



# **Exercising Discretion: The Gateway to Justice**

**A study by Her Majesty's Inspectorate of Constabulary and  
Her Majesty's Crown Prosecution Service Inspectorate on  
cautions, penalty notices for disorder  
and restorative justice**

**June 2011**

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# 1. Executive summary

In 1951, Sir Hartley Shawcross, who was then Attorney General, stated that 'It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution.' He continued with what is regarded as a classic statement on public interest: that there should be a prosecution 'wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest' (House of Commons Debates, Volume 483, 29 January 1951).

Offenders should never be allowed to think that they are immune from the law and from the consequences of committing crimes. However, this does not mean that every offender caught by police must be prosecuted in a criminal court in order to administer a just outcome. Effective justice that fits the circumstances of the crime can be achieved for victims and offenders – particularly young people – outside the formal court system by adopting different methods of dealing with crime.

As a rule of thumb, where there is sufficient evidence, serious offences and perpetrators who carry on offending despite being given appropriate chances to stop need to be dealt with in court. Less serious cases can be dealt with using approaches known as 'out-of-court disposals', always provided that these are a proportionate response to the offence or offender. Such methods have often been called 'diversions' from the criminal justice system; but in recent years they have been applied widely to an increasing number of cases, with the result that they are now a substantial area of practice in their own right.

The most commonly used out-of-court disposals are cannabis warnings, cautions (simple or conditional) and penalty notices for disorder. In addition, 'Restorative justice' (RJ) is now often included in this category, although it can also be used after a conviction at court.

These forms of justice are designed to simplify and speed up dealing with less serious offending. They were introduced as a proportionate response to so-called low-level crime. They do not require as much paperwork as a court case and when used effectively in neighbourhoods and communities can be a very efficient way of dealing with offending 'on the spot', particularly when police officers are able to check the identity and history of offenders using mobile technology. They are also generally less expensive.

Where there is sufficient evidence, police officers and prosecutors are responsible for deciding whether to send offenders to court or deal with them with such disposals. They therefore act as a gateway to criminal courts, and so play a vital part in the management of the criminal justice system, ensuring that the right cases are sent to court and less serious cases are managed effectively, using the appropriate disposal for the offence, offender and victim. The exercise of this discretion is not unfettered and sometimes the decisions are not as straightforward as they initially appear; but since the results have

significant consequences for the victims of crime, offenders and communities it is important that there is real transparency and accountability for the decisions made.

We have therefore conducted a focussed, indicative study of a small number of cases to look more closely at out-of-court disposals and the contribution they make in the fight against crime. In doing so we have asked two questions:

- Is justice being served by making the right decisions in most cases?
- Is there a wider understanding about why some offenders go to court and others do not?

In 2009, 38 per cent of the 1.29 million offences 'solved' by police were dealt with outside of the court system. We found that the use of out-of-court disposals has evolved in a piecemeal and largely uncontrolled way. An earlier public survey conducted on behalf of HMIC confirmed general public support for giving first-time offenders a second chance – which out-of-court options certainly offer; but this public support ebbs away when they are used for persistent offenders. Our work also suggested that victim satisfaction is high when offenders take part in RJ approaches. RJ, used appropriately, may also reduce re-offending.

The substantial growth in the use of out-of-court disposals has created some disquiet among criminal justice professionals over inconsistencies in their use, in particular for persistent and more serious offending. We found wide variations in practice across police force areas in the proportion and types of offences handled out of court.

In view of the growth and wide variations in practice, and the consequences for offenders and victims as well as for public confidence in the criminal justice system, we believe the time has come to formulate a national strategy to improve consistency in the use of out-of-court disposals across England and Wales, and we have made this our primary recommendation. We hope that such a strategy will draw on the good practice identified in this report, promote understanding and reduce excessive variations and inconsistencies. The strategy should be based on what works to improve victim satisfaction, reduce re-offending and provide value for money. It should take into account not only the nature of offending and offenders, but how best to achieve transparency and reassurance for the public.

In making this recommendation, we are acutely aware of the challenge that a national strategy may increase the bureaucratic burdens of prosecutors and police officers. We do not believe that such increases are an automatic consequence of this recommendation. In contrast, there are more definite consequences to decisions about whether someone enters the formal criminal justice system or receives an out-of-court disposal: an individual's chance of getting a job or travelling abroad can be affected, for instance, and there may be wider implications for public confidence. It is therefore imperative that the principles of openness and fairness are applied to the use of out-of-court disposals. This will necessarily rely on record-keeping, since confidence in a system of justice that is delivered outside the courtroom is dependent on the ability of police and prosecutors to publish information about their use,

enabling the public to see how out-of-court disposals are managed locally. This record-keeping must be proportionate and can be based on existing systems.

Although we have used the expression 'out-of-court disposals' throughout this report because the phrase is used by practitioners, we found the description wholly inadequate – the terms 'neighbourhood' and 'community' justice have been suggested as alternatives. But the label 'out-of-court disposals' has led to widespread misunderstanding – even among practitioners – about their use and purpose, and has tended to undermine the positive aspects of managing offenders and offending outside the formal court environment using methods which are fair, timely and proportionate.

## **The scope of this review**

The joint inspection team visited five police forces and associated CPS offices in England and Wales, and considered 190 cases involving theft and criminal damage offences dealt with by way of simple caution, conditional caution, penalty notice for disorder (PND) or RJ disposal. We allowed a further 12 months to establish the level of re-offending. We also compared our findings with 50 cases where the offender had been charged and pleaded guilty in a magistrates' court. It is accepted that our sample size was small: but the data, combined with practitioner experience, provides a good snapshot of current activity.

## **Our findings**

**Variation in use:** The use of out-of-court disposals varied considerably across all 43 force areas in England and Wales in 2009, ranging from 26 per cent to 49 per cent of all offences brought to justice. Some variation is to be expected, due to local crime and offending patterns, and the exercise of local discretion; but such factors do not fully explain the scale of variation found.

While all except restorative disposals are recorded on the Police National Computer (PNC), not all out-of-court disposals carry the same obligations of disclosure to a court or an employer. The choice of disposal therefore has a potential impact on an individual's future life. An offender in one area may be dealt with by way of restorative disposal for a first offence, whereas in another area he or she might have received a caution – which is visible in a Criminal Records Bureau (CRB) check.

We did not find any force with an explicit policy to increase their use of out-of-court disposals. Where greater use is evident, this is linked in some places to a strong emphasis on achieving targets associated with improving performance in the level of offences brought to justice. Target chasing has not been conducive to the effective exercise of discretion.

**Appropriateness of decisions:** We looked at 190 cases involving out-of-court disposals, and a further 50 cases where charges were laid, and considered the decision made in each case. In one-third of the cases the

disposal selected did not meet the standards set out in the existing national and force guidelines that were available.

The principal area of concern is the use of out-of-court disposals for repeat offenders. Although sometimes this may be accounted for by the circumstances (for instance, if a witness is reluctant to attend court), within our small sample we found obvious examples of unexplained and unchallenged overuse.

***Effectiveness of disposals:*** We selected cases from 2008/09 to allow a review of re-offending 12 months after the disposal. We found that re-offending rates are lowest for RJ disposals, at nine out of 40 cases; levels ranged from 18 out of 50 cases for conditional cautions to 22 out of 50 for PNDs, and reach 40 out of 50 for those charged in court.

While it is accepted that those selected to be charged may have been identified previously as more prone to re-offend, the comparative success rates of out-of-court disposals is an important finding.

A total of 53 out of 64 victims we interviewed reported being 'satisfied' or 'extremely satisfied' with the out-of-court disposal, compared to 14 out of 22 of those where the offender went to court.

Looking in more detail, for simple cautions 12 out of 17 victims we spoke to were satisfied or extremely satisfied. For conditional cautions, 10 out of 11 victims were satisfied or extremely satisfied. This may be unsurprising, given that conditional cautions rely more upon victim co-operation; but it is an illustration of the benefits of out-of-court disposals – benefits that ought to be conveyed consistently to the public.

***Efficiency and reducing costs:*** There are clear time benefits for some disposals: for example, issuing a PND on the street as opposed to at a police station after arrest saves nearly three hours of police time. Charging the offender would take almost five hours more, as well as the time taken to deal with the case in court, where the offender's first appearance may occur several days or weeks later.

Further work is required, however, to assess administrative processes and times spent preparing and presenting the case in court, and to provide a more comprehensive estimate of potential savings and efficiency improvements.

Given the high victim satisfaction rate for conditional cautions, it is clearly a frustration to police that each one takes, on average, an extra hour to complete compared to a simple caution (due to the additional requirements to send it to the Crown Prosecution Service (CPS) for a decision). Police officers regard this as unnecessary bureaucracy that is deterring use of an effective and otherwise popular option, while CPS staff hold mixed views about who ought to be making the decision to issue conditional cautions. The ability of the police to authorise and issue conditional cautions without referral to CPS is a measure that was put out for consultation in the Government Green Paper published on 07 December 2010.

**Recording and enforcement:** There are concerns about the accuracy and consistency of recording of out-of-court disposals. In particular, it is not always possible to see in one place on the PNC a record of all PNDs previously issued to an individual. This omission may have contributed to incorrect judgements on disposals.

Each force appears to take a different approach to recording RJ, and because RJ disposals are not 'counted' for the purposes of solving crime in national statistics, this important area of police activity has not attracted the profile of other out-of-court disposals. In addition, the lack of a standard recording practice, and the non-recording of these disposals on PNC, makes it possible for one offender to receive multiple restorative disposals in different forces without detection.

## Conclusions and next steps

Because out-of-court disposals have developed in a piecemeal fashion, they have not been regulated with the same intensity as the more formal criminal justice system. The expression 'out-of-court disposals' perpetuates a sense that they are much less important than a disposal in court – in effect a soft option. If there is to be a real change in this perception a greater understanding about what amounts to a proportionate response to offending will be necessary.

