QUEENSLAND CRIMINAL PROCEDURE REVIEW - MAGISTRATES COURT: RESPONSE TO THE CONSULTATION PAPER

ABOUT THE JUSTICE REFORM INITIATIVE

The Justice Reform Initiative is an alliance of people who share long-standing professional experience, lived experience and/or expert knowledge of the justice system, further supported by a movement of Australians of goodwill from across the country who believe jailing is failing and that there is an urgent need to reduce the number of people in Australian prisons.

The Justice Reform Initiative is committed to reducing Australia's harmful and costly reliance on incarceration. Our patrons include more than 100 eminent Australians, including two former Governors-General, former Members of Parliament from all sides of politics, academics, respected Aboriginal and Torres Strait Islander leaders, senior former judges including High Court judges, and many other community leaders who have added their voices to end the cycle of incarceration in Australia.

We seek to shift the public conversation and public policy away from building more prisons as the primary response of the criminal justice system and move instead to proven alternative evidence-based approaches that break the cycle of incarceration.

We are committed to elevating approaches that seek to address the causes of contact with the criminal justice system including responses to housing needs, mental health issues, cognitive impairment, employment needs, access to education, the misuse of drugs and alcohol, and problematic gambling. We are also committed to elevating approaches that see Aboriginal and Torres Strait Islander-led organisations being resourced and supported to provide appropriate support to Aboriginal and Torres Strait Islander people who are impacted by the justice system.

Queensland patrons of the Justice Reform Initiative include:

- **The Honourable Mike Ahern AO**, former Premier of Queensland, businessman and founder of the Queensland Community Foundation.
- **Sallyanne Atkinson AO**, former Lord Mayor of Brisbane, businesswoman and Trade Commissioner
- **Professor Kerry Carrington**, Head of the School of Justice, Queensland University of Technology
- **Mick Gooda**, former Aboriginal and Torres Strait Islander Social Justice Commissioner and former Royal Commissioner into the Detention of Children in the Northern Territory
- **Keith Hamburger AM**, former Director-General, Queensland Corrective Services Commission
- **Professor Emeritus Ross Homel, AO,** Foundation Professor of Criminology and Criminal Justice, Griffith University
- **Professor Elena Marchetti**, Griffith Law School, Griffith University
- **The Honourable Margaret McMurdo AC**, former President Court of Appeal Supreme Court of Queensland and Commissioner of the Victorian Royal Commission into the Management of Police Informants
- **Dr Mark Rallings**, former Commissioner, Queensland Corrective Services
- **Greg Vickery AO**, Former President Queensland Law Society and former Chair of the Standing Commission of the International Red Cross and Red Crescent Movement
- **The Honourable Deane Wells**, former Attorney General of Queensland
- **The Honourable Margaret White AO**, former Judge of the Queensland Supreme Court and Queensland Court of Appeal, former Royal Commissioner into the Detention of Children in the Northern Territory, and Adjunct Professor TC Berne School of Law UQ.

INTRODUCTION

The Justice Reform Initiative (JRI) welcomes the opportunity to provide this submission to the Criminal Procedure Review Magistrates' Court consultation. This submission will respond to the following questions that were listed in the Consultation Paper:

- QUESTION 4: Should the new legislation include guiding principles? If so, what should the main themes of those principles be?
- QUESTION 29: Should the new legislation about criminal procedure in the Magistrates Courts include 'in-court diversion'?
- QUESTION 30: If yes, what types of in-court diversion should be available? What sort of offences should they be available for? What safeguards are required?
- QUESTION 31: Should the new legislation about criminal procedure in the Magistrates Courts have specific objects or principles about 'in-court diversion'? If yes, what should they be?
- QUESTION 33: Could an in-court deferred prosecution scheme work in the Queensland Magistrates Courts? What issues need to be considered?
- QUESTION 36: Could an in-court diversion program (as in Victoria) work in the Queensland Magistrates Courts? What issues need to be considered?
- QUESTION 37: What procedures could be included in criminal procedure laws in Queensland to enable the Magistrates Court to divert a person out of the court system before the person pleads guilty or is sentenced? For example, could the court make its own orders? What types of requirements could be included?
- QUESTION 39: Should the Magistrates Court have the power to issue a caution if it is of the view the police officer should have cautioned the adult person (in a similar way to the Childrens Court)?
- QUESTION 40: Should new legislation about criminal procedure provide, as in the Childrens Court, that instead of accepting a plea of guilty the Magistrates Court can dismiss a matter, and may caution an adult? What issues need to be considered?

