

## **Prison Reform Trust response to the consultation on out of court disposals – January 2014**

The Prison Reform Trust is an independent UK charity working to create a just, humane and effective prison system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. We welcome the opportunity to make a submission to the consultation.

Out of Court Disposals (OOCs) provide an important early stage intervention in the criminal justice system. When used appropriately, for low level offending and people with limited or no previous convictions, they give police an effective means of holding a person to account for their actions when they have broken the law, providing an opportunity to divert them away from future crime and offending.

**Question 1:** Do you think the OOCs regime needs to be made simpler? If so, how?

We understand that OOCs need to be used in a way that doesn't undermine due process and also holds the confidence of victims and the wider public. We agree that a simplification of OOCs would be sensible given that the current structure has developed iteratively, rather than by design. Simplification would hopefully help to ensure greater consistency in their use, provided that police are supported with clear guidance.

We agree that a simplification of OOCs would be sensible given that the current structure has developed iteratively, rather than by design. Simplification would hopefully help to ensure greater consistency in their use, provided that police are supported with clear guidance.

However, simplification is not the only consideration to be made in trying to achieve this review's aims. It is important that the police response is tailored to the specific circumstances of the offender and the offence if it is to have the desired effect. For instance, if the person has a drug addiction which is leading them to commit acquisitive crime, then diverting and supporting them into appropriate treatment could provide a more positive outcome than issuing a penalty notice for disorder. It is unfortunate that in many cases people have to be drawn further into the criminal justice system before they are afforded the support that they need to address their offending behaviour.

**Question 2:** Do you think the current OOCB framework deters people from committing crimes?

**Question 3:** How do you think OOCBs can make people less likely to commit crimes?

We have chosen to answer question 2 and 3 together.

OOCBs have an important role to play, providing a swift and effective response to tackle low level offending. They give the opportunity for early stage diversion and latest government figures show that reoffending rates for adults given a caution remains low, with only 18% reoffending within 12 months. In addition, compliance rates for conditional cautions are good, with 83% of those awarded in 2012 having a positive outcome.

However, we would be concerned if there was a greater emphasis on making OOCBs more 'punitive'. This approach could undermine their success at reducing reoffending and make it more likely that people are drawn further into the criminal justice system. While sounding tough is politically popular, there is little evidence to support 'deterrence'. Rather than talking down the effectiveness that OOCBs already have the government should promote and build on their success.

**Question 4:** Should the consequences of accepting or being given an OOCB be clearer?

Yes. Employment is one of the keys to reducing reoffending. And yet, for most types of offence, having a criminal record is likely to result in rejection for about half of vacancies. A study by the Chartered Institute of Personnel and Development found that ex-offenders are the most disadvantaged of all the labour market. In 2010 only 12% of employers surveyed said that they had employed somebody with a criminal record in the past three years, and around one in five employers (19%) said they did exclude or were likely to exclude them from the recruitment process.<sup>1</sup> Whilst there have been welcome legislative reforms to the Rehabilitation of Offenders Act, new provision is yet to be enacted. We would urge the government to expedite this as soon as possible.

Police should ensure that the full consequences of receiving an OOCB are explained, particularly when an admission of guilt is required such as with the conditional caution. We are particularly concerned about the impact this can have on people with mental health problems or a learning disability or difficulty. Our research indicates that the suggestibility of some people could lead them to plead guilty to an offence and refuse to take up the offer of legal advice. Others

---

<sup>1</sup> Chartered Institute of Personnel and Development (2010) Disadvantaged Groups in the Labour Market, London: CIPD

may plead guilty without understanding the full implications of a guilty plea simply to extricate them from a stressful situation.

The Prison Reform Trust has some concerns that current safeguards are not adequate to ensure that people with mental health problems and learning disabilities are able to fully participate in the conditional caution scheme.

Paragraph 2.28 of the Code of Practice for Adult Conditional Cautions states that the decision maker should take the person's mental capacity into account, however the code does not outline how people's mental health will be assessed.

Links with the emerging liaison and diversion services could provide a useful means of assessment. Given the diversionary nature of a conditional caution it will also be important to ensure that there are safeguards in place so that people with mental health problems and learning disabilities are not set up to fail due to their not understanding the conditions asked of them and be drawn further into the criminal justice system.

**Question 5:** What type of punishment should OOCs deliver? An example might include financial penalties.

It is not helpful to create a false divide between "punitive" and "rehabilitative" measures. Any OOC is a punitive sanction; it remains on a person's criminal record and can have a significantly detrimental effect on their employment opportunities (see our response to Q4); they may be expected to comply with requirements in the case of conditional cautions, and sanctions are available for non-compliance. By attempting to focus solely on punishment this reduces the discretion of trained and skilled police officers in selecting what they believe is the most appropriate disposal.