We identified wide variations in the application of out-of-court disposals, which go beyond the local differences one would naturally expect. We identified particular concerns about the use of out-of-court disposals for persistent offenders. Recording practices may have contributed to this difficulty.

It is not possible or desirable to strive for consistency at the expense of local discretion – but wide variations in practice may lead to a perception, real or imagined, of unfairness. And there is nothing more likely to diminish public confidence in the criminal justice system in its widest sense than a sense of unfairness. Greater consistency in the choice of out-of-court options in individual cases will influence public confidence in the criminal justice system: and there are now opportunities to achieve this, as traditional targets are swept away.

We have made a clear **recommendation** that a national strategy would bring greater consistency in the application of 'out-of-court disposals' As part of that drive, the police and CPS should clearly state their strategic objectives for the use of such disposals, and review their use in the current criminal justice environment. There are now opportunities **to provide a clear steer on the use of RJ options**, particularly as they gain credibility with both victims and criminal justice practitioners. **RJ should be recognised as one of the approaches that the police can use to show local communities that a crime has been solved.**

The current out-of-court disposal regime was found to be a **legitimate and time-efficient option for dealing with less serious crimes.** We have identified areas of good practice where out-of-court disposals have been used to achieve **speedy** disposals for minor offending which were both **cost**

**effective and proportionate**, particularly when that ‘disposal’ was administered **quickly after the event and in consultation with the victim, providing feedback whenever possible**. We found that **the level of victim satisfaction hinged largely upon the extent to which they have been kept informed and updated**.

The application of sound commonsense principles should go a long way in remedying some of the difficulties we have identified. Perhaps the key to making the right decision is for the decision-maker to ask: ‘If all the facts and circumstances of this case were published, what would the public think?’

# 1. Justice outside of the courts

## Out-of-court disposals

- 1.1 In 2009, 38 per cent of the 1.29 million offences ‘solved’<sup>1</sup> by police were dealt with by a disposal outside the court system. In a five-year period from 2003, the number of ‘out-of-court disposals’ administered each year increased by 135 per cent (from 241,000 in 2003 to 567,000 in 2008). Although the number of court convictions has remained stable, the proportion of offences brought to justice outside court increased from 23 per cent in 2003 to a peak of 40 per cent in 2008, before falling back slightly in 2009.<sup>2</sup> Despite the fact that the number of out-of-court disposals administered appears to have reached a plateau, the trend since 2003 represents a fundamental shift in how justice is delivered.
- 1.2 Out-of-court disposals are designed to provide simple, swift and proportionate responses to low-risk offending, and to reduce the amount of time courts spend listening to minor and undisputed matters. Additionally, these disposals give police officers a quick and effective means of dealing with less serious offences, allowing them to spend more time on frontline duties and on tackling more serious offending.
- 1.3 Although we have used the term ‘out-of-court disposals’ throughout this report – as it is common expression in the criminal justice system – we found it unhelpful, as it fails to convey to the public the nature of the approach taken and why.
- 1.4 The most commonly used out-of-court disposals for adults are:
- **Cannabis warning** – a formal warning from a police officer for simple possession of cannabis;
  - **Simple caution** – a formal warning from a police officer following an admission of guilt;
  - **Conditional caution** – a caution with conditions attached, authorised by the Crown Prosecution Service (CPS) and administered by the police. These are issued to tackle offending behaviour, provide reparation and enable compensation to be paid to victims, where appropriate. Failure to comply with the conditions will usually result in prosecution for the original offence; and
  - **Penalty notice for disorder** – an offender is offered the chance by a police officer to pay a fixed penalty of £50 or £80 to discharge liability for an offence and avoid a court appearance.

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<sup>1</sup> 1.29 million crimes were detected in 2009, whereby a person responsible for the offence was identified and dealt with. Home Office (2011) *Criminal Statistics England & Wales 2009/10*.

<sup>2</sup> This slight reduction in out-of-court disposals for that year could possibly be attributed to the re-emergence of officer discretion and wider adoption of restorative justice (RJ) disposals in many forces across England and Wales.

- 1.5 Restorative justice (RJ) is also increasingly considered as an out-of-court disposal, although its use can also be applied following conviction and sentence. RJ (also sometimes called 'reparative justice') is an approach that focuses on the needs of victims and offenders, instead of taking offenders through the formal court system. In RJ processes, victims are given an active role in a dispute, and offenders are encouraged to take responsibility for their actions, and to repair the harm they have done – for example by apologising, compensating victims, repairing damage or doing some form of community service.
- 1.6 The term 'RJ' covers a wide range of options, starting from its use on the street (at a police officer's discretion) to deal with a minor offence, for example, by getting the perpetrator to clean off graffiti and apologise to the victim. At the other end of the scale, a formal RJ panel may take place, with victims and perpetrators coming together to encourage the offender to face up to his or her actions and, if appropriate, agree any reparation. RJ can be used with both young people and adults.
- 1.7 The Association of Chief Police Officers (ACPO) often refers to the following definition of RJ:

*'RJ is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.'*<sup>3</sup>
- 1.8 RJ can be delivered at any stage in the criminal justice process: from a resolution on the street, without the need for arrest, to on an offender's release from prison. For the purpose of this report, we have looked at RJ in the community.
- 1.9 Out-of-court disposals for young people are comparatively well regulated compared to those for adults, which have been introduced in a piecemeal fashion, with individual sets of guidance on implementation. It was only in 2007 that a consolidated guidance document<sup>4</sup> was published by the then Office for Criminal Justice Reform (OCJR), in an attempt to give some direction on choosing the correct option and on ensuring consistency in implementation.

## **Public views**

- 1.10 The concept of dealing with crime outside of the courts has received a mixed public reception. While many recognise the potential value of diverting first-time offenders from the court system and preventing re-offending, support falls away significantly when these disposals are perceived as a 'soft option' – especially if they are being given to someone who has offended before.

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<sup>3</sup> Marshall, T. (1999) *Restorative Justice – An Overview. A report by the Home Office Research development and Statistics Directorate.*

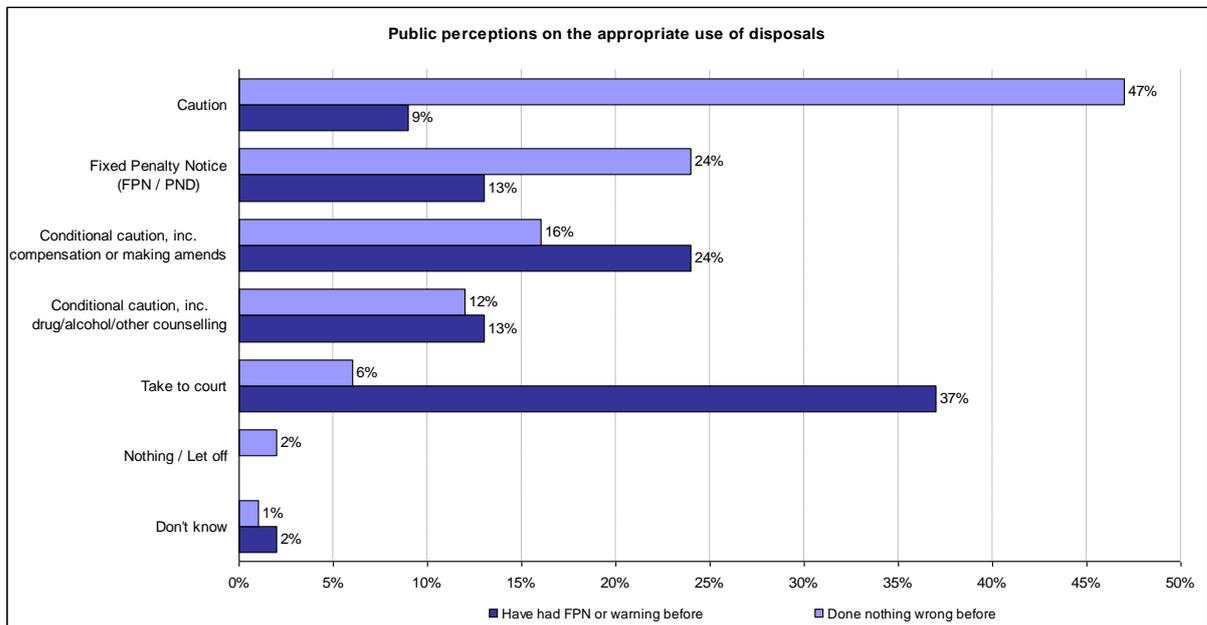
<sup>4</sup> OCJR (2007). *Out-of-court Disposals for Adults: A guide to alternatives to prosecution.*

1.11 This range of views was well illustrated in an Ipsos MORI survey in 2010,<sup>5</sup> conducted on behalf of HMIC, which asked the following question:

*‘Which, if any, types of penalty in your opinion are appropriate for adults who own up to a minor offence and haven’t done anything wrong before, and those who have had a fixed penalty or warning before?’*

The results of this research are shown in figure 1 (light purple shows the answers for those who haven’t offended before; dark purple shows those who have had a fixed penalty or warning before).

**Figure 1 – Public view of potential disposals**



1.12 It is clear from this research that public support for alternatives to court is high in the first instance, (ie for those without an offending history), but that it diminishes rapidly once the offender has already been given a ‘second chance’.

1.13 Academic research studies show that, while the public support harsh punishment for serious and persistent offenders, they are in favour of rehabilitation and reparation, particularly for lesser offences.<sup>6</sup>

1.14 There is a distinct danger that the repeated use of out-of-court disposals for persistent offenders will reinforce or generate a feeling that a ‘soft option’ is being used, or that it is solely a money-saving option for the police.

<sup>5</sup> HMIC/Ipsos MORI (2010). *Where Are the People on Crime and Punishment*.

<sup>6</sup> Maruna, S. and King, A. (2003). *Public Opinion and Community Penalties*.