QUESTION 4: SHOULD THE NEW LEGISLATION INCLUDE GUIDING PRINCIPLES? IF SO, WHAT SHOULD THE MAIN THEMES OF THOSE PRINCIPLES BE?

The new criminal procedure legislation should include a section that details the guiding principles, purposes or objects of the Act. Such a section will facilitate statutory interpretation of the legislation by indicating the purposes of the legislation which were intended by Parliament. Moreover, where a question arises as to the interpretation of particular sections in the legislation, a section detailing the purposes of the legislation will be critical in the interpretation of other sections to determine whether the grammatical meaning of the provision gives effect to the purpose(s) of the legislation.[1]

The section will also provide guidance to judicial officers as to their role and functions under the Act.

[1] *Palgo Holdings Pty Ltd v Gowans* [2005] HCA 28 at paragraph 35.

The JRI agrees with the suggested guiding principles outlined in paragraph 3.8 of the Consultation Paper. Specifically, the JRI considers that the following guiding principles and purposes should be included in the new legislation:

- the system should operate in a way that focuses on its users, including by engaging with local communities and groups such as victims and witnesses;
- court procedures should be culturally appropriate for Aboriginal and Torres Strait Islander people wherever possible and acknowledge the diversity of cultural practices across Queensland;
- people should not be disadvantaged in proceedings because they are from a culturally or linguistically diverse background and do not speak English as a first language.

In addition, the JRI considers that the guiding principles and purposes should also include principles regarding the proposals to facilitate the diversion of people from the Magistrates' Court. The guiding principles should therefore include the following:

- to provide a framework for the recognition and operation of programs that offer alternative ways of dealing with people who have committed (or are alleged to have committed) an offence;
- to make sure programs apply fairly to everyone eligible to participate, and that they are properly managed and administered;
- to reduce the likelihood of future offending by facilitating participation in these programs.

QUESTION 29: SHOULD THE NEW LEGISLATION ABOUT CRIMINAL PROCEDURE IN THE MAGISTRATES COURTS INCLUDE 'IN-COURT DIVERSION'?

The new legislation about criminal procedure in the Magistrates Court should include provisions that provide opportunity to develop innovative procedures that enable adults charged with certain offences to be diverted out of the court system once proceedings have started (in-court diversion). These procedures will enable matters to be resolved in various ways which are outside the traditional court processes and outcomes. The important objective of these procedures was articulated in paragraph 3.97 of the Consultation Paper as "to reduce a person's contact with the criminal justice system at an early stage, including by addressing issues relating to offending by providing appropriate therapeutic interventions and allowing for the participation of victims."

In-court diversion procedures provide innovative ways of addressing criminal offending and reducing the prospects of re-offending by offering pathways out of the criminal justice system and opportunities to address the underlying causes of offending and criminal justice use, including drug and alcohol use, problematic gambling, mental illness, cognitive impairment, poverty and disadvantage.

The Victorian Magistrates' Court in-court diversion programs ('the Criminal Justice Diversion Program') identifies the following program benefits:

- when appropriate, restitution is made to the victim of the offence and the victim receives an apology;
- reduces the likelihood of re-offending;
- allows people to avoid an accessible criminal record;
- facilitates assistance with rehabilitation;

- allows people to receive appropriate counselling and/or treatment;
- assistance towards local community projects with voluntary work and donations.[2]

QUESTION 30: IF YES, WHAT TYPES OF IN-COURT DIVERSION SHOULD BE AVAILABLE? WHAT SORT OF OFFENCES SHOULD THEY BE AVAILABLE FOR? WHAT SAFEGUARDS ARE REQUIRED?

