



BRIEFING PAPER

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Police, Crime, Sentencing and Courts Bill: Part 6, Cautions

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Summary

This briefing paper is one of a collection of Commons Library briefing papers on the [Police, Crime, Sentencing and Courts Bill](#) (the Bill). It deals only with the provisions in Part Five of the Bill which concern out of court disposals. Briefing papers dealing with other parts of the Bill and general background, are available on the [Commons Library website](#).

What would Part 6 of the Bill do?

Part 6 of the [Police, Crime, Sentencing and Courts Bill](#) (the Bill) would replace most existing out of court disposals (OOCs) with two new ones: the diversionary caution and the community caution. This would formalise and amend the “two-tier framework” (see below) for out of court disposals. At present around a third of English and Welsh police forces operate a two-tier framework for OOCs by using two of the six available OOCs. Conservative governments have been supportive of police use of the two-tier framework. The current Conservative Government committed to introducing legislation to formalise it in the White Paper [A Smarter Approach to Sentencing](#) (published September 2020).

What is the current system for out of court disposals?

Out of court disposals (OOCs) are used in cases where a charge or prosecution is not in the public interest. Disposing of a case out of court is supposed to provide a less costly and speedier justice outcome.

Any criminal offence can qualify for disposal out of court. However, OOCs can only be used when offenders accept them. In most cases offenders must admit guilt to accept an OOC. The police use ‘gravity matrixes’ to decide on a case by case basis whether to use an OOC. A [national adult gravity matrix](#) is published by the National Police Chiefs Council (NPCC) but some forces use local versions. Using their matrix, police officers give cases they have solved a score based on the seriousness of the offence and the presence of mitigating/ aggravating factors. The lower the score assigned to an offence the more likely it is to be disposed of out of court.

At present, there are four categories of adult out of court disposals (OOCs):

- **Cautions.** Formal warning for a criminal offence. There are two types of adult cautions:
 - *Conditional cautions* require offenders to meet conditions designed to rehabilitate, provide reparation and punish.
 - *Simple cautions* are purely formal warnings.
- **Community Resolutions (CRs).** A contract between the police and accused persons in which the accused agrees to undertake specified activities designed to rehabilitate, provide reparation or punish.
- **Penalty Notices for Disorder (PNDs)/ Fixed Penalty Notices (FPNs).** A process by which accused persons can discharge their liability for a listed offence by paying a fine. In some cases accused persons are offered the chance to attend an educational course in place of a fine (these are known as PND-Es).
- **Cannabis/khat warnings.** A warning for possessing cannabis for personal use.

Police officers choose which OOC to use depending on the circumstances of the offence. Some offences will not qualify for disposal by certain OOCs. For example, only “penalty offences” can be disposed of by PND. Sometimes, force level policies determine which

OCCD must be used for certain offences. For example, in some forces officers are told to issue cannabis warnings when they catch someone with a small amount of cannabis consistent with personal who has no previous drugs offences.

In 2019, approximately 192,000 out of court disposals were issued in England and Wales. This was the lowest number in a year since 1984 (see the table in the Appendix for annual figures since 1970) and around 28,000 fewer than in 2018. Out of court disposals were issued in around 14% of proven offences in 2019.

In 2019, the most common category of out of court disposal was community resolutions (105,000 disposals), followed by cautions (47,000), PNDs (19,800) and cannabis/khat warnings (19,500).

What is the two-tier framework?

The two-tier framework is a system by which forces pledge **not** to use simple cautions, PNDs and cannabis warnings for adult cases. Instead officers only use conditional cautions and community resolutions when disposing of adult cases out of court.

The two-tier framework for OCCDs

Conditional cautions

A statutory disposal, currently legislated for in [Part 3](#) of the *Criminal Justice Act 2003* (as amended). Conditional cautions are a formal warning or a criminal offence which requires an offender to meet certain conditions. The Ministry of Justice maintains statutory guidance on their use in the form of a [Code of Practice for adult conditional cautions](#). The Crown Prosecution Service has also published [guidance to police officers on issuing conditional cautions](#).

Offences	Any criminal offence can be disposed of by conditional caution. However, in accordance with guidance, they are rarely used to dispose of cases involving domestic violence or hate crime. Statutory guidance says issuing a conditional caution is “unlikely to be appropriate where the offence forms part of a pattern of offending”
Evidential test	The police <i>should</i> apply the principles of the Full Code Test when issuing conditional cautions. This means that they should only be issued when there is enough evidence to suggest the accused would be convicted at trial.
Criminal record	Conditional cautions issued to adults for certain serious offences will always be disclosed in a criminal record check. Conditional cautions for all other offences will no longer appear on a criminal record check six years after issue.
Conditions	Any condition that facilitates an offender’s rehabilitation or ensures they make reparation for their offence can be attached assuming it is “appropriate, proportionate and achievable”. At present the maximum financial penalty is £150 but the Secretary of State could raise fine levels up to £250. A condition that requires the offender to be at a certain place at a certain time (like rehabilitation classes or community service) can only require an offender attend 20 hours in total. Victims are consulted on the condition attached to the offender’s caution. A victim’s chosen condition must be attached where reasonable.

Consequence on breach	Those who fail to comply with their conditions can be arrested and may face prosecution for the offence they were cautioned with.
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Community resolutions

A non-statutory disposal. Community resolutions are voluntarily contracts between the police and accused persons in which the accused agrees to undertake specified activities designed to rehabilitate, provide reparation or punish. Some guidance on their use is included in [statutory guidance for frontline professionals on anti-social behaviour powers](#).

Offences	Any criminal offence. Community resolutions can also be used in cases involving anti-social behaviour that do not meet the criminal threshold. Community resolutions are typically used for less serious offences.
Evidential test	When there is a “reasonable suspicion” an individual is responsible for a crime or anti-social behaviour.
Criminal record	May be disclosed as part of an enhanced criminal records check.
Conditions	Conditions chosen, in collaboration with the victim, from a local Community Remedy Document. Community Remedy Documents are published by the local Police and Crime Commissioner (or the Mayor in London and Manchester).
Consequence on breach	No consequence on breach.

Fourteen police forces have adopted the two-tier framework (a third of all forces in England & Wales). The National Police Chiefs Council has endorsed the two-tier framework through its [strategy for charging and out of court disposals](#). Its [national adult gravity matrix](#) is based on the framework. Offences which score ‘one’ on the matrix are likely to be disposed of by community resolution and offences which score ‘two’ are likely to be disposed of by conditional caution. Offences which score above two are likely to be charged. This makes conditional cautions the “upper-tier” disposal and community resolutions the “lower-tier” disposal.

The use of the framework aligns with Conservative Party policy. The Conservative Party has long favoured OOCs which attach conditions and argued against the use of OOCs which are purely warnings. Successive Conservative governments have argued that OOCs which set conditions promote offender rehabilitation, victim reparation and ensure offenders are appropriately punished.

How would the new OOCs compare to the existing two-tier framework?

The Bill would introduce two new types of cautions, the diversionary caution and the community caution, both of which are comparable to the existing conditional caution. It would require officers to use one of the two new cautions when disposing of criminal cases out of court. It would also repeal existing legislation which regulates the current OOCs. This would result in all police forces using the same system for disposing of cases out of court, bringing national consistency to a presently fragmented system.

The proposed OOCs

Diversionsary cautions

Offences	<p>Could be used for any offence. However, could only be used for indictable-only offences (those that must be tried in a Crown Court) in “exceptional circumstances” and with consent of the Director of Public Prosecutions (DPP).</p> <p>Regulations would provide for rules about their use to dispose of some cases involving repeat offenders.</p>
Evidential test	<p>Same as with present conditional cautions. The police should apply the principles of the Full Code Test. This means that diversionsary cautions should only be issued when there is enough evidence to suggest the accused would be convicted at trial.</p>
Criminal record	<p>Conditional cautions issued to adults for certain serious offences will always be disclosed in a criminal record check. Conditional cautions for all other offences will no longer appear on a criminal record check six years after issue.</p>
Conditions	<p>In consultation with the victim, officers would be able to choose any condition(s) from the following types:</p> <ul style="list-style-type: none"> • Rehabilitative and reparative conditions: These include restrictive conditions (i.e. those that prevent offenders from going to certain places), attendance conditions (i.e. alcohol misuse support groups) and unpaid work conditions (i.e. community service). Attendance and unpaid work conditions can only require an offender attend up to 20 hours. • Financial penalty conditions: Regulations would set rules for deciding the value of the fine. There is no maximum fine value in the Bill. • Foreign offenders conditions: Conditions can be issued to foreign offenders which require them to return to their home country.
Consequence on breach	<p>Those who fail to comply with their conditions can be arrested and may face prosecution for the offence they were cautioned for.</p>

Community cautions

Offences	<p>Will not be used in cases involving indictable-only, certain either-way offences (offences triable in the magistrates’ court or Crown Court) and certain summary offences (offences triable only in the magistrates’ court). Regulations would provide a list of the either-way and summary offences that would not qualify for disposal by community caution.</p> <p>Regulations would provide for rules about their use to dispose of some cases involving repeat offenders.</p>
Evidential test	<p>Same as with present conditional cautions. The police should apply the principles of the Full Code Test. This means that community cautions should only be issued when there is enough evidence to suggest the accused would be convicted at trial.</p>

Criminal record	Community cautions issued to adults for certain serious offences will always be disclosed in a criminal record check. Community cautions for all other offences will no longer appear on a criminal record check six years after issue.
Conditions	<p>In consultation with the victim officers would be able to choose any of the conditions from the following types:</p> <ul style="list-style-type: none"> • Rehabilitative and reparative conditions: These include restrictive conditions (i.e. those that prevent offenders from going to certain places), attendance conditions (i.e. alcohol misuse support groups) and unpaid work conditions (i.e. community service). Attendance and unpaid work conditions can only require an offender to attend up to 10 hours. • Financial penalty conditions: Regulations would set rules for deciding the value of the fine. There is no maximum fine value in the Bill.
Consequence on breach	Failure to meet a community caution condition (including a financial penalty condition) could result in a police-issued fine. The payment of this fine is enforced by a Magistrate in accordance with rules set out in the Bill.

