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Summary justice
Fast – but Fair?

Professor Rod Morgan

Whose Justice? series

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Introduction

New Labour has made criminal justice reform a key policy commitment. Tony Blair, both as Prime Minister and, before 1997, as opposition leader and Shadow Home Secretary, repeatedly stressed the case for making the criminal justice system more responsive to public concerns about crime and anti-social behaviour. Before leaving office he made it clear that he regarded New Labour's achievements in this regard as no more than work in progress. His major swansong speeches on the topic unambiguously set out New Labour's case. The criminal justice measures taken in which the government took pride 'have one thing in common: they bypass the traditional way the criminal justice system used to work ... the rules of the game have changed' (Blair, 2005). The bypass involved greater use of summary justice. If that meant curtailing traditional liberties then, Tony Blair argued, this was necessary to protect the interests of the 'law-abiding majority'. It would not wash, he asserted, to say that the liberties of victims and offenders are not in conflict. They are. And 'every day we don't resolve [that conflict] by rebalancing the system, the consequence is not abstract, it is out there, very real on our streets'. 'Rebalancing' in this context meant greater use of summary justice, without which the new threats the country was said to be facing would not be beaten, the interests of the law-abiding majority would not be protected (Blair, 2006). The fact that this remains the policy post-Blair is made clear in the Home Office's most recent five-year plan to which the government remains committed (see Home Office, 2006a, paras. 3.5–9).

This review has four purposes. First, to explore what summary justice means. Second, to examine the case for and against greater use of summary justice. Third, to chart the degree to which the shift towards summary justice is happening and may further develop. Fourth, to consider the consequences of the trend and how the interests of all citizens, law-abiding or otherwise, will best be protected.

Summary justice: three versions

Summary justice has a particular meaning in English law, with slightly negative connotations. It has always meant proceedings in a court of law carried out rapidly by the omission of certain formalities as required by the common law. In the eighteenth century it meant 'performed or effected by a short method, done without delay' (Oxford English Dictionary). In modern times, summary proceedings mean proceedings conducted in the lower, magistrates' courts. That is, proceedings not involving juries, proceedings expedited through use of a less complex and less expensive method, where the offences are generally less serious and the available sanctions less punitive. Summary offences, as opposed to either-way or indictable offences, are those which can only be dealt with in the lower courts. Indictable offences are those more serious offences that must be dealt in the higher, Crown Court. Either-way offences are those where the defendant may elect trial by jury, a choice often held, mistakenly, to be the citizen's right.

In fact, there is no right to trial by jury (see Darbyshire, 1991) and parliament, most recently following the recommendations of the Runciman Royal Commission on Criminal Justice (1993), has repeatedly curtailed this option in order to save scarce resources and expedite less serious cases. Though, given the choice, the overwhelming majority of defendants elect to have their cases dealt with in the lower courts, trial by jury is generally considered the Rolls Royce option. But there is a price to pay for taking it. Cases dealt with

in the Crown Court involve delay, something most defendants wish to avoid, and the risk of a greater penalty if found guilty.

Summary justice can also mean vigilante justice, justice meted out by fellow citizens without recourse to law (for a review and conceptualisation, see Johnston, 1992, 1996). This form of summary justice is condemned, although in some circumstances, particularly when the criminal justice system is thought to be failing, it may enjoy a measure of popular support. Whenever this happens the result is considered by government to be disturbing (Abrahams, 1998). Which is partly why, in recent times, there has emerged a third form of summary justice, that involving recourse to the law, but not the courts – what we may term pre-court summary justice. Decision-making here rests with the police and the Crown Prosecution Service (CPS). In the mid-1990s, when concern about increased vigilante activity was attracting some media attention (Johnston, 1996; Abrahams, 1998), New Labour made it a central plank in their bid for electoral success that summary powers be given to the police and other officials in order to counter the powerlessness felt by many citizens as a result of the perceived, and possibly actual, ineffectiveness of the criminal justice system in tackling the anti-social behaviour that was said to blight the quality of life in many neighbourhoods (Labour Party, 1996).

Past reviews of summary justice have tended to focus on the shifting boundary between magistrates' court and Crown Court proceedings (see, for example: the discussion in the Royal Commission on Criminal Justice Report, 1993: 85–89; Ashworth, 1998: 255–262). But the focus of concern has shifted. In this review we shall be wholly concerned with the developing arena of pre-court summary justice, although it should be noted that another of the government's flagship programmes, CJSSS – Criminal Justice, Simple Speedy and Summary – aims to engineer the more efficient business of the lower, summary courts, ideally operating with lists stripped of minor matters best dealt with pre-court.

Principles

It is sometimes said, naively, that one cannot put a price on criminal justice (Mansfield and Wardle, 1993: 203). But of course every system does put a price on criminal justice and could scarcely do otherwise. Police resources do not permit every criminal act, even if known, to be responded to. Spending on criminal justice has to compete with health, education and other public services expenditure, all of which have implications for social justice. So, when it comes to setting boundaries for entry to the criminal justice system, priorities have to be set. And within criminal justice systems different cases are responded to differentially, according to their importance, which mostly means their gravity.

To achieve legitimacy any system of criminal justice must defend certain citizens' rights – to be treated with integrity, not to be wrongly convicted and not to be tricked. But criminal justice systems also have to safeguard the public interest that serious offenders be convicted effectively. This arguably is best achieved, inter alia, by adhering to the dispositional principle of *proportionality of imposition* (Ashworth and Redmayne, 2005: Chapter Two). That is, that the level of criminal intervention, both the process and the sanction, be proportionate to the seriousness of the offence, where seriousness relates to the degree of harm involved in the offence and the culpability of the offender. Adherence to this principle means that the more serious the offence, the more onerous the sanction, and the greater the procedural safeguards to ensure that justice (ensuring that the defendant is not wrongly convicted, etc.) is done. Conversely, minor offences, either because they involve little harm or because the perpetrators are for whatever reason not deemed seriously culpable, become candidates for diversion from the system or, if brought within its ambit, are dealt with leniently following a simplified, relatively non-stigmatic procedure.

All criminal justice systems in advanced, democratic societies adhere to this principle to some degree. Their criminal court systems, like that in England and Wales, typically have two or more tiers. The upper tier or tiers involve either juries or lay magistrates sitting alongside professional judges, or panels of judges, for determinations of guilt or punishment: here are dealt with the most serious cases for which the most severe penalties are available. The lower courts, by contrast, have limited powers of punishment and these are usually exercised either by judges sitting alone or by lay magistrates sitting as panels (Morgan and Russell, 2000). However, most systems have also developed pre-court or administrative criminal justice decision-making whereby some criminal matters are or can be dealt with by the police and/or the prosecutorial authorities without their coming before the courts at all. The offences dealt with in this manner tend to be the most common and straightforward, for which the penalty is normally pecuniary, making good the deficiency or the harm done, or involving the issue of a recorded warning. This differential approach is judged proportionate to the gravity of the offences and the risks of injustice involved. Each decision-making tier has its own safeguards. The question addressed in this review is whether the developing policies for pre-court summary justice in England and Wales are appropriate and the safeguards sufficient.

