

MANAGING POLICE DISCRETION:

Incorporating the Western Australia Cannabis Cautioning Mandatory Education System (CCMES)

TIM J ATHERTON

Targeting the dynamics of alcohol and drug addiction within the community places heavy demands on law enforcement. Managing and reducing the impact of these demands requires close monitoring and analysis of current trends and the development of innovative strategies and systems that are realistic and workable within the workplace environment. The Western Australia Police Service shifted its focus in recent times from a centralised and reactive policing philosophy to a more localised and proactive police service. The police more than ever promote community involvement and partnerships to develop a holistic approach to policing. This has led to the development of many programs bringing police closer to the community.

One such program, the Cannabis Cautioning System, provides a greater depth to police discretion when confronting persons caught in possession or using prescribed amounts of cannabis. This proactive measure brings police, the perpetrator and often guardians together and provides the opportunity to educate the parties on the effects of substance abuse and divert any future offending. The provision of this mechanism for deployment by police officers required careful planning and consultation prior to finalising its processes. The use of cautioning as a diversionary tactic requires an understanding by police of its purpose and delivery. It is equally as important to gauge police reaction to its use. Understanding the dynamics of police interaction and the use of discretion will aid in future development and effectiveness of this and other systems.

The National Drug Strategy identified the primary focus for dealing with drug issues as harm minimisation, which consists of three parts - demand reduction, harm reduction and supply reduction. This created a need for law enforcement to broaden its focus, historically centred on supply reduction, and develop strategies to implement harm reduction and demand reduction initiatives within communities. The introduction of new policing strategies challenged management to reform current policing ideology, culture and attitudes traditionally associated with the enforcement of illicit drugs legislation. One of the critical areas that underpinned the success of these reforms was the understanding and management of police discretionary powers (WA Police, 1998).

Tim J Atherton
Assistant Commissioner
Crime Investigation Support
Western Australia Police Service

Managing Police Discretion:

The Western Australia Police Service maintain clear guidelines on the use of discretion by police (WA Police Gazette, 1998). The basis for the principle of individual discretion lies with *Ennever VR (1906) 3 CLR 969* which established:

... that a constable, whether his powers were established at common law or by statute, holds the office of constable and his powers are exercised personally and not as a matter of delegation. He bears an original authority and responsibility.

In *Attorney General of NSW V Perpetual Trustees Co (1995) AC 457* described the authority of a constable as follows:

His authority is original and delegated, and is exercised at his own discretion by virtue of his office: he is a Ministerial officer exercising statutory rights independently of contract

In a report into the Brixton Disorders, Cmnd, 8427 (1981) Lord Scarman stated that:

...the exercise of discretion lies at the heart of the policing function. It is undeniable that there is only one law for all: and it is right that this should be so. But it is equally well recognised that successful policing depends on the exercise of discretion on how the law is enforced. ...Discretion is the art of suiting action to particular circumstances.

Discretion is a central and important feature of every decision made by a police officer to charge a person. Members must consider issues such as fairness, justice, accountability, consistency and wider community interests and expectations when deciding whether or not to prefer a charge (Taylor, 1999). By virtue of their office all police officers are expected to be accountable for such decisions. The decision should not display arbitrary and inexplicable differences in the way that different people are treated by police. Upon making a decision the officer must then ensure both consistency and accordance with statutes and prosecutorial policies set by the Director of Public Prosecutions, police policies and any guidelines.

The use of police discretion often comes under close scrutiny. Police are invariably called upon to account for their actions, particularly when the outcome of their discretion is questioned. Entities such as the Anti-Corruption Commission, the Ombudsman, the Coroner, the Director of Public Prosecutions, Police Internal Affairs/Investigations are mandated to test the discretion of an officer when complaints regarding the officer's conduct are raised. Community acceptance of the police use of discretion is frequently polarised.

Certain factions, such as the legal fraternity, would see the powers of discretion all but removed whilst advocates of community policing see a need to relax written directives and allow police a more flexible approach to problem solving within the community (Wilson, 1982). Typical sentiments from some members of the community on the issue of police discretion are that there is no accountability, police cannot be trusted, past bad practices predict future bad practices and there is inconsistent use of discretion. The police themselves report that use of discretion leaves them open to criticism, complaints, civil liability claims and criminal allegations.

The use of police discretion continues, despite this uncertain climate. The Western Australia Police Service is aware of its responsibility to provide a workable environment which complements the use of police discretionary powers and remains as vigilant as possible in modifying policy and guidelines to remove ambiguity.

The process of developing policy and guidelines that can affect the use of police discretion can be examined in the recent introduction of the Western Australian Cannabis Cautioning Mandatory Education System (CCMES). This system relies on the application of police discretion to be effective.

This paper will not elaborate on the development of the CCMES to any great extent other than to note that the method of cautioning apprehended persons associated with minor cannabis offences is either being used or contemplated in other Australian jurisdictions (Benier, 1998). The unique factor of the Western Australia cautioning method is that apprehended persons that satisfy essential criteria must attend a mandatory education session.