What impact might the new system have?

The proposed system is **very likely to be more costly**. The Government [estimates](#) the policy will cost a total of **£109.19 million over ten years**. It thinks the criminal justice system will incur extra operational costs of around **£15.58 million per year**. It also thinks the system will cost the police around £13.70 million to implement (over two years).

These estimates are based on data from a pilot of the current two-tier framework carried out in 2014. The actual costs are likely to be higher because some costly features of the proposed system, like proposed restrictions on the use of OOCs for certain offences, were not present during the pilot.

The Government hopes the proposed system will help reduce reoffending. Available data **does not suggest short-term reoffending rates are likely to go down**. The [evaluation of the 2014 pilot](#) of the two-tier framework found **no statistically significant difference** between the short-term re-offending rates of OOC offenders in two-tier framework areas to those in comparable areas not using the framework. However, this data was based on a small sample and did not analyse the effect of different conditions.

The Government also hopes the new system will improve victim satisfaction because more victims will be involved in the OOC process. It is true that more victims will be involved in the OOC process under the new system, but this is **unlikely to have a big impact on victim satisfaction rates**. This is because the victim satisfaction rate for OOC cases is already good. In 2019/20 [84% of victims whose offender was issued a caution](#) said they were satisfied with the police, a similar rate to victims whose offenders were charged (83%).

1. Background

1.1 What are out of court disposals (OOCs)?

Out of court disposals (OOCs) are used in cases where a charge or prosecution is not in the public interest. Disposing a case out of court is supposed to provide a less costly and speedier justice outcome.

Any criminal offence can qualify for disposal out of court. The police use 'gravity matrixes' to decide on a case by case basis whether to use an OOC. A [national adult gravity matrix](#) is published by the National Police Chiefs Council (NPCC) but some forces use local versions. Using the matrix, police officers give cases they have solved a score based on the seriousness of the offence and the presence of mitigating/ aggravating factors. The lower the score assigned to an offence the more likely it is to be disposed of out of court.¹

There are no appeals processes for OOCs because those issued with them must accept them by admitting guilt (or, in the case of Penalty Notices for Disorder/ Fixed Penalty Notices, choosing to discharge their liability for an offence). Accused persons who refuse an OOC can contest their innocence at court should the police charge them and their case proceeds to prosecution. Some people who accept an OOC might be able to challenge it after the fact via judicial review if it is arguable that it was issued unlawfully.

1.2 Types of OOCs

At present, there are four categories of adult out of court disposals (OOCs):

- **Cautions.** Formal warning for a criminal offence. There are two types of adult cautions:
 - *Conditional cautions* require offenders to meet conditions designed to rehabilitate, provide reparation and punish.
 - *Simple cautions* are purely formal warnings.
- **Community Resolutions (CRs).** A contract between the police and accused persons in which the accused agrees to undertake specified activities designed to rehabilitate, provide reparation or punish.
- **Penalty Notices for Disorder (PNDs)/ Fixed Penalty Notices (FPNs).** A process by which accused persons can discharge their liability for an offence by paying a fine. In some cases accused persons are offered the chance to attend an educational course in place of a fine (these are known as PND-Es).
- **Cannabis warnings.** A warning for possessing cannabis for personal use.

¹ NPCC, [Gravity Matrix \(Adult\): Two-tier framework](#), February 2019; Youth Justice Resource Hub, [ACPO Gravity Matrix](#) [last accessed April 2020]

Detailed information about each OOC is provided in section four of the Library's paper [police powers: an introduction](#).

Understanding how OOCs compare

There are many technical differences between the current OOCs but perhaps the key difference is whether conditions can be attached. Over the past ten years policy makers have favoured OOCs which attach conditions. The main policy aim of Part Five of the Bill is to ensure that offenders are always given conditions with their OOC.² The Government argues OOC conditions support offender rehabilitation and victim reparation. It also supports attaching conditions to OOCs as a way of ensuring offenders are appropriately punished.³

Three current OOCs involve conditions and three are purely warnings.

Warning only	Conditions
Simple caution	Conditional cautions
PND/ FPNS	Community resolutions
Cannabis warnings	PND-Es

The OOCs which involve conditions are not necessarily like each other in other ways. They are procedurally very different, have different impact on an offender's criminal record and the consequences for not complying with the conditions vary. A full description of conditional cautions and community resolutions (the most common) is given later in this paper. The Library paper [police powers: an introduction](#) provides a detailed description of all six OOCs.

OOCs which attach conditions require more police time to administer. Issuing officers are often required to follow more rules when applying them because of the seriousness of their consequences. OOCs with conditions also require police time monitoring compliance with conditions. Their time-consuming nature may undermine their use as a less costly and speedier justice outcome.

1.3 How often are OOCs issued?

In 2019, approximately 192,000 out of court disposals were issued in England and Wales.⁴ This was the lowest number in a year since 1984 (see the table in the Appendix for annual figures since 1970) and around 28,000 fewer than in 2018.⁵

² ENs, para 91

³ Ministry of Justice, [A Smarter Approach to Sentencing](#), September 2020, para 166

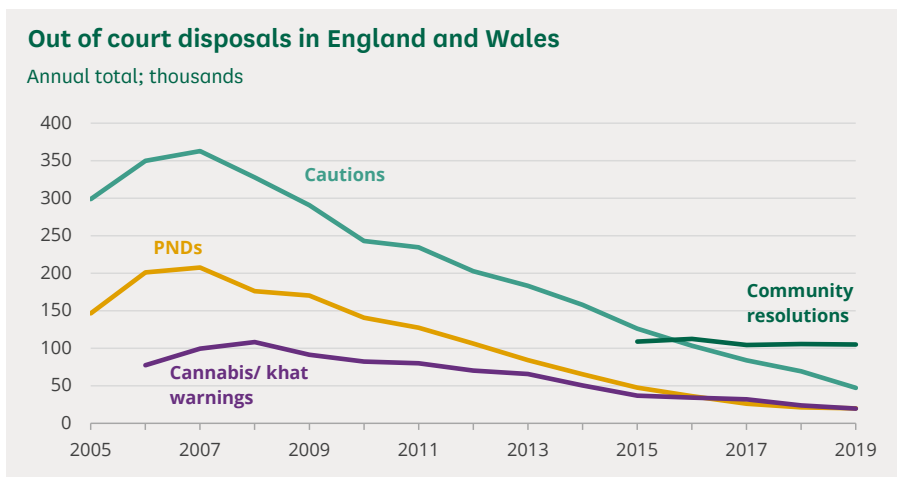
⁴ Ministry of Justice, [Criminal justice statistics October-December 2019](#), table A1.1 and Outcomes by Offence data tool

⁵ The Ministry of Justice has removed cautions from the main tables in its most recent published statistics. This is "due to the Ministry of Justice's data extract of the Police National Computer being inaccessible following the COVID-19 guidelines and regulations around movement and social distancing." However, cautions do still appear in the 'Outcomes by offence data tool' in the 2019 criminal justice statistics. These figures have been used here but should be treated as subject to future revision.

The use of out of court disposals has been in decline since 2008. Prior to that their use peaked at 670,000 disposals in the year 2007. Their use has fallen nearly three quarters since then. In 2008, community resolutions were introduced, and these remain the only type of out of court disposal that has been used at a similar rate in each of the past 5 years. Data on community resolutions is only available from 2015 onwards.

In 2019, the most common category of out of court disposal was community resolutions (105,000 disposals), followed by cautions (47,000), PNDs (19,800) and cannabis/khat warnings (19,500).

The use of community resolutions has increased following the National Police Chiefs Council’s endorsement of the “two-tier framework” for out of court disposals (see section 1.5 below). Around 109,000 community resolutions were issued between October 2018 and September 2019, a 4% increase on the same period in 2016/17.



