

# Suggestions for Reform to the Simple Cautioning Procedure

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*This article examines the simple police cautioning disposal and argues that at present the theory and practice of the procedure do not coincide, resulting in unfairness, dissatisfaction and grounds for potential challenge. It is suggested that the process should be amended so that a police caution can be offered, with appropriate safeguards in place, prior to an admission being made.*

## Introduction

Over three million people have been cautioned by the police since 2001, more than 205,000 of them in the 12 months to September 2012.<sup>1</sup> Whilst this disposal was doubtless fair, efficient and cost effective in the vast majority of cases, the authors are concerned with those situations where this may not have been the position. For professionals and regulated industry workers, a caution can end a career. For others the effects can be significant and, even with the new six year filter for many cautions provided by the Disclosure and Barring Service (DBS), long-lasting.<sup>2</sup>

In theory, even before a caution can be considered, there must be a clear and reliable confession. In practice, indications are often given before an interview that in the event of an admission, a caution is likely to be offered. That such discussions occur suggest that the parties involved appreciate an essential element of the cautioning process which the law neither recognises nor endorses—conflict of theory with practice. It is our contention that certainty, transparency and fairness would be improved by the introduction of a procedure similar to that approved in *Goodyear*.<sup>3</sup>

As with all inducement situations, there is always the danger of undue influence or improper pressure—particularly where, as will usually be the case if a caution is likely to be considered, a suspect has no previous experience of being in custody.

<sup>1</sup> Ministry of Justice, *Criminal Justice Statistics Quarterly Update to September 2012* (February 21, 2013), available at: <https://www.gov.uk/government/publications/criminal-justice-statistics--2> [Accessed September 26, 2013].

<sup>2</sup> The rules were changed on the May 29, 2013 following on from the decision in *T v Chief Constable of Greater Manchester Police* [2013] EWCA Civ 25; [2013] 1 W.L.R. 2515. The case is currently being appealed by the Government to the Supreme Court with a hearing date set for December 2013 and so the rules concerning disclosure may undergo further changes.

<sup>3</sup> *Goodyear* [2005] EWCA Crim 888.; [2006] 1 Cr. App. R. (S.) 6 (p.23).

To guard against such dangers, it is suggested that time for reflection, a proper understanding of the consequences and access to appropriate advice are necessary if unfairness, subsequent dispute and ultimately legal challenges are to be avoided.

In the first section of this paper the current *de jure* caution procedure is examined. In the second, various procedural issues and problems inherent in the *de facto* approach are highlighted. Finally, the proposed revisions are set out.

## Administering a caution and its impact

The caution procedure is set out in the recently updated Ministry of Justice Guidance entitled *Simple Cautions for Adult Offenders*.<sup>4</sup> In essence, a suspect must admit the offence, the evidential and public interest test for prosecution must be met and the suspect must provide an informed acceptance of the disposal—the consequences having been made clear.

### *Clear and reliable admissions*

For present purposes, the focus is the requirement for a clear and reliable admission, particularly the need for reliability.

Clarity is simply a matter of fact. Are the words used by the suspect such as to amount to an admission to the offence alleged? The issue was considered by the Administrative Court in *Ex p. P*.<sup>5</sup> Perhaps unsurprisingly, the court held that where an offence had not been admitted, this constituted the exceptional circumstances sufficient for a caution to be expunged.<sup>6</sup>

Self evidently, the clarity of an admission is discrete from its reliability; for example, where there is no doubt that an admission has been made, but it was procured using oppression, misinformation, inducement or a mixture of all three—casting doubt on its reliability. In *Thompson*<sup>7</sup> the court found that the requisite exceptional circumstances existed where a suspect had been wrongly induced to accept a caution. It is this type of situation involving clear, but nevertheless unreliable, confessions with which we are primarily concerned, which will usually turn on the conduct which led to the making of an admission.