The JRI agrees with the statement in the Consultation Paper that **the general objective of in-court diversion is to reduce a person's contact with the criminal justice system at an early stage, including by addressing issues driving criminal justice system contact, providing appropriate therapeutic interventions and allowing for the participation of victims.**

Diversion to practical, alternative programs provides an opportunity to address the drivers of offending. It also reduces the prospect of entrenching contact with the criminal justice system. In order for magistrates to utilise appropriate diversion programs successfully, there is a need for a measure of flexibility (in determining suitability) as well as a need to ensure accessibility and availability (of the programs themselves). There needs to be culturally appropriate diversionary options available to develop a plan that may require the person to do one or more of the following:

- attend counselling, treatment or support services;
- perform voluntary work;
- donate money to a charitable organisation or local community project;
- attend a defensive driving course and/or Road Trauma Awareness Seminar;
- apologise to the victim in a letter or in person;
- compensate the victim;
- any other condition the Magistrate deems appropriate.[3]

Some specific options for in-court diversion that should be available include; adult restorative justice conferencing, mediation, drug and alcohol rehabilitation programs, counselling, supported accommodation programs, and other therapeutic programs relevant to the drivers of incarceration. To ensure equitable access to in-court diversion options it is essential that the options include culturally appropriate programs for First Nations peoples and access to programs in regional and remote areas. These should be developed in close consultation with First Nations communities and community organisations in regional areas.

[2] 'Magistrates Court of Victoria, 'Criminal Justice Diversion Program', <https://www.mcv.vic.gov.au/sites/default/files/2018-10/Criminal%20Justice%20Diversion%20Program%20brochure.pdf> (accessed 26 July 2022).

[3] Ibid.

QUESTION 31: SHOULD THE NEW LEGISLATION ABOUT CRIMINAL PROCEDURE IN THE MAGISTRATES COURTS HAVE SPECIFIC OBJECTS OR PRINCIPLES ABOUT 'IN-COURT DIVERSION'? IF YES, WHAT SHOULD THEY BE?

As noted in the response to Question 4 (above), the new legislation should include specific objects and principles about in-court diversion. These should be included in the section that outlines the objects, purposes, and guiding principles of the new legislation.

QUESTION 33: COULD AN IN-COURT DEFERRED PROSECUTION SCHEME WORK IN THE QUEENSLAND MAGISTRATES COURTS? WHAT ISSUES NEED TO BE CONSIDERED?

The Justice Reform Initiative supports the *principle* of in-court deferred prosecution because of the potential this mechanism has in terms of reducing rates of incarceration. However, there are important considerations with regard to police discretion, appropriate partnering services, funding and project implementation that should be carefully considered prior to any trial of such a scheme. It is suggested that review of the forthcoming evaluation of the 'New Directions' program in Victoria will be a useful step in the QLD government's consideration of this scheme.

As noted in the Consultation Paper, deferred prosecutions have been used in the United Kingdom mainly to deal with corporate fraud in a more efficient way. Deferred Prosecution Agreements (DPAs) were introduced in Schedule 17 of the *Crime and Courts Act 2013* in England and Wales. In the UK a DPA is an agreement reached between a prosecutor and an organisation which could be prosecuted, under the supervision of a judge. The agreement allows a prosecution to be suspended for a defined period provided the organisation meets certain specified conditions.

DPAs can be used for fraud, bribery and other economic crime. They apply to organisations but never individuals. The key features of DPAs are:

- They enable a corporate body to make full reparation for criminal behaviour without the collateral damage of a conviction (for example sanctions or reputational damage that could put the company out of business and destroy the jobs and investments of innocent people);
- They are concluded under the supervision of a judge, who must be convinced that the DPA is 'in the interests of justice' and that the terms are 'fair, reasonable and proportionate';
- They avoid lengthy and costly trials;
- They are transparent, public events.[4]

Essentially, a DPA is a discretionary tool in relation to alleged criminal conduct, which enables the prosecutor to invite negotiation and to agree to terms as an alternative to prosecution. It is important to note that the main justification for the introduction of DPAs in the UK was not to provide a mechanism to divert vulnerable individuals away from the criminal justice system and facilitate a change in behaviour to address the underlying causes of criminal offending. The main justification was to address

[4] Deferred Prosecution Agreements: (last accessed 15 August 2022) <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/>

the difficulties encountered in undertaking successful prosecutions for economic crimes, combined with the significant financial cost to the UK of such crimes.[5]

It remains to be seen whether DPAs can be used to provide an alternative to prosecution and punitive responses to individual adults and young persons charged with criminal offences, by facilitating access to treatments and restorative practices.