Source: Ministry of Justice, [Criminal justice statistics October-December 2019](#), table A1.1 and Outcomes by Offence data tool

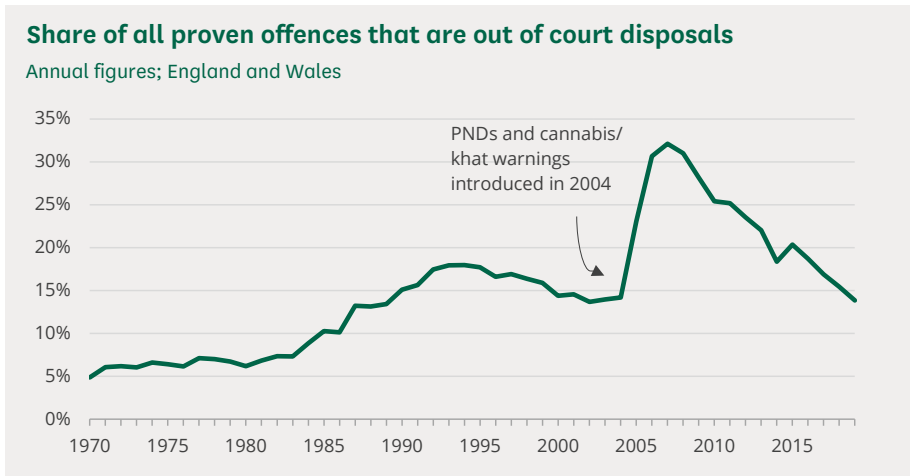
Notes: 1) These figures relate to defendants for whom these offences were the principal offences for which they were dealt with. When a defendant has been found guilty of two or more offences it is the offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the offence selected is the offence for which the statutory maximum penalty is the most severe.

2) Community resolutions were introduced in 2009 but data is only available (and included here) from 2015; There is no data for cannabis/khat warnings from 2005.

Out of court disposals were issued in around 14% of proven offences in 2019. A proven offence is considered to have taken place when an out of court disposal has been issued or a prosecution resulting in conviction has been made.

As shown in the chart below, out of court disposals now make up a smaller share of proven offences than in previous years. Following the introduction of PNDs and cannabis (and later khat) warnings in 2004, out of court disposals rose sharply to account for a peak of 32% of all proven offences in 2007.

Since then the share they make up of proven offences has declined in almost every year. This is primarily the result of the number of out of court disposals having fallen more than the number of convictions in court during this time.

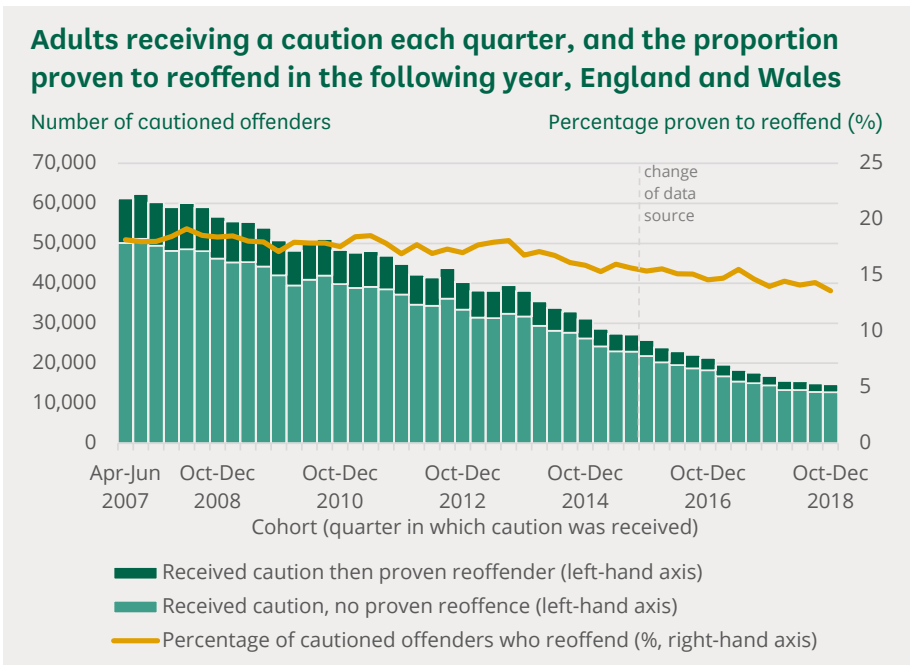


Source: Ministry of Justice, [Criminal justice statistics October-December 2019](#), table A1.1 and Outcomes by Offence data tool

Notes: Community resolutions were introduced in 2009 but data is only available (and included here) from 2015; There is no data for cannabis/khat warnings for 2005.

1.4 Reoffending after caution

The Ministry of Justice publishes [statistics](#) which track reoffending rates among recipients of different types of disposal, including cautions. As shown in the chart below, the large fall in the number of adults receiving cautions has been accompanied by a gradual decline in the proportion of cautioned adults who are proven to reoffend in the following twelve months, from an average of 18% during the period 2007-2013, to around 14% for those cautioned in 2018.



Source: Ministry of Justice, [Proven reoffending statistics: October to December 2018](#), table C1a, Adult proven reoffending data, by disposal1 (3 monthly).

Note: Proven reoffence is defined as any offence committed in a one-year follow-up period that resulted in a court conviction or caution in this timeframe or a further six-month waiting period (to allow time for cases to progress through the courts).

1.5 Coalition Government review

The Coalition Government conducted a review of adult OOCs in late 2013 early 2014.⁶ The Government's review was motivated by a desire to simplify a system they said had become "difficult for the public to understand and for practitioners to implement".⁷ The Coalition Government were concerned that OOCs were not helping to reduce reoffending or providing appropriate consequences to offenders.⁸ This tied in with the Coalition Government's programme for wider criminal justice reform, which was focused on offender rehabilitation and victim reparation (themes the previous Labour Governments had also been interested in).

The last twenty years of legislative reforms to OOCs

2003: Conditional cautions introduced.⁹

2012:

- PND-Es introduced allowing officers to offer educational courses to those accused of penalty offences.¹⁰
- Police allowed to issuing conditional cautions without consulting prosecutors.
- Foreign offender condition introduced. Conditions can now be used to help secure the removal of an offender from the UK.

2014:

- Introduction of the legal requirement for police to consult victims on the conditions attached to a conditional caution.¹¹
- Introduction of the requirement for Police and Crime Commissioners/ Mayors to publish a Community Remedy document listing possible actions to be carried out as part of community resolutions.¹²

2015: the use of simple cautions for indictable only offences, certain serious 'either way' offences and in cases involving repeat offenders is restricted. Such cases can now only be disposed of by simple caution in "exceptional circumstances" and with the consent of the DPP.¹³

As part of the review the Coalition Government mapped the OOC framework, conducted roundtables with criminal justice practitioners and ran a public consultation.¹⁴

The MoJ received 172 responses from police forces, magistrates, voluntary organisations and members of the public. Most consultees (71%) agreed the OOC system should be simplified. However, there was less support for Government proposals to strengthen the punitive aspects of OOCs. Only 13% of consultees agreed that punitive

⁶ MoJ, [Out of Court Disposals Consultation Response](#), November 2014

⁷ Ibid, p5

⁸ Ibid

⁹ [Part 3](#), *Criminal Justice Act 2003*

¹⁰ [Schedule 23](#), *Legal Aid, Sentencing and Punishment of Offenders Act 2012*

¹¹ [s23ZA](#), *Criminal Justice Act 2003* [as inserted by [s103](#)(1), *Anti-social Behaviour, Crime and Policing Act 2014*]

¹² [s102](#), *Anti-social Behaviour, Crime and Policing Act 2014*

¹³ [s17](#), *Criminal Justice and Courts Act 2015*

¹⁴ MoJ, [Out of Court Disposals Consultation Response](#), November 2014, p5

conditions supported rehabilitation, although around half (49%) did support the idea of attaching stronger financial penalties to OOCs.¹⁵

Proposals

Following the review the Coalition Government proposed to replace all existing OOCs with two new ones: a 'suspended prosecution' and a community resolution.¹⁶

The proposed 'suspended prosecution' would be like conditional cautions. It would have been used to tackle "more serious offending, such as theft, violence or drug offences." Offenders issued with a 'suspended prosecution' would have to comply with conditions or face prosecution for the initial offence.

The proposals would have removed OOCs which are purely warnings. The Coalition Government argued this would ensure that offenders "face consequences" for their actions.¹⁷ They said punitive financial conditions should be part of "suspended prosecutions" and community resolutions.¹⁸

The Coalition Government recognised their proposals represented a significant change to the OOC framework. For this reason they agreed to pilot the system before legislating for it.¹⁹

1.6 Two-tier framework

Police leaders have pledged to voluntarily implement aspects of Coalition Government's proposals by phasing out their use of simple cautions, cannabis warnings and PNDs. In doing so they will introduce a "two-tier framework" for OOCs. Under the framework conditional cautions are adopted as an "upper-tier" disposal and community resolutions as a "lower-tier" disposal.

A number of police forces have fully adopted the two-tier framework (a third of all forces in England & Wales).²⁰ The National Police Chiefs Council (the coordinating body for UK police forces) has endorsed the two-tier framework through its [strategy for charging and out of court disposals](#). Its [national adult gravity matrix](#) is based on the framework. Offences which score 'one' on the matrix are likely to be disposed of by community resolution and offences which score 'two' are likely to be disposed of by conditional caution. Offences which score above two are likely to be charged.