Reoffending rates for adults given a caution remains low, with the latest available figures showing that only 18% reoffended within 12 months. Whilst we appreciate the difficulties in comparing reoffending rates, this is significantly lower than for those leaving custody after a short prison sentence. Ministry of Justice research has also shown cautions to be slightly more effective than either fines or conditional discharges when matched to similar offenders. In addition, compliance rates for conditional cautions are positive, with 83% having a positive outcome in 2012.

Rather than focusing on how OOCs can be made 'tougher', the government should attempt to build on these positive results, ensuring that OOCs are tailored to address the issues leading to a person's offending and serve to reduce the risk of future offending.

**Question 6:** What sort of offences do you think OOCs are appropriate for?

We believe that existing guidance is already sufficient in explaining when an OOC is appropriate. It is important to ensure that this guidance is complied with by police forces.

**Question 7:** Do you think that OOC should be available for domestic violence?

We note that HM Inspectorate of Constabulary is currently undertaking a thematic review of police responses to domestic violence.<sup>2</sup> We recommend that decisions on the application of OOC in domestic violence cases should be taken in light of the outcomes of that review, which will have the benefit of expert input from the wide range of organisations involved in supporting victims of domestic violence. We understand that there is also an inquiry into women's access to justice and experiences of the criminal justice system being conducted by the All Party Parliamentary Group on Domestic and Sexual Violence which may make recommendations in this area.

**Question 10:** What sort of OOC, if any, is appropriate for repeat offenders?

There is already sufficient guidance on the appropriateness of using OOCs for repeat offenders. Existing guidance on the use of OOCs states that they are primarily intended to address first-time offending, or where no similar offences have been committed in a set time period. As the consultation highlights, 60.3% of those getting a caution have no previous cautions, and that a further 34% have had 1-2 previous cautions. Guidance already highlights that previous offences that were not committed recently should not necessarily be a bar to selecting an OOC.

We would be concerned at any moves to further limit police discretion in selecting what they believe to be the most appropriate OOC. Limiting discretion could have the unintended consequence of drawing people further into the criminal justice system unnecessarily. The government should learn from the experience from the youth reprimands and warnings scheme's inbuilt escalator, which as the consultation acknowledges led to minor cases being drawn into more a formal court process.

**Question 11:** Do some crimes or offenders need more significant consequences if the terms of their disposal are not met? For example, if they are asked to pay a fine but do not.

It is important to recognise that compliance rates for OOCs are generally good, with a compliance rate of 83% for conditional cautions in 2012, 89% of fixed penalty notices paid, and one year reoffending rates for cautions at 18%.

---

<sup>2</sup> Hansard HC, 6 September 2013, c34WS

If implemented with regard to people's ability to pay and their circumstances, then fines can provide a proportionate and sensible response to offending. However, many offenders are on low incomes, have high levels of debt and rely on benefits for support; any non-payment of a fine may not be wilful but as a result of the lack of ability to pay. It would be counterproductive to impose a fine that the offender is unable to pay and that may reinforce their financial exclusion and likelihood of reoffending. In these circumstances scope to replace the fine with an agreed number of hours of unpaid community work should be explored.

Revolving Doors has highlighted a significant problem with fixed penalty fines. For offenders with multiple needs they represent "a significant financial penalty ... the majority of people we interviewed would struggle to pay the fine in the 21 days. These fines may lead people to resort to crime as a means of getting the money to pay the fine. For many people this is the only way they know to get money in a short period of time... can be seen as a fast track into the criminal justice system for vulnerable people if used inappropriately."<sup>3</sup>

**Question 12:** When a practitioner (for example, a police officer) is deciding on an out of court disposal, how should victims be involved in that decision?

**Question 13:** Currently, the OOCs system includes ways in which offenders can "pay back" to the victim and/or society, sometimes financially and sometimes in other ways. Do you think that there are ways we could improve this and make it more efficient?

We have chosen to answer questions 12 and 13 together. Public involvement is an important part of improving confidence in OOCs, particularly for those who have been victims of crime. As the consultation acknowledges police already have powers available to engage with the victim to ensure that they have a say in the punishment of the offender. We believe that restorative justice remains the best way to involve victims in the process, with trained and skilled practitioners deciding on an out of court disposal.