A VICTORIAN CASE-STUDY

A recent program initiated by the Neighbourhood Justice Centre (NJC) in inner Melbourne, Victoria, has similar characteristics to DPAs. The New Directions program is described by the NJC as a "pre-charge diversion program". The program is a partnership between the North Richmond Community Health, Victoria Police, the NJC and the City of Yarra.

The program is available for people who may be charged with some types of offences in the City of Yarra. The program is an alternative to going to court. If a person charged with a criminal offence is eligible for the New Directions program and successfully completes the program, Victoria Police will drop the charges against the person that she/he was referred for.

With the support of a case manager (described as a "navigator") who is a healthcare worker at the North Richmond Community Health Centre, the NJC New Directions program aims to address underlying causes that may have led to the criminal offending. The navigator will support the person to make positive changes that she/he may have difficulty doing by themselves. This may include addressing such things as accommodation, financial issues physical/mental health, substance use, relationships, employment and education.

Eligibility for the New Directions program is based on the following criteria:

- *The person who has allegedly committed the criminal offence must be 18 years or older;*
- *The alleged offence happened in the City of Yarra;*
- *The alleged offence happened less than 6 months prior;*
- *The person is not on bail or a sentencing order;*
- *The police have not assessed the person as 'high risk';*
- *The alleged offence is an eligible offence.*

A person may still be eligible for the program even if they have a criminal record. This will depend on:

- *how many previous offences the person has and what the offences were;*
- *how long ago the offences happened and whether the person's record and current behaviour indicates a need for treatment or support;*
- *whether the person has had opportunities to participate in other programs in the past (e.g. Drug Court, Community Corrections Order) and how well she/he participated in these programs.[6]*

The New Directions program became fully operational in July 2022. An evaluation of the program is not expected until May 2023. The program is funded until June 2023. In conducting the evaluation it is expected that the following potential barriers and difficulties will be assessed:

- *The availability of and accessibility to relevant support and treatment services under the program and the extent to which the effectiveness of the program is undermined by inadequate resourcing of services;*
- *The extent to which the eligibility criteria serves to limit accessibility to the program from those who would most benefit from it;*
- *The relationship to the Bail Act 1977 (Vic) –while a previous criminal conviction will not of itself make a person ineligible for the program, being on bail for another offence will;*

[5] F Gerry and D Kelly, 'Around the nation: Northern Territory − Is it time for deferred prosecution agreements in the Northern Territory' (2016) 90(6) *Australian Law Journal* 387, 387-389.

[6] 'New Directions – A program to support you in making positive changes to your life'. North Richmond Community Health, Victoria Police, Neighbourhood Justice Centre and City of Yarra'. 2022. Pamphlet.

- *The consistency of police discretion in referring eligible persons to the program and whether such discretion is exercised in a discriminatory manner;*
- *The extent to which referral to the program usurps the use of other, less intensive pre-charge diversionary options such as cautions.*

The effectiveness of the Victorian program relies on the collaborative relationships between the partnering organisations: the North Richmond Community Health, Victoria Police, the NJC and the City of Yarra. In terms of the Victoria Police, close collaboration is required from the Chief Commissioner and Assistant Commissioners, and also the Local Area Command. It is a credit to the partnering organisation to have developed close, collaborative relationships that has enabled the program to be initiated. As noted previously, it is suggested that implementation of a pre-charge or deferred prosecution program incorporate and build on the lessons learned from Victoria in its development, specifically from the forthcoming evaluation of the Victorian NJC New Directions program which will be available in mid 2023. It is anticipated that this evaluation will explore critical issues with regard to eligibility (including concerns about the exclusion of people on bail).