Evaluation of a pilot of the framework

Three forces (West Yorkshire, Leicestershire and Staffordshire) took part in a year-long pilot of the two-tier framework in 2014 (following the conclusion of Coalition Government's OOC review). The Ministry of

¹⁵ Ibid, p17-18

¹⁶ Ibid, p7

¹⁷ Ibid, p9

¹⁸ Ibid, p7

¹⁹ Ibid, p12

²⁰ ENs, para 94

Justice commissioned an independent evaluation of that pilot which was published in 2018.

The evaluation found that the **use of OOCs was “no different”** in the pilot areas to England and Wales as a whole. It described this as “reassuring” given the potential effect of such a major change to the OOC system.²¹

The evaluation found **no statistically significant difference between the short-term re-offending rates** (reoffending within three months) of OOC recipients in the pilot areas to those in other comparable police force areas.²² Follow-up analysis did not find a statistically significant difference in 12-month reoffending rates either.²³

The evaluation did find **the two-tier framework “appreciably more expensive”**. The criminal justice system in pilot areas was estimated to have spent around 70% more on administering OOCs than in non-pilot areas. The evaluation concluded the increased spending was the result of using conditional cautions in place of simple cautions. Conditional cautions require more police time to administer and monitor.

The evaluation was unable to make a cost-benefit analysis of the extra spend because it could not quantify the benefit of victim satisfaction and were not able to measure the long-term impact on reoffending.²⁴

The evaluation concluded there were “positive indications” from using the system but that more information was needed to assess its overall impact.²⁵

1.7 Sentencing White Paper

The voluntary implementation of two-tier framework by forces was endorsed by the 2017-2019 Conservative Government, but no plans were announced for legislation to formalise it.²⁶ This changed following the 2019 General Election. The new Conservative Government, in its White Paper [A Smarter Approach to Sentencing](#) (published September 2020), says the “time is now right” to move the framework onto a “legislative footing”.²⁷

The Government committed to legislate for two new OOCs: an upper tier disposal “along the lines of the current statutory conditional caution”; and, a lower-tier disposal “along the lines of the current informal community resolution”.²⁸ The Government said this would

²¹ MoJ, [Adult Out of Court Disposal Pilot Evaluation – Final Report](#), 2018, p23

²² Ibid, p36

²³ MoJ, [Out of Court Disposals Pilot: Cautions Reoffending Analysis](#), 2018, p5

²⁴ MoJ, [Adult Out of Court Disposal Pilot Evaluation – Final Report](#), 2018, p46-47

²⁵ Ibid, p49

²⁶ [PO HL16982, Alternatives to Prosecution](#), answered on 22 July 2019; NPCC, [Charging and out of court disposals: A national strategy 2017-2021](#), undated, paragraph 2.5

²⁷ MoJ, [A Smarter Approach to Sentencing](#), September 2020, para 163

²⁸ MoJ, [A Smarter Approach to Sentencing](#), September 2020, para 163

“bring national consistency, an opportunity for early intervention with vulnerable offenders and a greater focus on victims”²⁹

The White Paper also expressed support for police use of “deferred prosecutions”. Several police forces operate deferred prosecutions schemes. Through these schemes certain offenders are offered structured rehabilitation programmes to avoid court. Offenders who fail to complete their programme are prosecuted. There is some evidence such schemes can reduce reoffending and are less costly than simply prosecuting. Participants of a West Midlands scheme piloted between 2011 and 2014 were 35% less likely to reoffend than their counterparts not on the scheme. The West Midlands pilot is estimated to have resulted in around 68% fewer court cases, saving £1,000 per case (including costs of the structured interventions).³⁰

²⁹ Ibid, para 166

³⁰ MoJ, [The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System](#), September 2017, p28

2. Diversionary cautions

Clauses 77 to 85 of the Bill would introduce diversionary cautions. Diversionary cautions would be a new out of court of disposal (OCD) designed to replace conditional cautions, which would be repealed by **clause 96** of the Bill.

Successive Conservative Governments have supported the replacement of conditional cautions with a comparative OCD as part of reforms to simplify the OCD system. The current Government committed to legislating for this change in the September 2020 White Paper [A Smarter Approach to Sentencing](#).

2.1 Conditional cautions

[Part 3](#) of the *Criminal Justice Act 2003* (as amended) provides police officers (and other authorised persons) with the power to dispose of adult cases with conditional cautions.³¹ Offenders issued with conditional cautions must adhere to the specified conditions attached to their caution. They agree to these conditions by signing an official document in which they also confirm their guilt.³² Those who fail to comply with their conditions can be arrested and may face prosecution for the offence they were cautioned with.³³

Any criminal offence can be disposed of by conditional caution. However, in accordance with guidance they are rarely used to dispose of cases involving domestic violence or hate crime.³⁴

Offenders can be issued with a conditional caution more than once. However, statutory guidance says issuing a conditional caution is “unlikely to be appropriate where the offence forms part of a pattern of offending”.³⁵

Adults issued with a conditional caution do not receive a criminal conviction, but it will appear on a criminal records check.³⁶ Conditional cautions issued to adults for certain serious offences will always be disclosed in a criminal record check. Conditional cautions for all other offences will no longer appear on a criminal record check six years after issue.³⁷

The police *should* apply the principles of the [Full Code Test](#) when issuing conditional cautions.³⁸ This means that they should only be issued when there is enough evidence to suggest the accused would be convicted at trial. Conditional cautions should not be offered as a way of getting the

³¹ [s22\(1\), Criminal Justice Act 2003](#)

³² [s23\(5\), Criminal Justice Act 2003](#)

³³ [s24-s24A, Criminal Justice Act 2003](#)

³⁴ CPS, [Conditional Cautioning: Adults – DPP Guidance](#), November 2019, para 3.1 & 3.2

³⁵ MoJ, [Code of Practice for Adult Conditional Cautions](#), January 2013, para 2.12

³⁶ *Ibid*, paras 3.7

³⁷ Disclosure & Barring Service, [Filtering rules for DBS certificates \(criminal records checks\)](#), 17 December 2013

³⁸ MoJ, [Simple Cautions for Adult Offenders](#), April 2015, para 24 & 26; MoJ, [Code of Practice for Adult Conditional Cautions](#), January 2013, paras 2.2- 2.6

accused to admit guilt.³⁹ Conditional cautions should not be issued to those who admit guilt but provide a defence.⁴⁰

There is no process to appeal a conditional caution, but conditional cautions can be the subject of a Judicial Review. They can be quashed if the courts determine they were not issued in accordance with the relevant guidance/ law.⁴¹

The Ministry of Justice maintains a [Code of Practice for adult conditional cautions](#). This is statutory guidance issued under [section 25](#) of the 2003 Act. Changes to the Code must be approved by the Attorney General and new additions must be 'laid before Parliament'.⁴² The CPS has also published [guidance to police officers on issuing conditional cautions](#).

Consulting victims

Conditional cautions were introduced to promote the rehabilitation of offenders and victim reparation.⁴³ Originally, the police (and others authorised to issue them) were encouraged to consult the victim before deciding what conditions to attach to a conditional caution.⁴⁴ The Coalition Government amended the 2003 Act to make it a legal requirement for the police (and other authorised persons) to make a "reasonable effort" to consult victims on the conditions attached to their perpetrators caution. The police are now legally required to attach appropriate conditions chosen by victims.⁴⁵

Attaching conditions

Conditional cautions can require offenders to do anything that facilitates their rehabilitation or ensures they make reparation for their offence.⁴⁶ The conditions attached must always be appropriate, proportionate and achievable.⁴⁷ Offenders can be required to attend drug or alcohol misuse programmes, be required to apologise to their victim or take part in some form of community service.⁴⁸ A condition that requires the offender to be at a certain place at a certain time (like community service) can only require an offender attend 20 hours in total.⁴⁹

Fines are the only condition that can be attached to a caution as punishment.⁵⁰ The police set the amount to fine in line with rules set in [The Criminal Justice Act 2003 \(Conditional Cautions: Financial Penalties\) Order 2013](#). Fines are presently set at £50 for a summary offence, £100 for a either-way offence and £150 for a indictable only offence. The

³⁹ MoJ, [Simple Cautions for Adult Offenders](#), April 2015, para 21; MoJ, [Code of Practice for Adult Conditional Cautions](#), January 2013, paras 3.4

⁴⁰ Ibid

⁴¹ MoJ, [Simple Cautions for Adult Offenders](#), April 2015, para 14

⁴² [s25](#), *Criminal Justice Act 2003*

⁴³ Home Office, [Justice for all](#), Cm 5563, July 2002, paras 4.10- 4.15

⁴⁴ Ibid

⁴⁵ [s23ZA](#), *Criminal Justice Act 2003* [as inserted by [s103\(1\)](#), *Anti-social Behaviour, Crime and Policing Act 2014*]

⁴⁶ [s22\(3\)](#), *Criminal Justice Act 2003*

⁴⁷ MoJ, [Code of Practice for Adult Conditional Cautions](#), January 2013, paras 2.21

⁴⁸ Ibid paras 2.15 to 2.17

⁴⁹ [s22\(3B\)](#), *Criminal Justice Act 2003*

⁵⁰ MoJ, [Code of Practice for Adult Conditional Cautions](#), January 2013, paras 2.17

Secretary of State can amend these fine levels by order, but they cannot be set above £250.⁵¹ Offenders may be required to pay compensation to their victim as part of a reparative condition. There are no restrictions on the amount an offender can be required to pay as compensation.⁵²

2.2 Comparing the proposed diversionary with the conditional caution

The proposed diversionary caution would be **very similar** to the existing conditional caution:

- The same “authorised persons” would be able to issue them (police, HM Revenue and Customs officers and those designated by criminal justice system leaders).
- Issuing officers would have to meet the same requirements before applying them. Diversionary cautions will still only be used in cases where officers have sufficient evidence and offenders admit guilt. Issuing officers would still be legally obliged to explain the consequence of accepting the caution. Offenders would have to sign a official document declaring they accept the caution in the same way they would have to now.
- The range of conditions that could be attached would be extremely similar. Offenders could still be issued with conditions that require they attend rehabilitative programmes, take part in unpaid work or make reparations to their victims. The maximum number of hours offenders could be required to attend rehabilitative programmes or unpaid work would stay at 20 hours. Although, the Bill would allow for this to be changed by regulations.
- The consequence of breaching conditions would be the same (arrest and prosecution for the initial offence).