The rationale for CCMES is that the criminal justice system and penalties do not discourage use of illicit drugs and individuals suffer a penalty that, by imposition of a permanent criminal record, is disproportionate to the behaviour. In contrast, cautioning and diversion systems provide opportunity for an intervention that has a greater potential for changing the behaviour of the individual concerned (WA Police, 2000).

The objectives of police training were:

- to develop, implement and monitor a comprehensive training package to clearly outline the purpose and goals of the CCMES pilot and to ensure police officers had a better understanding of the rationale for the system and the protocols and procedures to be followed
- to outline the use of police discretionary powers in relation to CCMES
- to provide interactive training to alter traditional hard line police attitudes on illicit drugs
- to develop acceptance of a comprehensive drug strategy.

Initial responses by police to the scheme when training commenced was that they felt uncomfortable exercising discretion in the absence of legislative support. In lieu of legislation, participating police insisted on comprehensive guidelines outlining all possible situations. Police displayed an apprehensive attitude to guidelines that were seen as too flexible or left open to interpretation and which placed a heavy emphasis on their use of discretion.

The interactive training sessions involved continual assessment of the application of guidelines and were seen by management as the best forum to achieve a workable model that was acceptable to participants and themselves. One example was the frequently encountered situation where an officer apprehended a person in possession of a prescribed amount of cannabis, a smoking implement and using same, hence three offences.

The guidelines only allowed one offence per caution and one caution only per apprehended person. Police felt this was inflexible and not in the best interest of the apprehended person and did not reflect the objectives of the cautioning method. Subsequently, the guidelines were modified permitting all three offences to be entered on the one caution.

This continual feedback during training allowed police input into the guidelines. These issues were assessed and, where appropriate, modifications were made. Trainers described the guidelines as “a living document”.

INTRODUCTION OF THE CCMES PILOT

There were three stages of CCMES pilot introduction. The first was to establish the pilot CCMES in two police districts (one metro, one country). The second was pilot scheme development, implementation and monitoring by a Steering Committee from Alcohol and Drug Coordination Unit (WAPS), WA Drug Abuse Strategy Office and Senior District Managers. The final stage was a 12 month evaluation of the pilot conducted by an external consultant and presentation of a final report.

Managing Police Discretion:

Police officers who took part in the pilot regarded the introduction of the CCMES as increasing their perceived professionalism within the general community. They regarded being equipped with a discretionary option that removed the social stigma of a criminal conviction as a positive. Police intervention in this area provided greater confidence in the ability of police to deal with cannabis use in a more equitable manner. Feedback from training staff regarding police conducting the pilot outlined a growing acceptance of the system both by police and the community.

The pilot was evaluated after a period of 12 months at which time 95 (87%) of the 125 persons apprehended were cautioned (77 males and 18 females). The participating police were interviewed and asked their views on the CCMES. The majority believed that the system provided more options to resolve matters and that the education component may have a flow on effect of providing more respect for police, who were seen to be fair. Seventy-two percent of police who had issued a caution expressed support for the system and 78% believed that the system reduced the time taken to process an offender (Penter, Walker and Devenish-Meares, 1999).

FINDINGS OF THE EVALUATION

The evaluation indicated that the CCMES is consistent with the use of law enforcement for treatment/intervention with cannabis users and the pilot was implemented in line with relevant legislation, policies, guidelines and protocols. There were no reported supervisory or technical problems and no complaints were registered against police officers. All police canvassed expressed their satisfaction with the guidelines for issuing a caution and the structure of the forms. These results indicate that the pilot achieved a viable process for police (Penter, Walker and Devenish-Meares, 1999).

MOVING ON

The CCMES system was implemented state-wide in March 2000. Police can now receive the latest enhanced training package. At the time of writing, 1,015 persons have been cautioned since commencement of the state-wide implementation. Of the 1,015 persons cautioned:

- 120 (11.8%) defaulted (compared to 17.8% during the pilot, which indicates the default rate has increased)
- 40 (4%) re-offended (based on periodic manual count)
- 43 (4.1%) were of Aboriginal descent.

(Statistics provided by Alcohol and Drug Coordination Unit, 2001)

In November 2000, a pilot illicit drug diversion scheme dealing with all illicit drugs commenced. The pilot illicit drug diversion scheme will be run on the same basis as the CCMES with the following two exceptions. First, amounts applicable for caution will be based on 25% of presumptive amounts recorded in the *Misuse of Drugs Act*, except for Ecstasy tablets (2 tabs) and LSD (2 tabs). Secondly, diversion packages will comprise three mandatory sessions - counselling, education and treatment.

CONCLUSION

Police discretion for minor cannabis charges can now be managed through the CCMES. Through the combination of enforcement, education and treatment we promote a clear message that illicit drugs are not acceptable in our community, that users are respected as individuals, who are responsible for their actions and will be offered appropriate treatment options. This may not be the final answer in drugs prevention but it is a fully supported and positive drugs prevention option exercised by this police service, in protecting and educating the community of Western Australia.

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Author Contact Details

Tim J Atherton
 Assistant Commissioner
 Crime Investigation Support
 WA Police

8th Floor, Curtin House
 60 Beaufort Street
 Perth WA 6000
 Ph: (08) 9223 3078
 Fax: (08) 9223 3001
 timothy.atherton@police.wa.gov.au

