) dismiss (b) convict and discharge is confined to first offenders	**FACTORS TO** Can court consider characteristics of offenders where power (a) to dismiss, (b) to convict and discharge?	**BE CONSIDERED** Can court consider triviality of offence (a) to dismiss, (b) to convict and discharge?	**BY THE COURT** Can court consider other extenuating circumstances where power (a) to dismiss, (b) to convict and discharge?
N.S.W. (ss. 556A & 558 of *Crimes Act 1900* as amended in 1974	(a) all courts (b) all courts	(a) either (b) conditional	(a) any (2) offence (b) any offence	(a) No (b) No	(a) Yes (b) Yes (general discretion)	(a) Yes (b) Yes (general discretion)	(a) Yes (b) Yes (general discretion)
Vic. (s.75 of *Justices Act 1958*) (3)	(a) courts of petty sessions (b) courts of petty sessions	(a) unconditional (b) conditional	(a) offences dealt with summarily (4) (b) offences dealt with summarily (4)	(a) No (b) No	(a) No (b) No	(a) Yes (b) Yes	(a) No (b) No
Qld. (s.657; & s.657A of *Criminal Code* as inserted in 1975)	(a) all courts (b) courts of petty sessions	(a) either (b) conditional	(a) any offence (b) offences against property	(a) No (b) No	(a) yes (b) yes (general discretion)	(a) yes (b) yes (general discretion)	(a) yes (b) yes (general discretion)
S.A. (s.4 of *Offenders Probation Act 1913*; see also ss.70(ab) & 75(2) (a) (b) of *Justices Act 1921* & s.313 of the *Criminal Law Consolidation Act 1935*)	(a) courts of summary jurisdiction (b) all courts	(a) either (b) either (for summary courts; conditionally (for superior courts)	(a) offences dealt with summarily (b) any offence	(a) No (b) No	(a) Yes (b) Yes	(a) Yes (b) Yes	(a) Yes (b) Yes

Tas. (s.7 of *Probation of Offenders Act 1973*; s.386 of *Criminal Code Act 1924*)	(a) courts of summary jurisdiction	(a) either	(a) offences dealt with summarily	(a) No	(a) Yes	(a) Yes	(a) Yes
	(b) superior courts	(b) conditional	(b) offences tried on indictment	(b) No	(b) Yes	(b) Yes	(b) Yes
A.C.T. (ss. 556A & 556B of *Crimes Act 1900* as inserted by *Crimes Ordinance 1971*)	(a) courts of petty sessions	(a) either	(a) offences dealt with summarily	(a) No	(a) Yes	(a) Yes	(a) Yes
	(b) all courts	(b) conditional	(b)any offence	(b) No	(b) Yes (general discretion)	(b) Yes (general discretion)	(b) Yes (general discretion)
England (s.7 of *Criminal Justice Act 1948*)	(a) None	(a) N/A	(a) None	(a) N/A	(a) N/A	(a) N/A	(a) N/A
	(b) all courts	(b) either	(b) any offence (other than one where the sentence is fixed by law)	(b) No	(b) Yes	(b) Yes	(b) Yes
N.Z. (ss.41 & 42 of *Criminal Justice Act 1954*; s.347 of *Crimes Act 1961*)	(a) all courts	(a) unconditional	(a) any offence (other than one where the sentence is fixed by law)	(a) No	(a) Yes (general discretion)	(a) Yes (general discretion)	(a) Yes (general discretion)
	(b) all courts	(b) conditional	(b) any offence	(b) No	(b) Yes (general discretion)	(b) Yes (general discretion)	(b) Yes (general discretion)
W.A. (ss.19(7), 19(8) & 669 of *Criminal Code*; see s.671 of Code & s.137 of *Police Act 1892*	(a) all courts	(a) unconditional	(a) offences punishable by not more than 3 years imprisonment	(a) first (5) offenders only	(a) Yes	(a) Yes	(a) Yes
	(b) all courts	(b) conditional	(b) any offence(6)	(b) No.	(b) Yes	(b) Yes	(b) Yes

(1) This table is confined to powers exercisable generally, and does not include provisions dealing with special classes of offenders, e.g. children.
(2) Except for certain driving offences (see s.10(5) of the *Motor Traffic Act 1909*).
(3) See also s.480 of the *Crimes Act 1961*, which gives a summary court power conditionally to discharge the offender from his conviction in respect of an offence against property.
(4) Except for charges which could not have been dealt with summarily, if the accused had not pleaded guilty.
(5) Except offences under the *Police Act*.
(6) Except those punishable by death.