There are just **two key differences** between the proposed diversionary caution and the existing conditional caution.

1 The offences for which they can be issued

Under **clause 77** diversionary cautions could only be used for indictable-only offences (those that must be tried in a Crown Court) in “exceptional circumstances” **and** with consent of the Director of Public Prosecutions (DPP). This rule is currently applied to simple cautions but not conditional cautions. At present conditional cautions can be used to dispose of any offence (although in accordance with statutory guidance they are rarely used to dispose of cases involving domestic violence or hate crime).⁵³

Clause 95 would allow the Secretary of State to make regulations prohibiting the use of diversionary cautions in cases involving some offenders who have previously been cautioned. The precise detail of which offenders would not qualify would be set out in the regulations.

⁵¹ [s23A\(3\), Criminal Justice Act 2003](#)

⁵² MoJ, [Code of Practice for Adult Conditional Cautions](#), January 2013, paras 2.39

⁵³ CPS, [Conditional Cautioning: Adults – DPP Guidance](#), November 2019, para 3.1 & 3.2

At present, conditional cautions can be given to those who have been cautioned before but guidance advises against cautioning offending that forms part of a pattern.

2 The maximum amount an offender can be fined through a financial penalty condition

Conditional caution fine levels are set by the Secretary of State but cannot be above £250.⁵⁴ This limit is currently set in primary legislation. This means that Parliament would have to pass a Bill to amend the limit.

The Bill would not provide a limit for diversionary caution fines. The value of a fine would be set using rules laid out in future secondary legislation made using powers in the Bill. This secondary legislation would require Parliamentary approval via a yes/ no vote. Therefore, Parliamentarians would not have an opportunity to amend proposals regarding the value of these fines (though they would be able to reject them).

2.3 Clauses 77 to 85

Clause 76 would set out some basic information about diversionary cautions. It would provide that “authorised persons” can issue them to adults (over the age of eighteen) for any offence. Although, regulations made under **clause 95** could prohibit their use in cases involving some offenders who have previously been cautioned.

Those authorised would be police officers, police community support officers, HMICFRS officers and those authorised by a “prosecution authority”. In accordance with **clause 87** “prosecution authority” would be defined as the Attorney General, the Director of Public Prosecutions, the Director of the Serious Fraud Office, the Secretary of State and any persons proscribed in future regulations.

Under **clause 76** diversionary cautions must have one or more conditions attached to them. Offenders who breach their condition(s) would be prosecuted for the offence they were cautioned for.

Clause 76 would also provide some information for community cautions which are explained in section 3.3. of this paper.

Clause 77 would set requirements issuing officers would have to meet before issuing diversionary cautions. Issuing officers would be able use diversionary cautions when:

- they have “sufficient evidence to charge” the offender with an offence;
- they are satisfied it “should” be given; and
- the offender admits guilt.

Under **clause 77** diversionary cautions could be given for any offence. However they could only be given for indictable- only offences (those that must be tried in a Crown Court) in “exceptional circumstances” **and** with consent of the Director of Public Prosecutions (DPP).

⁵⁴ [s23A\(3\)](#), *Criminal Justice Act 2003*

Under **clause 77** issuing officers would be required to explain the consequence of accepting the diversionary caution to the offender before issuing it. This must include warning the offender that not complying with their condition(s) would result in prosecution. The offender would also be required to sign an official document confirming their guilt and agreeing to the condition(s).

Clause 78 would set out some rules for deciding on the conditions attached to a diversionary caution. Three types of conditions could be attached to a diversionary caution:

- *Rehabilitative and reparative conditions* as defined by **clause 79**.
- *Financial penalty conditions*, as defined by **clause 80**.
- *Foreign offenders' conditions*, as defined by **clause 81**.

Issuing officers would be required to consult the victim on the conditions attached to a diversionary caution. Issuing officers would also be required to attach the victim's chosen condition unless it is inappropriate or incompatible with the legislation.

Clause 79 would define rehabilitative and reparative conditions as those with rehabilitative or reparative objectives. There would be three types of rehabilitative and reparative conditions:

- *Restrictive conditions*: Those which could restrict who the offender could communicate with, where they could go, the activities they could participate in and the conduct they could carry out (including conduct which is already a criminal offence).
- *Unpaid work conditions*: Those which require offenders to carry out up to 20 hours of unpaid work.
- *Attendance conditions*: Those which require offenders to attend a "specified place" for a "specified purpose" for up to 20 hours. These conditions could be used to require drug or alcohol misuse programmes for example.

Clause 79 would prevent rehabilitative or reparative conditions from being used to require an offender stay at their own or anyone else's residence for any period of time.

Clause 79 would also allow regulations to be made to amend the maximum number of hours offenders could be required to carry out as part of unpaid work or attendance conditions. These regulations must be made by statutory instrument using the affirmative procedure.

Clause 80 would define financial penalty conditions. Financial penalty conditions would be fines attached to diversionary cautions with the object of punishing the offender. Offenders would have 28 days to pay their financial penalty. Regulations would set out how much the penalty could be. They must be made by statutory instrument using the affirmative procedure.

Clause 81 would define foreign offenders' conditions as those with the object of facilitating the departure of the offender from the UK and preventing them from returning within a set period of time. These conditions would be eligible for use in cases involving foreign offenders

who may be deported under the *Immigration Acts 1971 and 1999* and those with a deportation order in force.

Clause 82 would allow issuing officers to vary an offender's conditions with their consent.

Clause 83 would confirm that offenders are liable to face criminal proceedings for the offence they were cautioned with if they do not comply with their conditions. It would also allow the offender's declaration document to be used as evidence in such proceedings.

Clause 84 would provide police officers with a power of arrest associated with diversionary cautions. Officers would have grounds to arrest those they have "reasonable grounds" to believe have failed "without a reasonable excuse" to comply with the conditions of their diversionary caution. The police would have powers to detain and charge those arrested under clause 71. The police would be required to release those arrested under clause 72 on bail if they were not in a position to charge them whilst held in custody.

Clause 85 would require the police comply with provisions in the *Police and Criminal Evidence Act 1984* relating to street bail and detention when they arrest someone using their **clause 84** power.

General and supplementary

Clauses 94 to 99 provide general and supplementary provisions relating to both diversionary and community cautions.

Clause 94 would require the Secretary of State issue statutory guidance in relation to diversionary and community cautions in the form of a code of practice. The Secretary of State would have to publish a draft version of the code, consider comments made about that code, consult the Attorney General before issuing the code of practice **and** lay it before the House of Parliament. Parliament would be required to approve regulations commencing the code using the affirmative procedure. The Secretary of State has powers to revise the code from "time to time" but must follow the same procedure for approving it as when they draft the first code. The procedure for drafting and amending the code is very similar to comparable codes (like the [PACE Codes](#)).

Clause 95 would allow the Secretary of State to make regulations which prohibit the use of diversionary and community cautions in cases who have been cautioned before (under the new or old out of court disposal framework) in some circumstances. In accordance with **clause 86**, these regulations would be made by statutory instrument using the affirmative procedure.

Clause 96 would prohibit the use of any other caution other than diversionary and community cautions. It would repeal the relevant sections of the *Criminal Justice Act 2003* and the *Criminal Justice and Police Act 2001* which provide for conditional cautions and penalty notices for disorder (PNDs).

Clause 97 introduced **Schedule 10** which would make consequential amendments to various other pieces of criminal justice legislation which relate to the existing out of court disposal regime.

Clause 98 would make provisions for regulations made under Part Five of the Bill. As explained where appropriate in this paper, regulations making significant provisions would be made by statutory instrument using the affirmative procedure.

Clause 99 would provide necessary interpretation for Part Five of the Bill.

3. Community cautions

Clauses 74 to 81 of the Bill would introduce community cautions. Community cautions would be a new out of court of disposal (OCD) designed to be used in place of community resolutions.

3.1 Community resolutions

A community resolution is a contract between the police (or authorised persons) and an accused person in which the accused agrees to undertake an action often chosen from those listed in the local “Community Remedy Document”. Community resolutions are not a criminal conviction, but they may be disclosed as part of an enhanced criminal records check.⁵⁵ The accused’s involvement in the community resolution process is voluntary and therefore their completion of an “action” cannot be enforced.

Community resolutions are used to dispose of both criminal cases and cases involving anti-social behaviour (ASB). The Bill **would not** repeal provisions in the *Anti-social Behaviour, Crime and Policing Act 2014* associated with them. Therefore their use to dispose of ASB cases that do not meet the criminal threshold is likely to continue.⁵⁶

Police can issue a community caution for any offence when they have a “reasonable suspicion” an individual is responsible for a crime or anti-social behaviour.⁵⁷ Officers should consider if it would be “more appropriate” to issue another form of OCD before deciding on a community resolution.⁵⁸

Community resolutions are designed to give victims a say in the outcome of their case but their involvement is also “entirely voluntary”.⁵⁹ The police (and others designated) are legally obliged to consult victims wherever possible on what action their perpetrator should undertake as part of their community resolution.⁶⁰ The police should include appropriate actions chosen by victims in community resolutions.⁶¹

The Home Office maintains guidance on community resolutions as part of its [statutory guidance to frontline professionals on their anti-social behaviour powers](#).

Community Remedy Documents

Under [section 101](#) of the *Anti-social Behaviour, Crime and Policing Act 2014*, Police and Crime Commissioners (PCCs), or the Mayor’s Office in Manchester and London, are required to publish a Community Remedy

⁵⁵ College of Policing, [Possible justice outcomes following investigation](#), section 3.1.1 [last accessed 23 April 2020]

⁵⁶ c84, c85 & Schedule 9

⁵⁷ Ibid

⁵⁸ s102(4), *Anti-social Behaviour, Crime and Policing Act 2014*

⁵⁹ Home Office, [Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers Statutory guidance for frontline professionals](#), August 2019, p15

⁶⁰ s102(3-5), *Anti-social Behaviour, Crime and Policing Act 2014*

⁶¹ s102(4), *Anti-social Behaviour, Crime and Policing Act 2014*

Document.⁶² Community Remedy Documents list actions designed to rehabilitate/ punish those who have committed an offence/ behaved anti-socially or provide them with an opportunity to make amends.⁶³

The 2014 Act does not provide any further restrictions on what actions can be included in a Community Remedy Document but PCCs and Mayors are required to consider “the need to promote public confidence” in OOCs when drawing up their documents. They must also conduct appropriate consultation with their chief constable, other interested parties, and the public on the actions they include.⁶⁴ Home Office guidance provides a list of possible actions that could be included in a Community Remedy Document. These include a written or verbal apology, paying money to repair damage caused and participation in structured educational or rehabilitative activities.⁶⁵

3.2 Comparing the proposed community caution with existing OOCs

The proposed community caution is **very different** to the community resolution it is designed to replace. It is more akin to the conditional caution that is being replaced by the diversionary caution.

Comparing the community caution and the community resolution

There are **two fundamental differences** between the community caution and the community resolution.

1 Community cautions would be formally administered

It would be a formal police caution. This would mean it would appear on an offender’s criminal record in the same way other cautions do.

The new formality would require offenders meet the conditions of their OOC. Failure to meet a condition could result in a police issued fine. The payment of this fine is enforced by magistrates in accordance with rules set out in the Bill.

The formality associated with community cautions would also impose procedural rules on those issuing them. Police officers would be compelled to follow statutory guidance on their use. The Bill will provide for clearer statutory rules about the conditions that can be attached to community cautions.

This is markedly different to the current process for community resolutions. These are voluntary agreements between the police and an accused person. They do not appear on an offender’s criminal record and the actions agreed to by them are not legally enforceable. At present, there is “light touch” regulation of their use in police guidance.

2 Community cautions would involve financial penalties

⁶² s101(1), *Anti-social Behaviour, Crime and Policing Act 2014*

⁶³ s101(3), *Anti-social Behaviour, Crime and Policing Act 2014*

⁶⁴ S101(4), *Anti-social Behaviour, Crime and Policing Act 2014*

⁶⁵ Home Office, [Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers Statutory guidance for frontline professionals](#), August 2019, p14

The Bill would allow issuing officers to attach a fine to community caution as a punitive condition. At present, offenders may be asked to pay damages to their victims as part of a community resolution, but community resolutions are not used to fine individuals.

As discussed above, Failure to meet a condition (including a financial penalty condition) could result in a police issued fine. The payment of this fine is enforced by a magistrate in accordance with rules set out in the Bill.

Comparing the community caution and the conditional caution

As discussed above the community caution is more akin to the existing conditional caution. It is therefore helpful to compare them as well.

The proposed community caution would be like the conditional caution:

- The same “authorised persons” would be able to issue them (police, HMICFRS officers and those designated by criminal justice system leaders).
- Issuing officers would have to meet the same requirements before applying them. Community cautions would, like conditional cautions, be used in cases where officers have sufficient evidence and offenders admit guilt. Issuing officers would be legally obliged to explain the consequence of accepting the caution. Offenders would have to sign a official document declaring they accept the caution in the same way as those accepting conditional cautions have to now.
- The types of conditions that could be attached to a community caution would be extremely similar to those that can be attached to conditional cautions. Offenders could be issued with conditions that require them to pay a fine, attend rehabilitative programmes, take part in unpaid work or make reparations to their victims. Although, community caution conditions could only require an offender attend 10 hours of rehabilitative activities (as opposed to 20 in the current conditional and proposed diversionary caution).

There are **two key differences** between the proposed community caution and the existing conditional caution.

1 The offences they can be issued for

Issuing officers would be prohibited from using community cautions in cases involving indictable only, certain either way and certain summary offences. The exact either way and summary offences that would be covered would be set out in regulations made using powers in the Bill. If officers wanted to dispose of these cases out of court they would have to use the new diversionary cautions. Even then they would need to convince the Director of Public Prosecutions there were “exceptional circumstances” to dispose of an indictable only offence out of court.

The Bill would allow the Secretary of State to make regulations prohibiting the use of diversionary cautions in cases involving some offenders who have previously been cautioned. The precise detail of which offenders would not qualify would be set out in the regulations.

2 The effect of non-compliance with a condition.

Non-compliance with a community caution condition **would not** make an offender liable for arrest. Instead, they would make themselves liable to be fined. As discussed above, failure to meet a condition could result in a police issued fine the payment of which is enforced by a magistrate in accordance with rules set out in the Bill.

3.3 Clauses 86 to 93

The Bill provides for some basic information about community cautions in **clause 76** (which also contains provisions relating to diversionary cautions). Clause 76 would empower “authorised persons” to issue community cautions for any offence except “excluded offences”.

Clause 76 defines “excluded offences” as:

- all indictable- only offences (those that must be tried at a Crown Court),
- either-way offences (those that can be tried at a Crown or magistrates’ court) listed in regulations.
- summary offences (those that are tried in a magistrates’ court) listed in regulations.

The regulations listing the either-way and summary offences that cannot be disposed of by community caution, would be made by statutory instrument using the affirmative procedure.

Regulations made under **clause 95** could prohibit the use of community cautions in cases involving some offenders who have previously been cautioned. These regulations would also be made by statutory instrument using the affirmative procedure.

Clause 76 defines “authorised persons” as police officers, police community support officers, HMICFRS officers and those authorised by a “prosecution authority”. Prosecution authority is defined in **clause 87** as the Attorney General, the Director of Public Prosecutions, the Director of the Serious Fraud Office, the Secretary of State, and persons proscribed in future regulations.

Clause 76 would also set out that community cautions must have one or more conditions attached to them. It would provide that breach of such a condition would result in “a financial penalty”.

Clause 86 would set requirements for the issuing of community cautions. These are the same requirements as for issuing a diversionary caution, minus the requirement relating to indictable only offences, which is not relevant to community cautions.

Issuing officers would be able use community cautions when:

- they have “sufficient evidence to charge” the offender with an offence;
- they are satisfied it “should” be given; and
- the offender admits guilt and accepts the caution.

Under **clause 86** issuing officers would be required to explain the consequence of accepting the diversionary caution to the offender before issuing it. This must include warning the offender that not complying with their condition(s) would result in a fine. The offender would also be required to sign an official document confirming their guilt and agreeing to the condition(s).

Clause 87 would set out some rules for deciding the conditions attached to a community caution. Two types of conditions could be attached to a community caution:

- *Rehabilitative and reparative conditions* as defined by **clause 88**; and
- *Financial penalty conditions*, as defined by **clause 89**.

Issuing officers would be required to consult the victim on the conditions attached to a diversionary caution. Issuing officers would be required to attach the victim's chosen condition(s) unless it is inappropriate or incompatible with the legislation.

Clause 88 would provide a very similar definition of "rehabilitative and reparative community conditions" as **clause 79** does for the equivalent diversionary conditions.

Rehabilitative and reparative community conditions would be those with the objective of rehabilitating an offender or ensuring they make reparation for their offence. The same three types of rehabilitative and reparative conditions could be used for community cautions as could be used for diversionary cautions. However, the detail of their application would be different. Issuing officers would be able to apply:

- *Restrictive conditions*: Those which could restrict who the offender could communicate with, where they could go, the activities they could participate in and the conduct they could carry out (including conduct which is already a criminal offence).
- *Unpaid work conditions*: Those which require offenders to carry out up to 10 hours of unpaid work (less than can be required by a diversionary caution).
- *Attendance conditions*: Those which require offenders to attend a "specified place" for a "specified purpose" for up to 10 hours (less than can be required by a diversionary caution). These conditions could be used to require drug or alcohol misuse programmes for example.

Clause 88 (like **clause 79**) would prevent rehabilitative or reparative conditions from being used to require an offender stay at their own or anyone else's residence for any period of time.

Clause 88 (like **clause 79**) would also allow regulations to be made to amend the maximum number of hours offenders could be required to do as part of unpaid work or attendance conditions. These regulations must be made by statutory instrument using the affirmative procedure.

Clause 89 would define financial penalty conditions for the purposes of community cautions. Like financial penalties attached to diversionary cautions (as set out in **clause 80**), community financial penalties would

be fines attached as punishment. Offenders would have 28 days to pay their financial penalty. Regulations would set rules for deciding the value of the fine. These regulations must be made by statutory instrument using the affirmative procedure.

Offenders who do not pay their community caution fine within 28 days would have their fine increased by 50%. They would then have a further 21 days to pay the increased fine. This is different to non-payment of a diversionary caution fine. Non-payment of a diversionary caution fine would make an offender liable for arrest.

Clause 90 would provide details of an enforcement regime for non-payment of an increased community condition fine. Police forces would be required to send a "registration certificate" outlining the details of the fine and the offender to the local magistrate's office. Designated officers in the magistrate's office would be required to check the offender's details are correct, register the fine and give notice to the offender that this has been done.

Clause 91 would allow for magistrate court proceedings to be bought against offenders with non-paid fines registered by magistrates. Offenders would be able to claim they should not pay the fine because either it was issued incorrectly (they are not the person who was cautioned or they have already paid the amount required) or they have a "reasonable excuse" for not paying.

The court must use the civil standard of proof (i.e. "on the balance of probabilities") to determine whether the facts of an offender's claim are valid. The court would be able to use its own discretion when determining the "reasonableness" of a given excuse for not paying a fine. Magistrates would be able to withdraw or vary fines when they find an offender has a "reasonable excuse" for not paying.

Clause 92 would allow issuing officers to vary an offender's community conditions with their consent.

Clause 93 would also allow issuing authorities to impose a financial condition under clause 76 to those who do not comply with their conditions (including those who do not comply with a financial condition). Alternatively, issuing authorities could rescind a condition not complied with.

General and supplementary

Clauses 94 to 99 provide general and supplementary provisions relating to both diversionary and community cautions.

Clause 94 would require the Secretary of State issue statutory guidance in relation to diversionary and community cautions in the form of a code of practice. The Secretary of State would have to publish a draft version of the code, consider comments made about that code, consult the Attorney General before issuing the code of practice **and** lay it before the House of Parliament. Parliament would be required to approve regulations commencing the code using the affirmative procedure. The Secretary of State has powers to revise the code from "time to time" but must follow the same procedure for approving it as when they draft the first code. The procedure for drafting and amending the code is very similar to comparable codes (like the [PACE Codes](#)).

Clause 95 would allow the Secretary of State to make regulations which prohibit the use of diversionary and community cautions in cases who have been cautioned before (under the new or old

out of court disposal framework) in some circumstances. In accordance with **clause 86**, these regulations would be made by statutory instrument using the affirmative procedure.

Clause 96 would prohibit the use of any other caution other than diversionary and community cautions. It would repeal the relevant sections of the *Criminal Justice Act 2003* and the *Criminal Justice and Police Act 2001* which provide for conditional cautions and penalty notices for disorder (PNDs).

Clause 97 introduced **Schedule 10** which would make consequential amendments to various other pieces of criminal justice legislation which relate to the existing out of court disposal regime.

Clause 98 would make provisions for regulations made under Part Five of the Bill. As explained where appropriate in this paper, regulations making significant provisions would be made by statutory instrument using the affirmative procedure.

Clause 99 would provide necessary interpretation for Part Five of the Bill.

4. Potential impact of the proposed new system

It is difficult to predict how the proposed system might impact frontline services, offenders and victims. Some benefits of the new system, like improved simplicity and national standardisation, cannot be effectively measured. That being said, the available evidence suggests the system:

- *may* result in a further decline in the use of OOCs;
- is *likely* to cost more - the Government estimates the proposed system will cost the criminal justice system an extra £15.58 million a year to administer;
- is *unlikely* to have a major impact on the reoffending rates of offenders; and
- *may* improve victim satisfaction but is *unlikely* to have a major impact.

4.1 OOC use

The Ministry of Justice's (MoJ) evaluation of the pilot of the two-tier framework found no change in the volume of OOCs issued by police forces using the system. It appears officers in the pilot switched to disposing offences with conditional cautions where they would have used simple cautions. This suggests that officers are not likely to make big changes to their use of OOCs as a result of the Government's proposals. However, there are some features of the proposed system, not present in the two-tier framework, which might contribute to a further decline in the use of OOCs.

Under the proposed system there will be more restrictions on the use of OOCs for certain offences. Police officers will need the Director of Public Prosecution's consent to issue OOCs for indictable-only offences. They will also be prohibited from disposing of some cases involving repeat offenders by OOC. Rules concerning repeat offenders will be set by regulations made using powers in the Bill.

Data is not available on how many cautions are issued for indictable-only offences or repeat offenders. Therefore we cannot accurately estimate how these changes might affect OOC volumes. However, data does show 55% of cautions issued in 2019 (26,100) were for indictable **and** either-way offences.⁶⁶ This suggests that restricting the use of OOCs for certain serious offences is likely to have some impact on OOC volumes.

4.2 Cost

The Government recognises a system in which the only OOCs available are two new forms of conditional caution will be more expensive. It estimates the proposed system will cost the criminal justice system an

⁶⁶ See appendix for data and source

extra **£15.58 million a year to administer**. It is also estimating £13.7 million in police implementation costs. In total the Government estimates the policy will cost **£109.19 million over ten years**.

Summary of financial cost/ benefit of proposed system⁶⁷			
	21/22	22/23	23/24 (and thereafter)
Costs (£m)			
Police	6.85	6.85	11.4
CPS			1.33
Rehabilitative treatment			2.86
PND revenue			1.26
Fine & victims' services revenue			0.47
Total costs	6.85	6.85	11.66
Benefits (£m)			
PND enforcement			0.65
Reparations			1.28
Financial penalties			0.15
Total benefits			2.07
Net benefits (£m)	-6.85	-6.85	-15.58

The Government is predicting most the extra cost will be incurred by the police. Police forces will assume the administrative burden of issuing the new cautions and monitoring offender compliance with conditions.⁶⁸

The Government also anticipates increased costs for the Crown Prosecution Service. As more offenders are likely to be issued an OOCDC that could result in prosecution if conditions are not met, more cases are likely to end up in court (even if the proportion of offenders who breach their condition stays the same).⁶⁹

The Government expects more offenders to be given access to drug, alcohol and other mental health services as part of their conditions. This will incur consequential costs for treatment services.⁷⁰

The new system will see the loss of PND fine revenue, although there would be cost savings associated with enforcing PND fines. The Government has assumed the fines and compensation collected under

⁶⁷ [MoJ071/2020](#), A Smarter Approach to Sentencing: Reform of the Adult Out of Court Disposals Framework, September 2020, para 43 (**Note** the impact assessment published alongside the Bill is identical to this one published in September 2020)

⁶⁸ *Ibid*, para 29 & 30

⁶⁹ *Ibid*, para 31

⁷⁰ *Ibid*, para 32

the new system will not equal the PND revenue and compensation collected under the current system.⁷¹

How accurate are these costings?

The Government's published estimates are likely to underestimate the potential cost of the system. Its estimates are based on the evaluation of the 2014 pilot of the two-tier framework. The two-tier framework does not feature many potentially costly elements of the Government's proposals. For example, under the proposed system the police will not be able to use community resolutions to dispose of criminal cases and fewer cases are likely to qualify for disposal out of court.

These features are likely to impose increased costs on the police, CPS and Her Majesty's Courts & Tribunal Service (HMCTS) that the Government has not costed. The CPS and HMCTS may incur more costs prosecuting cases that no longer qualify for disposal out of court. The police are likely to incur more costs issuing and monitoring community cautions than community resolutions. This change is likely to have a major impact on the cost of the system because at present community resolutions account for 55% of all OOCs.

4.3 Reoffending

The evaluation of the two-tier framework pilot found **no statistically significant difference in the 12-month re-offending rates** of OOC recipients in the pilot areas to those in other comparable police force areas.⁷² The same analysis found no statistically significant difference in when offenders reoffended or the types of offences they went onto commit.⁷³ This would suggest the Government's proposals are not likely to have a major impact on reoffending.