QUESTION 36: COULD AN IN-COURT DIVERSION PROGRAM (AS IN VICTORIA) WORK IN THE QUEENSLAND MAGISTRATES COURTS? WHAT ISSUES NEED TO BE CONSIDERED?

The Victorian Criminal Justice Diversion Program is available in the Magistrates' Court of Victoria. It is established under s 59 of the *Criminal Procedure Act 2009* (Vic) ('*CP Act*').

The program aims to divert first-time or low-risk individuals from the criminal justice system by having their matter adjourned for up to 12 months. During the adjournment period, participants must participate in programs and/or activities identified by the court to address their underlying causes of offending. Case management or supervision is not provided. Individuals can only be considered for the program under certain conditions, including that they 'take responsibility for their actions' (but are not required to plead guilty). Successful participation in the program results in the individual being discharged without a finding of guilt. However, if an individual's participation is deemed unsatisfactory and they are subsequently found guilty, the court must take into account the extent of their participation in the program during sentencing.[7]

A 2004 evaluation of the Criminal Justice Diversion Program found that 94% of diversions through the program were successfully completed, with positive responses from participants. Research undertaken in 2016 found that diversionary programs in Victoria had been well received by magistrates and are viewed as a positive mechanism for minimising young peoples' contact with the criminal justice system.[8]

The JRI proposes that a similar in-court diversion program would be of significant value in Queensland as it would provide an opportunity for the court to address some of the underlying causes of offending and reduce the prospect of continuing contact with the criminal justice system.

As noted above in the response to Question 30, for a Queensland Magistrates Court in-court diversion program to be effective, the following need to be considered:

- The need for a wide range of appropriate, culturally responsive in-court diversion programs and options to provide flexibility to facilitate the formulation of an appropriate diversion plan tailored to the particular needs of an individual coming before the court;

[7] Legislative Council, Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's criminal justice system'* (Report, March 2022). Table 10.2

[8] Ibid 497.

- The need for culturally appropriate programs for First Nations peoples; and
- The need to ensure access to programs in regional and remote areas.

Diversion programs should be developed in close consultation with First Nations communities and community organisations in regional areas.

While the Consultation Paper states at paragraph 3.107 that issues concerning the funding of diversionary programs is outside the scope of the review, it is important to emphasise that without adequate funding for a range of appropriate, culturally responsive in-court diversion programs across Queensland, the benefits of such programs as identified in Victoria would be extremely difficult to achieve.

QUESTION 37: WHAT PROCEDURES COULD BE INCLUDED IN CRIMINAL PROCEDURE LAWS IN QUEENSLAND TO ENABLE THE MAGISTRATES COURT TO DIVERT A PERSON OUT OF THE COURT SYSTEM BEFORE THE PERSON PLEADS GUILTY OR IS SENTENCED? FOR EXAMPLE, COULD THE COURT MAKE ITS OWN ORDERS? WHAT TYPES OF REQUIREMENTS COULD BE INCLUDED?

Given the positive outcomes of the Victorian Criminal Justice Diversion Program that have been identified and referred to in the response to Question 36, it is useful to consider whether the Queensland criminal procedure laws in relation to in-court diversion should be based on s59 of the Victorian *CP Act*. Section 59 states:

59 Adjournment to undertake diversion program

(1) This section does not apply to—

(a) an offence punishable by a minimum or fixed sentence or penalty, including cancellation or suspension of a licence or permit to drive a motor vehicle and disqualification under the Road Safety Act 1986 or the Sentencing Act 1991 from obtaining such a licence or permit or from driving a motor vehicle on a road in Victoria but not including the incurring of demerit points under the Road Safety Act 1986 or regulations made under that Act; or

(b) an offence against section 49(1) of the Road Safety Act 1986 not referred to in paragraph (a).