### *Obtaining and recording an admission and the consequences of a caution*

Paragraphs 48 and 49 of the MOJ Guidance stipulate that: (i) an admission of guilt is required before a person can be invited to accept a caution; and (ii) a caution must not be offered in order to secure an admission. The requisite admission can be made in interview or recorded in writing in accordance with PACE.<sup>8</sup> Additionally, before being cautioned, a suspect must be made aware of the

<sup>4</sup> Ministry of Justice, *Simple Cautions for Adult Offenders* (April 8, 2013), available at: <http://www.justice.gov.uk/downloads/oecd/adult-simple-caution-guidance-oecd.pdf> [Accessed September 26, 2013].

<sup>5</sup> *Commissioner of Police for the Metropolis Ex p. P* (1995) 160 J.P. 367.

<sup>6</sup> Also see *R. (on the application of Wyman) v Chief Constable of Hampshire Constabulary* [2006] EWHC 1904 (Admin). The Court ruled that as a clear and reliable admission had not been given a caution should not have been authorised.

<sup>7</sup> *R. v Commissioner of Police of the Metropolis Ex p. Thompson* [1997] 1 W.L.R. 1519.

<sup>8</sup> Ministry of Justice, *Simple Cautions for Adult Offenders* (2013), para.52.

significance of the process.<sup>9</sup> The guidance requires that the suspect is made aware: (i) of the fact that the caution is an admission of guilt and forms part of the individual's criminal record<sup>10</sup>; and (ii) the consequences of accepting a caution in terms of recording, retention and disclosure.<sup>11</sup>

The previous 2008 Home Office Circular provided a suggested pro-forma document explaining the significance of the caution which the suspect was invited to sign. This document highlighted the fact that certain occupations are "notifiable" and that the caution could be disclosed to current and future employers.<sup>12</sup> The notice also stated that a list of all notifiable occupations could be provided on request. The 2013 Guidance does not include a suggested pro forma template for the police to use, but does require at para.68 that the police should "ask the offender to sign a form setting out the implication of the simple caution 'the simple caution form'". It seems that individual police forces are free to create their own version of the form, subject to guidance as to contents,<sup>13</sup> with the manifest potential for inconsistency and challenge.

The absence of a prescribed form appears a retrograde step particularly as, even under the old procedure, it was common practice (certainly in the Metropolitan Police Service area) to show the suspect the form on a screen in the custody area, and then read through it at speed before requiring a signature, just before the caution was administered.<sup>14</sup>

It follows that the suspect has little opportunity properly to understand the information presented before being asked to provide what should have been an informed acceptance of the course proposed.

## Problems with the current approach

### *Court approach v police approach*

The court approach requires a formal admission to the offence in a recorded interview before the offer of a caution is made. The informal approach allows the police to offer a caution before an admission had been made.

This principal problem of which approach was to be followed was considered some time ago in *Thompson*.<sup>15</sup> The case concerned an offence contrary to s.5 of the Public Order Act 1986, and turned on the issue of whether Thompson had been induced into making a confession by the prospect of not being prosecuted—thereby rendering the confession unreliable.<sup>16</sup> On the available evidence the court could not be sure precisely when the admission had been made, but were satisfied that

<sup>9</sup> Ministry of Justice, *Simple Cautions for Adult Offenders* (2013), para.53.

<sup>10</sup> Ministry of Justice, *Simple Cautions for Adult Offenders* (2013), para.54.

<sup>11</sup> Ministry of Justice, *Simple Cautions for Adult Offenders* (2013), paras 53–70.

<sup>12</sup> Home Office, *Home Office Circular 016/2008 Simple Cautioning of Adult Offenders* (July 10, 2008), available at: <http://webarchive.nationalarchives.gov.uk/20130125102358/http://www.homeoffice.gov.uk/about-us/corporate-publications-strategy/home-office-circulars/circulars-2008/016-2008/> [Accessed September 26, 2013].

<sup>13</sup> Ministry of Justice, *Simple Cautions for Adult Offenders* (2013), para.70.