The Ministry of Justice's seven year evaluation of restorative justice found high rates of completion by the offender (89% of agreements at least partially achieved) and 85% of victims surveyed said they were either 'very' or 'quite' satisfied with their experience of the restorative conference.<sup>4</sup>

Underpinning the success of restorative justice is its voluntary nature. Participation by both victim and offender must always be voluntary and made with informed consent, and trained professionals should support them at every stage of the process. Hearing directly from a victim of the effect of a crime on

---

<sup>3</sup> Pratt, E. and Jones, S. (2009) Hand to mouth: The impact of poverty and financial exclusion on adults with multiple needs, London: Revolving Doors.

<sup>4</sup> Shapland, J. et al. (2007) Restorative Justice: The views of victims and offenders, Ministry of Justice Research Series 3/07, London: Ministry of Justice

them and those close to them is more likely to cause an offender to take responsibility for their behaviour and work to make amends.

Ministry of Justice research indicates that the offenders who benefit the most are those who have made a personal commitment to take part.<sup>5</sup> This strongly supports the view that reparation works best with the offenders' role is voluntary, coerced reparation may appear to be tougher, but it is much more likely to foster resentment, and undermine the long-term aims of reparation.

Where the victim does not wish to meet the offender, or to receive any kind of reparation, it is still desirable that society offers offenders a chance to make amends indirectly.

Restorative justice services should be available to victims of crime in every area, and at all stages of the criminal justice system. The Ministry of Justice Restorative Justice Action Plan aims to “establish the necessary levers to enable restorative justice to be embedded nationally, and remove unnecessary barriers that prevent victims benefitting from restorative justice.”<sup>6</sup> Therefore, as capacity improves, we would want to see the duty to inform victims about the availability of restorative justice amended to become a duty to offer restorative justice, as soon as the capacity to deliver this exists in every area.

**Question 14:** How can we make sure that the right offenders are given the chance to address the root cause of their offending?

**Question 15:** How can we make sure that front line officers know what services are available in their local area when they are at the point of using an OOC?

**Question 16:** If you have anything else to add on how the OOC system can help reduce reoffending, please add it below.

We have decided to group our response to these questions together. OOCs provide an important early stage intervention in the criminal justice system. When used appropriately, for low level offending and people with limited or no previous convictions, they give police an effective means of holding a person to account for their actions when they have broken the law, providing an opportunity to divert them away from future crime and offending.

The inclusion of rehabilitative and reparative conditions can be particularly helpful in turning someone away from crime and into the support they need. Rehabilitation and preventing future offending should be the primary aim. It is

---

<sup>5</sup> Ibid.

<sup>6</sup> Ministry of Justice (2012) Restorative Justice Action Plan for the Criminal Justice System, London: Ministry of Justice. Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/162265/restorative-justice-actionplan.pdf.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/162265/restorative-justice-actionplan.pdf.pdf)

concerning that the consultation refers to ‘the right offenders’ being given the chance to address the root cause of their offending. This should be available to everyone.

Ensuring that police officers are aware of local services which can help to tackle the root causes of offending lies in establishing strong partnerships between local organisations – those working in criminal justice including Community Rehabilitation Companies, as well as local authorities and health and social care agencies.

Police and Crime Commissioners could work with these agencies to map current provision in their local area which could be used by front line staff when issuing an OOC.

**Question 17:** Is the current OOCs system difficult for the public to understand?

**Question 18:** How do you think it could be communicated better?

**Question 19:** What more could be done to improve public confidence in the OOC system?

We have decided to group our response to these questions together. We are not convinced that these changes would have an impact on either the understanding of or support for OOCs by the wider public. There are many misconceptions surrounding OOCs. They are often portrayed as a soft option and that people are being ‘let off’ after committing an offence, with political rhetoric and media coverage playing a significant part in fuelling this.

Whilst simplification of the existing system should make OOCs easier to understand, the government should learn lessons from similar existing justice campaigns that seek to raise public awareness, including ‘You be the Judge’ and ‘Local Crime: Community Sentence’, a joint venture by magistrates and probation officers to increase the knowledge and understanding of community sentences. Ministers also have a vital role to play in setting the tone of public debate. Talking down the effectiveness of OOCs and questioning their appropriateness can have a lasting impact on public confidence.

Political and judicial concern about the over use of OOCs has increased in recent years, in turn fuelling public concern. However as the consultation acknowledges, Ministry of Justice data shows that use of OOCs has already fallen significantly in recent years, with a 42% decrease between 2007 and 2012, with falls across all disposals and notably the use of cautions for indictable offences. Given that this reduction has already taken place without any significant change to the OOC structure it is questionable whether reform is needed to tackle their perceived overuse.