(2) If, at any time before taking a formal plea from an accused in a criminal proceeding for a summary offence or an indictable offence that may be heard and determined summarily—

(a) the accused acknowledges to the Magistrates' Court responsibility for the offence; and

(b) it appears appropriate to the Magistrates' Court, which may inform itself in any way it considers appropriate, that the accused should participate in a diversion program; and

(c) both the prosecution and the accused consent to the Magistrates' Court adjourning the proceeding for this purpose —

the Magistrates' Court may adjourn the proceeding for a period not exceeding 12 months to enable the accused to participate in and complete the diversion program.

(3) An accused's acknowledgment to the Magistrates' Court of responsibility for an offence is inadmissible as evidence in a proceeding for that offence and does not constitute a plea.

(4) If an accused completes a diversion program to the satisfaction of the Magistrates' Court—

(a) no plea to the charge is to be taken; and

(b) the Magistrates' Court must discharge the accused without any finding of guilt; and

(c) the fact of participation in the diversion program is not to be treated as a finding of guilt except for the purposes of—

(i) Division 1 of Part 3 and Part 10 of the Confiscation Act 1997; and

(ii) section 9 of the Control of Weapons Act 1990; and

(iii) section 151 of the Firearms Act 1996; and

(iv) Part 4 of the Sentencing Act 1991; and

(d) the fact of participation in the diversion program and the discharge of the accused is a defence to a later charge for the same offence or a similar offence arising out of the same circumstances.

(5) If an accused does not complete a diversion program to the satisfaction of the Magistrates' Court and the accused is subsequently found guilty of the charge, the Magistrates' Court must take into account the extent to which the accused complied with the diversion program when sentencing the accused.

(6) Nothing in this section affects the requirement to observe the rules of natural justice.

(7) This section does not affect the incurring of demerit points under the Road Safety Act 1986 or regulations made under that Act.

Under section 59 a proceeding in the Magistrates' Court may be adjourned in order to allow an accused person to complete a diversion program. This only occurs where an accused person acknowledges responsibility for the offence and undertakes to complete the program. This mechanism allows an accused person to avoid a finding of guilt, upon successful completion of the program.

Subsection (2) provides the pre-requisites for an accused person to be afforded this opportunity, namely that:

- they acknowledge to the Court responsibility for the offence;
- it appears appropriate to the Court that she/he should participate in a diversion program; and
- the prosecution must consent to the proceeding being adjourned for this purpose.

The *CP Act* does not provide any guidance as to the factors that police prosecutors ought to consider when making a decision about diversion, nor does it prescribe any procedure that police ought to observe when considering the appropriateness of diversion. In the absence of legislative guidance, police are given unlimited and unchecked discretion as to whether to refer matters for diversion. According to the Criminal Bar Association of Victoria, this has resulted in the development of informal and undisclosed practices and procedures applied inconsistently at various levels of the police

hierarchy.[9] The 2004 evaluation of the Criminal Justice Diversion Program noted that there were concerns regarding the lack of consistency in the approval for diversion by police informants.[10]

In a 2015 review of the Criminal Justice Diversion Program conducted by the Magistrates' Court of Victoria the Law Institute of Victoria, the Criminal Bar Association and the Victorian Aboriginal Legal Service expressed concern that under s59(2)(c) police prosecuting crimes effectively had the power to 'veto' an accused's request for diversion without appropriate judicial oversight, and called for this power to be scrapped.[11]

While it is appropriate that the views of the prosecution are considered by the Magistrates Court in determining whether to refer an accused person to an in-court diversion programs, prosecution consent should not be a pre-requisite for such a referral. Accordingly, the JRI submits that s59(2)(c) of the *CP Act* is not replicated in Queensland legislation.

The JRI also submits that it is not appropriate that a person with a limited prior criminal offending history be refused the opportunity to be referred to an in-court diversion program, where such a referral may be considered appropriate given all of the relevant circumstances. While the nature and extent of the prior criminal offending may be a relevant factor to consider in determining whether a referral is appropriate, the mere fact that there is some prior criminal offending history should not of itself prevent such a referral.

The JRI submits that legislation should provide criteria that the court must consider in determining whether a referral to in-court diversion is appropriate. This might for instance include:

- Whether the accused person has a mental or cognitive impairment and would benefit from referral to an in-court diversion program;
- Whether the accused person has a drug or alcohol addiction for which referral to treatment from in-court diversion program may be appropriate;
- The views of the police informant and prosecution to a referral to an in-court diversion program.