Reoffending analysis of the two-tier framework pilot ⁷⁴		
	Pilot areas	Comparable areas
Number reoffending	602	806
Proportion reoffending	16.2%	17.3%
Average number of reoffences	0.26	0.29
Average time to next offence	124 days	131 days

The Government has said:

While the 2014/15 pilot showed no impact on 12-month proven reoffending for cautions, it may be that reoffending results may mask variations in effectiveness of individual conditions, since international evidence suggests that certain rehabilitative programmes (e.g. drugs, mental health, anger management initiatives) can reduce re-offending.⁷⁵

⁷¹ Ibid, para 43

⁷² MoJ, [Out of Court Disposals Pilot: Cautions Reoffending Analysis](#), 2018, p5

⁷³ Ibid

⁷⁴ Ibid, table 2

⁷⁵ [MoJ071/2020](#), A Smarter Approach to Sentencing: Reform of the Adult Out of Court Disposals Framework, September 2020, para 41

The two-tier pilot evaluation did assess the impact of different conditions. Again, the analysis found **no statistically significant difference between the type or number of conditions issued and offender outcomes.**⁷⁶

However, the evaluation did find that specific conditions were more effective for specific offenders. **Rehabilitative conditions were more effective for male offenders.** Male offenders in the pilot areas who were not issued rehabilitative conditions were 49% more likely than women to reoffend, with rehabilitative conditions their odds of reoffending were 9% lower than women. **Those with two previous offences were less likely to reoffend again with restrictive conditions.** They were 132% more likely to reoffend than those without previous convictions when restrictive conditions were not attached to their cautions. They were 2% less likely to reoffend than those without previous conditions when they had restrictive conditions.⁷⁷

4.4 Victim satisfaction

The Government says its proposals would enhance victim engagement and satisfaction.⁷⁸ It is true that under the new system victims would have more opportunity to engage with the OOCDF process. However, the victim satisfaction rate in OOCDF cases is already good. In 2019/20, 84% of victims whose offender was issued a caution said they were satisfied with the police, a similar rate to victims whose offenders were charged (83%).⁷⁹

⁷⁶ MoJ, [Out of Court Disposals Pilot: Cautions Reoffending Analysis](#), 2018, p6

⁷⁷ Ibid

⁷⁸ [MoJ071/2020](#), A Smarter Approach to Sentencing: Reform of the Adult Out of Court Disposals Framework, September 2020, para 42

⁷⁹ ONS, [Crime in England and Wales: Annual supplementary tables](#), 17 July 2020, table S17

Appendix: Data table

Out of court disposals in England and Wales

Annual total 1970 to 2019; Thousands

	<i>of which:</i>			Penalty			Total out of court disposals⁽⁸⁾	Total convictions in criminal courts	OCDs as a % of proven offences
	Cautions	<i>Cautions: indictable⁽⁵⁾</i>	<i>Cautions: summary non-motoring⁽⁶⁾</i>	Notices for Disorder (PNDs) ⁽⁶⁾	Cannabis /khat warnings ⁽⁷⁾	Community resolutions			
1970	85.5	55.7	29.8	*	*	*	85.5	1,674.0	5%
1971	109.1	77.3	31.8	*	*	*	109.1	1,688.0	6%
1972	120.2	86.5	33.7	*	*	*	120.2	1,826.2	6%
1973	123.9	90.8	33.1	*	*	*	123.9	1,928.6	6%
1974	136.5	105.1	31.4	*	*	*	136.5	1,933.7	7%
1975	136.3	102.2	34.1	*	*	*	136.3	1,988.7	6%
1976	135.5	97.7	37.8	*	*	*	135.5	2,072.6	6%
1977	149.4	111.2	38.2	*	*	*	149.4	1,951.2	7%
1978	141.5	103.0	38.5	*	*	*	141.5	1,879.0	7%
1979	136.6	96.8	39.8	*	*	*	136.6	1,898.1	7%
1980	145.8	100.9	44.9	*	*	*	145.8	2,211.7	6%
1981	153.9	103.9	50.0	*	*	*	153.9	2,104.7	7%
1982	160.6	111.3	49.2	*	*	*	160.6	2,031.0	7%
1983	165.5	114.9	50.6	*	*	*	165.5	2,095.5	7%
1984	190.4	124.1	66.3	*	*	*	190.4	1,962.6	9%
1985	218.8	145.4	73.4	*	*	*	218.8	1,910.8	10%
1986	213.5	136.9	76.6	*	*	*	213.5	1,894.2	10%
1987	236.6	149.8	86.8	*	*	*	236.6	1,554.7	13%
1988	235.4	140.7	94.7	*	*	*	235.4	1,555.3	13%
1989	238.1	136.0	102.1	*	*	*	238.1	1,534.5	13%
1990	269.1	166.3	102.8	*	*	*	269.1	1,514.7	15%
1991	278.8	179.9	98.9	*	*	*	278.8	1,505.1	16%
1992	321.3	216.2	105.1	*	*	*	321.3	1,519.7	17%
1993	311.4	209.6	101.8	*	*	*	311.4	1,425.3	18%
1994	308.5	209.8	98.7	*	*	*	308.5	1,407.6	18%

Table continued

Out of court disposals, 1970 to 2019; Thousands

	<i>of which:</i>			Penalty			Total out of court disposals⁽⁸⁾	Total convictions in criminal courts	OCDs as a % of proven offences
	Cautions	<i>Cautions: indictable⁽⁵⁾</i>	<i>Cautions: summary non-motoring⁽⁶⁾</i>	Notices for Disorder (PNDs) ⁽⁶⁾	Cannabis /khat warnings ⁽⁷⁾	Community resolutions			
1995	291.3	202.6	88.7	*	*	*	291.3	1,354.6	18%
1996	286.2	190.8	95.4	*	*	*	286.2	1,438.0	17%
1997	282.1	189.4	92.7	*	*	*	282.1	1,385.8	17%
1998	287.9	191.7	96.2	*	*	*	287.9	1,469.7	16%
1999	266.1	170.6	95.6	*	*	*	266.1	1,408.5	16%
2000	239.0	150.9	88.1	*	*	*	239.0	1,423.7	14%
2001	229.9	143.9	85.9	*	*	*	229.9	1,349.7	15%
2002	225.4	142.9	82.4	*	*	*	225.4	1,421.3	14%
2003	241.8	150.7	91.1	*	*	*	241.8	1,491.2	14%
2004	255.8	156.3	99.5	*	*	*	255.8	1,548.5	14%
2005	298.9	222.2	76.8	146.5	*	*	445.4	1,484.4	23%
2006	350.0	203.8	146.2	201.2	77.4	*	628.6	1,421.3	31%
2007	362.9	205.1	157.8	207.5	99.5	*	669.9	1,415.9	32%
2008 ⁽⁹⁾	327.9	181.2	146.7	176.2	108.3	.	612.4	1,363.2	31%
2009	290.6	159.5	131.1	170.4	91.2	.	552.3	1,408.4	28%
2010	242.8	133.5	109.3	140.8	82.4	.	466.0	1,367.5	25%
2011	234.7	125.3	109.4	127.5	80.0	.	442.3	1,313.6	25%
2012	202.9	106.8	96.1	106.2	70.1	.	379.2	1,231.6	24%
2013	183.2	95.3	87.9	84.3	65.8	.	333.2	1,179.4	22%
2014	157.8	79.6	78.2	65.5	50.6	.	273.9	1,217.7	18%
2015	126.2	62.1	64.1	47.4	36.7	109.0	319.3	1,249.1	20%
2016	103.4	51.6	51.7	36.2	34.3	112.4	286.2	1,243.2	19%
2017	84.0	42.9	41.1	26.0	31.9	104.5	246.4	1,213.2	17%
2018	69.4	36.6	32.8	21.3	23.9	105.6	220.1	1,206.8	15%
2019 ⁽¹⁰⁾	47.3	26.1	21.3	19.8	19.5	105.0	191.6	1,190.7	14%

Source: Ministry of Justice, Criminal justice statistics October-December 2019, table A1.1 and Outcomes by Offence data tool

Notes: *' = Not applicable - disposal not available (PNDs, cannabis/khat warnings, and community resolutions prior to 2008)
 . = data not available (community resolutions from 2008-2014) (*Notes continue overleaf*)

- 1) Including "other defendants" such as companies and public bodies.
- 2) The figures given in the table relate to defendants for whom these offences were the principal offences for which they were dealt with. When a defendant has been found guilty of two or more offences it is the offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the offence selected is the offence for which the statutory maximum penalty is the most severe."
- 3) Figures are based on all offenders (including companies and public bodies) at all courts.
- 4) Data are given on a principal disposal basis - i.e. reporting the most severe sentence for the principal offence.
- 5) Summary motoring offences are typically addressed through Fixed Penalty Notices when dealt with out of court. These are not included in this table.
- 6) Full calendar year data is available for PNDs from 2005 onwards.
- 7) Reliable data for Cannabis Warnings can only be provided from 2006 onwards where full calendar year data is available. Cannabis warnings will include a small number of khat warnings in year ending December 2015. Totals for years ending December 2014 and December 2015 exclude a small number of cannabis warnings erroneously recorded against non-drug-related offences which are expected to be revised in future quarters.
- 8) Some police forces have moved to reduce the types of out of court disposals used for adult offenders. In these areas, the only out of court disposals used are community resolutions and conditional cautions. Cannabis/Khat warnings will not be used.
- 9) Excludes data for Cardiff magistrates' court for April, July, and August 2008.
- 10) Excludes data for Cardiff magistrates' court for April, July, and August 2008.

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