<sup>14</sup> In practice the form used by the Metropolitan Police is more fulsome than the one suggested and notably reminds the suspect of their continuing right to legal advice.

<sup>15</sup> *Ex p. Thompson* [1997] 1 W.L.R. 1519.

<sup>16</sup> The court stated that: "A rationale behind that exclusion is that a confession obtained in such circumstances is not reliable and a man ought not to be convicted on unreliable testimony. 'A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as evidence of guilt, that no credit ought to be given to it.'" *Ex p. Thompson* [1997] 1 W.L.R. 1519 at [22].

the inducement, namely the explanation, and perhaps the offer, of the caution, had preceded it. Having considered the two approaches and being initially attracted by the informal approach, the court ultimately ruled in favour of the court approach.

The tension between these two approaches recognises the obvious efficiencies and practical realities of the informal approach. It was feared that adopting the court approach would mean that this fast and cost effective means of case disposal in straightforward cases would be unnecessarily slowed and made more expensive by the need for a formal interview. This might reduce the use of cautions and increase the number of minor cases coming unnecessarily before the court, or going unrecorded. The judgment seems to have been informed by the submission that once it is accepted that an inducement can vitiate an admission, it is impossible to distinguish between different types of inducement. The court concluded that it was for Parliament, and not judges, to decide if there are inducements which might be considered acceptable.<sup>17</sup>

Home Office statistics do not allow an easy conclusion as to whether the fears of the court were well founded, as both court proceedings and the use of cautions have fluctuated since 1996.<sup>18</sup> There is certainly now a broad acceptance of the need for a formal tape recorded police interview before a caution is administered, inevitably taking more time and consuming greater resources than the procedure utilised in *Thompson*.

It is also apparent that by favouring the court approach, the practical issue of what was in fact happening in police stations was never properly considered. The informal approach had evolved as a consequence of the inherent flaw in the official Home Office/court approach. Furthermore, the formality of a tape recorded interview does not solve the problem of the pre-admission, pre-interview inducement, it merely records the terms of the admission when it is finally made.

### *The consequences of the caution*

As noted above, most of the detailed information given to a suspect is not provided until just before the caution is administered. Where a suspect has declined the services of a solicitor, it will not be until they are brought before the custody officer who is to administer the caution that the full details begin to become apparent.

The implications of the caution may be briefly read out to the suspect, at which point he or she is expected to agree to it. This is a highly pressured environment in which to make a potentially life changing decision. Where some information has already been provided, this has the potential to exacerbate rather than alleviate the danger. A police officer giving such information unwittingly assumes the role of a legal adviser, but without the requisite knowledge, experience or independence.

<sup>17</sup> *Ex p. Thompson* [1997] 1 W.L.R. 1519 at [28].

<sup>18</sup> There were 286,200 cautions issued in 1996 the number lowered to 239,000 in 2000, the number of cautions issued peaked in the 12 months ending in September 2007 at 367,293 but by 2012 dropped again to 205,668. The number of charges/summons went up from 1.923 million in 1996 to a peak of 2.079 million in the 12 months up to June 2004 and dropped to 1.506 million in the 12 months up to June 2012. Home Office, *Statistics relating to Crime and Criminal Proceedings for the year 2000, England and Wales* (December 2001), available at: <http://www.archive.official-documents.co.uk/document/cm53/5312/crimstats.pdf> [Accessed 26 September 2013]; Ministry of Justice, *Quarterly Update to June 2012* (November 29, 2012), available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/162591/criminal-justice-stats-june-2012.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/162591/criminal-justice-stats-june-2012.pdf) [Accessed September 26, 2013]; Ministry of Justice, *Out of Court disposals — June 2012* (November 29, 2012), available at: <https://www.gov.uk/government/publications/criminal-justice-statistics-in-england-and-wales-earlier-editions-in-the-series> [Accessed September 26, 2013].