Chapter 1

New Labour and summary justice

The fullest statement of the government's case for and philosophy regarding the expansion of summary justice was provided in the 2006 position paper, Doing Law Differently, by the then Lord Chancellor, Lord Falconer. His argument was as follows.

Public confidence in the criminal justice system is critical to its effective working. (Lord Falconer did not spell out why this is so, but the case is easily made. Without such confidence: victims may not be prepared to report offences to the police; witnesses may not provide evidence; citizens may be unwilling to serve on juries or as lay magistrates; and so on.) He asserted that public confidence in the system had fallen: '60% of people believe that the criminal justice system is ineffective in bringing offenders to justice and around a quarter of court users emerge with a confidence level in the court system lower than it was before they experienced it' (Falconer, 2006: 9; see also: Nicholas, Kershaw and Walker, 2007; Jansson et al., 2007). In fact, the evidence as to whether public confidence has fallen is equivocal in the sense that it depends on which questions are asked and which time period is taken into consideration (see, for example, Nicholas, Kershaw and Walker, 2007: Table 5d).

This lack of confidence Lord Falconer attributed to the:

- system not protecting citizens from harm by bringing offenders to justice
- proceedings being 'often lengthy and arcane' ('in 2005, cases in the magistrates' courts took on average 153 days from offence to completion')
- outcomes often involving 'a disconnection between crime prosecuted and the sentences given, and the concerns of local communities, especially around anti-social behaviour' (Falconer, 2006: 9).

The solution, he contended, was to 'connect the instance of crime much more quickly and directly with the consequences of crime', a process:

> ... in which summary justice plays a much greater part ... Some anti-social behaviour and other less serious crimes, such as certain cases of criminal damage, theft or public order offences, do not need to come to court if the defendant admits guilt and is willing to make reparation to the victim, accept a fine, pay compensation, go for drug treatment or carry out unpaid work. Many cases can be diverted out of court and dealt with by the use of fixed-penalty notices or conditional cautioning pilots. (ibid)

But he emphasised that:

> ... the defendant needs proper protection against injustice within the system ... our aim should be a system that will allow the court to know what happened and a process that will be driven by the substantive merits of the case, not the exploitation of safeguards. If the case is to proceed to trial, courts have a proactive role to ensure the prosecution and defence have the case ready for trial in a timely fashion. The

> defendant should not have pressure put on them but, where the weight of evidence is against him or her, they should be given every opportunity to admit their guilt and allow the matter to be resolved quickly.
> (ibid: 10)

At about the same time that Lord Falconer set out the case for *Doing Law Differently* a consultative document, *Strengthening Powers to Tackle Anti-Social Behaviour*, was issued (Home Office, 2006b). This document unashamedly set out what was described as a 'practitioner-led approach'. This involves frontline law enforcers, the police, local government officials, prosecutors and so on, telling the government what powers they need to do the job – that is, 'nipping unacceptable behaviour in the bud' – and the government providing them with those powers (ibid: 3).[1]

This botanical analogy, 'nipping behaviour in the bud', ran though the document. It implied a model of effectiveness. The unwanted part of the plant, or the behaviour, is cut out, thereby enabling everything remaining to flourish more vigorously (though, arguably, the relationship between unwanted behaviour and the actors engaging in unwanted behaviour is rather more complex than this botanical analogy suggests). This, it was said, is best achieved by adopting summary pre-court procedures for dealing rapidly and simply with the behaviour that is causing the public concern. This, it was contended, is what the public wants. Research was cited. Pre-court disposals are favoured by an overwhelming majority of the public in response to specific acts of anti-social behaviour and disorder committed by young, first-time offenders (the latter qualifications, 'young' and 'first-time', were not discussed in the consultation paper and we shall return to them). For instance, only 14 and 21 per cent respectively of those surveyed suggested that court was the most appropriate way to deal with young offenders caught breaking windows in disused properties or vandalising bus shelters (ibid: 7, citing a survey commissioned by the government from Ipsos-MORI, 2005).

Set out in the consultation paper are the pre-court summary powers already introduced for anti-social behaviour, powers additional to longstanding powers for traffic offences or for diverting offenders, particularly children and young people, from the courts. These powers are best summarised as follows:

Cautions. The police have formally cautioned minor offenders, as opposed to charging and bringing them before the court, from the very beginning of professional policing, though the practice was not always approved of (Steer, 1970: 54–55). However, it was encouraged for juveniles by the Children and Young Persons Act 1969 on the grounds that it would reduce the likelihood of re-offending. By the early 1990s, however, doubts were being expressed about cautions on the grounds that the deterrent impact of the law was being eroded through use of repeat cautioning. The Crime and Disorder Act 1998, s.65–66, introduced new cautioning arrangements for children and young persons (see Reprimands and final warnings below), leaving those for adults in place. For adults there are three pre-conditions for the issue of a caution: sufficient evidence to prosecute; an admission of guilt by the offender; and the offender's consent. The research evidence suggests that these conditions are often not met and the low visibility of police cautioning decisions (that is, they are determined by relatively low-ranking police officers, nowadays in liaison with relatively junior CPS staff, in settings that are not public) has long made them a cause for concern (see Sanders and Young, 2006: 346–353). Cautions count as criminal convictions and can be cited in subsequent criminal proceedings. They also count as offences brought to justice (OBTJ – see Chapter 3). The ratio of prosecutions to cautions for adults is roughly 3:1 (see Ministry of Justice, 2007).

Reprimands and final warnings. These replaced cautions for children and young persons (10 to 17 year olds) in 2000. Unless there is a significant lapse of time, further offences,

1. The government is also pursuing this 'practitioner-led approach' with its proposal to extend from 28 to 42 days the period for which persons suspected of terrorist offences may be detained without charge, an extension favoured by some senior police officers.

no matter how minor, will, after a final warning, result in prosecution. The same pre-conditions apply as for cautions except that the young person's consent is not required. With respect to final warnings the police have a statutory duty to refer the young person to the local youth offending team (YOT), which must in turn carry out an assessment of the young person and will, in most cases, provide an intervention aimed at tackling the causes of the offending behaviour and preventing re-offending. Marginally more children and young people are dealt with by these means than are prosecuted and brought before the youth court. Like adult cautions, reprimands and final warnings also count as OBTJ.

Fixed Penalty Notices (FPNs). The Road Traffic Act 1988 introduced FPNs for a wide variety of minor traffic offences, both construction (for example, having a defective brake light) and driving (for example, speeding) offences. The range of traffic offences for which they can be used has since been extended to relatively serious matters such as driving without insurance. Traffic offences dealt with in this manner, now the overwhelming majority, are either non-endorsable or endorsable, that is, resulting penalty points being recorded on the driver's licence. Twelve penalty points within the span of three years normally results in loss of licence for six months. FPNs can also be used for many non-traffic offences, for example, littering, dog-fouling, graffiti and fly-posting, unauthorised distribution of free literature, abandoned vehicles, nuisance parking and offences relating to waste receptacles and dog control orders. Recipients of FPNs normally have 28 days to challenge the fine, in which case the matter is heard in the magistrates' court. Failure to pay or request a hearing within 28 days normally results in the fine being increased by 50 per cent. No record is kept, other than licence endorsements, if payment is made. If FPNs are not paid, the police or the local authority can prosecute the perpetrator for the original offence. Depending on the offence FPNs can be issued by the police, by police community support officers (PCSOs), by local authority authorised officers, by parish councils, by waste collection authorities and by the Environment Agency. Penalties can range from £50 to £500. FPNs do not count as OBTJ.

