

บทคัดย่อ

มาตรการชะลอฟ้องในอังกฤษและเวลส์ รู้จักกันในชื่อ Conditional caution (“CC.”) CC. เป็นมาตรการหนึ่งที่ใช้เพื่อผันคดีจากกระบวนการยุติธรรมทางอาญา (pre-trial diversion) ที่ถูกนำมาใช้โดยกฎหมาย Criminal Justice Act 2003 CC. คือ คำเตือน (a caution) ที่ใช้กับผู้ต้องหาที่มีอายุตั้งแต่ 18 ปีขึ้นไป ซึ่งกระทำความผิดเล็กน้อยๆ โดยมีเงื่อนไขที่กำหนดให้ผู้ต้องหาต้องปฏิบัติตาม เพื่อเยียวยาความเสียหายแก่ผู้เสียหายและแก้ไขความประพฤติของผู้ต้องหา เช่น การกำหนดให้ผู้ต้องหาชดเชยค่าเสียหายแก่ผู้ต้องหา หรือเข้ารับการบำบัดการติดยาเสพติด

เมื่อมีการใช้ CC. คดีของผู้ต้องหาจะถูกชะลอไว้ (suspension of prosecution) เมื่อผู้ต้องหาปฏิบัติตามเงื่อนไขใน CC. ครบถ้วน ผู้ต้องหาจะได้รับการปล่อยตัวไป โดยไม่ถูกดำเนินคดี แต่ถ้าผู้ต้องหาไม่ปฏิบัติตามเงื่อนไขใน CC. พนักงานอัยการมีดุลพินิจที่จะฟ้องผู้ต้องหาต่อศาลได้

การใช้ CC. กับผู้ต้องหาไม่ขัดต่อสิทธิของผู้ต้องหาที่จะได้รับการพิจารณาคดีอย่างเป็นธรรม (the right to a fair trial) โดยผู้พิพากษาที่เป็นอิสระและเป็นกลาง (an independent and impartial tribunal) เพราะทันทีที่พนักงานอัยการตัดสินใจไม่ดำเนินคดีกับผู้ต้องหา ข้อกล่าวหา (criminal charge) จะตกไป จึงไม่มีกรณีที่จะต้องพิจารณาข้อกล่าวหาโดยผู้พิพากษาที่เป็นอิสระและเป็นกลางอีกต่อไป แต่การที่พนักงานอัยการกำหนดเงื่อนไขใน CC. เป็นการปรับหรือวางข้อจำกัดเสรีภาพของผู้ต้องหา เช่น ห้ามผู้ต้องหาไปยังสถานที่แห่งใดแห่งหนึ่ง ซึ่งเป็นโทษทางอาญาอย่างหนึ่ง เงื่อนไขดังกล่าวจะต้องได้รับการกำหนดโดยผู้พิพากษาที่เป็นอิสระและเป็นกลาง มิฉะนั้น จะขัดต่อสิทธิของผู้ต้องหาที่จะได้รับการพิจารณาคดีอย่างเป็นธรรม พนักงานอัยการจึงไม่สามารถกำหนดเงื่อนไขลักษณะดังกล่าวได้ เว้นแต่ผู้ต้องหาสมัครใจละสิทธิที่จะได้รับการพิจารณาอย่างเป็นธรรม

ในอังกฤษและเวลส์ ผู้เสียหายสามารถฟ้องคดีอาญาเองได้ ในคดีที่พนักงานอัยการใช้ CC. กับผู้ต้องหา แต่ผู้เสียหายนำคดีไปฟ้องต่อศาล ย่อมส่งผลให้ CC. เสียไป ดังนั้น เมื่อผู้เสียหายฟ้องผู้ต้องหาที่ได้รับ CC. พนักงานอัยการจะใช้อำนาจยุติการดำเนินคดีของผู้เสียหาย

ในกรณีที่ผู้เสียหายหรือผู้ต้องหาไม่เห็นด้วยกับ CC. สามารถฟ้องศาลให้ตรวจสอบความชอบด้วยกฎหมายของการใช้ CC. ได้

การนำ CC. มาใช้บังคับในอังกฤษและเวลส์ มีประโยชน์ดังนี้ คือ ความต้องการของผู้เสียหายได้รับการตอบสนอง ผู้ต้องหาไม่มีความรับผิดชอบต่อการกระทำผิดของตน และสามารถลดการกระทำผิดซ้ำลงได้

Conditional Caution

Sakulyut Horpibulsuk*

A conditional caution is defined as “a caution which is given in respect of an offence committed by the offender and which has conditions attached to it with which the offender must comply”.¹ It is a pre-trial diversion, which was introduced by the Criminal Justice Act 2003. It was developed from the non-statutory police diversion (known as “simple caution”), which has been available in England and Wales for a long period of time.² Furthermore, it is designed to tackle a low level offence – summary only offences and either way offences – quickly and effectively outside court.³ Conditions attached to caution aim to repair the harm to the victim and rehabilitate the offender.⁴ The legal result of conditional caution is that when the offender completes conditions attached to the caution within a limited period, he shall be discharged from prosecution.

This article examines whether or not conditional caution, which aims to repair the harm done by and rehabilitate the offender, can respond to the needs of the victim; make the offender responsible for the damage he has caused and reduce the likelihood of reoffending. Furthermore, this article explores problems of conditional caution. Particularly, do conditional caution infringe on the right to a fair trial? What will it happen when the victim takes private prosecution against a conditional caution recipient? This article starts with how conditional caution is implemented. Secondly, it studies how conditions are established. Thirdly, it examines the period to complete the conditions. Fourthly, it investigates the legal results of non-compliance. Finally, it criticizes conditional caution process and its outcomes.

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¹ Criminal Justice Act 2003 s 22 § 2

² Crown Prosecution Service ‘Conditional Cautioning Code of Practice & associated annexes’ paragraph 2.1 <<http://www.cps.gov.uk/Publications/others/conditionalcautioning04.html>> accessed 24 May 2008

³ L Blakeborough and other ‘Conditional Cautions: An examination of the early implementation of the scheme’ <<http://www.justice.gov.uk/docs/conditional-cautions.pdf>> accessed 25 March 2008 1

⁴ Criminal Justice Act 2003 s 22 § 3

1. Conditional caution process

There are two state organizations – the police and the Crown Prosecution Service – involved in the conditional caution process. The police officer, during the course of interviews, preliminarily selects a case that is suitable for giving a conditional caution. Then, the case is sent to the Crown Prosecutor to decide whether conditional caution is appropriate to the offender.

The police officer must be satisfied by the following requirements before sending the case to the Crown Prosecutor.

- (1) The offender must be 18 years old or over.⁵
- (2) His offence must be a low-level offence provided by the Director of Public Prosecutions' Guidance on conditional caution.⁶
- (3) There must be sufficient evidence that the offender has committed the offence as alleged.⁷
- (4) The offender must admit the offence.⁸
- (5) The circumstance of the offence is too serious to give a simple caution and penalty notice to the offender.⁹
- (6) The offender is willing to accept the caution and to carry out the conditions.¹⁰

As for the first, conditional caution can only be applied to the offender aged 18 years or over. The young offender, under 18 years old, can be dealt with by reprimand or final warning.¹¹ As for the second, an offence suitable for conditional caution is a summary only offence, or an either way offence – for example, criminal damage under section 1(1) of the Criminal Damage Act 1971, theft under section 1-7 of the Theft Act 1986 and unlawful possession of any class of drug under section 5 of

⁵ Criminal Justice Act 2003 s 22 § 1

⁶ See detail in Annex

⁷ Criminal Justice Act 2003 s 23 § 1

⁸ Criminal Justice Act 2003 s 23 § 3

⁹ Interview with Andy Short, Kent Police, Kent Police Head Office (Maidstone 25 June 2008)

¹⁰ Crown Prosecution Service, 'Cautioning and Diversion' <http://www.cps.gov.uk/legal/section3/chapter_k.html> accessed 18 May 2008

¹¹ Pre-trial diversions in England and Wales consists of 6 schemes, namely, (1) minimum age of criminal responsibility, (2) reprimand and final warning, (3) caution, (4) penalty notice, (5) public interest and (6) conditional caution.

Misuse of Drugs Act 1971.¹² These offences have penalties of no more than 7 years imprisonment.¹³ Hate crimes, domestic violence, and all indictable offences – for example, murder and rape – are excluded from conditional caution.¹⁴ The third and fourth requirements are safeguards to prevent the police officer from inducing the offender to confess in exchange for conditional caution in cases where the evidence is weak. An example of this is a simple caution case where a police officer asked the offender whether he was willing to accept a caution. The officer then told the offender that if he accepted the caution, it meant that he was admitting the offence. The court held that

Since an admission of guilt is a precondition of a decision to administer a caution rather than prosecuting an offender, such an admission should already have been made before formal consideration is given to proceeding by way of caution, and it is not proper to seek an admission of guilt as part of the cautioning process itself [...] quashing the decision to administer the caution, that the admission was vitiated by an offer to forgo the possibility of a successful prosecution for the offence.¹⁵

Although, this case refers to a simple caution, its legal principle applies to conditional caution since it can prevent involuntary confession. Therefore, sufficient evidence as well as confession must exist before the police officer can consider conditional caution.

As for the fifth requirement, this condition is not provided by the law, but is set by the police to classify and identify a case that is suitable for conditional caution. Generally, when the police deal with a low-level offender, they have at least 3 options: namely, simple caution, penalty notice and conditional caution. Short explains that simple caution and penalty notice tend to be applied to very low-level offences.¹⁶ If the police think that the offence is not serious, they may give simple caution or penalty notice to the offender. If they think that the offence is serious and

¹² Crown Prosecution Service, 'The Director's Guidance on Conditional Cautioning' (5th 2007) paragraph 3.8 <http://www.cps.gov.uk/publications/directors_guidance/conditional_cautioning.html> accessed 28 June 2006

¹³ Interview with Peter Holt, Kent Crown Prosecutor, Kent Crown Prosecution Service (Canterbury 12 June 2008)

¹⁴ Kent Criminal Justice Board, 'Conditional Cautioning Operational Guidance' (2008) 8

¹⁵ Regina v Commissioner of Police of the Metropolis Ex p. Thompson, [1997] 1 W.L.R. 1519

¹⁶ Interview with Andy Short (n 9)

the offender should be charged, they may think about conditional caution as an alternative to charge and prosecution. The police's discretion in this is explored in detail below.

As for the sixth requirement, if the offender is not willing to accept conditional caution and to carry out the conditions, the police officer can charge him and send the case to the Crown Prosecutor.

When the above criteria are met, the police officer sends the case to the Crown Prosecutor. The Crown Prosecutor is a decision-maker. He will give a conditional caution to the offender when the following criteria are met.

- (1) There must be sufficient evidence to provide a "realistic prospect of conviction" against an offender.¹⁷
- (2) It is in public interest to prosecute.¹⁸
- (3) Conditional caution should be given to the offender.¹⁹

As for the first, "realistic prospect of conviction" means "a jury or a bench of magistrates and a judge hearing a case alone is more likely to convict the defendant as alleged".²⁰ This criterion ensures that there must be sufficient evidence to prove guilt. Under this requirement, the offender shall not be prosecuted without sufficient evidence.²¹ However, this test is weighted lower than the test of beyond reasonable doubt, which is applied by the jury as well as the judge when sentencing.

As for the second criterion, generally the Crown Prosecutor is regarded as a guardian of public interest. If it is not in public interest to prosecute, the Crown Prosecutor must drop the case.²² On the other hand, if it is in public interest to prosecute, the Crown Prosecutor will consider conditional caution before continuing prosecution. These two requirements are of importance since they can prevent the police officer from unduly inducing the offender to admit to the offence in order to receive a

¹⁷ Criminal Justice Act 2003 s 23 § 2 (a); The Code for Crown Prosecutors 8.5

¹⁸ Criminal Justice Act 2003 s 23 § 2 (a); The Code for Crown Prosecutors 8.5

¹⁹ Criminal Justice Act 2003 s 23 § 2 (b)

²⁰ The Code for Crown Prosecutors 5.3

²¹ A Ashworth and M Redmayne, *The Criminal Process* (3rd Oxford University Press, Oxford 2005) 265

²² The Code for Crown Prosecutors 5.7

conditional caution in a case where there is insufficient evidence to prosecute.²³ Furthermore, where the offender fails to meet the conditions, the Crown Prosecutor can institute the original offence immediately.²⁴

As for the third criterion, although the first two criteria are met, the Crown Prosecutor has discretion about whether to employ conditional caution as an alternative to prosecution. A conditional caution is more likely to be given if the following factors are found. Firstly, the Crown Prosecutor views that the interests of the offender, victim and community are better served by the offender complying with suitable reparation and rehabilitation conditions.²⁵ Secondly, he expects that the court judgment is more likely to be a small fine, compensation, conditional discharge or a low community penalty, which has less impact on future offending.²⁶ Thirdly, the circumstance of the offence is not serious, since the more serious the offence, the less likely conditional caution is to be given.²⁷ Fourthly, the offender feels remorse for his action.²⁸ Fifthly, the likelihood of re-offending is low.²⁹ This discretion is examined in detail below.

Table 1 demonstrates the offences to which the conditional caution is applied between 2006 and May 2008 in all 42 areas/forces of England and Wales.³⁰

Offence	Total to date	%
Summary criminal or malicious damage offences (value lower than £500)	2,757	43.2%
Possession of any class of drug (consistent with personal use) (section 5)	700	11.0%
Theft (sections 1-7)	679	10.7%
Common assault	653	10.2%

²³EURO Justice ‘Country report England/Wales’ <http://www.eurojustice.org/member_states/england_wales/country_report/448/> accessed 20 March 2008

²⁴ Ibid

²⁵ The Code for Crown Prosecutors 8.4

²⁶ Crown Prosecution Service (n 10)

²⁷ Crown Prosecution Service (n 12) paragraph 3.8

²⁸ Ibid, paragraph 3.15

²⁹ Ibid, paragraph 3.18

³⁰ *Conditional Cautioning Balanced Scorecard* (May 2008) supplied by Peter Holt

Offence	Total to date	%
Other fraud (Fraud Act 2006 and Theft Act 1978 offences)	326	5.1%
Other criminal damage (Value over than £500)	290	4.5%
Other summary offences (Excluding Motoring)	219	3.4%
Drunkenness, with aggravation	156	2.4%
Public Order Act 1986	145	2.3%
Assault on Constable (Police Act 1996)	84	1.3%
Other theft or unauthorised taking	76	1.2%
Making off without payment	57	0.9%
Kerb-Crawling	53	0.8%
Malicious wounding etc. •	31	0.5%
Burglary in a building other than a dwelling**	27	0.4%
Handling stolen goods	20	0.3%
Other	102	1.6%
Total	6,375	100%

2. The Condition-making process

When the above requirements are met, the Crown Prosecutor will look for suitable conditions with which the offender must comply. The conditions must have qualifications as follows. Firstly, they must concentrate on reparation to the victim and rehabilitation of the offender. Restrictions can be a condition if it can achieve reparative and rehabilitative objectives.³¹ Secondly, they must be proportionate to the offence.³² Thirdly, they must be achievable within the period set by the Crown Prosecutor.³³ Finally, they must be appropriate to the offence and the offender.³⁴

The process can be divided into two parts. Firstly, the police officer is preliminarily responsible for searching for possible conditions. At this stage, the police officer will

• Offences under this classification have been removed from the Directors Guidance.

** Burglary was removed from the Director's Guidance since 1 October 2007

³¹ Crown Prosecution Service (n 12) paragraph 5.3

³² Crown Prosecution Service (n 2) paragraph 5.1

³³ Ibid

³⁴ Ibid

collect the victim's views, needs and details of damage.³⁵ Furthermore, he will include the conditions proposed by the offender and his defence lawyer – for example, compensation and drug and alcohol treatment. This information is useful for the Crown Prosecutor to establish conditions. Then, the case and this information are submitted to the Crown Prosecutor.

Secondly, the Crown Prosecutor makes a decision on the conditions with which the offender must comply. There are two ways to set up conditions. Firstly, the Crown Prosecutor sets the conditions that he thinks fit to the offence and the offender by himself. These conditions are based on information collected by the police officer. Secondly, he uses the restorative justice process to determine the conditions. Restorative justice is a “process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator”³⁶ It is worth noting that restorative justice can be used only where the offender and the victim agree to meet and talk together at a restorative justice conference. Where restorative justice is used to establish conditions, the Crown Prosecutor must give approval to the conditions reached at a restorative justice conference before they are applied to the offender. He also has the power to add, or amend, or reject all or part of the conditions if he views that the conditions are inappropriate or disproportionate to the offending.³⁷ This guarantees that the conditions are proportionate, appropriate and achievable. There is no hierarchy between the two ways of setting conditions. The Crown Prosecutor has discretion to select between these two means as he sees fit to each case. Furthermore, the Crown Prosecutor does not bargain the conditions with the offender and his defence lawyer. If the offender does not agree to all the conditions that the Crown Prosecutor has proposed, he will be prosecuted.³⁸

³⁵ Crown Prosecution Service (n 12) paragraph 3.11

³⁶ Basic principles on the use of restorative justice programmes in criminal matter s 2

³⁷ Crown Prosecution Service ‘Conditional Cautioning - Annex B’ paragraph 8.1 <http://www.cps.gov.uk/Publications/others/conditional_cautioning04annexb.html> accessed 13 June 2008

³⁸ Crown Prosecution Service (n 2) paragraph 4.1 iii

Table 2 shows the type of condition applied to the offender between 2006 and May 2008 in all 42 areas/forces of England and Wales.³⁹

Type	Detail	Totals	Percentage
Rehabilitative	Drugs intervention programme (DIP)	607	8.2%
	Alcohol-related condition	369	5.0%
	Other rehabilitative condition	245	3.3%
Reparative	Restorative justice	124	1.7%
	Compensation	4130	55.7%
	Letter of apology	1230	16.6%
	Other reparative condition	349	4.7%
Restrictive	Restrictive	366	4.9%
Punitive	Punitive	n/a	
Total		7420	100%

The most popular condition is compensation. The second one is letter of apology. Restorative justice as a means to create conditions is used in only 1.7% of cases. Holt says that restorative justice is useful in setting conditions, but it is used very seldom since the Crown Prosecution Service and the police have heavy caseloads, and there is a lack of resources to hold restorative conferences⁴⁰. Furthermore, Short says that most offenders and victims do not want to meet and talk to each other. Therefore, restorative justice conferences are generally not held.⁴¹ However, Wendy argues that both practitioner and the stakeholder of crime are under concept of retribution. They neither know exactly what restorative justice is, nor realize the effectiveness of restorative justice in restoring the aftermath of crime and restoring personal relationship. If they realize, she believes that restorative justice process must be employed more than the present situation.⁴²

When the conditions have been set, and the offender agrees with such conditions, the Crown Prosecutor informs the police officer that he can give a conditional caution to

³⁹ *Conditional Cautioning Balanced Scorecard* (n 30)

⁴⁰ Interview with Peter Holt (n 13)

⁴¹ Interview with Andy Short (n 9)

⁴² Interview with Wendy Freshman, Chief Executive, The East Kent Mediation Service (Canterbury 5 August 2008)

the offender. Then, the police officer explains the effect of the conditional caution, as well as warning the offender that failure to comply with the conditions will result in prosecution for the original offence.⁴³ After that, the offender must sign a document, which contains details of his offence, his confession, his consent to being given the conditional caution and an agreement to complete, or comply with, conditions.⁴⁴ Finally, the police officer monitors whether the offender completes, complies with, the conditions.

The legal result of conditional caution is as follows. When a condition is given, the prosecution is suspended.⁴⁵ When all conditions attached to a conditional caution are completely met, the prosecution will be dropped.⁴⁶ However, if the conditions are not met without reasonable excuse, the prosecution of the original offence is initiated.⁴⁷

3. The period for completion of the conditions

Holt says that the period for completion of the conditions is limited to 4 months, or 16 weeks, from the date of the offence.⁴⁸ The law provides that summary only offences and either way offences, as specified by the list of the Director of Public Prosecutions, must be prosecuted within 6 months of the date of the offence.⁴⁹ Therefore, the period to complete the conditions should be no longer than 16 weeks, since the Crown Prosecutor will have enough time to institute prosecution if the offender fails to meet the conditions.⁵⁰ However, the said period will not preclude any programme whose process lasts longer than 16 weeks. For example, a programme of alcohol and drug treatment may last for more than 16 weeks. In this case, the offender must attend the whole programme, but the police officer can monitor the performance of the offender until the period of prosecution is expired. Therefore, after the period is expired, if the offender does not complete the programme, the Crown Prosecutor cannot prosecute him since the period to commence prosecution has already passed.

⁴³ The Criminal Justice Act 2003 s 23

⁴⁴ The Criminal Justice Act 2003 s 23

⁴⁵ Crown Prosecution Service (n 12) paragraph 2

⁴⁶ Ibid

⁴⁷ Criminal Justice Act 2003 s 24 § 1

⁴⁸ Interview with Peter Holt (n 13)

⁴⁹ Crown Prosecution Service (n 12) paragraph 5.18

⁵⁰ Crown Prosecution Service (n 2) paragraph 6.1

4. Non-compliance

The law provides that if the offender fails to comply with any of the conditions without reasonable excuse, the original offence shall be instituted.⁵¹ However, prosecution is not automatically initiated. The Crown Prosecutor will consider whether or not the breach of conditions is sufficient to justify prosecution.⁵²

Firstly, where the conditions have been partly completed, and the Crown Prosecutor thinks that what the offender has done is sufficient, he will not prosecute the offender.⁵³ Holt says that if the offender must pay £300 to the victim and he has already paid £290, it is unlikely that the offender would be prosecuted⁵⁴.

Secondly, where the offender has a reasonable excuse for non-compliance, the Crown Prosecutor then may extend the period of time for completion of the conditions, or, in exceptional circumstances, he may amend some conditions in the light of any change of circumstance. Holt explains that a conditional caution can be amended if the circumstances of the offender change or the information on which the conditional caution was based has been found to be inaccurate. For example, where the income of an offender changes so that he cannot be responsible for payment or where it is found that the cost of repair of damage is less than expected, the Crown Prosecutor can amend conditions⁵⁵.

Finally, where non-compliance has occurred without reasonable excuse, the Crown Prosecutor will prosecute the offender. When prosecution takes place, the conditional caution will cease. Furthermore, the document that the offender has signed in relation to the admission of his offence will be used as evidence against him in court.⁵⁶

Between 2005 and May 2008, 8,345 conditional cautions were been given to the offenders in all 42 areas/ force of England and Wales. There were 125 conditional

⁵¹ Criminal Justice Act 2003 s 24

⁵² Kent Criminal Justice Broad, *Conditional Cautioning Operational Guidance* (2008) 22

⁵³ Criminal Justice Act 2003 s 24

⁵⁴ Statement by Peter Holt (Personal email correspondence 11 September 2008)

⁵⁵ *Ibid*

⁵⁶ Criminal Justice Act 2003 s 24

caution administered in Kent. From July 2006 to May 2008, there was 17.7 percent of non-compliance from 5,727 conditional cautions administered.⁵⁷

5. Criticism of conditional caution

This topic criticizes conditional caution in two aspects: namely, the conditional caution process and conditional caution outcomes.

5.1 Conditional caution process

This topic discusses 6 problems in relation to the conditional caution process: namely, (1) discretion in applying conditional caution (2) the condition-making process (3) restrictive and penal conditions versus the right to a fair trial (4) period to complete conditional caution (5) private prosecution and (6) judicial review.

5.1.1 Broad discretion

This topic examines the discretion of the police and the Crown Prosecutor in considering whether or not conditional caution is appropriate for the offender.

5.1.1.1 The police

The police officer has broad discretion when he preliminarily selects a case that is appropriate for conditional caution. As mentioned above, when the police officer deals with a low-level offence, he has at least three choices. He may give a simple caution, or issue a penalty notice, or deliver a conditional caution to the offender. Conditional caution will be applied only in a case where the police officer views that the circumstances of the case are too serious to give a simple caution or penalty notice to the offender.⁵⁸ In this regard, it is found that determining the seriousness of a crime is subjective. Each police officer may determine the seriousness of a crime in a different way. Therefore, they may respond to the same crime in different ways. For example, if someone has broken a window, a police officer may give him a caution. Another police officer may issue a penalty notice. Another police officer may think that a conditional caution is suitable. This becomes an arbitrary decision.

⁵⁷ *Conditional Cautioning Balanced Scorecard* (n 30)

⁵⁸ Interview with Andy Short (n 9)

Consequently, the similar cases are treated differently. This leads to unequal treatment of the offenders of the same type of crime.

Furthermore, compared to simple caution and penalty notice, conditional caution is a complicated process, and takes more time to handle. The police officer must interview the offender; seek the views of the victim; do paper work and consult with the Crown Prosecutor. This difficulty may induce the police officer to apply a simple caution or penalty notice rather than a conditional caution since he has broad discretion to select any measure to respond to a low-level offence as he thinks fit. Therefore, conditional caution may be applied less than a simple caution and penalty notice.⁵⁹ If the government views that the conditional caution is better than a simple caution and penalty notice in terms of reparation and rehabilitation, it should limit the discretion of the police officer in applying simple caution and penalty notice, or terminate such dismissal processes.

5.1.1.2 The Crown Prosecutor

As mentioned above, conditional caution gives the Crown Prosecutor broad discretion to determine whether or not conditional caution should be given to the offender.⁶⁰ Although the Director of Public Prosecutions provides guidelines for practice on which cases are suitable for conditional caution, these cannot reduce this broad discretion. In particular, when the number of Crown Prosecutors is insufficient to handle the number of criminal cases, conditional caution becomes a legitimate way to reduce heavy caseloads and time preparing and prosecuting cases. For this reason, Crown Prosecutors may be induced to apply conditional caution rather than prosecution.

In this regard, it is not a good idea to remove this discretion, since it would make the law inflexible to apply. However, in exercising this discretion, the Crown Prosecutor must have sufficient reasons to give a conditional caution. Furthermore, where there is doubt about his discretion, he must clarify his reasons. Moreover, the Crown Prosecutor must show to the public that conditional caution has been administered

⁵⁹ Statement by Peter Holt (Personal email correspondence 1 July 2008)

⁶⁰ Criminal Justice Act 2003 s 23 § 2 (b)

because there is sufficient reason to do so, and not because he does not want to deal with the case as a prosecution.

In addition, when the Crown Prosecutor wants to give a conditional caution, he can set up the conditions by himself, or use the restorative justice process to make conditions. Because of the heavy overload of cases, he may not employ restorative justice to make conditions. A restorative justice conference may need 2-3 weeks to prepare and organise.⁶¹ Compared to conditions being set by the Crown Prosecutor, making conditions by way of the restorative justice process takes a long time. Therefore, the Crown Prosecutor may prefer to set conditions by himself, since he can complete his work easily and fast. This may be another reason why the restorative justice condition- making process is rarely applied, as shown in Table 2. If the Director of Public Prosecutions views that the restorative justice method of making conditions is more useful in terms of the satisfaction of the victim than conditions made by the Crown Prosecutor, he should suggest that the Crown Prosecutor applies restorative justice first. Where a restorative justice conference cannot be held, or it fails to reach an agreement, the Crown Prosecutor can then set conditions as he thinks fit.

5.1.2 Condition-making process

As mentioned above, there are two kinds of conditions: namely, conditions made by the Crown Prosecutor and conditions established by the restorative justice process. But, there is no priority as to which should be used. If the restorative justice method of making conditions were to be the first priority, this would be advantageous for conditional caution. That is, where conditions are not reached because of the victim, the Crown Prosecutor still has another channel to give conditional caution to the offender. For example, if the victim demands unreasonable compensation and the offender cannot afford it, the Crown Prosecutor can specify conditions and, subsequently, give a conditional caution to the offender. If the Crown Prosecutor cannot do so, the offender must be tried after condition-making cannot be reached at the restorative justice conference. In this regard, the private interests of the victim can prevent the Crown Prosecutor from exercising its power to divert the offender from

⁶¹ Interview with Wendy Freshman (n 42)

prosecution in a case where the Crown Prosecutor thinks the conditional caution is suitable for the offender. If the Crown Prosecutor can specify conditions and divert the offender after a restorative justice conference fails, this must be the other channel to discharge the offender from trial. However, the Crown Prosecutor must seriously consider whether it is appropriate to do so, or whether there is enough reason to do so, since the victim can easily criticize the Crown Prosecutor as being biased and partial in favour of the offender.

5.1.3 Restrictive and penal conditions versus the right to a fair trial

There are questions as to whether or not pre-trial diversions infringe the right to a fair trial as provided by the European Convention on Human Rights, Article 6. Conditional caution, as a pre-trial diversion, is subject to the same question. Furthermore, the Crown Prosecutor can set restrictive conditions with the conditional caution. The restrictive conditions, for example avoidance of a particular place and street⁶², deprive the offenders of their freedom. Short says that it is regarded as a punishment.⁶³ This leads to the question of whether or not the Crown Prosecutor can impose restrictive conditions on the offender.

The Convention provides that “in the determination of [...] any criminal charge against him, everyone is entitled to a fair and public hearing [...] by an independent and impartial tribunal [...]”.⁶⁴ This topic will be examined in four aspects. Firstly, does the right to a fair trial apply to pre-trial diversions? Secondly, do the police officer and Crown Prosecutor qualify as an independent and impartial tribunal? Thirdly, is pre-trial diversion process a determination of criminal charge? Fourthly, can the police officer and Crown Prosecutor give penalty notice and impose restrictive conditions respectively on the offender?

As for the first question, although this provision is known as ‘fair trial’, its scope of application does not limit to the trial stage, but it shall apply since “a person become subject to a criminal charge at the earliest time when he was officially alerted to the

⁶² Crown Prosecution Service (n 2) paragraph 5

⁶³ Interview with Andy Short (n 9)

⁶⁴ European Convention on Human Rights s 6

likelihood of criminal proceeding against him”.⁶⁵ Cheney and other explain that it is because events that happen at the investigation can affect the fairness of the trial.⁶⁶ For example, the evidence illegally collected by the investigator can affect the fairness of hearing. It must be excluded from hearing. Therefore, the right to a fair trial shall apply to pre-trial diversions.

As for the second question, in *Piersack v Belgium*⁶⁷, the judge who presided over the Piersack’s case, had previously served as a public prosecutor in the same case. The European Court of Human Rights held that there had been a violation of article 6 of the European Convention on Human Rights. This article is to ensure that trial must be preceded by a tribunal who is free from bias and prejudice.⁶⁸ If the police officer who are involved in the investigation and prosecution and, subsequently, engage in determination of the charge, they are not free from bias and prejudice. The police officer and the Crown Prosecutor do not qualify as an impartial tribunal.

As for the third question, in *R. v Durham Constabulary Ex p. R*⁶⁹, the appellant aged 14 years old had been complained that he had indecently assaulted a number of girls in his school. During interviewing, the appellant confessed. The police officer thought that a final warning was suitable for his case. When the final warning was given, neither him nor his stepfather, acting as an appropriate adult, had been warned that by receiving final warning, the appellant was obliged to register for two and a half years under the Sex Offenders Act 1997. He, then, challenged that the final warning process involved the determination of a criminal charge. The police officer was not an independent and impartial tribunal. Therefore, the whole process was incompatible with article 6 of the European Convention on Human Rights. The House of Lords held that “even if there was criminal charge, the criminal charge ceased to exist when a firm decision was made not to prosecute”. Although the fact in this judgment is about final warning, the legal principle from this judgment can be applied to other pre-trial diversion since final warning is one of pre-trial diversions. It can be concluded that the pre-trial diversion is not a process to determine a criminal

⁶⁵R. v Durham Constabulary Ex p. R, House of Lords, 17 March 2005, [2005] UKHL 21D [11]

⁶⁶ D Cheney and other, *Criminal Justice and the Human Right Acts 1998* (2nd Jordan Publishing Limited, Bristol 2001) 118

⁶⁷ *Piersack v. Belgium* (App no. 8692/79) (1982) ECHR

⁶⁸ M Amos, *Human Rights Law* (Hart Publishing, Oregon 2006) 317

⁶⁹ *R. v Durham Constabulary Ex p. R*, House of Lords (n 65)

charge. The police officer and Crown Prosecutor's decision to divert the offender from trial does not infringe on the right to a fair trial.

From the third answers, it is found that pre-trial diversions do not infringe upon the right to a fair trial. As for the fourth question, when the police officer and the Crown Prosecutor not only divert the case but also deliver penalty notice and restrictions on the offender before diversion, a question arises as to whether or not they are delivering punishment. Article 6 of the European Convention on Human Rights provides only "determination of charge". It does not mention "delivery of punishment". One may think that punishment must not be delivered by an independent and impartial tribunal. Therefore, the police and the crown prosecutor can deliver penalty notice and restrictive conditions without infringement of the right to the fair trial. However, in *R. v Durham Constabulary Ex p. R*, the House of Lords held that "the determination of a criminal charge, to be properly so regarded, must expose the subject of the charge to the possibility of punishment, whether in the event punishment is imposed or not".⁷⁰ Therefore, delivery of punishment is under definition of determination of a criminal charge.⁷¹ Consequently, when the police officer, who is not an impartial tribunal, gives a penalty notice, which is a financial penalty to the offender, he is infringing upon the right to a fair trial.

The question arises in case of restrictive conditions. The House of Lords held in the same case that "a process which can only culminate in measures of a preventative, curative, rehabilitative or welfare - promoting kind will not ordinarily be the determination of a criminal charge".⁷² Furthermore, the Director of Public Prosecutions suggests that restrictions can be imposed on the offender if they contribute to reparative and rehabilitative objectives.⁷³ Under the judgment, if the Crown Prosecutor want to rehabilitate the offender and order him not to go to a pub in the night time, such restriction, which aims at rehabilitation, is not determination of criminal charge. Therefore, the Crown Prosecutor can impose such restriction without infringement on the right to a fair trial. However, the author disagrees with this. Restriction is punishment since it deprives the offender's liberty. Therefore, the

⁷⁰ Ibid [14]

⁷¹ M Amos (n 68) 280

⁷² *R. v Durham Constabulary Ex p. R*, House of Lords (n 65) [14]

⁷³ Crown Prosecution Service (n 12) paragraph 5.3

Crown Prosecutor, who is not an impartial tribunal, cannot impose restrictions since it is incompatible to the right to a fair trial.

If the police and the Crown Prosecutor cannot deliver penalty notice or restrictive conditions respectively, there may be two ways to solve this problem. Firstly, after delivering a penalty notice and restrictions, the police officer and the Crown Prosecutor must send the case to the court to approve it, like the pre-trial diversion process in Germany.⁷⁴ This idea is problematic, since it is contrary to the concept of pre-trial diversion. That is, the case will not be terminated at the stage of the police officer and the Crown Prosecutor, but will continue to the court. It wastes time and requires more paperwork to submit the case for scrutiny.

Secondly, the offender waives the right to a fair trial. In *Millar v Dickson* and other appeals⁷⁵, each of the four appellants pleaded guilty to, or been convicted of, criminal charges in proceedings before temporary sheriffs in Scotland, and had been sentenced by such sheriffs. Subsequently, the High Court of Justiciary held in another case that a temporary sheriff was not an independent and impartial tribunal. Therefore, the appellants appealed that their prosecutions before such sheriffs had been unlawful. The high court dismissed the appeals and held that the appellants had waived the right to a fair trial. The appellants appealed to the Privy Council.

The Privy Council held that

The right of an accused in criminal proceedings to be tried by an independent and impartial tribunal was one that could not be compromised or eroded unless validly waived by the accused [...] ‘waiver’ meant a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it was open to that party to claim or raise.

Waiver of the right is the best way to avoid infringement on article 6 of the European Convention on Human Rights. The police officer and the Crown Prosecutor can give penalty notice or impose restrictions respectively if the offender waives this right.

⁷⁴ EURO Justice, ‘Country Report Germany’ <http://www.eurojustice.org/member_states/germany/country_report/2788/> accessed 2 July 2008

⁷⁵ *Millar v Dickson* (Procurator Fiscal, Elgin) and other appeals [2002] 3 All ER 1041

However, waiver of the right to a fair trial must be done voluntarily and unequivocally at the time which was open to claim. The tacit waiver cannot be accepted as a valid waiver of right.⁷⁶ Therefore, only the wish of the offender to accept conditional caution or penalty notice is not enough to be a voluntary and unequivocal waiver of the right of a fair trial. Furthermore, before the offender waives this right, there must be other legal guarantees of his rights; in particular, the right to consult a defence lawyer, and a full explanation of the consequence of admission, to ensure that the offender voluntarily and unequivocally waives this right.⁷⁷

5.1.4 Period to complete conditional caution

As mentioned above, a summary only offence and an either way offence, according to the list of the Director of Public Prosecutions, must be prosecuted within 6 months of the date of the offence⁷⁸. If the condition lasts longer than 6 months, the power of the police officer to monitor whether the offender completes the conditions expires at the sixth month of the date of the offence. Therefore, if the offender fails to comply with the condition after that period, the Crown Prosecutor cannot prosecute him on the original offence. It may be better to temporarily freeze the period of prosecution of a summary only offence and an either way offence during the implementation of conditional caution until the duration to complete the condition has already passed. This guarantees that the offender will not break the conditions after the power of the Crown Prosecutor to institute prosecution is terminated.

5.1.5 Private prosecution

Private Prosecution may threaten conditional caution. In England and Wales, although the Crown Prosecution Service shall be responsible for instituting and conducting any criminal proceedings⁷⁹, this does not preclude a victim from taking criminal action against the offender by himself.⁸⁰ Furthermore, the court held in *Hayter v L* that it is fair to take out a private prosecution against that offender⁸¹ since

⁷⁶ Ibid [38]

⁷⁷ I Brownlee, 'Conditional Cautions and fair trial rights in England and Wales: form versus substance in the diversionary agenda?' *Criminal Law Review* (2007) 140

⁷⁸ Crown Prosecution Service (n 12) paragraph 5.18

⁷⁹ Prosecution of Offence Act 1985 s 3(2)

⁸⁰ Prosecution of Offence Act 1985 s 6(2)

⁸¹ *Hayter v L* [1998] 1 WLR 854

this does not infringe the double jeopardy doctrine. The victim can institute prosecution by himself. If the victim does not content with a conditional caution and takes out a criminal action against the offender, it leads to the question of whether or not conditional caution will fail. Holt accepts that conditional caution will fail when a private prosecution is taken out. He says that, to avoid such a situation, the Crown Prosecutor shall exercise his powers to stop the private prosecution.⁸²

5.1.6 Judicial Review

When the victim is not satisfied with the conditional caution and he cannot take out a private prosecution as mentioned above, he may consider judicial review. In *R. v DPP Ex p. C*⁸³, the court held that

The Divisional Court had the power to review a decision of the DPP not to prosecute but the authorities also showed that the power was to be sparingly exercised. The court could act in the present circumstance if and only if it demonstrated that the respondent arrived at the decision not to prosecute because of some unlawful policy, or because the DPP failed to act in accordance with the settled policy as set out in the Code or because the decision was perverse.

However, it is worth noting that the legal result of conditional caution is that the prosecution is suspended⁸⁴, not dropped. This leads to the question of whether or not the judge can review the suspension of prosecution.

Under the principle of rule of law and the separation of powers, the executive is subject to the law, and is required to operate its functions in accordance to the law enacted by Parliament. Furthermore, the function of the judiciary is to protect the citizen against unlawful acts by government agencies and officials.⁸⁵ The court has jurisdiction to consider whether or not the decision of an administrative authority is legal, and to ensure that the executive exercises its power according to the law. In this regard, since the Crown Prosecution Service is a part of the executive, and its decision

⁸² Interview with Peter Holt (n 13)

⁸³ *R. v DPP Ex p. C* [1995] 1 Cr. App. R. 136

⁸⁴ Crown Prosecution Service (n 12) paragraph 2

⁸⁵ A W Broadley and K D Ewing, *Constitutional and Administrative Law* (13th Pearson Education Limited, Essex) 86

of conditional caution may affect the victim, the author believes that the court should have the jurisdiction to review conditional cautions, even if the legal result is suspension of prosecution. Furthermore, judicial review should apply both when the Crown Prosecutor considers whether conditional caution is appropriate and when he considers whether non-compliance is reasonable. Moreover, the author thinks that the offender should be able to use this channel to review the Crown Prosecutor's decision if the decision affects him.

5.2 Conditional caution outcomes

This topic examines the following issues: namely, (1) the needs of the victim, (2) the responsibility of the offender, (3) reduction of re-offending, (4) proportionality (5) an innocent accused and (6) compensation.

5.2.1 The needs of the victim

There are two kinds of condition attached to conditional cautions: namely, (1) conditions set by the Crown Prosecutor, and (2) conditions reached at a restorative justice conference. As for the second condition, since the Crown Prosecutor has the authority to approve or amend conditions reached at restorative justice conferences, such conditions can be divided into two types. That is, (1) conditions reached at a restorative justice conference, which the Crown Prosecutor approves without amendment, and (2) conditions reached at a restorative justice conference with amendment. In conclusion, there are 3 kinds of condition: namely, (1) conditions set by the Crown Prosecutor, (2) conditions reached at a restorative justice conference without amendment, and (3) conditions reached at a restorative justice conference with amendment.

Conditions reached at a restorative justice conference without amendment is full restorative justice. Wendy claims that such conditions respond to all needs of the victim⁸⁶. The victim can solve the aftermath of crime by himself. He is included in the process so he will not miss any information about his case. The victim can conciliate and negotiate with the offender about compensation. His physical and material losses are restored by the offender. Moreover, the process helps the victim to

⁸⁶ Interview with Wendy Freshman (n 42)

overcome emotional loss. He has a chance to understand why the offender has committed a crime against him, and receives a sincere apology from the offender. These conditions make the victim satisfied.

It is worth noting that the victim can only take part in the restorative condition making process. He can define the outcome of the conditions with which the offender must comply. However, the law does not allow him to take part in the conditional caution process. He cannot say to the Crown Prosecutor that conditional caution is not suitable for the offender, or that the offender should be punished, since this power solely belongs to the Crown Prosecutor.

Conditions reached at a restorative justice conference with amendment can partially respond to the needs of the victim. If the Crown Prosecutor amends the conditions, so they are different from the agreement reached between the victim and the offender at the restorative conference, then these conditions may not be what the victim needs and expects. This leads to partial material restoration, and may make the victim less satisfied than in the case of full restorative conditions.

It is worth noting that although the Crown Prosecutor has the authority to amend and terminate conditions reached at a restorative justice conference, the question arises as to what extent the Crown Prosecutor should intervene in the conditions, since both the victim and the offender think that these conditions are fair for them.

Conditions set by the Crown Prosecutor do not meet any element of restorative justice. This is not restorative justice even it aims to repair the harm to the victim. Compensation set by the Crown Prosecutor can respond to the victim's need for material restoration. But other needs of the victim, for example, case participation, information and emotional restoration, are ignored. The victim cannot take part in, and resolve the aftermath of his crime by himself. His emotional loss tends to be ignored. This leads to the victim be less satisfied than with conditions reached at a restorative justice conference. However, such conditions make conditional caution better than other pre-trial diversions – for example, reprimand and final warning, Caution, fine and public interest – since these diversions completely omit the needs of the victim.

Blakeborough and others interviewed 50 practitioners of conditional caution who worked in 13 Basic Command Unit across 6 police force areas found that 14 practitioners felt that conditional cautions increased victim satisfaction since the victim got compensation from the offender faster than it would be if his case went to court.⁸⁷ The research of satisfaction of victims with conditional caution scheme conducted by a local voluntary organization in 2007 found that 71 percent of 118 victims reported that the advantages of conditional caution were that the process was fast and saves since the victims did not go to the court. Furthermore, it could address offending behaviour.⁸⁸ However, these researches did not mention about satisfaction of the victim between conditions reached at restorative justice and condition established by the Crown Prosecutor.

5.2.2 Responsibility of the offender

All conditions set by the Crown Prosecutor and by the stakeholders of crime at a restorative justice conference become pre-conditions for diversion. The law provides that when all conditions attached to a conditional caution are completely met, the prosecution will be dropped.⁸⁹ However, if the conditions are not met without reasonable excuse, the prosecution of the original offence is initiated.⁹⁰ Therefore, it is likely that the offender will complete all conditions attached to the conditional caution, since he will not want to be prosecuted.

The research of satisfaction of victims conducted by a local voluntary organization in 2007 also found that only 17 percent of 135 victims argued that conditional caution was not good in that they waited for a long period of time before receiving compensation or did not receive any payment.⁹¹

⁸⁷ L Blakeborough and other (n 3) 5

⁸⁸ Office of Criminal Justice Reform, 'Conditional Cautions: Key findings from a victim satisfaction survey' (December 2007) <<http://www.cjsonline.gov.uk/downloads/application/pdf/Victim%20satisfaction%20Dec%2007.pdf>> accessed 7 September 2008

⁸⁹ Crown Prosecution Service (n 12) paragraph 2

⁹⁰ Criminal Justice Act 2003 s 24 § 1

⁹¹ Office of Criminal Justice Reform (n 88)

5.2.3 Reduction of re-offending

Wendy says that the offender, who participates in restorative justice conference, repents of what he has done⁹². She gave an example about a drunken offender, who was angry at the victim (a Polish female bartender) and threw a bottle of beer to the floor in front of her when she prevented him to bring the beer into her pub. At the meeting, the victim did not participate in. Wendy delivered her feeling to the offender. After talking for a long period of time, the offender realized that the victim was very fear and frighten because of his action. Then, he wrote a letter to apologize her. Although, this case is not a full restorative justice since the victim does not take part, it demonstrates that the offender feel remorse after confronting with his action.

However, Daly argues that the aftermath of crime, as well as the feelings of the victim resulting from the restorative justice conference, may have no effect, or little effect, on the young offender.⁹³ The adult offender is unlikely to be affected by the negative impact of his actions as well. Therefore, these offenders neither realize that what they have done wrong, nor change their behaviour after confronting the consequences of their actions.

Although restorative justice cannot absolutely make the offender change his behaviour, conditional caution authorizes the Crown Prosecutor to set rehabilitation conditions; for example, drug and alcohol treatment and aggression management⁹⁴, with which the offender must comply before diversion. Conditional caution can ensure that the offender must attend such programmes for at least 16 weeks from the date of offence; otherwise he shall be indicted.⁹⁵ The practitioners of conditional caution say that these programmes can tackle the cause of crime and could reduce re-offending in the long term.⁹⁶

⁹² Interview with Wendy Freshman (n 42)

⁹³ K Daly, 'Restorative Justice: the Real Story' in G Johnstone (ed), *A Restorative Justice Reader Texts, Sources, Context* (Willan Publishing, London 2003) 376

⁹⁴ Kent Criminal Justice Broad (n 14) 48

⁹⁵ See detail in topic 3

⁹⁶ L Blakeborough and other (n 3) 5

5.2.4 Proportionality

Restorative justice is criticized in that it omits the principle of equal treatment and proportion of punishment to the seriousness of the crime⁹⁷. Restorative justice empowers the stakeholders of crime to solve the aftermath of crime by themselves. The victim may demand for and negotiate with the offender on what is an appropriate solution to their conflict. The outcome of negotiation tends to depend on satisfaction of the parties. Therefore, the outcome of the same case may be different to the other same cases and may not be proportionate to the seriousness of the crime. Conditional caution may solve this problem, since it authorizes the Crown Prosecutor to examine whether the conditions reached at a restorative justice conference are proportional, appropriate and achievable. If the Crown Prosecutor views that the conditions are disproportionate, inappropriate and unachievable, he can amend such conditions in order to make them consistent and proportionate to the outcomes of similar cases. In doing so, similar cases will have the same result. However, the question arises as to whether or not the Crown Prosecutor should intervene in conditions made voluntarily by the stakeholders of crime, since both the victim and the offender view that such conditions are fair for them. Therefore, the opportunity to exercise this power is rare. Consequently, the conditions reach at a restorative justice conference may still not be proportionate to the seriousness of the crime, and are treated differently from case by case.

5.2.5 The innocent accused

An accused who is innocent may accept conditional caution to avoid trial. On the one hand, the process to prove innocence at the court is expensive and long. The accused must hire a defence lawyer, whose service is expensive, to represent him at court. He is also required to appear at the court every time that the trial proceeds. Further, the whole process may be delayed, and take a long period of time. On the other hand, conditional caution is cheap and fast. The accused is not required to have a defence lawyer for trial. He is also not required to appear at court. Furthermore, conditions with which he must comply are not serious; for example, a letter of apology or compensation. Therefore, it is possible that the innocent accused will select this

⁹⁷ A Ashworth, 'Is Restorative Justice the Way Forward for Criminal Justice?' In E Mclaughlin and other (eds) *Restorative Justice Critical Issues* (SAGE Publications Ltd., London 2003) 164

channel to avoid trial. He may admit an offence, despite the fact that he has not committed any crime. But he feels compelled to do so, since it is the good way to avoid the heavy burden of proving his innocence at court.

5.2.6 Compensation

As mentioned in Table 2 above, the most popular condition is compensation. If the offender must complete payment of compensation before being discharged, this may lead to two results. On the one hand, the rich offender who can afford compensation to the victim is more likely to get a conditional caution, and freedom from trial. On the other hand, the poor offender is more likely to be prosecuted. This leads to unfair treatment between the rich and the poor offender.

6 Conclusion

This article criticizes conditional caution in 2 aspects; namely, process and outcome. As for the process, it is found that conditional caution process is not a process to determine a criminal charge. The Crown Prosecutor can deliver conditional caution to the offender without infringement on the right to the fair trial. However, if the Crown Prosecutor gives conditional caution with restrictive conditions, he is delivering punishment. He cannot do so except the offender voluntarily waives the right to a fair trial. Furthermore, the process allows the victim to petition to the court for judicial review the order of the Crown Prosecutor in administering conditional caution.

As for outcome, basically, the conditional caution is better than other pre-trial diversions – for example, minimum age of responsibility, reprimand and final warning, penalty notice, caution and public interest – in two aspects. Firstly, conditional caution can respond to the needs of the victim, particularly material reparation needs. Secondly, it can solve the cause of crime by referring the offender to rehabilitation programmes – drug and alcohol treatments.

If the restorative justice is implemented to establish conditions, it can increase effectiveness of conditional caution. That is, the victim can conciliate and negotiate with the offender on how to solve the aftermath of crime by himself. His material and emotional losses can be restored from the process. The offender will sincerely repent;

take responsibility for the damage he has done and change his behaviour. However, it is found that restorative justice process has been employed only 1.7 per cent of all conditional caution cases. This is very low.

Conditional caution has disadvantages. Firstly, it gives broad discretion to the police. Therefore, it is likely that the police apply other measures – simple caution and penalty notice, which is not as complicate as conditional caution, to deal with a low serious offender instead of this measure. Secondly, the period to monitor whether the offender complete the conditions is short. If the offender fails to meet the conditions after this period, the Crown Prosecutor cannot institute prosecution. These problems should be solved.

Annex

Offences that may be Conditionally Cautioned⁹⁸

1. Summary only offences

- Common assault (level 5)
- Assaulting a police officer (level 5)
- Obstructing a police officer (level 3)
- Section 4 and 4A Public Order Act 1986 (level 5)
- Section 5 Public Order Act 1986 (level 3)
- Violent behaviour in a police station (level 1)
- Drunk and disorderly (level 3)
- Simple drunk (level 1)
- Indecent exposure (level 3)
- Prostitution (level 2, or if after similar conviction, level 3)
- Kerb crawling (level 3)
- Unlawful taking of a motor vehicle (level 5) section 12 Theft Act 1968
- Interference with vehicles (level 4) Criminal Attempts Act 1981

But excluding any offence under the Road Traffic Act 1988 and the Road Traffic Offenders Act 1988.

2. Either way offences and attempts to commit these offences

Theft Act 1968:

- Theft (section 1-7)
- Removal of articles from places open to the public (section 11)
- Abstracting electricity (section 13)
- False accounting (section 17)
- Handling stolen goods (section 22)
- Going equipped for stealing etc (section 25)

⁹⁸Crown Prosecution Service, 'The Director's Guidance on Conditional Cautioning' (5th 2007) <http://www.cps.gov.uk/publications/directors_guidance/conditional_cautioning.html> accessed 28 June 2008

Theft Act 1978:

- Making off without payment (section 3)

Fraud Act 2006

- Making a false representation (sections 1 & 2)
- Failing to disclose information (sections 1 & 3)
- Fraud by abuse of position (sections 1 & 4)
- Possession of articles for use in frauds (section 6)
- Making or supply articles for use in frauds (section 7)
- Obtaining services dishonestly (section 11)

Criminal Damage Act 1971

- Destroying or damaging property (section 1(1))
- Threats to destroy or damage property (section 2)
- Possessing anything with intent to destroy or damage property (section 3)

Misuse of Drugs Act 1971

- Possession of any class of drug (consistent with personal use) (section 5)

Road Traffic Act 1988 and Schedule 2 of the Road Traffic Offenders Act 1988

- Forgery of documents (including offences involving use of driving licence and insurance with intent to deceive) (section 173)

Vehicle Excise and Registration Act 1994

- Forgery and Fraud (including fraudulent use of excise license) (section 44)