There is a perception that OOCs are used inappropriately, particularly when people have committed serious offences or are repeat offenders. But again data in the consultation highlights that 60.3% of those getting a caution have no previous cautions, and that a further 34% have had 1-2 previous cautions. Furthermore, whilst common assault and battery is included, typical offences tend to be low level or summary offences, particularly when using Penalty Notices for Disorder and conditional cautions. In addition existing guidance on the use of OOCs highlights that they are primarily intended to address first-time offending, or where no similar offences have been committed in a set time period.

A YouGov opinion poll of 1,552 people conducted on behalf of the Prison Reform Trust revealed strong public support for effective community and public health measures to prevent crime and disorder. The poll found that treatment for drug addiction, intensive supervision, and mental health care were the top three solutions to get public backing.<sup>7</sup>

Despite these positive findings we believe that there could be a greater role for Police and Crime Commissioners to provide greater scrutiny. There will have undoubtedly been incidences where police forces have deviated from existing guidance and OOCs have been issued inappropriately. PCCs could play an important part in improving monitoring and accountability, ensuring that OOCs are used appropriately, and helping to improve public confidence. This could be done through a periodic case review examining their use, possibly with the involvement of either local Magistrates or the Crown Prosecution Service.

**Question 20:** Do you think there is more information that should be shared?

Gender and race disaggregated data is essential to assess effectively any disproportionate application or impact of out of court disposals. The 'key statistics on use of OOCs' in the Ministry of Justice's Impact Assessment provides little in the way of gender or race disaggregated data – the only figure given is that for adult offenders 'the 2012 cautioning rates were 21% for males and 16% for females', and there are no statistics on race. The information provided in the government's biennial publications Statistics on Women and the Criminal Justice System and Race and the Criminal Justice System do not include 'cautioning rates', although data is otherwise more extensive.

---

<sup>7</sup> Prison Reform Trust website, 'Public back community and health solutions to cutting crime', available at <http://www.prisonreformtrust.org.uk/PressPolicy/News/ItemId/170/vw/1>



**Question 21:** Do you think that the public are able to hold the police to account for the way that OOCs are used?

See our response to Q19. We believe that a periodic system of review for the use of OOCs conducted by Police and Crime Commissioners would allow decisions to be scrutinised and communicated to the public, with PCC elections providing the best form of accountability.

**Question 22:** How can we ensure that the person making the decision about an OOC has the right experience and skills?

**Question 23:** How can we best ensure that decision making about what OOC to apply is both timely and thorough?

We have chosen to answer questions 22 and 23 together. Making sure that police officers are provided with adequate training, guidance and support on their use will ensure that they have the necessary knowledge to make appropriate decision on whether to issue an OOC. On-going review of OOC decisions should be an integral part of this process, with issues communicated directly to officers to ensure that they are used appropriately.

The additional powers given to police, introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2013, allowing them to authorise conditional cautions without referral to the Crown Prosecution Service are welcome. Use of conditional cautions remains low when compared with other OOCs, yet they have the potential to provide a constructive and supportive means of preventing future offending, with compliance rates in 2012 at 83%.<sup>8</sup>

We are not yet aware of the impact that these legislative changes have had on use of the conditional caution, however one can reasonably expect that their use will increase. Concerns have been raised about whether the conditional caution acts as a dragnet, drawing people further into the criminal justice system when a less formal disposal would be appropriate. This was one area that Ministers in the previous government were cautious of when piloting the Women's Specific Condition, a concern that the evaluation team supported.<sup>9</sup>

The removal of CPS involvement will inevitably mean that some people will receive conditional cautions when they would not have done so in the past. Therefore there will need to be regular periods of review within police force areas to ensure that they are being used appropriately, not only for those who have committed more serious offences, but also where a more proportionate disposal may have been a more appropriate response.

---

<sup>8</sup> Ministry of Justice (2013) Wider Out of Court Disposals (OOC) Review: Impact Assessment, London: Ministry of Justice

<sup>9</sup> Easton, H. et al (2010) Conditional cautions: Evaluation of the women specific condition pilot, London: Ministry of Justice

**Question 25:** How should we make sure that offenders are treated equally?

The principle of equal treatment does not mean that everyone should be treated the same. Where the underlying circumstances are different, different approaches may be needed to achieve equitable outcomes. The Equality Duty requires public services, including those delivered by the private and voluntary sector, to assess and meet their different needs.