Penalty Notices for Disorder (PNDs). Introduced by the Criminal Justice and Police Act 2001, s.1–11, PNDs form part of the wider penalty notice scheme and, as their title makes clear, are said to deal specifically with disorderly behaviour, such as drunken or threatening behaviour, throwing fireworks, etc. (see, for example, Home Office, 2006c: Annex D). However, PNDs have been made available for common offences that are or may be unrelated directly to social disorder: for example, theft (retail value up to £200), wasting police time, criminal damage (up to £500) or selling alcohol to someone under 18 years. The offender receives an immediate fine, which if paid will not be taken any further. If the fine is not paid, it is increased by one and a half times the level of the penalty. Unpaid fines are enforced through the courts in the normal way. PNDs are normally issued by uniformed police officers though PCSOs with designated powers, and accredited persons can issue a limited range of them. PNDs can be given to anyone aged 16 years and above. Penalties for each offence are set at either £50 or £80. Some PNDs count as OBTJ – those for the three 'notifiable offences' of causing harassment, alarm or distress (Public Order Act 1988, s.5), criminal damage under £500 in value (Criminal Damage Act 1971, s.1(1)) and retail theft under £200 in value (Theft Act 1968, s.1) – whereas those for all other offences do not (Ministry of Justice, 2007: para. 5.2).

Cannabis warnings. Since 2004 police officers have had the power to issue recorded warnings to adults for possession of small quantities of cannabis, which remains a notifiable offence (ACPO, 2006). The power does not exist for children and young people aged 10 to 17, who, if found in possession of cannabis, will normally be dealt with by means of a reprimand, final warning or brought before the youth court. Cannabis warnings are recordable, though offenders so dealt with do not acquire criminal records. Cannabis warnings count as OBTJ.

Conditional cautions. Conditional cautions were provided for by the Criminal Justice Act 2003, s.22–27 for adults only. The pre-conditions for use are the same as for simple cautions, though in this case the discretion lies solely with the prosecutor. Conditional cautions may be used when the prosecutor judges that rehabilitation of the offender or reparation to the victim will best be achieved by the offender agreeing to undertake some action (participation in treatment for alcohol or illicit drug dependency or compensating a victim, for example). Failure to comply with the agreed action may lead to the conditional caution being cancelled and the offender being prosecuted. Refusal to accept the conditions to the caution will normally result in prosecution. The offences for which conditional cautions may be given include criminal damage, theft, public order and drug-related offences. Conditional cautions count as OBTJ. The Police and Justice Act 2006, s.17, not yet in force, will add 'punishing the offender' to the purposes for which conditional cautions can be used. The corollary of this is that the conditions which may then be applied will include payment of a financial penalty and attendance at a specified place at specified times for up to a total of 20 hours, that period not including any attendance required for the purposes of rehabilitation. Further, the Secretary of State is empowered to increase by order this total time period (this is an issue to which we return below). The government plans to extend the use of conditional cautions for 16 and 17 year olds and from April 2009 will pilot a new Youth Conditional Caution (HM Government, 2008: 53).

The government is considering further options for pre-court summary justice. Those options mentioned to date comprise:

Deferred PNDs. This proposal, set out in the 2006 consultation paper on tackling anti-social behaviour, is described as follows:

> Where an offender commits an offence and it might be appropriate to issue a PND, the officer and an offender will agree a set of conditions that aim to nip the offending behaviour in the bud. This agreement will last for three to six months and payment of the PND for the original offence will be deferred for the period of the agreement. If the offender fulfils the agreement then the original offence can be discharged after the end of the relevant period with no payment required ... If the agreement is not fulfilled, the PND could then be 'reactivated' for the original offence. As with all PNDs, the offender will then have 21 days in which to decide whether to pay ... an alternative option (which would have legislative implications) would be to strengthen the sanction for breach by proposing that, when a breach occurs and a PND is issued, then if the PND is not paid within 7 days the value is doubled, and if it is not paid after 14 days the value is trebled.
> (Home Office, 2006b: 12)

Among the issues about which the government is seeking views is the sequence for deferral. That is, whether it would be preferable first to issue a PND and then to discharge it once the offender has complied with agreed conditions, or first agree conditions which if not complied with would lead to imposition of a PND.

'Arms-length' deferred PNDs for 10 to 15 year olds. Use of PNDs for 10 to 15 year olds have been piloted in six police forces and are being evaluated (in this instance, their parents are responsible for payment), and the 2006 consultation paper on tackling anti-social disorder considers whether, if PNDs for 10 to 15 years olds are generally introduced, these might also be deferred. In the case of these children and young people it is suggested that:

> ... the police would have to draw the incident to the attention of the parent(s) or guardian and agree the ABC [an acceptable behaviour contract – contracts that are not at present legally enforceable] in their presence. The police officer would also have to inform local agencies concerned with prevention, including, as appropriate,

> the local YOT [youth offending team] and targeted youth support services commissioned by local authorities. Practitioners in each area should agree a local protocol for this to take place ... [the] agreement would be with the adult liable for payment of the PND in case of a breach.
> (Home Office, 2006b: 12)

Youth Restorative Disposal. Restorative justice (RJ), whereby the offender, with victims either directly or indirectly being involved in the process, makes good whatever harm he has caused to the victim, can take place within the context of a reprimand or final warning for a child or young offender, or a conditional caution for adults, or the proposed system of deferred PNDs. However, the evidence suggests that this is so far seldom the case and the government is piloting a new Youth Restorative Disposal for children who commit 'low level first time offences' (HM Government, 2008: 21). It is being piloted in eight police force areas and involves the police working with Youth Offending Teams. According to the recently published *Youth Crime Action Plan*:

> The police will use the principles of restorative justice, bringing the offender and the victim of the crime together and agreeing on steps the young person must take, including apologising for their actions.
> (Ibid: para. 1.9)

The Plan says that 'subject to successful evaluation' of the pilots the government will consider expanding the Youth Restorative Disposal.