Even if acting with the best of motives, the potential for misleading, incomplete or erroneous advice is manifest. The misunderstandings that can arise are illustrated in *Chief Constable of Humberside Police*<sup>19</sup> where the police had made incorrect assumptions about what needed to be disclosed on CRB certificates.

The caution is a hybrid and complex concept, not amounting to a conviction but recordable and forming part of an antecedent history, with the potential to have a similar effect to a conviction, dependant on an almost infinite variety of facts and circumstances.<sup>20</sup> Even where legal advice is available, it is not always practical or possible for the lawyer to provide a complete and accurate answer to the question: “If I accept the caution, will it affect my future?” For a duty solicitor confronted with a client who hopes to become a FCA regulated worker, doctor, teacher, civil servant, solicitor or perhaps a foreign national hoping to obtain permanent residency in the United Kingdom, it may not be possible for full and complete advice to be given in the police station; particularly as the question touches on other specialist areas of law such as employment and immigration.

### *Advice or inducement?*

If the police are not permitted to offer a caution prior to an interview what can the police say to a suspect, or his lawyer, who enquires about the possibility of a caution? In *Lee*<sup>21</sup> the claimant sought to argue that when it was suggested by the investigating officer that a caution “might” be possible, he had been unfairly induced into confessing.

The court clarified the judgment in *Thompson* by confirming that there was no prohibition on “any mention of a possible caution by a police officer at any stage before a confession is made.”<sup>22</sup> An officer should therefore safely be able to say that a caution “might” be forthcoming, but can probably go no further. Such an indication is likely to be of limited assistance given that any competent legal adviser would be alive to a situation where the criteria for a caution may be met and the fact that such an outcome “might” therefore be a possibility.

A legal adviser should be able to gauge the likelihood of a caution being offered from any number of cues or clues, allied to his or her knowledge and experience, but such a situation is redolent of the nod and a wink “informal approach” that the court deprecated in *Thompson*, and any advice would have to be accompanied by the warning that the outcome could not be guaranteed, was little more than an educated guess, and might turn out to be completely wrong.

### *Timing*

The purpose of the caution is to deal quickly and efficiently with lower level offences. It therefore follows that once a detainee has been identified by the police as being eligible for a caution, one might safely assume that the police would want

<sup>19</sup> *Chief Constable of Humberside v Information Commissioner* [2009] EWCA Civ 1079; [2010] 1 W.L.R. 1136 at [3].

<sup>20</sup> See *R. (on the application of Stratton) v Chief Constable of Thames Valley* [2013] EWHC 1561 (Admin) for a detailed explanation of the consequences of a caution.

<sup>21</sup> *R. (on the application of Lee) v Chief Constable of Essex* [2012] EWHC 283 (Admin).

<sup>22</sup> *Lee* [2012] EWHC 283 (Admin) at [19].

to deal with the matter as quickly as possible. Indeed in busy police stations with limited accommodation there is inevitably pressure to allocate resources efficiently.

Equally, one might imagine that detainees are not much enamoured of the conditions in which they find themselves as guests of the local constabulary, and may have any number of reasons besides for wishing to regain their liberty as swiftly as possible. The combination of these pressures may in practice create a situation in which the police encourage, expressly or by implication, a suspect towards a caution at a time when his or her judgement may be clouded, resulting in a quick decision without the proper fair and necessary reflection.

It is not difficult to imagine a situation in which a hard pressed police officer nearing the end of a shift and a suspect who has never before been arrested and believes that requesting legal advice may significantly delay release might make for misunderstanding and a poor and hasty decision.

It is the experience of the authors that suspects do indeed feel pressured, for a multitude of different reasons, including a desire to leave the police station as soon as possible—which is very often the primary concern. If the offer of a caution is made to a suspect in this state of mind, particularly when they lack experience of the criminal justice system and may therefore be a good candidate for a caution, they are very likely to seize it as a way of securing immediate release from an unpleasant situation. It may take days, weeks or even months before clear reflection is possible, almost always too late.