### **Mental Health and Learning Disabilities**

The Prison Reform Trust has a particular interest in ensuring that the needs of vulnerable offenders are met by criminal justice, public health and allied services. Our *No One Knows* programme was a three year UK-wide programme which explored and publicised the experiences of people with learning disabilities and difficulties who were in contact with the criminal justice system.

This work is being taken forward as part of the *Care not Custody* coalition, a partnership lead by the National Federation of Women's Institutes with the Prison Reform Trust. *Care not Custody* is concerned with the effective recognition, treatment and support of offenders with mental health problems, learning disabilities and other learning, developmental and behavioural disorders.

We believe that links with the emerging liaison and diversion services could provide a useful means of assessment. Given the diversionary nature of a conditional caution it will be essential that there are safeguards in place to ensure that people with mental health problems and learning disabilities are not set up to fail due to their not understanding the conditions asked of them and so end up being prosecuted for the original offence. Our research indicates that the suggestibility of some people with learning disabilities could lead them to plead guilty to an offence and refuse to take up the offer of legal advice.

### **Women**

Women's centres and women-specific services play a key role in delivering effective OOCs for women involved in low level offending. Most women's community centres provide services on a voluntary basis to vulnerable women at risk of offending, women referred by the police as an alternative to prosecution, as well as supervising women offenders serving a court order. Some centres deliver schemes in partnership with police, probation and health, others with local authorities, drawing funding from different budgets and workstreams.

Service level agreements between women's centres and local police forces, and steering groups bringing together diverse service providers, are examples of strategic partnerships which have developed locally to facilitate closer working

between statutory services like police, probation and the courts and women's centres.<sup>10</sup> Some of these centres are able to show extremely low reoffending rates for women referred to their services – for example Together Women Projects (TWP) across the North West report reoffending rates of between 3-6%.<sup>11</sup>

We welcome the fact that a number of police forces are piloting innovative out of court disposal mechanisms such as 'triage' schemes that seek to address offending behaviour by:

- redirecting those who have committed low-level offending away from formal prosecution;
- where appropriate, directing women into restorative justice or supportive interventions where they have evident needs (for example drug and alcohol) and/or meet specified criteria (for instance, it is a first offence, or shoplifting of goods below a certain value);
- improving collaborative decision-making between statutory partners; and
- expediting prosecution in cases where it is deemed necessary.

In addition to the women's specific conditional caution there are other OOCs which can facilitate access to support services for women who commit low level minor offences. For example, the Fixed Penalty Notice Fee Waiver Scheme is being used by South Yorkshire police, in partnership with NHS Yorkshire, to address a variety of behaviour, including alcohol-related offences. Offenders issued with a notice who volunteer to attend and successfully complete an alcohol awareness session and a follow-up session with local alcohol services within 28 days of receiving it, have the fine waived. A women-specific waiver scheme has been developed for use in cases of theft and criminal damage. Whilst the scheme is dependent on referral processes and local service provision, the Fixed Penalty Notice fee waiver scheme is an example that could be adapted to meet local need. Humberside police are considering adapting the model as part of the women's triage scheme in operation in Hull.

## **Black and Minority Ethnic Offenders**

The Prison Reform Trust is also currently contributing to two government reviews on black and minority ethnic disproportionality in the criminal justice system, one led by Baroness Young, and the other by Justice and Home Office Minister Damien Green MP. It will be important for the findings of both of these reviews to inform any future development or change to the OOC framework.

---

<sup>10</sup> Radcliffe, P. & Hunter, H. (2013) The development and impact of community services for women offenders: an evaluation, ICPR: London

<sup>11</sup> Together Women (2013) Breaking the cycle: Empowering women to promote real changes - 2012 impact report, Leeds: TWP

**Question 26:** How should the role of central guidance be balanced against the need for local choice?

An effective national framework for OOCs should facilitate police discretion, rather than prescribe for every eventuality. We would be cautious of anything that limited the existing discretion already available to police. Guidance should allow for forces to learn and adopt local responses to meet their needs, with periodic review of their use to ensure they are being used appropriately.

As ACPO lead on out-of-court-disposals, Chief Constable Lynne Owens said in response to this review:

“It is important that there is room for officer discretion in any system to ensure the punishment is proportionate to the offence. I’m pleased that the Simple Cautions Review showed that where discretion is being used it is being done so properly, and in my view this is important to maintain.”<sup>12</sup>

**Prison Reform Trust  
January 2014**

---

<sup>12</sup> Association of Chief Police Officers website, available at <http://www.acpo.presscentre.com/Press-Releases/Out-of-court-disposals-review-27a.aspx>