Chapter 2

The case for and against extending pre-court summary justice

The government's case for the range of pre-court summary justice measures already introduced and those being considered is the same. The courts will not be cluttered with relatively minor offenders and offences that can more effectively, speedily and proportionately be dealt with by police, prosecutorial or other authority figures. Where appropriate, the pre-court interventions are accompanied by 'work to support individuals and prevent such behaviour from arising' (Home Office, 2006b: 6), victims are more likely to be satisfied and 'the visible punishment ... sends a signal to the wider community that the behaviour is being tackled and not tolerated' (ibid) thereby increasing public confidence in the criminal justice system generally. Further, appropriate safeguards are in place. If the pre-court sanction or condition is not agreed by the offender or, in the case of children and young people, the offender's parent or guardian, then they have the unconditional right to challenge the decision. In which case, the relevant authorities must either drop the matter or charge the offender with an offence and bring the case before the court to determine. The balance between these considerations within the criminal justice system is, as Lord Falconer put it:

> The defendant needs proper protection against injustice within the system, but our aim should be a system that will allow the court to know what happened and a process that will be driven by the substantive merits of the case, not the exploitation of safeguards. If the case is to proceed to trial, courts have a proactive role to ensure the prosecution and defence have the case ready in a timely fashion. The defendant should not have pressure put on them but, where the weight of evidence is against him or her, they should be given every opportunity to admit their guilt and allow the matter to be resolved quickly.
>
> Some anti-social behaviour and other less serious crimes, such as certain cases of criminal damage, theft or public order offences, do not need to come to court if the defendant admits guilt and is willing to make reparation to the victim, accept a fine, pay compensation, go for drug treatment or carry out unpaid work. Many cases can be diverted out of court and dealt with by the use of fixed-penalty notices or Conditional Cautions.
> (Falconer, 2006: 10)

Moreover, as the Director of Public Prosecutions, Sir Ken McDonald, has argued, removing minor offences from court lists should free up court time so that sentencers 'can concentrate on more serious offending'. Delays in dealing with more serious defendants could thereby be reduced, shortening periods spent by some defendants on remand in custody, reducing the prison population and saving overall expense (McDonald, 2005). In pursuing this approach we would, Ken McDonald has argued, be following the example that other jurisdictions have already demonstrated can bring benefits by exploiting the quasi-judicial, pre-court role of prosecutors.

> In Scotland, the Procurator Fiscal intervenes early employing a wide range of options including warning letters, fiscal fines, conditional offers (fixed penalties) and diversion to social work or restorative justice. In a recent snapshot, they were found to have diverted 41% of all incoming work in a year. In his report to the Scottish Executive, Sheriff McInnes endorsed the value of Fiscal disposals to the criminal justice system. He said they were essential to it. Indeed, legislation is being prepared to raise the level of the Fiscal penalties – for example, up to a £500 fine. Research for the McInnes Report demonstrated that the disposals, which by their nature are low profile, were popular with the public and that the rate of fine payment was good. Any recipient who does not agree with the proposed penalty has the right to have the case heard in court.
>
> [In the] Netherlands ... under a scheme known as HALT, public prosecutors routinely divert young offenders from court. Around 60% show a reduction or cessation of unlawful conduct compared with 25% of those not in the scheme. Adults are diverted using prosecutorial discretion and are required to pay a fine or do some voluntary work.
>
> Sweden has been diverting low level cases from the courts since 1948, with prosecutors able to impose a penal order (a fine) or waive prosecution in minor cases. Powers were strengthened in 1998 to include disposals with conditions (conditional cautions). Swedish sources show that the court now has 40% of its lower end work diverted, leaving it more room to deal with the more serious and contested remainder.
>
> In the United States, District Attorneys are routinely involved in diverting categories of offenders into rehabilitative, treatment and community service programmes.
> (ibid)

The role given public prosecutors in England and Wales by the Prosecution of Offenders Act 1985, the Act that established the CPS, was, Ken McDonald argued, very limited compared to that in other countries:

> The magistracy does an excellent job. But despite many efforts at moving the business more efficiently with incentives for guilty pleas, fixed penalty tickets, penalty notices for disorder, listing reforms and so on, courts probably still suffer from a surfeit of low level criminality, a huge number of regulatory offences and the endless returning business of executed warrants.
> (ibid)

Bringing many of these low-level cases before the courts is arguably the equivalent of using a sledgehammer to crack a nut.

> So perhaps it's time to look at other ways of giving prosecutors a wider series of options to consider as a case is initially assessed with police at the charging stage. These would have to be processes which are quick, simple and effective and follow closely on the heels of the offending behaviour ... It would be rare, of course, for these types of diversion to capture cases which would otherwise attract custodial penalties. But potentially they would give prosecutors, probation staff and other social workers the opportunity to target appropriate offenders, whether for drug intervention, or for a psychiatric referral or even for literacy or other social assistance or behavioural therapy.
> (ibid)

Not everyone, however, is persuaded that the growing range and use of pre-court summary justice interventions is desirable or that existing safeguards are adequate. The greatest concerns have so far been expressed by the magistracy and the judiciary, sometimes in response to critical mass media comment. On 13 August 2007 a leader in *The Times* entitled 'Duff justice' observed, with respect to the dramatic growth in the use of PNDs:

> This substantial shift towards street-level punishment has eased the pressure on still-overburdened courts and prisons. It has also helped the Government to hit targets for tackling crime. Whether it constitutes justice or makes people feel safer is another matter.

The article went on to maintain that the use of PNDs: so far had little deterrent effect; had in some cases prompted crime (it was suggested, for example, that some offenders, knowing that they would not likely be brought before the court and thus would not be liable to more severe penalties, were more willing to commit offences such as shoplifting); since approximately half of all PNDs were not paid, meant that magistrates' courts had not had their administrative burden eased but now had a substantial enforcement role; and, given the fact that some PNDs count as OBTJ, for which a key government target had been set, led to the danger not just that police forces were 'box-ticking at any price, but of justice [being] subordinated to revenue-raising'. *The Times* was not against PNDs or setting crime-reduction targets per se.

> But the PND experiment is gravely undermined if it fails to build public confidence in the criminal justice system as a whole, or even erodes it. There is a real risk of this happening ... The conclusion for those considering whether to expand their use must therefore be: this far, and no farther.

The Times leader was prompted by a news story that appeared in the paper the same day. Commenting on the fact that the number of PNDs issued in England and Wales had in the past year increased by almost 40 per cent, it was suggested that the increase owed more to police forces meeting the government's OBTJ target than appropriate use of PNDs. Chief Superintendent Derek Barnett, vice-president of the Police Superintendents' Association, was reported as saying that the government target for OBTJ had 'corrupted' the use of PNDs:

> Policing is often about common sense and resolving difficult circumstances with discretion. But some individual officers are choosing not to use their discretion perhaps because they feel it is a way of fulfilling the Government's target.

Offenders paying a PND of £50 or £80 might, it was pointed out, have caused criminal damage of £500 or stolen goods up to a value of £200 from a shop. Shopkeeper representatives reportedly claimed that PNDs were encouraging shoplifting by effectively letting offenders off. No evidence was advanced to support this contention but it was disturbing, *The Times* leader argued that a sharply declining proportion of all OBTJ were resulting from court convictions in favour of pre-court summary justice. The same criticism has repeatedly been voiced by the Conservative Party. When Shadow Home Secretary, David Davis, described the government's bypassing of the courts by introducing summary justice measures as a counter-productive 'counsel of despair' (Davis, speech in Maidstone, 7 November 2005).

This viewpoint brought support the following day in a letter to *The Times* from the chairman of the Magistrates' Association, Cindy Barnett. The Magistrates' Association rarely resorts to a critical public expression and this therefore deserves to be taken very seriously. Her letter read:

> We welcome your condemnation of "duff justice" (leading article, August 13). The Magistrates' Association has repeatedly cautioned about the dangers of inappropriate use of out-of-court disposals. There is an undoubted risk that targets can lead to the wrong cases – more serious cases – being kept from court. Of course there are very minor matters that do not need prosecution, but can the numbers quoted all relate to very minor matters? Serious cases should come to court. It is the magistrates' courts which uphold and dispense summary justice.

Slightly different concerns regarding the police determining outcomes pre-court in what might be relatively serious criminal cases were expressed by Lord Justice Leveson in a public lecture delivered to the Centre for Crime and Justice Studies, Kings College London, in 2007. His focus was on another developing summary power, the conditional caution, where the decision rests with the CPS. The conditions attached to a conditional caution had, Lord Justice Leveson emphasised, to 'be appropriate and achievable and, up to the present date, have been entirely rehabilitative and restorative. Thus, they might include writing a letter of apology, attendance on a course or payment of compensation' (Leveson, 2007). But the legislation, he pointed out, now goes further. As we have seen, the Police and Justice Act 2006, s.17, provides for conditions, not yet in force, to punish or penalise the offender (including payment of a financial penalty, unpaid work not exceeding 20 hours and attendance at a specified place for a period not exceeding 20 hours). Lord Justice Leveson said:

> I do not believe that I am alone in expressing concern about these powers. It is not a question of not trusting the police or the CPS, or challenging the will of parliament. It goes back to the origins of our system of summary justice, carried out in public by members of the public, appointed as magistrates, whose decisions can be scrutinised by the public, can be the subject of public debate and, if appropriate, appeal to the court in public.

He cited a plausible, hypothetical case:

> A drunken 18 year old of prior good character ends up in the cells. He is not entirely sure what he did but does not want his parents to know that he has been in trouble. What would he admit and accept rather than risk going to court, whether or not he could truly be proved to have committed an offence? And what impact would such a conditional caution, part of a record, have upon him which an absolute or conditional discharge, which could be appropriate depending on the circumstances, would not? Where is the mechanism for accountability for these important decisions, taken behind closed doors? It is perhaps appropriate that I merely ask the questions and allow others to consider the answers.
> (ibid)

The concerns of the Magistrates' Association and those of Lord Justice Leveson about pre-court summary justice overlap. They relate to the gradual abrogation of the role of the summary courts to decide the appropriate punishment of criminal cases, which, though not of the most serious kind, may nonetheless be relatively serious and have serious consequences. Further, this abrogation in favour of the police, prosecutors or other authority figures appears to be undertaken in a relatively unaccountable manner and in circumstances where defendants may feel under pressure to admit matters that they possibly should not admit. This latter argument, it should be noted, is not new nor does it apply only to the new summary provisions of PNDs and conditional cautions. It is an objection which from the very beginning of the modern policing period has been raised with respect to simple cautions (Steer, 1970).

Finally, it should be noted that concerns have also been raised to the effect that the growth of pre-court summary justice interventions is having the reverse but equally damaging consequences as those drawn attention to by The Times, the chairman of the Police Superintendents' Association, the chairman of the Magistrates' Association and Lord Justice Leveson. Namely, it has been argued by some commentators that these summary powers are less displacing the role of the courts and more dragging into the criminal justice system offenders and offending behaviour that would not previously have been criminalised. This, it is argued, is particularly the case with regard to children and young people, whose offences are typically minor in nature and are committed in groups in public places, thus being supremely easy for the police to process if they decide to do so (Morgan and Newburn, 2007: 1044). This is happening, so the youth justice critics argue, for the same 'corrupting' OBTJ-target reason as has already been cited, only this time the pressure is the reverse. Instead of the police employing PNDs to hit their OBTJ targets in preference to the more resource-intensive method of obtaining a court conviction, here it is suggested that reprimands, final warnings or PNDs are being used in circumstances where informal warnings or controls were formerly applied. That is, that there is taking place a classic example of managerially-driven net-widening (Cohen, 1985: Chapter Two).

If net-widening is taking place, in the sense that more offenders and behaviours are being criminalised than was formerly the case, it will be disputed whether this is or is not a bad thing. The critics' 'net widening' is the advocate's 'closing the justice gap' (Home Office, 2001: para. 28; CJS, 2002: para. 0.4). The government in general and former Prime Minister Blair in particular have repeatedly committed themselves to 'bringing more offenders to justice'. That is, reducing the impunity which many offenders allegedly have had in the past as a result of ineffective policing and a criminal justice system which failed to protect members of the public from repeated, albeit sometimes minor, depredations and acts of anti-social behaviour which seriously undermine some citizens' quality of life. This is the basis of the OBTJ target adopted following the Labour Party's manifesto commitments for the 2001 and 2005 elections to be tougher on crime (Labour Party, 2001: Chapter Four; Labour Party, 2005: 47–48).

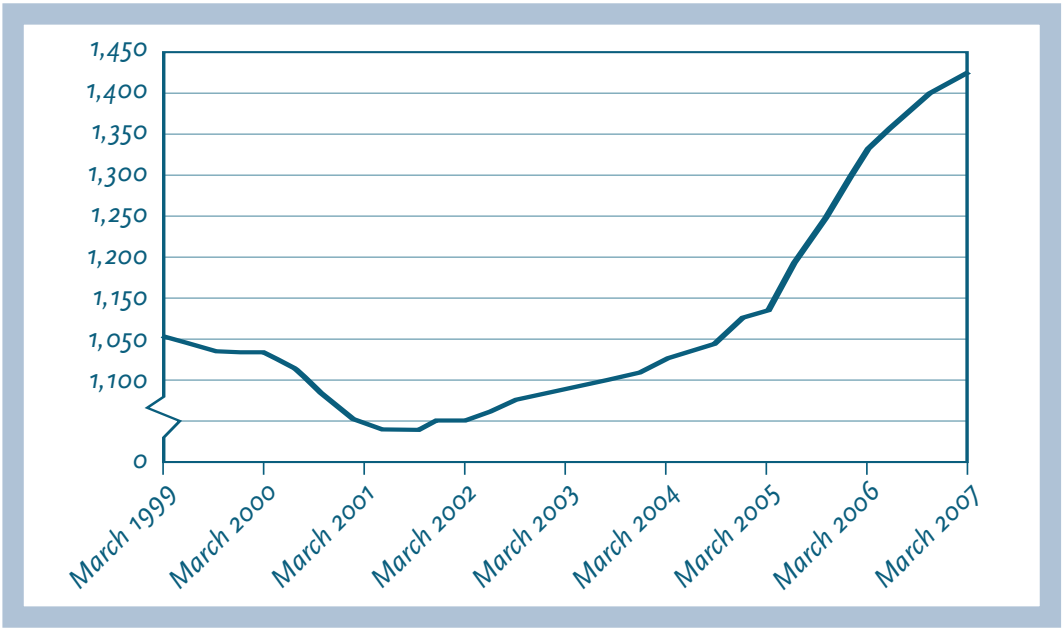
To examine closely these competing hypotheses and arguments about the meaning and implications of the growth in pre-court summary justice we must next examine the extent of that growth and its relationship with court interventions.

Chapter 3

An analysis of the data

The first point to note is that the number of offences brought to justice (OBTJ) has, in line with the government's aim and numerical target, risen sharply since 2001, having previously fallen in the first years of New Labour's administration (Figure 1).

Figure 1: Offences brought to justice, March 1999 to March 2007 *Source: Adapted from Ministry of Justice (2007), Criminal Statistics 2006, England and Wales, London: National Statistics, Figure 5.1, p.99*



How has this trend, in which the government takes pride, been achieved? It has not, as Table 1 makes clear, been achieved by bringing more offenders before the courts and convicting them. Indeed, that number has fallen since the late 1990s and at the end of 2006 stood at almost the same level as in 2001.

Table 1: Number of offences brought to justice, 1999 to 2006 (thousands) *Source: Ministry of Justice (2007) Table 5.1, p.105*

Year	Offences taken into consideration	Penalty Notices for Disorder	Formal warnings for cannabis possession	Cautions	Convictions	Total
1999	405	—	—	1,024	2,940	4,370
2000	376	—	—	961	2,876	4,215
2001	344	—	—	918	2,712	3,975
2002	381	1	—	900	2,784	4,068
2003	389	10	—	921	2,871	4,193
2004	396	58	35	1,024	2,872	4,386
2005	444	301	159	1,159	2,774	4,837
2006	479	513	298	1,402	2,799	5,487

Whereas court convictions accounted for 67 per cent of OBTJ in 1999, the proportion shrank substantially from 2003 onwards. It was 57 per cent in 2005 and 51 per cent in 2006. All of the increase in OBTJ has been accounted for by the substantial growth in the use of cautions, the rapid expansion of the new kids on the summary pre-court block, the PNDs and formal warnings for possession of cannabis, and a slight resurgence in the number of offences 'taken into consideration'. In 2006, cautions, warnings and PNDs accounted for 40 per cent of all OBTJ.

Before we consider more closely the relationship between these pre-court disposals and proceedings in the courts, it is important to recognise that this national trend has been far from even across the country. It has always been the case, for example, that cautioning rates vary widely between police force areas. In 2006 cautioning rates for indictable offences (excluding motoring offences) varied from a high of 61 per cent in Dyfed Powys to a low of 21 per cent in Merseyside, the average rate across the country being 41 per cent (Ministry of Justice, 2007: Table 3.5 and para. 3.24). Moreover, police forces which have a high cautioning rate for indictable offences do not necessarily have a high rate for summary offences and vice versa. So, for example, Bedfordshire which in 2006 had a high cautioning rate for indictable offences had a very low one for summary offences, whereas the reverse was the case in North Yorkshire (ibid: Tables 3.5 and 3.6). Likewise, PNDs, use of which appears not to be closely related to cautioning rates, in 2006–2007 accounted for as little as 7 per cent of all OBTJ in Norfolk and as much as 32.8 per cent in North Wales (ibid: relating Tables 5.3 and 5.4).[2] This degree of variation is not unusual for new provisions which, because of staggered policy roll-outs and different initial levels of enthusiasm among local operational managers, tend to be taken up rapidly in some areas with slow starts in others.

This level of variation in the use of PNDs has, however, facilitated some comparative analysis of the impact of PNDs on the business of the magistrates' courts. Natural experiments have been made possible.

In early 2007 analysis was undertaken for the Office for Criminal Justice Reform (OCJR), which co-ordinates the work of the criminal justice departments in Whitehall. Four offences – causing harassment alarm or distress; drunk and disorderly (which does not count as an OBTJ); criminal damage under £500; and shoplifting – accounted, in that order of importance, for the largest number of PNDs in the preceding year, together representing 92 per cent (in 2006 the first two offences accounted for almost two-thirds, 63 per cent, of all PNDs (ibid: 101). The rank order is partially explained by the fact that PNDs were not available for criminal damage under £500 and shoplifting until November 2004: in 2006 the biggest increase in PND use was 76 per cent, for shoplifting (ibid: para. 5.15).

The OCJR analysts compared low with high PND use areas and examined the relative use of different sentences in the magistrates' courts in the same areas. This revealed that there was little difference in the changing pattern of sentences in the courts – though the decline in the use of fines was slightly steeper, albeit from a higher baseline, in the high PND use areas. However, when the size of fines imposed in the magistrates' courts was examined there was a difference. Whereas the size of fines under £100 in all magistrates' courts for all summary offences (excluding motoring offences) had declined by 20 per cent since the roll-out of PNDs, that in areas of low PND use had declined by only 9 per cent. However, when this issue was examined closely, the differences evaporated, except in the case of shoplifting. Whereas there was no significant difference in the decline of court fines under £100 in the high and low PND use areas for the offences of drunk and disorderly, causing harassment and criminal damage, there was a significantly greater

2. The relationship here is approximate, the data in *Criminal Statistics* 2006 Table 5.3 being for 2006–2007 and those in Table 5.4 being for 2006.

reduction in the size of court fines for shoplifting. This suggested that factors other than PND use differences were influencing fine values in the magistrates' courts.

Nevertheless, one clear finding emerged from the OCJR analysis. The increase in PND use for the four offences for which PNDs are principally being used significantly exceeded the decrease in all other disposals, something now clear from the published Criminal Statistics (ibid). The use of PNDs is significantly increasing the number of people being pulled into the criminal justice system.

Two conclusions follow from the above. The expansion of pre-court summary justice measures is having a significant net-widening effect (though, as I shall argue below, that general conclusion needs deconstructing). But it appears also to be displacing magistrates' court business, though to what degree remains unclear. The decline in small fines issued in the magistrates' courts may partly be attributable to the issue of PNDs, but other unidentified factors appear to be influencing that trend. It may be, for example, that a growing proportion of the cases reaching the courts involve offenders who have already received a PND, in which case there may be knock-on consequences for both the selection and severity of the sentences given.

The other development worthy of scrutiny relates to the greatly increased use of cautions since the turn of the millennium. As the Criminal Statistics 2006 emphasise, the number of offenders found guilty or cautioned for certain offences – violence against the person and summary and indictable criminal damage – is rising significantly and most of the increase is attributable to cautions for those offences (ibid: para 3.6).

In the case of offences of violence against the person, whereas the number of convictions or cautions for the more serious offences of wounding decreased by 10 per cent in 2006 compared to 2005, those for the less serious offences increased by 9 per cent, the increase in the case of the summary offence of common assault being 33 per cent and almost entirely attributable to the use of cautions. Likewise, for indictable and summary criminal damage offences, which in 2006 increased by 14 and 6 per cent respectively, in both cases the increases were almost entirely attributable to cautions. Since 2001 the number of offenders cautioned for violent offences has increased threefold and that for criminal damage offences almost threefold (ibid: Table 3.2). To what extent has this greater use of cautions displaced business from the magistrates' courts and/or, as in the case of PNDs, drawn into the criminal justice system additional cases and persons? The answer to this question is hazy, but the available published data suggest tentative answers.

The biggest increases in offenders dealt with during the five years to 2006 were for the indictable offences of sexual offences (+22.5%), robbery (+19.1%) violence against the person (+18.7%), and criminal damage (+18.7%), whereas there were falls in the number of offenders cautioned or convicted of burglary (-7.3%), drugs (-11.2%) and theft and handling (-22.7%). Numbers of offenders dealt with for indictable cases of fraud and forgery remained almost exactly the same while there was an increase in the number of offenders dealt with for all summary offences (+9%). These data prompt the question as to whether this pattern has been the same for both offenders convicted and offenders cautioned.

Consider, for example, the picture for offences of violence against the person. Here we are able to distinguish between not merely indictable and summary offences but more and less serious indictable offences (for details of which offences are included in each category, see Ministry of Justice, 2007: Table 3.12).