## Insiders' views

1.15 The disquiet concerning out-of-court disposals has not been restricted to the public. In 2009, the House of Commons Justice Committee commented that:

*'The growth in the number of out-of-court disposals represents a fundamental change to our concept of criminal justice and raises a number of concerns about consistency and transparency in the application of punishment.'*<sup>7</sup>

1.16 In August of the same year, in an article in the *Daily Telegraph*,<sup>8</sup> the Magistrates' Association also warned of the inherent dangers to the wider justice system of police officers handing out 'summary justice'. In an outspoken statement, the chair of the association said:

*'...the growth of out-of-court disposals is failing the public and "dumbing down" the criminal justice system...[the police] cannot be relied upon to handle them appropriately...there is inconsistency of their use, there is inappropriate use...'*

1.17 By 2009, some of those working within the criminal justice system were raising concerns about how such disposals were being deployed, in particular in relation to:

- serious offences, including violent and sexual offences, which ought to have been prosecuted at court;
- reports that some persistent offenders were repeatedly receiving out-of-court disposals when their conduct demonstrated a pattern of behaviour requiring a more serious response;
- the apparent significant variation between criminal justice areas in the number of out-of-court disposals administered each year; and
- the robustness of fine enforcement arising from unpaid PNDs.

1.18 These concerns also raised questions about the wide variation in uptake of such disposals; the effectiveness of local quality assurance arrangements; their impact on victims and offenders (respectively); and data recording.

## The social impact on the offender

1.19 The decision whether to prosecute or administer an out-of-court disposal has ramifications beyond the most efficient way of dealing with specific offending or the impact on public confidence – important as both these things are. It can affect the future life choices of the offender, and do so differentially depending on the option selected.

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<sup>7</sup> House of Commons Justice Committee (06 August 2009). *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System*.

<sup>8</sup> *Daily Telegraph* (19 August 2009). 'Repeat and serious offenders are escaping court with on-the-spot fines.'

1.20 Figure 2 (overleaf) sets out some of the different outcomes or impacts of each out-of-court disposal.

**Figure 2 – A comparison of impacts from disposal options**

Disposal	Recordable (entered onto PNC)	Disclosable to courts for sentencing	Criminal Records Bureau (standard)	CRB (enhanced)	Disclosable abroad	Rehabilitation of Offenders Act applies
PND	✓	✓	x <sup>9</sup>	x <sup>10</sup>	x	x
Simple caution	✓	✓	✓	✓	x	✓
Conditional caution	✓	✓	✓	✓	x	✓
RJ disposals	x	x	x	x	x	x
Convictions	✓	✓	✓	✓	✓ <sup>11</sup>	✓

1.21 As Figure 2 shows, all except RJ disposals are recordable on the Police National Computer (PNC), providing the offence itself is recordable. Convictions, simple cautions, conditional cautions and PNDs may all be disclosed to a court after conviction.

1.22 The Rehabilitation of Offenders Act 1974 now includes simple cautions and conditional cautions as well as convictions. This means that simple cautions become ‘spent’<sup>12</sup> immediately after issue, with the result that a person can legitimately answer ‘no’ on an application form asking whether they have any cautions. Conditional cautions are ‘spent’ after three months.

<sup>9</sup> Only disclosed where deemed relevant to application.

<sup>10</sup> Only disclosed where deemed relevant to application.

<sup>11</sup> Providing offence is recordable; Statutory instrument 2000/1139 refers.

<sup>12</sup> ‘Spent’, under the Rehabilitation of Offenders Act 1974, means that the offence can be disregarded after a period of time has elapsed. This period of time is variable according to the nature of the offence and resulting sentence.

- 1.23 Criminal Records Bureau (CRB) checks, however, will reveal convictions, simple cautions and conditional cautions for recordable offences, although details of PNDs are only disclosed when deemed 'relevant' to the application. This applies for both standard and enhanced checks. An enhanced check is conducted for applicants for certain jobs (for example those that involve working with children).
- 1.24 The United Kingdom has an agreement in place with other European countries to disclose convictions for recordable offences upon request. Out-of-court disposals are not disclosed.

### **The focus for joint inspection**

- 1.25 The Criminal Justice Chief Inspectors Group<sup>13</sup> (CJCIG) recognised the effect of out-of-court disposals on the balance of cases entering the formal court system. Based on both public unease and previous inspection findings, they also shared concerns about the apparent inconsistencies.
- 1.26 This joint thematic inspection was therefore commissioned by CJCIG to build on previous statistical analysis by undertaking joint fieldwork designed to gain a better understanding of the obvious variations in approach, and to identify what out-of-court disposals work well.
- 1.27 The objectives of the inspection were to:
- Identify the reasons behind the **variation in use of disposals** in different areas;
  - Check the **appropriateness of the decisions** in cases where out-of-court disposals have been used;
  - Assess the **relative effectiveness** of various out-of-court disposals, from a police, victim and offender perspective;
  - Identify ways of **improving efficiency and reducing costs** in administering out-of-court disposals; and
  - Check the **follow-up** of out-of-court disposals, in particular the enforcement of non-compliance with out-of-court disposals; recording of the results on the Police National Computer (PNC); and storage of case papers.
- 1.28 As out-of-court disposals for young people under 18 are regarded as having more structure and oversight (by Youth Offending Teams), it was decided to focus on adult disposals.

### **Methodology**

- 1.29 This inspection looked at a randomly selected sample of cases across a range of out-of-court disposals:

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<sup>13</sup> Consisting of the Chief Inspectors of Constabulary, CPS, Court Administration, Probation and Prisons.

- simple cautions;
- conditional cautions;
- penalty notices for disorder (PNDs); and
- RJ disposals.

- 1.30 We decided to concentrate on the high volume offences of criminal damage and theft, to avoid duplicating the concurrent work commissioned by the Ministry of Justice on disposals linked to serious and violent offenders.
- 1.31 Five criminal damage cases and five theft cases were reviewed for each disposal type, in each of the selected force areas. The same number of cases were examined for offenders who were charged and dealt with by way of guilty plea at the magistrates' court, to ensure that comparisons could be made between out-of-court cases and court disposals.
- 1.32 Cases were reviewed to see whether they were issued appropriately, with regard to national and local policies. For consistency, simple cautions, conditional cautions and PNDs were checked against national policies, while RJ disposals were assessed against local policies. Our review took into account the flexibility built into national guidelines to promote the application of local discretion.
- 1.33 We looked at the effectiveness of the disposals in two ways. First, we examined any offending behaviour resulting in charges being brought or a further out-of-court disposal being issued in the 12 months following the disposal; and second, we telephoned victims and asked them the extent to which they were:
- consulted prior to a decision being made;
  - kept updated; and
  - satisfied with the end result.
- 1.34 The cases selected were drawn from the period 01 April 2008 to 31 March 2009, to ensure that sufficient time had elapsed to examine any further offending since the disposal. We acknowledge that this makes the sample older than is desirable, but that disadvantage was moderated by the benefits of looking more widely at the impacts.
- 1.35 The case reviews were supported by interviews with key personnel from the respective police force and local CPS office.

- 1.36 We looked at the time and cost of administering different disposals to identify areas where potential savings might be made. This involved asking police officers to estimate the time spent on each of the following components of the process, for each of the different disposal types:
- at the scene and investigating;
  - in custody (where relevant); and
  - undertaking related administrative and other processes.
- 1.37 The time estimates given took account only of the time spent by police officer(s) deployed to deal with the incident. We did not seek to include the time contributed by dispatchers, supervisors or custody staff.
- 1.38 Throughout the inspection, the team focused on identifying any improvements to processes or practices which could lead to increased efficiency or reduced costs. We asked key personnel for examples of good practice that might be transferable for the benefit of other forces and criminal justice areas.

## 2 What did we find on the key issues?

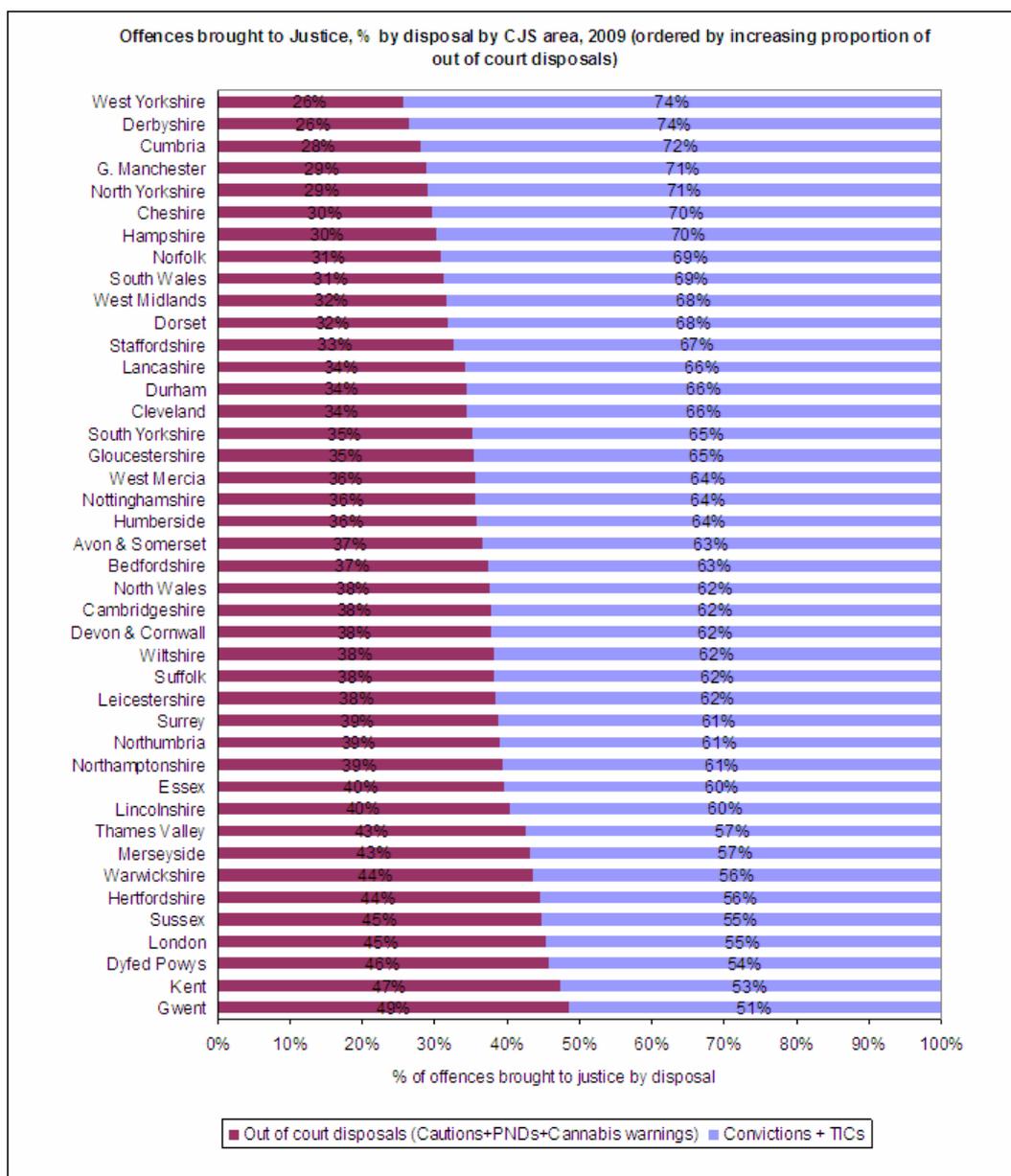
- 2.1 As set out in paragraph 1.27, the key issues which formed the focus for this inspection were:
- a) variation in use of disposals;**
  - b) appropriateness of decisions;**
  - c) effectiveness of disposals;**
  - d) efficiency and the reduction of costs; and**
  - e) follow-up of out-of-court disposals.**
- 2.2 The joint inspection team visited five criminal justice areas: Leicestershire, West Yorkshire, Dyfed Powys, Thames Valley and London. Interviewees were drawn mainly from local police and CPS in each of these areas.
- 2.3 Two further police forces, Norfolk Constabulary and Lancashire Constabulary, kindly assisted the inspection by providing additional information and further cases of RJ disposals.
- 2.4 In each area, the team sought to relate their findings to the expectations of how out-of-court disposals should be handled, based on any relevant national guidelines and context. We compared these expectations to the reality of local practice, and identified what appeared to work well.

### **a) Variation in use of disposals**

#### ***National context***

- 2.5 The uptake of out-of-court disposals varies greatly between criminal justice areas in England and Wales (see Figure 3 overleaf, which sets out the national figures). In 2009 (the latest available figures), out-of-court disposals accounted for 26 per cent of all offences brought to justice in West Yorkshire; but in Gwent, this figure was 49 per cent. The average across England and Wales was 38 per cent.
- 2.6 To some extent such variation is to be expected, as each area has a different offender profile, crime mix, and set of local policing and justice priorities. However, previous research has suggested that the wide variations are not fully explained by these local issues.

**Figure 3 – Variation in case disposals<sup>14</sup>**



2.7 The chart at Figure 3 does not show RJ disposals. According to information provided by the Association of Chief Police Officers (ACPO), 33 out of 38 forces surveyed in England and Wales were using some form of restorative practices in 2010. Of these, 24 were using RJ as defined in paragraph 1.7, and overall the survey showed a common understanding of RJ.

<sup>14</sup> Source: Ministry of Justice, *Crime Statistics for 2009*.

## ***Our findings***

- 2.8 This inspection sought to understand the key factors behind the variation in case disposals shown in Figure 3. We therefore carried out in-depth interviews of relevant operational and strategic staff from the participating police forces and CPS teams.
- 2.9 The main factors identified as having an impact on the variation in the use of out-of-court disposals are:
- the existence of a **'performance culture'**;
  - **patchy knowledge** of the range and use of out-of-court disposals;
  - a **lack of structure** in the use of out-of-court disposals; and
  - the **uptake of RJ** in some forces.
- 2.10 While all areas inspected recognised the potential benefits and risks of using out-of-court disposals, none had a comprehensive strategy that covered their use. As a result, local practices – even within individual forces – were seen to heavily influence decision-making. This gave the appearance of a postcode lottery in relation to the disposal actually chosen.
- 2.11 Increases in the use of out-of-court disposals within a force seemed to happen as a result of a **'performance culture'**, which included a push to improve sanction detection rates.<sup>15</sup>
- 2.12 In one force, an operation to improve the force's sanction detection rate was introduced at the same time as a campaign to encourage the use of RJ. Officers reported a dilemma over what to do, when pressure is being placed on them to make an arrest and strive to achieve a sanction detection. In forces where the 'performance culture' encourages officers to seek every opportunity to detect crimes, some out-of-court disposals offer a realistic opportunity to achieve this – but the use of RJ disposals becomes less attractive. Sanction detections reaped the greater reward for officers in terms of performance.
- 2.13 However, a balanced approach is achievable. Police officers in Leicestershire reported they received equal credit from their supervisors and managers for issuing a RJ disposal as for sanction detection, so were able to make the best decision in the circumstances.
- 2.14 Many police officers exhibited **patchy knowledge** of the range of disposals, and of the detailed guidance behind each separate type of disposal. This has led to localised trends and preferences. The policies for the various disposals have been written separately, and this works against achieving a consistent approach to decision-making.
- 2.15 The *CJS Code of Practice for Conditional Cautions* was revised in January 2010; however, some prosecutors were still referring to an

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<sup>15</sup> Sanction detection: where the offender is charged, reported for summons, or cautioned (including a conditional caution), been given a formal warning for possession of cannabis, been issued with a PND or the offence has been taken into consideration when an offender is sentenced.

earlier version of the Code at the time of our inspection. The guidance to CPS lawyers on their intranet had only recently been updated to show the new Code. In addition, *The Director's Guidance on Conditional Cautioning* provides more detailed guidance to prosecutors on how the Code should be applied.

- 2.16 An example of local variation was found in one force area, where one neighbourhood sergeant encouraged his officers to arrest offenders to ensure that fingerprints and DNA were captured, while in another neighbourhood team, officers were encouraged to issue PNDs on the street for similar offences.
- 2.17 The **lack of structure** and hierarchy in the range of available disposals means that a number of disposals can be considered for the same offence. Thus we found a similar scenario prompted use of a range of out-of-court disposal options. While this discretion is viewed positively by decision-makers and gives flexibility to choose a disposal which is appropriate to the circumstances, it does encourage diversity in application and makes any attempts by supervisors to introduce consistency much more difficult. This also leads to the criticisms highlighted by the chair of the Magistrates' Association in 1.16 above.
- 2.18 There were differences in the **uptake of RJ** in the forces visited. All employed youth RJ disposals in some format, but only three of the five forces offered RJ disposals for adult offenders (although one of the two that did not offer RJ was developing a plan to implement the practice in 2011). Although the RJ policies of the three forces which were using it varied considerably, a common factor was that officers could use their discretion to administer an RJ disposal in the community, without needing to arrest the perpetrator at the outset. ACPO are proposing to publish minimum standards for RJ in 2011.

Norfolk Constabulary actively promotes RJ and has trained 485 police officers to deliver across three distinct tiers:

**Tier 1 – Street RJ, problem-solving** – trained officers can administer on the street using their discretion.

**Tier 2 – Community restorative conferences** – for situations where it is thought advantageous for the offender to meet the victim in a controlled environment. These meetings are administered and run entirely by volunteers. Police officers can be involved in the process, as required.

**Tier 3 – Specialist restorative conferences** – run by specially trained practitioners, these are identical to the community restorative conferences, but are for high risk individuals. These conferences can be held in prison after sentence.

Tiers 1 and 2 are most commonly associated with out-of-court disposals. Since 2007, 9,000 Norfolk residents have been involved either as a victim or an offender in the RJ processes (mainly at Tier 1), and 89 per cent of the victims across all tiers were satisfied with the outcome.

- 2.19 The drift to greater use of out-of-court disposals has not been universal. In fact, there was evidence from one force that there has been a conscious decision to actively reduce the number of out-of-court disposals. They were undertaking a 'charging' pilot whereby offenders were arrested and charged instead of being issued with an out-of-court disposal. The rationale for this strategy was to take away the notion of the police officer acting as the 'judge and jury' when dealing with offenders, and to ensure that cases go before a court.
- 2.20 Despite the intended benefits, some local officers believe that this policy increased demand on local custody facilities and on CPS resources beyond their maximum capacity, leading to excessive queues to book detainees into custody, and long waiting times for CPS advice on charging. A review of this project was underway at the time of the inspection.

## **b) Appropriateness of decisions**

### ***National context***

- 2.21 As highlighted in paragraph 1.17, concerns have been expressed that persistent offenders are repeatedly issued with out-of-court disposals, and that serious offences are inappropriately being dealt with out of court.
- 2.22 There are varying levels of guidance upon which officers base their decision-making. There are separate national policies for each type of disposal, brought in at different times. Additionally, most forces have created their own policies, which tailor the national guidance to their local context. In 2007, a set of guidelines was published in relation to out-of-court disposals.<sup>16</sup> These contained clear explanations and overviews of each disposal type, but gave no guidance on their interoperability or relative gravity.
- 2.23 Although the national guidelines for out-of-court disposals were written and published separately, PNDs, simple cautions and conditional cautions have several common conditions of issue. These include requirements:
- for the offence to be of low-level criminality, or not in the public interest to prosecute;
  - that there is sufficient evidence to charge the offender; and
  - that the offender agrees to accept the simple caution or conditional caution (or, in the case of PNDs, is compliant with the process).
- 2.24 There are also rules that are specific to each disposal. These are outlined in the separate guidance documents, and give the specific offence types for which certain disposals are precluded or restricted (such as domestic violence cases and sexual offences). In certain cases,

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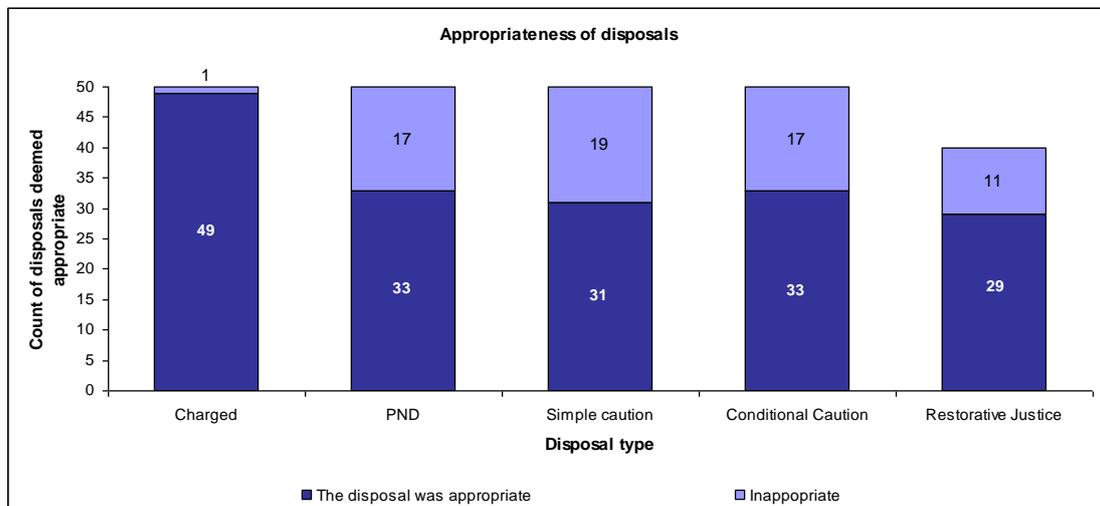
<sup>16</sup> OCJR (2007) *Out-of-court Disposals for Adults; A guide to alternatives to prosecution*.

for example, CPS authority is required for the issue of a simple caution. They also give guidance on the circumstances in which the disposals may be appropriate for those offenders with a criminal history.

### **Our findings**

- 2.25 The cases in this inspection were reviewed to see whether they had been issued correctly (ie according to the relevant national and local guidance). For simple cautions, conditional cautions and PNDs national guidelines were used to determine appropriateness, while for RJ disposal cases we used local policies (because there is currently no over-arching national guidance or policy – although ACPO are considering the adoption of a set of minimum standards).
- 2.26 Overall, 126 of the 190 out-of-court disposals reviewed were administered appropriately. Sixty-four disposals did not appear to comply with the standards set out in the available guidance, compared to only one out of the 50 charge cases reviewed. Figure 4 shows the variation for each disposal type. While the cases reviewed were drawn from the period April 2008 to March 2009 (for the reasons outlined in paragraph 1.34 above), officers in all inspected forces reported that there had been no major procedural changes in the time that had passed since the sample period.

**Figure 4 – Appropriateness of disposals**



- 2.27 The most prevalent reason for apparent non-compliance is the offender’s offending history (at a level beyond that which the relevant guidance allows). While some categories of disposal (such as PNDs) are not ruled out for perpetrators with previous convictions, the principle is that out-of-court disposals should not be used for those who are prolific offenders. The out-of-court disposals guidance document<sup>17</sup> states:

<sup>17</sup> OCJR (2007) *Out-of-court Disposals for adults; A guide to alternatives to prosecution.*

*‘Out-of-court disposals aim to deal with low-risk, low-level and mostly first-time offenders outside of the court system in appropriate circumstances. Out-of-court disposals are not suitable for contested or more serious cases. They would not normally be considered for those who offend repeatedly (subject to relevant guidance).’*

2.28 The second most common reason for non-compliance was the nature of the offence itself, either by type or because of the gravity. Two examples are set out below:

- An offender with numerous convictions was issued with a simple caution for criminal damage caused during a repeat domestic abuse incident, where the matter had not been referred to CPS for charging advice; and
- A simple caution was issued to an offender who had stolen £5,000 (of which very little had been recovered) from his employer.

2.29 In another case, a simple caution was issued because witnesses were unwilling to attend court, and the police believed that the CPS were unlikely to proceed with a prosecution. While a 2008 Home Office Circular<sup>18</sup> permits some categories of offending – namely domestic abuse cases, violence against the person and harassment – to be dealt with in this way (providing there is sufficient evidence), this rule does not yet extend to other offences and circumstances.

2.30 Some of the difficulties in making the right choice were illustrated in a dispute between two neighbours, resulting in one witnessing the other damage his car. Although the witness did not want to go to court, the alleged perpetrator had numerous previous cautions, and convictions and recent PNDs, and out-of-court disposals were therefore unsuitable. As the offender admitted the offence, he was again issued with a simple caution rather than proceed with a ‘prosecution with a reluctant witness’. In contrast, although this was an inappropriate disposal according to the guidelines, the victim of the offence was happy with the outcome.

2.31 On occasions out-of-court disposals were administered when offenders had been given many chances, as the following example illustrates:

#### **Case study**

In one force, a 22-year-old woman had been issued with a reprimand for shoplifting in 2004, a final warning for shoplifting in 2005, a caution for assault on police in February 2008, a caution for shoplifting in August 2008, a PND for shoplifting in August 2008, and a third caution in October 2008 for criminal damage. Clearly a prolific offender, she had never been before a court.

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<sup>18</sup> Home Office Circular 16 (2008) covers the use cautions for adult offenders and replaced Home Office Circular 30 (2005).

- 2.32 It must be noted, however, that – with the exception of the third simple caution – all these disposals were legitimately given according to the separate guidance documents. Nevertheless, the principle of not allowing prolific offenders to be issued with multiple out-of-court disposals ought to have been sensibly applied at an earlier stage.
- 2.33 The current guidance allows for locally applied discretion if the circumstances suggest that more than one such disposal might be appropriate. However, the examples of multiple use did not appear to fall within existing guidelines, even given the room allowed for discretion. A joined-up, simplified policy, supported by knowledgeable quality assurance, could result in easy-to-follow guidelines for the combined use of out-of-court disposals where appropriate.
- 2.34 Across all the cases examined, a brief rationale for the decision was only recorded very rarely, even though each force required this in its policy. This made it very difficult to ascertain why the decision for the disposal had been made.
- 2.35 By issuing an out-of-court disposal, a police officer may be perceived as acting as judge and jury, and officers – and indeed forces – should be able to justify the decisions they make. The recording of a rationale, which need be no more than a few lines on the custody record, crime report or other appropriate place, is necessary to account for the action taken and is part of the drive towards greater transparency.
- 2.36 Most forces inspected had clear arrangements for decision-making about disposals in cases where the perpetrator enters custody, such as the use of Evidence Review Officers (EROs) or Gatekeepers, whose role it is to review evidence and make the most appropriate decision in the circumstances before disposal. Their oversight did not extend to disposals issued on the street.
- 2.37 There was a lack of quality assurance of the decisions made on out-of-court disposals; for example, three out of the five forces inspected were not able to evidence that they dip-sampled caution decisions for consistency.

## **c) Effectiveness of disposals**

### ***National context***

- 2.38 With approximately 40 per cent of all offences brought to justice resulting from out-of-court disposals, it was important to look at the relative effectiveness of each disposal type. Two specific indicators of effectiveness were examined:
- **Re-offending behaviour** within 12 months following disposal; and
  - **Victim satisfaction** rates for the different disposal types.
- 2.39 **Re-offending behaviour** is measured at national and local levels. Between 2000 and 2008, the Ministry of Justice (MoJ) reported that

re-offending rates fell 16 per cent (from 185 offences to 155 offences per 100 offenders).<sup>19</sup> At the same time, the proportion of offenders in the cohort who re-offended decreased from 43 per cent to 40 per cent. The limitation of this data is that it only comprises offenders commencing a period of custody or a court order, and so does not include offenders in receipt of out-of-court disposals.

2.40 An MoJ statistical bulletin published in November 2010<sup>20</sup> drew a comparison of cautions, fines and conditional discharges between 2005 and 2007, and showed a slightly higher percentage of offenders who were conditionally discharged or fined went on to re-offend than of those who were cautioned. The differences however were small (ranging from 0.6 to 2.7 percentage points). The same bulletin reported that 24.5 per cent of adults receiving a PND in 2008 offended – a decrease from 25.2 per cent in 2007. The proven re-offending rates for adult males and females in 2008 were 26.5 per cent and 18.5 per cent respectively. Although these figures included most out-of-court disposals, offenders who received a PND were not counted in the definition of ‘re-offending’.

2.41 Different academic studies on RJ have reported a range of re-offending rates, from 6 per cent to 22 per cent. An MoJ report published in 2008<sup>21</sup> states:

*‘...those offenders who participated in RJ committed statistically fewer offences (in terms of reconvictions) in the subsequent two years than offenders in the control group.’*

2.42 There is little data available nationally to compare **victim satisfaction** rates between the various out-of-court disposals, but some disposals require a higher level of victim co-operation than others, and hence suggest a relative degree of satisfaction with the agreed disposal. RJ disposals should be victim-centred and, as such, should have a very high satisfaction rate. PNDs issued for theft and criminal damage should be issued only if the victim is aware of and in agreement with the proposed action. Conditional cautions require the victim to be involved in and agree with the proposed conditions.

2.43 The survey conducted as part of Her Majesty’s Inspectorate of Constabulary’s anti-social behaviour inspection in 2010<sup>22</sup> also revealed the important effect that victim involvement has on satisfaction rates. It showed that 83 per cent of respondents who had been aware of the police action taken in their case were either quite satisfied or very satisfied with it.

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<sup>19</sup> Ministry of Justice (2010) *Re-offending of Adults; Results from the 2008 Cohort in England and Wales*.

<sup>20</sup> Ministry of Justice (2010) *Compendium of Re-offending Statistics and Analysis*.

<sup>21</sup> Shapland, J. et al. (2008). *Does Restorative Justice Affect Reconviction? The fourth report from the evaluation of three schemes*. Ministry of Justice.

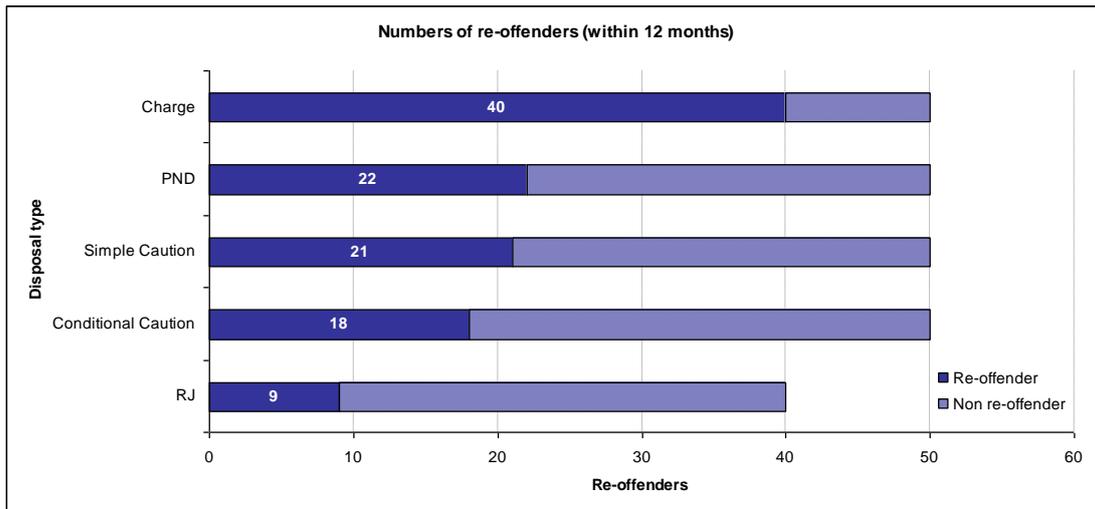
<sup>22</sup> HMIC, Ipsos MORI (2010) *Where Are the People on Crime and Punishment*.

## Our findings

### Re-offending

- 2.44 Each case reviewed was subject to a check on the Police National Computer (PNC) to look for post-disposal offending in the 12 months following the date on which the case was finalised. Comparisons were then made between the various disposal types; the results are shown in Figure 5.

**Figure 5 – Re-offending rates**



- 2.45 These results show that RJ disposals have the lowest level of re-offending (9 out of 40). This is perhaps unsurprising, given that it is aimed at first-time offending; however, in 24 out of the 40 cases of RJ disposals inspected (60 per cent), the offender had an offending history (resulting in conviction or out-of-court disposal). Therefore the results are not simply explained by the fact that offenders are lower on the offending ladder, and may be attributed to the process itself. In most cases, the restorative element involved either apologising to the victim or paying some form of compensation.

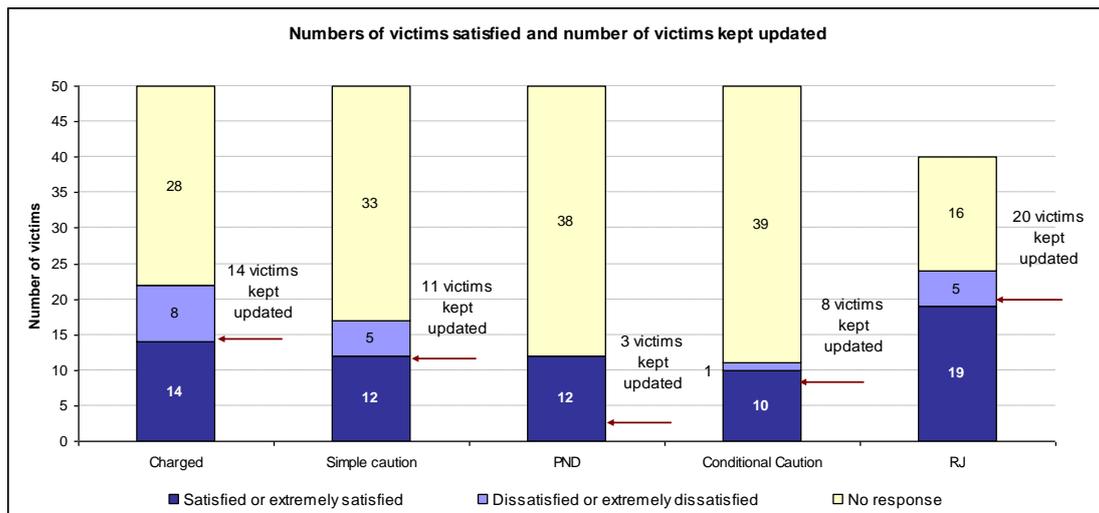
- 2.46 The re-offending rates for the other out-of-court disposal types are quite similar (conditional cautions: 18 out of 50 reoffended, simple cautions: 21 out of 50, and PNDs: 22 out of 50), but all compare favourably to the cases where offenders are charged (40 out of 50). Generally offenders who go to court are likely to be more prolific, or the offences are of a more serious nature. It is therefore no surprise that this category produced the highest re-offending rate.

- 2.47 Care needs to be taken when comparing these rates to the national figures, because the latter measures only those re-convicted of an offence, whereas we have included charging and out-of-court disposals in our measurement. We are also mindful of the relatively small size of the sample collected in this inspection. However, we believe that the findings, as supported by previous larger samples, are valid.

### Victim satisfaction

- 2.48 In each of the cases reviewed, we attempted to contact the victim to ascertain their level of satisfaction with how the case had been resolved, and whether they had been consulted and/or kept updated by the police on the action taken against the offender. However, because the cases dated back to the period from 01 April 2008 to 31 March 2009, it proved very difficult to contact victims, as many phone numbers had changed.
- 2.49 We did speak to 63 victims across a range of out-of-court disposals, and a further 22 victims in cases that went to court where the offender pleaded guilty in the first instance. While this sample is by no means statistically significant, 53 of the 63 victims in out-of-court disposal cases described themselves as satisfied or extremely satisfied with the outcome. Figure 6 shows the different levels of satisfaction with the outcome of the case for each of the different disposal types. It also shows (marked by the arrow) the number of victims who felt that they had been consulted before the offender received the disposal, and updated after the disposal had been given.

**Figure 6 – Victim satisfaction compared to police contact**



- 2.50 Of all the disposal types, the victims in cases that went to court were the least satisfied, with only 14 out of 22 describing themselves as either satisfied or extremely satisfied. This contrasted to the rates for PND disposals, where all 12 victims spoken to were either satisfied or extremely satisfied with the result. Conditional cautions also produced a very high satisfaction rate: 9 out of 10 were extremely satisfied.
- 2.51 With the exception of PNDs, there is some correlation between the victims who were consulted and kept updated and those who were satisfied with the outcome. It could therefore be suggested that openness and transparency, as well as good communication, had contributed to the feeling of satisfaction. In the case of PNDs, victims were generally happy to have been consulted before the issue of the

notice, and did not expect to be updated afterward. Only 12 victims in offences where PNDs were issued were contactable due to victim details being missing, incomplete or out of date.

#### **Case study**

During the victim satisfaction survey, the manager from a supermarket in Fosse Park, Leicester, stated that the local neighbourhood policing team routinely consulted and updated his staff on the results of cases where offenders were caught. This produced a response of 'extremely satisfied' and a general high regard for the service provided.

### **d) Efficiency and reducing costs**

#### ***The national context***

2.52 In the current economic climate, the need to improve **efficiency** in the criminal justice system has never been greater. In October 2010, Jan Berry's report, *Reducing Bureaucracy in Policing*,<sup>23</sup> was published, highlighting a number of areas where efficiency could be improved. One of the recommendations in the report asked the police service to:

*'Encourage an organisational culture of constructive challenge and continuous improvement, to drive out unnecessary bureaucracy, create efficiencies and enable transformational change.'*

2.53 The report specifically identified the criminal justice system as being one area in which potential efficiencies could be achieved for the common purpose of *'reducing crime, preventing re-offending and reducing the prison population'*.

2.54 There are also numerous initiatives underway to drive out inefficiencies within CJS processes. For example: the establishment of integrated prosecution teams; the use of 'virtual courts' (where defendants are dealt with via a video link when in prison or held in police cells, to save time); the 'streamlined' prosecution process; and consideration of earlier admissions and/or guilty pleas.

#### ***Our findings***

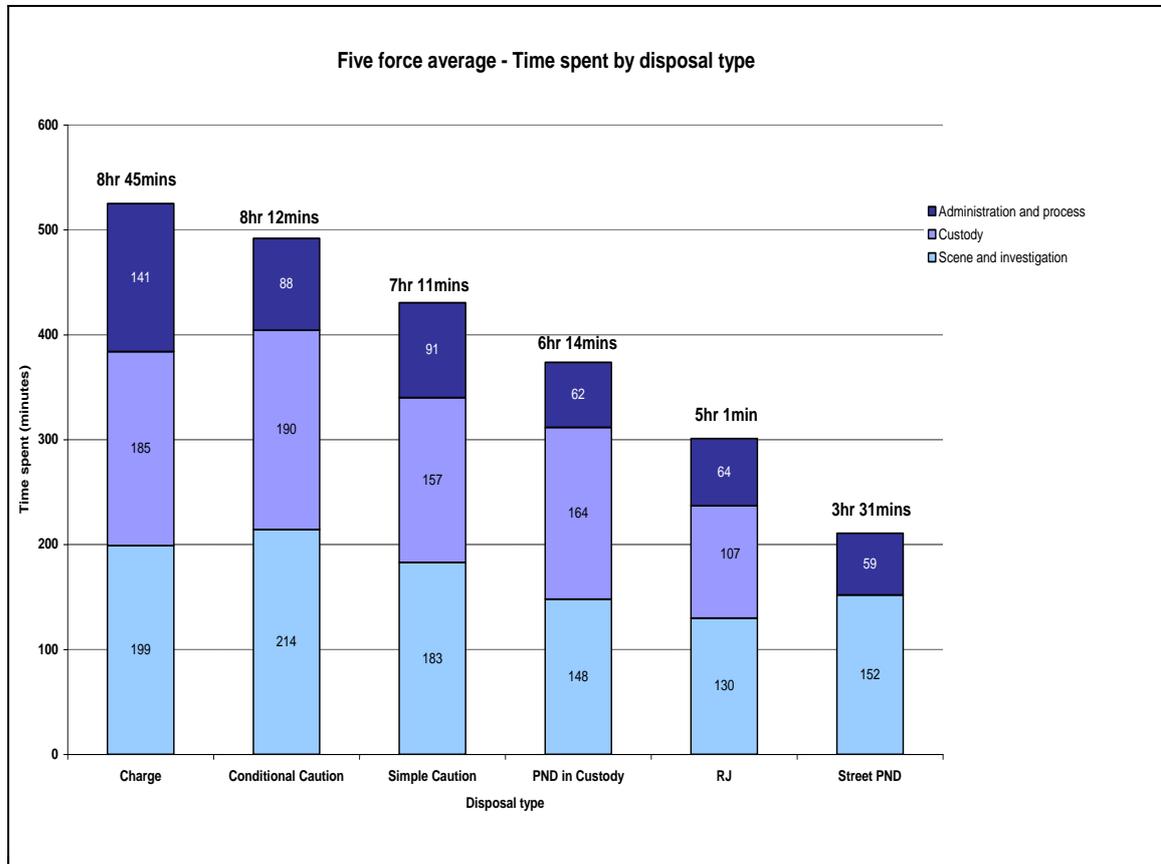
2.55 This inspection looked at some of the costs by category of the different disposals. Staff in each of the forces we visited also had views on how efficiency could be improved or money saved through the use of out-of-court disposals.

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<sup>23</sup> Berry, J. (2010) *Reducing Bureaucracy in Policing, Final Report*.

2.56 Our work looked at the relative time spent delivering each disposal process. Figure 7 shows the results.

**Figure 7 – Time spent by disposal type**



2.57 These values include all the time taken by the officer dealing with the case to perform all tasks related to the issue of the disposal – including investigation, interviewing, transport, and associated written work. It does not include time spent by call-takers, dispatchers, supervisors and custody staff. Nor does it include time spent by criminal justice agencies – including the police – in dealing with the case, from the time the defendant has been charged until conclusion in court. Whereas most out-of-court disposals are, in effect, ‘final’ disposals, a ‘charge’ leading to an appearance in court marks the beginning, not the end of a process.

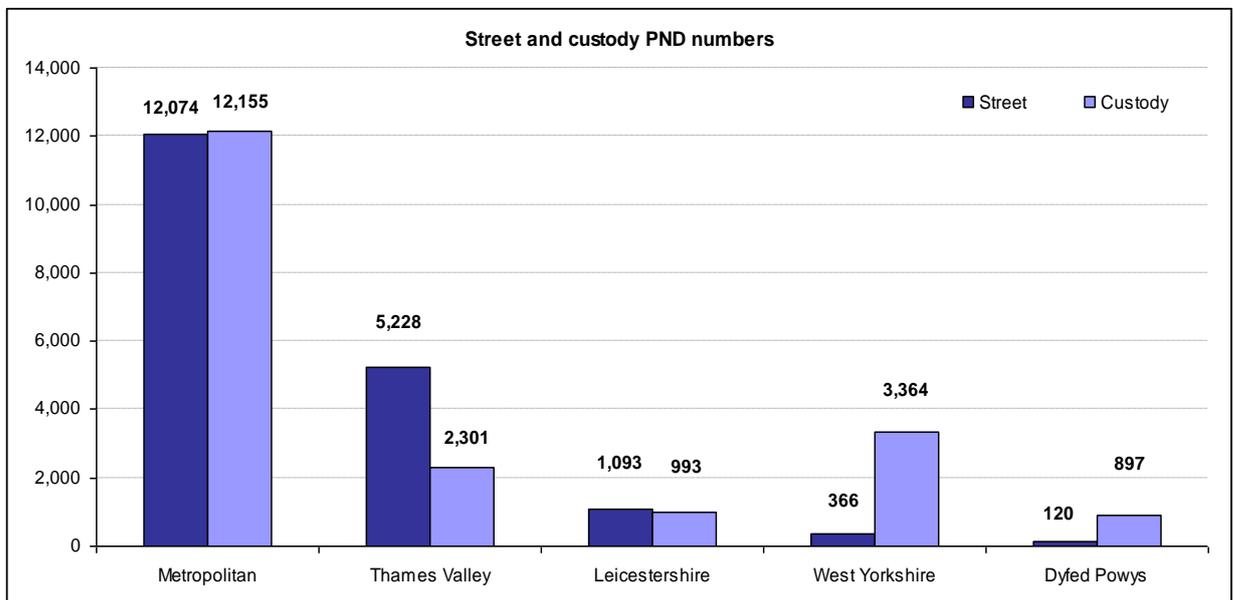
2.58 Nevertheless, offenders who were charged took longer to deal with: eight hours and 45 minutes (excluding subsequent court appearances). Conditional cautions took less time: eight hours and 12 minutes. Current guidelines on issuing conditional cautions dictate that they must be authorised by the CPS. In many cases this necessitates additional paperwork being given or sent to the CPS lawyer to review. Most interviewees from the police service and some from the CPS reported that they find this to be an unnecessary layer of bureaucracy for low-level offending.

2.59 This is especially so, given that decisions on charging for lower level offences have been brought back into the police custody remit, and the

only disposal needing CPS authority is a conditional caution. As a result, officers are reluctant to use them.

- 2.60 Simple cautions take around an hour less than conditional cautions – seven hours and 11 minutes – but are still quite time consuming, as they are mostly administered in custody. Another hour is taken off the time delivering a PND in custody – six hours and 14 minutes, with the lower administrative and scene investigative components of this total accounting for the difference.
- 2.61 RJ disposals are second lowest at five hours and one minute – surprisingly high – but this does contain a total for custody where some offenders are initially arrested for the offence before determining that a RJ disposal is more appropriate. RJ disposals have the shortest period for time spent at the scene and investigating, but a similar period of time on administration and processes as street PNDs. Officers reported that RJ disposals still generate the requirement to submit reports, and many forces have created specific forms on which to record them.
- 2.62 PNDs issued in custody (six hours and 14 minutes) take almost twice as long as street PNDs (three hours and 31 minutes).
- 2.63 In the five forces visited, a total of 38,591 PNDs were issued in 2008, of which 18,881 (49 per cent) were issued on the street, and 19,710 (51 per cent) in custody. However, the street versus custody split varied greatly between forces, as shown in Figure 8 below:

**Figure 8 – Street and custody PND numbers for five forces**



- 2.64 Only one force, Thames Valley, had a significantly higher proportion of street-issued PND compared to those issued in custody. West Yorkshire and Dyfed Powys both had very low numbers of street-issued PNDs, while the MPS and Leicestershire have an approximately equal split in numbers.

2.65 In the forces with low levels of street PNDs, officers indicated that taking the offender into custody led to a number of perceived benefits, including:

- better quality of investigation;
- the ability to check out the background of the offender, including offending history;
- the ability to obtain fingerprints and DNA; and
- the production of better performance figures for officers.

2.66 The exact figure for the split of custody and street-issued PNDs is not available at a national level. However, each 10 per cent change in the split from custody to street of the 176,200 PNDs issued in England and Wales in 2008<sup>24</sup> would save approximately 47,000 hours of police time in custody. This represents an equivalent saving of about £1,222,000,<sup>25</sup> which could be re-invested in frontline policing. It is acknowledged, however, that there are circumstances which are not suitable for street issue of a PND: for example, if an offender is drunk, or if his or her identity cannot be ascertained. In these circumstances, arresting the offender may be the most appropriate option.

2.67 The additional level of work generated by issuing a PND in custody (as opposed to on the street) is an obvious area to examine when looking to improve the efficient and effective use of resources. PNDs were introduced as part of the Government strategy to deal with low-level crime, anti-social and nuisance behaviour, and were intended to be dealt with on the street, thereby saving officer time and bureaucracy. If custody processes can be avoided with the same result, then this should be encouraged. In order for this opportunity to be maximised, there will need to be improvements in identification methods, and in the quality of street checks prior to issue. There is, otherwise, a risk that integrity will be compromised in the quest for increased efficiency.

2.68 Some officers utilise street bail powers<sup>26</sup> to bail offenders to attend a police station at a later point if obvious delays are likely in low-level investigations. One officer had used this power when he had found someone damaging a newly planted tree on a Sunday evening. Intending to issue a PND, he conducted an interview contemporaneously at the scene, and then bailed the suspect to the police station while the owner of the tree was traced and contacted. It is also worthy of note that if the offender had been arrested, it may have been difficult to show that the arrest was necessary to ensure the prompt and effective investigation of the offence – as required by the Serious Organised

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<sup>24</sup> Source: Ministry of Justice (2008) *Criminal Statistics in England and Wales*

<sup>25</sup> Based on HMIC staff costs ready reckoner of £26 per hour.

<sup>26</sup> Sections 30A to 30D of PACE as amended by Section 4 of the Criminal Justice Act 2003. It enables a person arrested for an offence (or taken into the custody of a police officer after an arrest) to be released on bail by a police constable on condition that they attend a police station at a later time.

Crime and Police Act 2005. The offender ultimately received a PND for the offence.

- 2.69 Proving the identity of the offender is critical to maintaining the integrity of the PND process, so there are clear gains for forces in improving identification methods on the street.
- 2.70 Some of the forces visited had adopted practices to check the identity of offenders issued with disposals on the street. These included:
- mobile fingerprint identification devices to check identity at the scene;
  - taking a fingerprint from an offender, rolled directly onto the retained section of the PND form; and
  - officers using mobile data devices to photograph offenders issued with street PNDs.
- 2.71 While some of these identification techniques require financial outlay for forces, the potential benefit of dealing with some offenders more effectively on the street has been demonstrated in paragraph 2.66.

## e) Recording and enforcement

### *The national context*

- 2.72 Disposals should be **recorded** accurately and in a timely fashion onto the Police National Computer (PNC). Failure to record the offence or disposal type correctly may lead to incorrect decision-making in future cases. Of particular interest was the recording of PNDs, which have in previous inspections proved problematic and difficult to detect on the summary page of a PNC 'person check'. Recent IT improvements have now made it possible to record these properly, and retrospectively back-convert old PND entries. When PentiP is introduced nationally in 2011 the recording of all PNDs will be put into one place, including all those issued previously. Police areas will then have access to a national PND database which will be interrogated alongside PNC before any disposal decision is made.
- 2.73 Incorrectly recorded disposals of any type can also have an impact on the lives of individuals, with certain jobs requiring Criminal Record Bureau (CRB) checks as a condition of employment. It is important to ensure that the identity of the offender and the details of the offence are entered onto the correct person's record.
- 2.74 Some types of out-of court disposals require follow-up **enforcement** when conditions of issue are not complied with. Conditional cautions require certain conditions to be met within timescales (e.g. for compensation to be paid to the victim). If it is not paid, the perpetrator may be summonsed or charged with the original offence and the PNC updated accordingly.
- 2.75 In the first quarter of 2009, the level of compliance with conditional cautions stood at 87 per cent, down from 89 per cent for the same period

in 2008.<sup>27</sup> Of those who do not comply, 70 per cent were charged to go to court, 15 per cent had the conditions varied, and 15 per cent were not proceeded with.

- 2.76 PNDs need to be paid within 21 days unless a court hearing is requested. If this is the case then the officer dealing with the case prepares a file for court. If 21 days elapses without payment or a request for a hearing, the matter is reported to HMRC for recording as a fine and for recovery of the moneys owed.
- 2.77 Nationally, in 2008, only 52 per cent of all PNDs were paid before court action and most of those remaining unpaid were registered with Her Majesty's Court Service (HMCS) as fines. Enquiries with HMCS have revealed that it is not possible to track what happens once they are registered as fines, as the IT system cannot distinguish fines arising from unpaid PNDs from other types of fine. What can be quoted is a current payment rate of 85 per cent for all court fines, including those registered as a result of the non-payment of a PND.

### ***Our findings***

#### *Recording*

- 2.78 There are three main themes affecting the recording of out-of-court disposals:
- **data quality;**
  - recording of **RJ disposals;** and
  - **identification** of offenders.
- 2.79 Overall, **data quality** was good, but problems were observed in the recording of conditional cautions – a process which relies on a manual update on the PNC once the conditions of any such disposal are complete. In many cases, conditional cautions were not shown as complete, making it ambiguous as to whether the conditions were unfulfilled or simply not updated.
- 2.80 Similar problems were found with the recording of PNDs, in that the unique reference number for tickets issued in custody was not always entered onto PNC. This was again due to the lack of interface between custody IT systems and PNC, and makes tracing the original documentation for that offence almost impossible.
- 2.81 All forces visited in this inspection still record custody-issued PNDs using the 'old' method, which shows the PND as a 'non-conviction', or code 9999. PNDs recorded in this way are not visible in the offence summary page on PNC (which lists different types of disposal). This method ought to have been replaced by the practice of the automatic recording of PNDs as code 9998 through the custody/ PNC interface, which correctly places them into the offences summary and lists them for consideration as part of the full disposal history. Street-issued PNDs were generally

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<sup>27</sup> Figure quoted is from data.gov.uk.

found to be accurately input as code 9998 and could be viewed in the offence summary.

- 2.82 The recording of PNDs as code 9999, rendering them invisible in the offence summary section of PNC, was considered to be a contributory factor to cases where more than the permitted number of PNDs were issued to the same offender.

**Case study**

In one force an offender had received four PNDs within an 18-month period, but PNC did not show them all in the offences summary section, indicating they had not been recorded correctly as code 9998.

- 2.83 Each of the inspected forces that offered adult **RJ disposals** had their own method for recording them. An issue could arise where an offender receives two or more RJ disposals in different force areas, because the separate police computer systems used are not linked together. There is no specific RJ disposal available on the PNC.

**Case study**

An 18-year-old male had spent an afternoon taking shots at a neighbour's house with an air pistol, damaging the guttering. The initial police response to reports from the public of a man shooting a gun from a window involved mobilisation of a large number of resources, including the force armed response vehicles. After resolving the initial incident, and determining that the offence was much less serious than at first thought, it was agreed that an RJ disposal was the most appropriate way to deal with the matter. This offence was not recorded on PNC and therefore relied on a local check of criminal intelligence systems to uncover further details of the incident against his record. Although these checks are routinely conducted when a firearms licensing application is received, multiple system checks are less efficient, take longer to perform and are arguably more likely to be missed, particularly where the applicant has lived in several different police force areas.

- 2.84 There were examples of offenders having multiple **identities** on the PNC, and although they had been linked, there had been no consolidation of the records. This occurred when incorrect details were taken for offenders issued with PNDs. A slightly different date of birth or spelling of name generated a new PNCID number, and if this was a street-issued PND, there would be no fingerprints or DNA to ensure the records were collated. It is important that identification details are verified and recorded accurately when issuing street disposals.

### *Enforcement*

- 2.85 Some CPS prosecutors stated that the quality of evidence provided by the police was generally poor if the offender had received a PND but then opted for a hearing at court. They stated that quite often those cases lacked the evidential care and detailed investigation that is needed to prove cases in court, so were often discontinued. In the five forces we looked at, however, 929 out of 38,591 PNDs issued in 2008 resulted in a request for a court hearing, a proportion of 2.4 per cent of cases.
- 2.86 If the conditions laid down in a conditional caution are not complied with, current guidance states the police have to consult the CPS over whether charges should be brought. Both the police and some CPS lawyers see this as an unnecessary waste of time, and feel that a straightforward decision could be made by the police in this respect.
- 2.87 Lancashire Constabulary sends payment reminder letters to recipients of PNDs after 10 days if they have not yet paid. These remind them to pay and warn them of the consequences of non payment. This has led to a 10 per cent improvement in the initial payment rates for PNDs.

### 3 What works?

- 3.1 Throughout this inspection, we identified practices and processes which were working well to provide the public with appropriate outcomes, and others where there were problems which prevented or reduced effective delivery.
- 3.2 The full findings as described above are summarised in the below table.

<b>What works?</b>
Consulting victims before making a decision, and keeping them updated after administering the disposal appears to have a positive impact upon satisfaction levels towards the overall result.
Out-of-court disposals are more time-efficient and less paper intensive than those charged and going to court.
RJ appears to work well, and is well-liked by operational police officers. RJ disposals in the review showed low re-offending rates, high satisfaction rates and were relatively time-efficient compared to most other out-of-court disposals.
Where it is possible to issue PNDs on the street, these take just over half the time taken to issue PNDs in custody.
Street bail was seen to be used effectively in certain circumstances, to avoid unnecessary 'latent' time spent in custody, which sometimes disproportionately ties up the officer dealing with the case.
Mobile technology is being utilised by some forces to prove identification of perpetrators prior to issue of out-of-court disposals.
Lancashire Constabulary stated they send follow-up reminder letters to recipients of PNDs who had not paid after 10 days. This increased collection rates by 10 per cent.
<b>What doesn't work?</b>
Where the performance culture is apparently in conflict with the use of officer discretion, this causes confusion among frontline officers.
Officer knowledge of out-of-court disposals is (at best) patchy, mainly due to the volume of different policies for each disposal type.
About a third of out-of-court disposals did not comply with the relevant national or local guidelines.
Conditional cautions were perceived by most officers and some CPS to be unnecessarily bureaucratic and, hence, seldom used. It was felt the decision to issue a conditional caution, and to charge the offender in the case of non-compliance could be a decision made by the police.
PNDs and Conditional cautions are frequently incorrectly recorded on the PNC.

## 4 Recommendations and next steps

### Recommendations

- 4.1 Recommendation 1 – We invite the Ministry of Justice to produce a clear and consolidated set of guidance for all out-of-court disposals based on a proportionate response to the level of offending and the nature of the offender, and on what works to improve victim satisfaction, reduce re-offending and provide value for money. This guidance should take into account how best to achieve transparency and reassurance for the public without creating an over-bureaucratic system.
- 4.2 Recommendation 2 – Police forces and CPS areas should examine, in partnership, their use of out-of-court disposals to clarify strategic objectives, improve efficiency and effectiveness and ensure robust quality assurance and evaluation of outcomes.
- 4.3 Recommendation 3 – All forces should review their use of restorative justice disposals and consider an extension of their use to include adult offenders.

### Next steps

- 4.4 By the conclusion of the inspection, there were already workstreams underway to address two of the issues we highlighted earlier in this report: extending authorisation of conditional cautions to the police, and consolidating current guidance.
- 4.5 Conditional cautions are currently authorised by the CPS; but this is challenged by police officers and some CPS lawyers, who question the logic of this, given that the police can authorise all other disposals (including a charge for some offences). A Government Green Paper was published in December 2010 and has consulted on this issue, and this could pave the way for change.
- 4.6 As regards simplification of guidance, although we have retained a recommendation on this issue (in order to reflect its critical importance), we welcome and acknowledge that the Ministry of Justice has committed to producing a simplified national framework, to include clearer guidance. This will greatly assist in providing the basis for consistent understanding of the rules, and therefore greater consistency in the application of out-of-court disposals.

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