QUESTION 39: SHOULD THE MAGISTRATES COURT HAVE THE POWER TO ISSUE A CAUTION IF IT IS OF THE VIEW THE POLICE OFFICER SHOULD HAVE CAUTIONED THE ADULT PERSON (IN A SIMILAR WAY TO THE CHILDRENS COURT)?

Official cautioning schemes can be an important mechanism to divert people who have committed minor offences away from the criminal justice system. The NSW Law Reform Commission has noted that the use of warnings and cautions allow for a less restrictive or punitive measure, which may be appropriate in circumstances of minor offending, or where the person is vulnerable or disadvantaged.[12]

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[9] Criminal Bar Association of Victoria, Submission to the Magistrates' Court of Victoria, *Review of the Criminal Justice Diversion Program*, 5 June 2015.

[10] Department of Justice, *Court Diversion Program Evaluation Overview – Final Report* (2004) 7.

[11] Law Institute of Victoria, Submission to the Magistrates' Court of Victoria, *Review of the Criminal Justice Diversion Program*, 26 May 2015; Victorian Aboriginal Legal Service Co-operative Limited, Submission to the Chief Magistrate of the Magistrates' Court of Victoria, *Review of the Diversion Program in the Magistrates' Court*, 2015; Victorian Aboriginal Legal Service Co-operative Limited, Submission to the Chief Magistrate of the Magistrates' Court of Victoria, *Review of the Diversion Program in the Magistrates' Court*, 8 March 2016.

[12] NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [5.7].

In the UK, written cautions operate as an effective diversionary mechanism where simple cautions provide a means of dealing with low-level, mainly first-time, offending without a prosecution.[13]

The JRI submits that the Magistrates Court should have the power to issue a caution if it is of the view that the police officer should have cautioned the adult person. Currently, the decision to issue a caution is a matter of police discretion. When the power to issue a caution is a matter solely for police discretion, there is a possibility of such discretion being exercised in an inequitable, inconsistent or discriminatory manner.

Data from the NSW Bureau of Crime Statistics and Research (BOCSAR) indicates that non-Indigenous people are far more likely to be cautioned than an Indigenous person. For the period 2013-2017:

- 11.41% Indigenous people were cautioned for non-indictable drug offences, compared to 40.3% non-Indigenous people
- 82.55% Indigenous people were charged for non-indictable drug offences, compared 52.29% non-Indigenous people, overwhelmingly for possession.

The data indicates the disproportionate number of Indigenous people found with small amounts of cannabis who are charged with possession and pursued through the courts, compared to non-Indigenous people, who are more likely to receive an official caution.[14]

Giving the Magistrates Court the power to issue a caution to an adult person would provide a mechanism to address the inappropriate exercise of police discretion not to issue a caution where it would have been appropriate to do so. Such a power also provides an important accountability mechanism on the way police exercise their discretion to issue cautions. It will also provide a further option for courts to use to divert minor people charged with minor offences away from the criminal justice system.

QUESTION 40: SHOULD NEW LEGISLATION ABOUT CRIMINAL PROCEDURE PROVIDE, AS IN THE CHILDRENS COURT, THAT INSTEAD OF ACCEPTING A PLEA OF GUILTY THE MAGISTRATES COURT CAN DISMISS A MATTER, AND MAY CAUTION AN ADULT? WHAT ISSUES NEED TO BE CONSIDERED?

The new legislation should provide that the Magistrates Court can dismiss a matter and may caution an adult. The legislation should specify the circumstances in which the Magistrates Court can issue such a caution. This might include for instance:

- where the adult does not deny committing the offence and provides informed consent to the caution.
- Where the offence is considered 'less serious' or 'lower end' in terms of severity

The legislation might also define the circumstances in which a caution cannot be issued. For instance:

- In respect of indictable offences that cannot be dealt with summarily.

[13] https://www.cps.gov.uk/legal-guidance/cautioning-and-diversion

[14] https://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts