

Proceed with Caution

Use of Out-of-Court Disposals in England & Wales

Karen Sosa

Summary

Since the early 2000s, the use of out-of-court penalties as a quick means of disposing of offences has been a haphazard practice, resulting in wide variations across police forces in the frequency with which these penalties are applied. More often than not, cautions are used to deal with repeat offenders, and penalty notices are frequently unpaid and unprosecuted, rendering them meaningless. Improved guidance and accountability is needed to ensure the effective use of these disposals.

Background

Police and prosecuting authorities in England and Wales have long enjoyed considerable discretion over how to dispose of an offence. While the 'simple' police caution has its origins in the prosecutorial discretion of police, under the last Labour government (1997-2010), attempts were made to introduce a wider system of out-of-court disposals (OOCs).

The **simple caution** remains in place, and can be administered for a less serious crime – a summary or triable either way offence¹ – by the police. For indictable-only offences,² which would otherwise be tried in Crown Court, the decision must be taken by the local Crown Prosecution Service. In

respect of a simple caution for an indictable-only offence, the Code of Conduct for prosecutors states, *“The occasions when this will be an appropriate disposal **will be exceptional.**”*³

The Criminal Justice and Police Act 2001 introduced **penalty notices for disorder** (PNDs) enabling the police to issue ‘on the spot’ financial penalties for certain low-level offences.⁴ PNDs can be issued by the police or, subject to the Chief Constable’s approval, by Police Community Support Officers or other ‘accredited persons’.

The 2003 Criminal Justice Act introduced a system of **conditional cautions** under which the CPS (but not the police) could decide that an offence serious enough to warrant prosecution could be dealt with by a caution subject to reparative, rehabilitative or certain punitive conditions.⁵

In 2004, a system of **formal warnings for simple possession of cannabis** (for personal use only and not for resale) was introduced. Police can immediately issue a warning to persons found with small amounts of cannabis. The purpose of the cannabis warning is to free up police time otherwise spent arresting these offenders. In 2009, following concern over repeat use of warnings for the same offender, the Government issued guidance stating that repeat warnings should not be given and that a second offence should normally be dealt with by way of a PND.⁶

Whereas cautions are recorded on the Police National Computer, cannabis warnings are only recorded locally. The ad hoc and piecemeal way in which these disposals have developed has led to inconsistent and inappropriate use of out-of-court disposals.

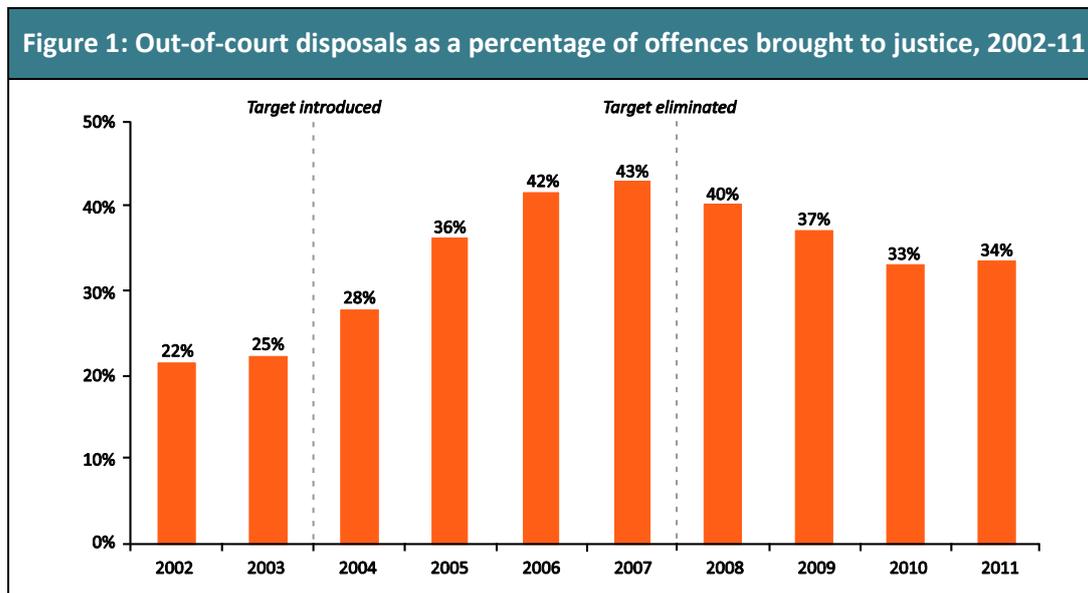
Impact of the Offences Brought to Justice Target (2004-2008)



In April 2004, a public service agreement target went into effect to increase the number of “Offences Brought to Justice” (OBTJ) across police forces.⁷ This target did not distinguish among the types of offences brought to justice, nor did it distinguish among disposals. An offence brought to justice using a caution counted toward the target just as if it had been tried in court, except at significantly less time and cost. This target created a perverse incentive for criminal justice agencies, and it coincided with a significant jump in the use of OOCs. The proportion of offences disposed of out of court rose from 23% in 2003 to 43% in 2007.⁸

The target was scrapped in April 2008, and the use of OOCs declined accordingly. Use of out-of-court disposals peaked in 2007 and by 2009 this figure had dropped to 33% of all disposals, showing just how distorting the centrally-imposed OBTJ target was. However, in 2003, there were 241,651 out-of-court disposals for all offences, and despite the fall off from the peak of use in 2007

(625,229), there were still 405,943 offences in 2011 that were disposed of out-of-court – 68% higher than 2003.



Current data and concerns

In 2011, the number of cautions given in England and Wales dropped 4.4% from 2010 and 36% from 2007, the peak year for caution use.⁹ A similar downward trend has been observed in the use of Penalty Notices for Disorder. In 2011, 9.4% fewer PNDs were given than in 2010, a 38.6% reduction from the peak use of PNDs in 2007.¹⁰

In June 2011, Her Majesty’s Inspectorate of the Constabulary (HMIC) and Her Majesty’s Crown Prosecution Service Inspectorate (HMCPSI) published a report detailing their review of out-of-court disposals from April 2008 through March 2009.¹¹ Their review accepted that these new police-imposed sanctions had allowed some “net-widening”, with offences being dealt with that previously would not have been, but they raised many concerns about the use of OOCs:

- *“The use of out-of-court disposals varied considerably across all 43 force areas [...] local crime and offending patterns, and the exercise of local discretion [...] do not fully explain the scale of variation found.”¹²*
- *“In one third of the cases [reviewed] the disposal selected did not meet the standards set out in the existing national and force guidelines [...] we found obvious examples of unexplained and unchallenged overuse.”¹³*

- Public support for out-of-court disposals – especially for simple cautions – falls away sharply when they are used for repeat offenders.¹⁴

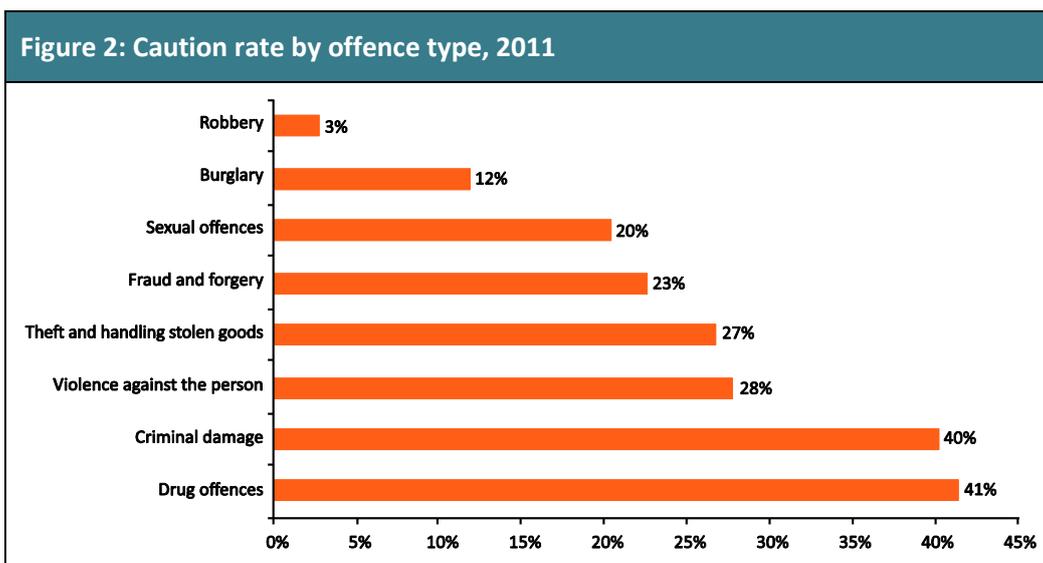
The Inspectorate noted: “the trend since 2003 represents a fundamental shift in how justice is delivered.”¹⁵ Despite the decline in recent years, out-of-court disposals still account for one-third of all offences brought to justice in England and Wales, and their use remains 9% higher than in 2003.¹⁶ Therefore, the patterns of their use remain of critical importance to the criminal justice system.¹⁷

Erratic Use of OOCs

In 2011 in England and Wales, out-of-court disposals constituted one-third of all offences brought to justice. However, the charts below demonstrate the wide variations in the use of OOCs across police forces and across offence types.

Inconsistency by offence type

Out of court disposals are rightly used at varying rates across offence types.¹⁸ However, some offence types are handled outside of court at an alarmingly high rate. While just 269 offenders charged with robbery (2.8%) received cautions in 2011, for example, cautions were used for 41.3% of drug offenders.¹⁹ 3,359 offenders charged with burglary (11.8%) and 1,532 sexual offenders (20.4%) were dealt with out of court.²⁰ Over 16,000 violent offenders (over one in four) received a caution only.²¹



Cannabis warnings

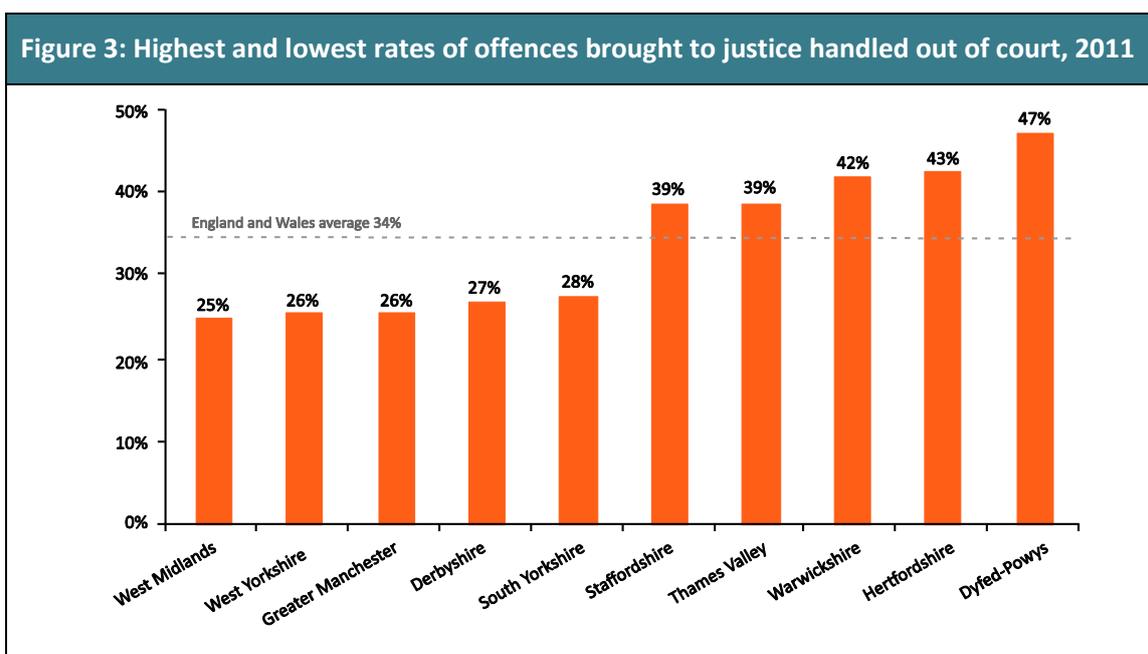


Cannabis warnings accounted for 6.6% of all offences brought to justice in England and Wales in 2011, but this again masks wide variations between police forces.²²

Cannabis warnings accounted for 13.69% – or one in seven – of all offences brought to justice in London, where the Metropolitan Police continues to issue cannabis warnings at a significantly higher level than other areas – a total of 27,489 issued in 2011.²³ The next highest rate was 9.36% in Merseyside, another urban force, where 3,380 were issued in 2011.²⁴ In contrast, cannabis warnings accounted for a mere 2.11% of offences brought to justice in Kent, where only 815 were issued.²⁵ In total, over a third (34.51%) of all cannabis warnings given in 2011 were issued by the Metropolitan Police, with the national rate greatly skewed by London practice.²⁶

Some of this disparity can be attributed to the use of PNDs to respond to cannabis possession. Kent and Merseyside, for example, issued PNDs for cannabis possession at a much higher rate than London. In 2011, Kent issued 570 PNDs for cannabis possession and 815 cannabis warnings. Merseyside issued 2,114 PNDs for cannabis possession and 3,380 cannabis warnings. By contrast, the Metropolitan Police gave only 4,151 PNDs for cannabis possession offences, preferring to rely on cannabis warnings (27,489).

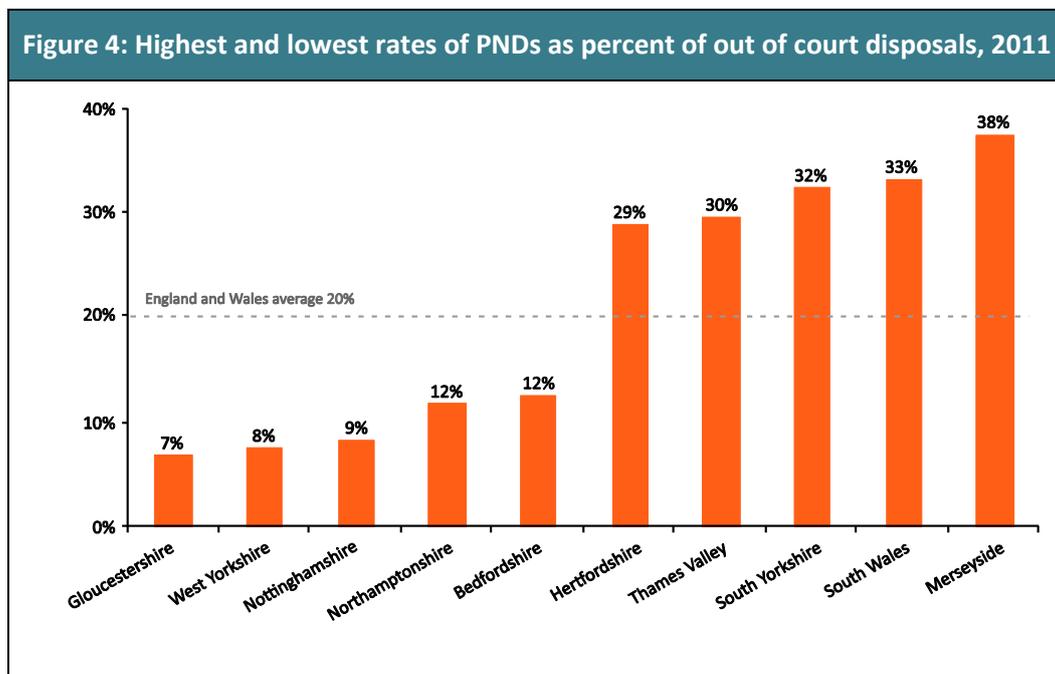
Police force inconsistency in the use of all OOCs



Out-of-court disposals are used with varying frequency across police forces in England and Wales. The national average of one-third of all offences brought to justice with an OOC varies widely across individual police forces. The lowest out-of-court disposal rate is West Midlands with 25.43%, while Dyfed Powys has the highest out-of-court disposal rate; nearly half (47.31%) of all offences brought to justice in that force area were done so out of court.²⁷

Police force disparities in the use of penalty notices for disorder

Penalty notices for disorder (PNDs) are also administered inconsistently across police force areas. In 2011, PNDs accounted for 20.28% of offences brought to justice out of court.²⁸ Gloucestershire had the lowest rate, with 6.60% of OOCs being PNDs, while Merseyside had the highest use of PNDs, constituting 37.74% of OOCs.²⁹ Just 8% of out-of-court disposals were PNDs in West Yorkshire in 2011, compared to 33% in neighbouring South Yorkshire.



Inappropriate Use of OOCs

Home Office guidance specifies that out-of-court disposals are meant to be used only for low-level offending: *“Only in exceptional circumstances should [a caution] be used to deal with more serious offences.”*³⁰ The Home Office further advises that *“if the suspect has previously received a caution, then a further simple caution should not normally be considered.”*³¹ Nonetheless, significant numbers

of serious offences are responded to with out-of-court disposals, including violent and sexual offences. In addition, persistent offenders repeatedly receive out-of-court disposals.

Unsuitable offence type



One simple measure for the appropriate use of OOCs is the rate at which they are used for serious offences. This category in official returns includes both triable-either-way offences and indictable-only offences, with an OOC for the latter offence always being inappropriate unless “exceptional” circumstances exist. To caution for an indictable-only offence requires consultation with the CPS. When triable-either way offences are excluded, the number of cautions applied is much lower. However, data received from police forces shows that cautions are still applied in response to indictable-only offences.

A total of 783 cautions were given in 2011 for just three offences that are usually triable on indictment only: Robbery, Wounding or Causing Grievous Bodily Harm (GBH) with Intent, and Racially or Religiously Aggravated Criminal Damage.^{32,33} In London alone, 156 offenders received a caution for Robbery, 152 were cautioned for Wounding or Causing GBH with Intent, and 18 offenders were cautioned for Racially or Religiously Aggravated Criminal Damage.

Table 1 lists which forces administered the most cautions in 2011 for each indictable-only offence, and how many cautions were issued for that offence.

Table 1: Forces issuing highest number of cautions for selected indictable-only offences, 2011			
Robbery	Aggravated Burglary	Wounding/GBH with Intent	Racially/Religiously Aggravated Criminal Damage
London (156) Greater Manchester (19) Kent (10)	London (2) Gloucestershire (1) Wiltshire (1)	London (152) Greater Manchester (50) Lancashire (43)	London (18) Greater Manchester (5) Northamptonshire, (4) Staffordshire (4) West Yorkshire (4)
England & Wales: 258	England & Wales: 4	England & Wales: 458	England & Wales: 56

A full list of forces issuing cautions for these indictable-only offences can be found at <http://www.policyexchange.org.uk/images/pdfs/proceed%20with%20caution%20-%20supplementary%20table.pdf>

The serious offence of wounding or causing grievous bodily-harm (GBH) with intent is very rarely disposed of with a caution. However, even for this offence, some forces are using cautions at a high rate. Dyfed Powys handled 13% of 154 GBH with intent offences by way of a caution, meaning that in 2011, one in eight offences of serious wounding resulted in a caution in Dyfed Powys – this is seven times the national average rate.

Data for 2011 shows that cautions were used for very serious offences including: threats or conspiracy to murder (128 cautions); sexual activity with a child under 13 (100 cautions); domestic burglary (1,324 cautions); and arson (461 cautions).³⁴ Despite an overall decline in their use, this evidence strongly suggests that cautions are still being used inappropriately in some areas to deal with offences which ought to be prosecuted in Crown Court.

Repeat use for same offender



An offender should not receive multiple out-of-court disposals, and these disposals are intended for first time offenders only. However, data from the Joint Inspectorate's review of these disposals revealed that they are regularly given to offenders who already have received at least one out-of-court disposal. Over one-third (35%) of the out-of-court disposals reviewed by the Inspectorate were given to offenders who had previously received a caution. In Leicestershire and Thames Valley, this proportion rose to 50%.

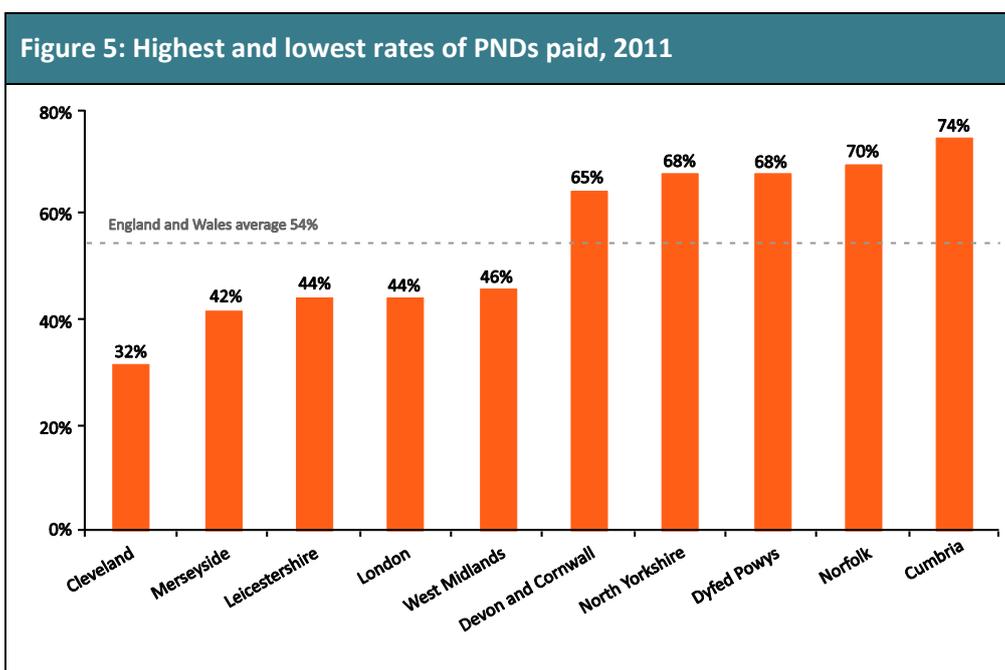
In 2008-09, Penalty Notices for Disorder were routinely given to offenders who had previously received a PND. There is no centrally-imposed limit on the use of PNDs,³⁵ and practice varies across forces.³⁶ Depending on force policy, a single offender could receive dozens of PNDs, and no integrated system or database exists to monitor repeat administration of PNDs to individuals in a force area, or across numerous areas.

Across the survey, an average of one-third (34%) of PNDs for criminal damage or theft were given to those who had a previous PND. The Metropolitan Police Service only gave 10% of their PNDs for criminal damage and theft to offenders with previous PNDs. By contrast, in Thames Valley, 60% of PNDs for criminal damage or theft were issued to offenders with previous PNDs. In Leicestershire, half of all PNDs for these offences were given to those with previous PNDs.

In 2010, while the use of cautions continued to fall, they continued to be used inappropriately. More than half (51.7%) of all adult offenders receiving cautions had received at least one previous caution or conviction.³⁷ A quarter of adults receiving cautions in 2010 had three or more previous cautions or convictions.³⁸



In 2011, well under half (41.02%) of all PNDs were paid in full within the 21 day payment window, with a further 12.63% paid late.³⁹ Nearly half (46.35%) of all issued PNDs are never paid. In 2011, 59,111 PNDs were unpaid in England and Wales out of 127,530 issued.⁴⁰ The 2011 data demonstrates the range of unpaid PND rates across the country. The lowest rate of paid PNDs was in Cleveland, where a significant 68.41% of PNDs are not paid.⁴¹ In London, only 44% of PNDs are paid.⁴² In 2011, this amounted to 9,426 PNDs going unpaid in London alone.⁴³ Even the best performing area, Cumbria sees a quarter (25.65%) of PNDs go unpaid.⁴⁴



Large numbers of PNDs have gone unpaid year upon year. In the past five years (2007-2011), a total of 388,555 PNDs have been recorded as unpaid, and a total of 585,001 unpaid PNDs have been recorded since 2004 when PNDs were first introduced.⁴⁵ These unpaid PNDs represent 47.42% of all PNDs issued in England and Wales in these years.

With an individual charge of either £50 or £80, the total value of the 585,001 unpaid PNDs since 2004 is between £29.3 million and £46.8 million – income that police forces themselves have foregone because of non-payment.

Table 2: Unpaid PNDs in England & Wales, 2004-2011		
Year	PNDs Issued	PNDs Unpaid of Those Issued that Year
2004	63,639	30,561
2005	146,481	69,234
2006	201,197	96,651
2007	207,544	100,619
2008	176,164	84,875
2009	170,393	80,277
2010	140,769	63,673
2011	127,530	59,111
TOTAL	1,233,717	585,001

While nationally 80.51% of unpaid PNDs are registered as fines, some areas (Kent, Sussex and West Yorkshire in particular) instead mark the majority of their unpaid PNDs for ‘potential prosecution’.⁴⁶ Kent, for instance, registers only 9.77% of unpaid PNDs as fines; 86.4% of their unpaid PNDs – 43.25% of all PNDs in Kent – are marked for potential prosecution.⁴⁷ This might mean that the force uses prosecution in order to strengthen enforcement, or, alternatively, it might mean that no action is taken at all, as we do not know how many potential prosecutions are actually prosecuted.

Other forces simply cancel a large proportion of their unpaid fines. Across all forces, an average of 8% of unpaid PNDs are cancelled.⁴⁸ In Cleveland, however, over a third (37%) of unpaid PNDs are cancelled.⁴⁹ Close behind are Hertfordshire and Northamptonshire, where 31% and 28% of unpaid PNDs are cancelled, respectively.⁵⁰ Nationally, almost the same number of unpaid PNDs were cancelled as were marked for potential prosecution (8.4% in both cases). Cancelling an unpaid PND renders the sanction optional and removes consequences for non-compliance.

Conclusion



Out-of-court disposals have an important role in the criminal justice system in England and Wales. If applied consistently and appropriately – and then enforced – they can offer a swift and effective response to low-level offending that is more cost-effective and proportionate than formal prosecution.

However, despite an overall reduction in their use, the evidence points to a continued problem of widespread inconsistency in their application and in the enforcement of out-of-court disposals. In part, this may reflect inconsistencies in the design of the disposals themselves, in turn reflecting the ad hoc way in which these sanctions have developed. Current data also suggests that along with erratic use, there are a number of areas where OOCs are being used inappropriately; to dispose of serious, indictable-only offences, and serial offenders are receiving multiple out-of-court disposals, with no formal system to monitor repeat use.

The use of any disposal will vary among areas to some extent depending on local police practice and local crime conditions, and this is not objectionable in itself. However, the extent of the disparities seen in the Joint Inspection published in 2011 suggests that there are more fundamental issues around inappropriate and inconsistent use of out-of-court disposals that need careful examination by the Ministry of Justice. The enforcement of financial penalties and their accumulation by repeat offenders still lacks clarity, and the practice for responding to unpaid PNDs is inconsistent and opaque. Without greater transparency and focus, the widespread and erratic use of out-of-court disposals risks undermining public confidence in criminal justice agencies and weakening the power of the sanctions in the eyes of offenders.

Recommendations



- To ensure justice and to maintain public support, there needs to be a much more systematic administration of out-of-court disposals with a view to creating a single guidance regime that applies to simple and conditional cautions, cannabis warnings and penalty notices. This should include consideration of the implications for the offender of criminal records bureau checks and the Rehabilitation of Offenders Act 1974 and associated reforms thereof.
- Aside from infrequent national inspections, there is no formal oversight of the administration of OOCs in local police areas. The Ministry of Justice should explore what role the magistracy might play in providing local oversight of these sanctions and their subsequent operation to help monitor for erratic or inappropriate use in cases that should be prosecuted and taken to court.
- The lack of detailed and transparent data on the use of OOCs contributes to uncertainty over their appropriate use and undermines public confidence. A requirement should be placed on police forces to routinely publish breakdowns of

OOCs in their area, with clear explanations of the disposals and the offences for which they were given.

- From November 2012, elected Police & Crime Commissioners (PCCs), elected in November 2012, should regard the use of OOCs as an important factor for monitoring local police response to offending. Ultimately, PCCs should be answerable to ensure that cautions, PNDs and other out of court disposals are being applied appropriately.



- ¹ A “triable either way” offense is one which may be tried either on indictment or summarily. Defendants in these cases can elect to be tried either before a jury in the Crown Court or at a summary trial in the Magistrates’ Court. These offences are more serious than summary-only offenses, but are usually less serious than indictable-only offences.
- ² An indictable-only offense is one that can be tried only on indictment. These offenses are the most serious and will necessarily be tried in the Crown Court.
- ³ http://www.cps.gov.uk/publications/code_for_crown_prosecutors/disposals.html
- ⁴ Criminal Justice and Police Act 2001, Chapter 1
- ⁵ Criminal Justice Act 2003, Part 3
- ⁶ Ministry of Justice Circular 2009/05, ‘Penalty notice for disorder – police operational guidance’ <http://www.justice.gov.uk/publications/docs/circular-05-2009-pnds-cannabis-possession.pdf>
- ⁷ Home Office, Annual Report 2004-2005
- ⁸ Ministry of Justice, Criminal Statistics 2011, Vol. 3 Part 8
- ⁹ <http://www.justice.gov.uk/statistics/criminal-justice/criminal-justice-statistics>
- ¹⁰ Ibid.
- ¹¹ ‘Exercising Discretion: The Gateway to Justice, A study by Her Majesty’s Inspectorate of Constabulary and Her Majesty’s Crown Prosecution Inspectorate on cautions, penalty notices for disorder and restorative justice’ (2011) <http://www.hmic.gov.uk/media/exercising-discretion-the-gateway-to-justice-20110609.pdf>
- ¹² Ibid., p. 5
- ¹³ Ibid., p. 6
- ¹⁴ Ibid., p. 11
- ¹⁵ Ibid., p. 9
- ¹⁶ Ministry of Justice, Criminal Statistics 2011, Vol. 3 Part 8
- ¹⁷ Ibid.
- ¹⁸ Ministry of Justice, Criminal Justice Statistics 2011, Out of court disposals, Table Q2.3; Table Q2.4
- ¹⁹ Ibid.
- ²⁰ Ibid.
- ²¹ Ibid.
- ²² Ministry of Justice, Criminal Statistics 2011, Vol. 3 Part 8
- ²³ Ibid.
- ²⁴ Ibid.
- ²⁵ Ibid.
- ²⁶ Ibid.
- ²⁷ Ministry of Justice, Criminal Statistics 2011, Vol. 3 Part 8
- ²⁸ Ministry of Justice, Criminal Statistics 2011, Vol. 3 Part 8
- ²⁹ Ministry of Justice, Criminal Statistics 2011
- ³⁰ Home Office Circular 016/2008, “Simple cautioning of adult offenders”
- ³¹ Ibid. See also, Office for Criminal Justice Reform, ‘Out of court disposals for adults: A guide to alternatives to prosecution’, 2007 (“Out of court disposals are not suitable for contested or more

serious cases. They would not normally be considered for those who offend repeatedly (subject to relevant guidance).”)

³² Data assembled from Freedom of Information Requests to all police forces in England & Wales.

³³ The original version of this report indicated 828 cautions for these offences. This data was updated on 31 July 2012 to reflect corrections to the data submitted by South Wales Police. In their original response, they provided data for all criminal damage offences. The updated data includes cautions given for racially and religiously aggravated criminal damage only.

³⁴ Ministry of Justice, Criminal Statistics 2011, Vol. 3 Part 7

³⁵ Criminal Justice and Police Act 2001 (s.1-11), Penalty Notices for Disorder: Police Operational Guidance, 7.8

³⁶ See Office for Criminal Justice Reform, ‘Penalty Notices for Disorder: Review of Practice Across Police Forces’ (2006) (“[There are] wide variations in approach concerning a ceiling or cap on the numbers of PNDs for recordable offences that should or could be issued to an individual before escalating the disposal.” p. 13).

³⁷ Hansard HL Deb 2 Nov 2011, vol 731, col WA268

(<http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/111102w0001.htm>)

³⁸ Ibid.

³⁹ Ministry of Justice, Criminal Justice Statistics 2011, Vol. 3 Part 11

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ministry of Justice, Criminal Justice Statistics 2004-2011

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

Acknowledgements



Policy Exchange would like to thank the staff of the various police forces for their time and attention in responding to our Freedom of Information requests. We would also like to thank Dr. Robert Kaye for his assistance in the initial stages of this report.

About Policy Exchange



Policy Exchange is the UK's leading think tank. We are an educational charity whose mission is to develop and promote new policy ideas that will deliver better public services, a stronger society and a more dynamic economy. Charity Registration Number 1096300.

The authority and credibility of our research is our greatest asset. Our research is independent and evidence-based, and we share our ideas with policymakers from all sides of the political spectrum. Our research is strictly empirical and we do not take commissions. This allows us to be completely independent and make workable policy recommendations.

For more information please contact us at: Clutha House, 10 Storey's Gate, London, SW1P 3AY. Alternatively we can be contacted on 020 7340 2650 and at info@policyexchange.org.uk

About the Crime & Justice Unit



Research by the Crime & Justice Unit at Policy Exchange is all about being "*smart on crime*" – pursuing ideas and developing new crime policies that are cost-effective, evidence-led, and credible with the public. For full details of our future work or if you would like any more information about our analysis and recommendations in this area, please contact Blair Gibbs, Head of Crime & Justice: blair.gibbs@policyexchange.org.uk

Trustees



Daniel Finkelstein (Chairman of the Board), Richard Ehrman (Deputy Chair), Theodore Agnew, Richard Briance, Simon Brocklebank-Fowler, Robin Edwards, Virginia Fraser, Edward Heathcoat-Amory, David Meller, George Robinson, Robert Rosenkranz, Andrew Sells, Tim Steel, Rachel Whetstone, Simon Wolfson.