The acute pressure felt by a suspect may be such that it is almost impossible for a well balanced decision to be made there and then in the police station. The recent case of Dr Caetano is a stark illustration of an intelligent, but vulnerable, individual accepting a caution where it was subsequently decided that it should not have been issued. Dr Caetano, a postgraduate student in molecular and cell biology had been issued with a caution for assault by beating against her partner, a Mr Hackett. The court expunged the caution on the basis that the public interest test had not been met. The facts of the case reveal that Dr Caetano had accepted the caution on the same day that she was interviewed but only comprehended the significance of the caution some time later:

“The duty solicitor advised Dr. Caetano to accept a caution. He said if she did not, the case would go to court. She would get a worse criminal record. She signed. She was feeling extremely distressed. She did not feel that she was in a fit state to absorb what she was told about the consequences of a caution. She did not read the written declaration. When Dr. Caetano (and Mr. Hackett) appreciated the implications, they immediately raised the matter with the police. They sought the withdrawal of the caution.”<sup>23</sup>

The judgment does not provide details of precisely what was said by the duty solicitor. Perhaps there was a failure clearly to explain the retention and disclosure rules, or maybe Dr Caetano was simply not in a fit state to heed any warning? What is clear is that the pressurised environment of the police station, very often soon after arrest, may not provide the best conditions in which to make life altering decisions.

<sup>23</sup> *Caetano v Commissioner of Police of the Metropolis* [2013] EWHC 375 (Admin) at [16].

## *Disclosure*

In order for a suspect properly to make a decision regarding whether they should accept a caution, it is essential that they understand the nature of the allegation and appreciate the available evidence. The entitlement of a suspect to know the case against them is fundamental to a fair criminal justice system and requires prompt and effective disclosure of the evidence that both supports and undermines the prosecution case.

Pre-interview disclosure, however, falls outside the disclosure regime applicable after charge and up to and beyond arraignment which obviates the need for the disclosure of the full evidential picture, including all the evidence upon which the police rely and any material which undermines the case for the prosecution or might assist the defence. Indeed, in criminal investigations there may be tactical reasons for investigators to withhold disclosure of aspects of the case; in order to test the veracity of a suspect's account, or prevent the manufacture of a defence tailored to meet the evidence. There may also be valid public policy and/or security reasons for withholding information. For investigators there is a balance to be struck between disclosing sufficient information to elicit valuable evidence during questioning, and providing too much disclosure which might undermine or harm an investigation.

Where investigators have already formed the view that the case is suitable for caution, they will usually be forthcoming with information. The MOJ Guidelines on simple cautioning do in fact clearly require that suspects know the details of the case against them and the nature of the evidence:

“The police officer must inform the offender of the evidence against them and the decision to offer a simple caution. Offenders and their legal representatives are entitled to seek and have disclosure of the evidence before the offender agrees to accept a simple caution.”<sup>24</sup>

In practice, however, what constitutes adequate, proper or full disclosure varies from case to case, often dependent on the individuals concerned and, in the absence of a unified policy, rarely provides a complete evidential picture and does not in any event address material which might undermine the case against the accused. If a suspect is unrepresented, it is unlikely that the full details of the allegation will emerge until the PACE interview. Even where an investigator has formed the opinion that a caution is appropriate—which may or may not have been communicated to the suspect or legal advisor—they may still be mindful of the possibility of court proceedings in the event a caution is not suitable or is declined, and so may be reluctant to give full and complete disclosure.

It will often be the case that an investigator will use the cautioning regime as a way of avoiding the need to make a full enquiry into the alleged offence. Indeed it is a *sine qua non* of the cautioning regime that police resources can be allocated and used more efficiently to resolve cases. This can lead to a situation where cautions are offered on the basis that evidence is only “likely” to be obtained. Although investigators are under an obligation not to mislead suspects<sup>25</sup>, it may

<sup>24</sup> Ministry of Justice, *Simple Cautions for Adult Offenders* (2013), para.66.