Table 2 shows that while the number of violent offenders dealt with in all categories, both convicted and cautioned, has risen, the increase in the numbers convicted has been relatively modest compared to the huge increase in the numbers cautioned. There is evidence, once again, of both displacement of the work of the courts by means of pre-court summary justice and net-widening. Thus, whereas the majority of indictable violent offenders continue to be dealt with through conviction in the courts, the proportion dealt with by means of cautions, both those committing more and less serious offences, has increased very substantially. Indeed, by 2006, almost three-fifths of the offenders committing the less serious, indictable, violent offences were being cautioned. As for the summary offence of common assault, the least serious offence in the calendar of violence, the total number of offenders dealt with by the criminal justice system more than doubled between 2001 and 2006, most of the increase accounted for by a more than threefold increase in the number cautioned. This is clear evidence of net-widening, that is, of offenders being brought within the ambit of the criminal justice system who previously were ignored or dealt with informally. It is possible that the type of offenders who might previously have been convicted by the courts are now being dealt with pre-court, but there is no clear evidence of this. The number of court convictions for all the major violence offence categories has increased.

Table 2: Offenders cautioned and convicted for more and less serious violence against the person offences and summary offences of common assault, 2001 and 2006 *Source: Home Office (2002): Table 5.11; Ministry of Justice (2007): Table 3.12*

	Conviction 2001	%	Caution 2001	%	Conviction 2006	%	Caution 2006	%	Percentage increase on 2001 for convictions	Percentage increase on 2001 for cautions
More serious violence against the person indictable offences	2,908	86	478	14	3,240	78	916	23	11	92
Less serious violence against the person indictable offences	32,390	63	19,090	37	38,622	41	56,357	59	19	195
Summary offences of common assault	26,610	62	16,590	38	49,260	45	60,938	55	85	267

That there is taking place displacement of court proceedings *and* net-widening as a result of the push for pre-court summary justice also emerges if we consider the use of cautions and PNDs for shoplifting (theft from shops). If the 38,800 PNDs issued in 2006 for shoplifting are added to the convictions and cautions for the same offence then the total number of shoplifting offenders dealt with in 2006 was 142,390, that is, 16.5 per cent higher than in 2000. In 2000, there being no PNDs, 77,542, or 63 per cent, of all shoplifters were convicted in court, the remaining 37 per cent being cautioned. By 2006 only 58,536, or 41 per cent, of the increased number of shoplifters were convicted in court. Thirty-two per cent of those now dealt with were cautioned and 27 per cent were issued with PNDs. For this rather common, everyday offence, more offenders are being criminalised and a sharply declining proportion of the total business is coming before the magistrates' courts.

Before concluding this section we should re-emphasise why the OCJR has been paying close attention to these pre-court summary justice trends. The attention is because of the accusation, referred to earlier, that the national managerial framework within which local law enforcement decision-making takes place has had unintended, perverse consequences as a result of pressures locally to tick boxes and meet targets.

Preoccupation with the disparity between the number of offences committed and those for which offenders are brought to account – the so-called 'justice gap' – has been a major New Labour theme, first spelt out in its 1997 Election Manifesto (Labour Party, 1997) and translated into a policy priority in the government's 2000 Spending Review (HM Treasury, 2000: Chapter Ten). Narrowing the 'justice gap' was thereafter made a numerical target for increasing the number of suspected offences resulting in offenders being cautioned, convicted or otherwise sanctioned: these became the 'offences brought to justice' (OBTJ). A Public Service Agreement (PSA) target for the Home Office was set, increasing the number and proportion of individuals formally sanctioned in relation to the total number of recorded crimes. In 2002 this Home Office PSA was for 1.2 million offences to be brought to justice by 2005–2006. It was adjusted upwards two years later in 2004 to 1.25 million OBTJ by 2007–2008.[3] This is the managerial background to the huge increase since 2001 in the number of OBTJ – the target has been substantially exceeded (1.42 million OBTJ were reportedly achieved in 2006–2007: see HM Treasury, 2007: para 1.2) – and, as we have seen, the substantially growing proportion of the sanctions which count towards the government's target have been handed out pre-court (see Figure 1 and Table 1). The criticism that 'seriousness of offence' was not built into the equation (reprimands for juvenile minor assaults gave the police as many OBTJ brownie points as convictions for major organised crime) identified a fundamental flaw, even if the government did not accept that it had led to disastrously perverse consequences (resulting, for example, in the too ready criminalisation of children and young people for minor offences). The result was a change in the Treasury PSA with the Home Office in October 2007 (PSA 24 – see HM Treasury, 2007). OBTJ data, defined as before, continue to be collected but they are now set alongside other indicators of criminal justice effectiveness which guard against the criticisms cited above. Thus, for example, allied PSAs are to Make Communities Safer (PSA 23) and Increase the Number of Children and Young People on the Path to Success (PSA 14). The former is focused on how particularly serious offences, such as rape, are effectively dealt with and the latter considers, inter alia, how many children and young people are entering the criminal justice system for the first time. Further, PSA 24 involves subdividing crime and OBTJ data into three sub-categories – serious violent and sexual offences, serious acquisitive crime and other crime – so that it can readily be seen precisely which parts of the justice gap are being narrowed. Moreover, and most tellingly, the government has conceded in the preamble to PSA 24 that:

> Successful delivery of the Government's vision cannot be imposed simply through top-down performance management, and the strategy is therefore to develop a criminal justice operating framework that provides local services with greater flexibility to determine how this vision is to be delivered effectively and efficiently. (ibid: para. 1.4)

Conceding to local decision-makers' greater discretion to determine priorities and approaches presumably provides part of the background to the announcement in late May 2008 by four police forces that they would in future be pursuing what they termed 'commonsense policing'. Acting Chief Constable Mark Rowley of Surrey Constabulary was reported as saying that his own force would be restoring to local constables' discretion decisions on how minor offences would be responded to rather than pursue 'misleading' Home Office targets (The Times, 31 May 2008). Although the four forces, Leicestershire,

3. For a general account of this history, see Solomon *et al.*, 2007: Chapter Four.

Staffordshire, Surrey and West Midlands, were identified in Sir Ronnie Flanagan's Review of Policing as forces who would in spring 2008 undertake a trial of 'proportionate' police crime recording and response (Flanagan, 2008: Recommendation 21), it appears that the forces concerned were pushing the initiative rather faster and further than the Home Office had anticipated. The arguments about when and to what extent the police should be employing pre-court summary justice options for minor offences is clearly part of this developing debate.

Conclusion

Whatever view one takes about the growing proportion of offenders and offences dealt with pre-court it is clear from this review that we need more information about and analysis of the trend. It is noteworthy that HM Chief Inspector of the CPS singled out this issue in his annual report for 2006–2007. Reflecting on the government's introduction in 2005 (CJS, 2005), and its abandonment in 2006, of a statute to merge into a single body the five criminal justice inspectorates, the Chief Inspector commented that the outcome, though no doubt right in the circumstances, had been something of 'a lost opportunity':

> A single inspectorate would have been better placed to respond to the extensive changes now being experienced within the criminal justice system. A far wider range of public authorities are now involved in enforcement of the criminal law. There are frequently overlaps in responsibilities ... which can result in gaps or inconsistency of approach ... enforcement is increasingly undertaken by alternative means such as cautions and fixed penalties ... the resource implications of prosecution make such alternatives more attractive. There has been a decline in recent years in the number of prosecutions both in absolute terms and as a proportion of offences brought to justice. Typically, prosecutions now account for between 40 and 50 per cent of the offences brought to justice within a criminal justice area. The use of alternatives to prosecution can be both pragmatic and sensible provided that it is done with appropriate discretion.
>
> In particular, the power to fine is now vested in many authorities and brings the risk that over zealous use may lead groups of citizens to believe that they are in reality the subject of a revenue raising initiative. There is often a perceived link with the way staff are managed and incentivized when there is outsourcing. This may cause substantial damage to public confidence. Such systemic issues could more readily be addressed by one inspectorate.
> (HM Chief Inspector of the CPS, 2007: 4–5)

It is of course not necessary for there to be a single criminal justice inspectorate for the emerging sphere of pre-court summary justice to be closely scrutinised. However, the fact that the Chief Inspector of the CPS has raised questions over the current lack of scrutiny and suggested that pre-court decision-making may be inconsistent or over-zealous and give rise to loss of public confidence is an indication that concerns over this developing aspect of government are widespread, and not just among the judiciary. There is need for a thoroughgoing review.

Several issues deserve attention. First, it is clear from the published statistics that the expansion of pre-court summary justice has, as the government intended, displaced some court business and that most of the cases displaced have been at the minor end of the seriousness spectrum. But has that invariably been the case? Are relatively serious cases, which arguably merit the attention of the courts, being dealt with pre-court? Some commentators have suggested this is so and that justice and crime preventive considerations are being undermined as a consequence. No detailed analysis, by either the criminal justice inspectorates or Home Office researchers, has so far been undertaken to assess these criticisms, but they deserve attention. The available published data do not provide definitive answers to this question but neither, as we have seen, do they offer any

support for the contention. The number of court convictions for all categories of violence, for example, has risen in recent years. Further, the criticism that certain types of cases which used to be dealt with in court are now being dealt with pre-court is not persuasive: it was always the government's intention that it should be so, and for as long as those displaced cases are minor then that outcome seems reasonable according to the justice principles discussed at the outset of this report.

Second, it is clear from the published evidence that extensive net-widening has occurred over the past five or six years in the sense that many more children, young people and adults have been drawn into the criminal justice system, mostly through the use of pre-court sanctions. This trend begs questions as to the character of the net-widening and whether or not it is desirable. Does the net widening constitute a narrowing of the justice gap of the sort the government intended and of which the public might widely approve – namely, offenders who were previously able to offend with virtual impunity for want of police and criminal justice attention now being brought effectively to book? Or does it involve the criminalisation of marginally criminal behaviour which in the past was dealt with, possibly quite effectively, through the application of various informal community sanctions (for example, the authority of teachers in schools, the interventions of residential neighbours or the sanctions of landlords in licensed premises), the operation of which has been undermined by the greater intervention of the police. If the latter is the case then the net-widening may be counter-productive in terms of both crime prevention and public confidence. These questions merit systematic attention. There is a good deal of anecdotal evidence, for example, that behaviour, particularly that of children and young people, is being criminalised which arguably would be better dealt with informally (school-related misbehaviour, for example) and in previous times was. The aggregate number of children and young people criminalised by either pre-court or court interventions has increased hugely in recent years (the number of disposals – which is not the same as the number of children, though there is no evidence that the number of disposals per annum per child has altered – rose by 28 per cent during the period 2002–2003 to 2006–2007: see Youth Justice Board, 2008: 24).

This leads, third, to various questions relating to the principles of proportionality of imposition and procedural justice which the widening scope of summary justice raise. It is a commonplace that there have always been differences in the sentencing policies of the courts from one part of the country to another. But those differences have been more visible and analysable than the developing sphere of pre-court summary justice where the decision-making differences between police and CPS areas are, as we have seen, significantly greater. These differences are not easily susceptible to public scrutiny. The decisions are made in police, prosecutorial and other offices rather than open court and, as the CPS Chief Inspector has emphasised, this expanding sphere lies either outwith the existing inspectorates' mandates or has yet to attract the attention of the five criminal justice inspectorates working collaboratively. There is an accountability deficit here which requires remedy.

The proliferation of pre-court summary justice options also raises the question as to whether persons incurring such penalties either do or should incur cumulative punitive consequences. It is, for example, arguably perverse that children and young persons, for whom cautions were originally introduced to divert them from court proceedings, must be brought before the court, no matter how minor their subsequent offence, if they have received a final warning (though this principle enshrined in the Crime and Disorder Act 1998 is now compromised by the introduction of PNDs for young persons, etc), whereas an adult is technically capable of receiving repeat cautions as well as being subject to the

other pre-court options now available. What is the logical basis for that distinction and should certain offences, if dealt with pre-court, be non-cumulative in their consequences (as are fines, so long as one pays them, for parking offences)? Or, to take another angle, should not a distinction be made in this regard between children, for whom criminalisation should, according to our international treaty obligations, be 'a last resort' (UN Convention on the Right of the Child 1989, Article 37b), and adults. Further, we need to know whether the impact of pre-court summary justice is unequal between different ethnic groups or whether, for want of insufficient guidance or scrutiny, offenders with mental health or other incapacities are being criminalised inappropriately.

In conclusion, the government has presented a cogent case for expanding the array and scope of pre-court sanctions. It makes sense, on grounds of economy and justice, that the courts do not have their lists filled with minor matters which can more expeditiously and effectively be dealt with summarily pre-court if the offence is admitted or, if the accused contest the matter, they have recourse to a court hearing. For as long as these conditions apply, the magistracy and judiciary have little cause for complaint, not least because, certainly in the case of children and young persons, they have themselves occasionally complained that trivial matters were needlessly being brought before them. Net-widening the criminal justice system as a result of the trend in favour of pre-court summary justice is also reasonable if it means that offenders, whose behaviour unequivocally harms the general public and who have previously been able to act with virtual impunity, are being brought to book. So far so good.

However, if relatively serious offences are being dealt with pre-court (no evidence has yet been produced that they are), or if the extent of pre-court summary decision-making varies too starkly between police or CPS areas (which certainly is the case), or if offending behaviour is being criminalised where use of informal sanctions and/or delegated authority would be more just, economical, effective and expeditious (there is good circumstantial evidence that it is with regard to children), then the current trend may be counter-productive and serve to risk rather than enhance public confidence. These issues deserve ongoing critical scrutiny. The government has recently amended the managerial framework for assessing police and other criminal justice agencies' effectiveness. But, it should be noted, the number of OBTJ will continue to be counted and they will continue to include, under 'other crime', alcohol-related crime and disorder and anti-social behaviour. There remains a risk, therefore, despite the pressure from the police that they be freed from such targets and granted greater discretion to use 'commonsense' decision-making, that persons and behaviours will be criminalised where both commonsense and the public interest suggest that informal control systems and informal sanctions would better apply. For all these reasons, the trend towards pre-court summary justice should more incisively be scrutinised to ensure that justice is being meted out fairly and effectively as well as rapidly. We cannot yet be wholly confident that this is so.

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