<sup>25</sup> *Mason* [1988] 1 W.L.R. 139; [1987] 3 All E.R. 481; (1988) 86 Cr. App. R. 349.

be that key witnesses do not support proceedings or vital evidence may not be as readily available as suggested during the course of a PACE interview or during oral pre-interview disclosure.

## A solution?

### *Goodyear in the Police Station*

It is suggested that the offer of a caution, pre-admission, in the appropriate context and with suitable safeguards would not amount to an inducement such as to vitiate an admission, and would avoid the potential difficulty created by the decision in *Thompson*. A procedure analogous to that approved in *Goodyear*<sup>26</sup> should be adopted so that a fully informed decision can be made by each suspect when contemplating the acceptance of a police caution.

The conditional cautioning scheme provides a useful precedent in that it allows the offer of the conditional caution to be made before an admission is forthcoming. The current Home Office Code of Practice on Adult Conditional Cautions states at para.13.3.3 that:

“The offender must admit the offence. The 2003 Act does not require an admission to be made by the offender before the decision maker determines whether a conditional caution is appropriate”.

At para.13.3.6, the Code goes on to stipulate that the officer authorising the caution must “make it clear to the offender that an admission should never be made merely to receive a conditional caution”, presumably in contemplation of the fact that there can and will usually be some discussion of the possibility of a caution before an admission has been made, and arguably in the expectation that this will be the case.<sup>27</sup> Similar wording can be found in the Code in respect of youth conditional cautions.<sup>28</sup>

Adult conditional cautions are not currently greatly in use,<sup>29</sup> but may become more so as a result of the changes brought about by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which allow the police to authorise a conditional caution without reference to the CPS, and the amendment to s.22 of the Criminal Justice Act 2003, which permits a condition to secure the removal from the United Kingdom of certain foreign offenders.<sup>30</sup>

<sup>26</sup> *Goodyear* [2005] EWCA Crim 888; [2005] 1 W.L.R. 2532.

<sup>27</sup> Ministry of Justice, *Code of Practice for Adult Conditional Cautions* (April 8, 2013), available at: <http://www.justice.gov.uk/downloads/oecd/code-practice-adult-conditional-cautions-oecd.pdf> [Accessed September 26, 2013].

<sup>28</sup> Ministry of Justice, *Code of Practice for Youth Conditional Cautions* (April 8, 2013).

<sup>29</sup> In the fourth quarter of 2012–2013 the CPS statistics state that there were only 915 pre-charge cautions issued and 120 post charge. In London only 112 were issued (both pre and post charge): CPS, *Conditional Cautioning Data* (January–March 2013), available at: [http://www.cps.gov.uk/publications/performance/conditional\\_cautioning/conditional\\_cautioning\\_data\\_Q4\\_12\\_13.pdf](http://www.cps.gov.uk/publications/performance/conditional_cautioning/conditional_cautioning_data_Q4_12_13.pdf) [Accessed September 26, 2013].

<sup>30</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) ss.133–134 amending ss.22–23 of the Criminal Justice Act 2003 (CJA 2003).



## Safeguards

### *Simple caution form and disclosure*

In ideal circumstances the most appropriate safeguard to ensure the integrity of the cautioning regime is always to require the suspect to take advice from a lawyer. It is not however, practical, given the current proposed reforms to legal aid procurement, to suggest greater funding for police station advice. Furthermore suspects do not always wish to avail themselves of the services of a lawyer, and should not be excluded from the cautioning process as a result.

Whilst not requiring a suspect to take legal advice as a pre-condition to accepting a caution undoubtedly increases uncertainty and reduces transparency, it is difficult to see how a suspect could fairly be compelled to receive advice—still less act upon it; and deficiencies in disclosure will not necessarily be remedied in a situation where inevitably a difficult decision falls to be made in less than ideal circumstances.

As the CPS or authorising police officer are in effect exercising a quasi-judicial function in assessing the sufficiency of evidence and passing sentence—albeit by consent, the guarantees pertaining to the fairness of a trial should apply to the process.<sup>31</sup> The European Court of Human Rights has ruled that the protections under art.6 of the European Convention on Human Rights run from the moment of “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”.<sup>32</sup> Fairness and equality of arms suggest that a suspect should be entitled to adequate and timely disclosure as an integral part of the cautioning procedure.

It is suggested that the best protection, short of requiring the provision of legal advice, is to ensure that comprehensive information and disclosure is provided, in writing, to all cautionable suspects.

We suggest that a standardised “Simple Caution Form” should be drafted by the Ministry of Justice which should include clear and comprehensive written information. This form should be mandated across police forces. As well as an unambiguous reference to the need for an admission to the offence, the form should contain better information about the impact of a police caution, including the full list of notifiable occupations and guidance on the operation of the CRB, the nature of the different checks that can be undertaken, what information will be held on the Police National Database and who will have a right of access.

An explanation of the information provided should be a mandatory part of any legal advice and a Law Society practice note on advising on police cautions should be formulated. If legal advice is provided over the phone, the suspect must be reminded that they have the right to have a lawyer attend and to be bailed pending further enquiries (see below), such advice should be recorded and acknowledged.

In addition, as an annex to the form, a clear summary of the allegation should be set out including details of the evidence obtained and further potential enquiries—if there is evidence which undermines the case it should be disclosed. The precise offence being considered for caution should be set out so as to leave

<sup>31</sup> European Convention on Human Rights art.6.

<sup>32</sup> *Eckle v Germany* (1983) 5 E.H.R.R. 1 at [73]

no ambiguity about its elements and consequences; for example, the suspect should be in no doubt as to whether they are required to admit to an allegation of common assault or ABH—the former being an offence that will not be disclosed on a DBS certificate after six years and the latter an offence which will never be filtered from a criminal records check.<sup>33</sup>

To guard against the possibility of the police misleading the suspect about the nature and consequences of the caution (intentionally or otherwise), once the police have determined that a case is suitable for a caution, the suspect—provided they are otherwise fit to be interviewed and have the assistance of an appropriate adult if necessary—should be advised in general terms that their case is considered suitable for disposed by way of caution as an alternative to prosecution.

No mention should be made of the requirement for a confession, or the consequences of acceptance, but the simple caution form should be provided and the suspect should be reminded of their right to legal advice and representation. The suspect should be given adequate time to read and understand the form, with the assistance of legal advice and/or an appropriate adult if they wish, before the police proceed to obtaining an admission. Regardless of whether the admission is to be obtained during interview or only in writing, the basis of the admission should be recorded on the caution form or an annex to it.

### *Bail*

The most obvious way to alleviate the pressure on both the police and suspect to conclude matters with possible undue haste is to bail in appropriate circumstances. Cases which suggest themselves as suitable for a caution will almost inevitably involve relatively minor offences and suspects with a limited antecedent history. In such circumstances there are unlikely to be significant concerns in relation to bail. An option to bail for a 14 day period to seek legal advice once a case has been identified as potentially suitable for a caution would answer concerns about unfair pressure and is likely to be an efficient use of police time and resources—suspects would be able to consult with a lawyer and other information resources outside the pressurised environment of the police station.

The caution form should state in writing that, absent any new charge or evidence, the offer of the caution will subsist until the bail to return date. Paragraph 68 of the existing guidance does state that the police must ensure that

“the offender understands that he or she does not have to make an immediate decision on whether to accept the simple caution but can consider the matter and if need be take independent legal advice.”<sup>34</sup>

There is however no express guidance as to how the police should fulfil this protection; perhaps para.68 simply means placing the offender back in a cell for half an hour to think things through. Similarly the police might offer the suspect bail under the guidance of para.68 but might also state that the offer of the caution might not be available when the suspect returns; this is certainly a practice

<sup>33</sup> Disclosure and Barring Service, *Information for Employers* (August 2013), available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229449/Filtering\\_guidance\\_v1\\_4.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229449/Filtering_guidance_v1_4.pdf) [Accessed September 26, 2013].

<sup>34</sup> Ministry of Justice, *Simple Cautions for Adult Offenders* (2013), para.68.

experienced by the authors under the previous 2008 guidance which contained a similar provision to para.68.<sup>35</sup> Without the reassurance of the caution still being available on their return suspects will naturally feel pressured into accepting a caution rather than be bailed. The 2005 Home Office Guidance in fact did recommend that suspects could be required to return to the police station at a later date for the caution to be administered however the subsequent editions of the guidance omit this safeguard.<sup>36</sup>

### *Oversight*

At present, oversight of police cautions is limited to a suspect issuing a complaint against the police force involved or to the IPCC. Individuals may also issue judicial review proceedings but this can often be a costly and high risk strategy and may not be accessible to all. We endorse the recommendation in the recent case of *Stratton*<sup>37</sup> by the High Court that an oversight mechanism at magistrates' court level should be adopted for the administration of cautions. Individuals should be able to apply to the magistrates' court for a review of the decision to administer a caution with the power to expunge a caution from the record in the instance a caution has been given incorrectly.

### **Costs savings**

It is suggested that there would be cost savings for the Ministry of Justice if our proposals were adopted. Increasing the transparency of the cautioning process should facilitate the use of written admissions so that the practice of interviewing cautionable suspects as a matter of routine could be greatly reduced, and only be used where there is ambiguity or doubt. The updated Ministry of Justice Guidance in fact appears to lean towards officers not routinely conducting a formal interview. Paragraph 52 of the guidance states that "an admission of guilt does not need to be made within a formal interview under PACE".<sup>38</sup> Previous manifestations of the guidance have not so pointedly drawn this fact to the attention of the police. If in future formal interviews are to be used less, thereby saving time and costs, then the need for suspects to have access to full and complete information becomes all the more important.

### **Conclusion**

Whilst the use of a caution is often the best outcome for all concerned, the present legal structure does not properly reflect the way in which the disposal is used in practice, leading to unnecessary disputes and litigation, potential unfairness and a lack of honesty and transparency.

<sup>35</sup> Home Office, *Home Office Circular 016/2008 Simple Cautioning of Adult Offenders*, para.44.

<sup>36</sup> Home Office, *Cautioning of Adult Offenders, Home Office Circular 30/2005* (June 14, 2005), available at: <http://webarchive.nationalarchives.gov.uk/20130315044536/http://www.homeoffice.gov.uk/about-us/corporate-publications-strategy/home-office-circulars/circulars-2005/030-2005/>, para.26 [Accessed September 26, 2013].

<sup>37</sup> *Stratton* [2013] EWHC 1561 (Admin) at [58].

<sup>38</sup> Ministry of Justice, *Simple Cautions for Adult Offenders* (2013), para.52. The 2008 Home Office guidance simply details the ways in which an admission can be recorded specifying that they must be "PACE compliant" there is no express direction that an admission does not need to be obtained under formal interview conditions: Home Office, *Home Office Circular 016/2008 Simple Cautioning of Adult Offenders*, paras 9 and 19.

In a way analogous to credit for early guilty pleas, suspects are inevitably interested in the advantages that will accrue if they choose to accept the allegations made against them, and the present requirement to confess before a caution can be offered renders the procedure less useful and more cumbersome and unfair than is necessary.

If the possibility of a caution is communicated at an early stage then, subject to appropriate safeguards including the provision of full information as to the consequences, access to legal advice and adequate disclosure of the prosecution case combined with a reasonable time to reflect on the decision, then the effective and efficient use of the caution as a disposal, and public confidence in it, is likely to increase.