

Initial findings from a review of the use of out-of-court disposals

A report by the Office for Criminal Justice Reform

February 2010

1. Executive summary

1.1 Since 2003 the number of out-of-court disposals administered each year has increased by 135% from 241,000 in 2003¹ to 567,000 in 2008, peaking in 2007 at 626,000. Although the number of convictions has remained stable, the proportion of offences brought to justice outside court has increased from 23% in 2003 to 40% in 2008. This represents a fundamental shift in how justice is delivered.

1.2 The introduction since 2004 of cannabis warnings, penalty notices for disorder (PNDs) and conditional cautions represented a series of pragmatic responses to particular operational challenges.

1.3 In responding to any offence, the police officer performs a critical function as gatekeeper to the criminal justice system. Decisions taken at the start of the process determine whether an offender will enter the criminal justice system and, if so, the route through it they will take.

1.4 It is vital the public has confidence that these disposals are being used appropriately and proportionately; that they are effective; that there is consistency in their use across England and Wales and that the system is understood by the public and its operation is transparent.

1.5 We therefore believe the time is right to undertake a wider policy review of the out-of-court disposals frameworks for adults and youths.

¹ Prior to the national roll-out of PNDs and cannabis warnings in 2004.

2. Introduction

2.1 Since 1998 there have been significant developments to the operation of the criminal justice system. A National Criminal Justice Board has been created to provide effective strategic leadership to the criminal justice system, supported by 42 local criminal justice boards responsible for the criminal justice service in an area. The efficiency of the magistrates' courts has been transformed by the *Criminal Justice: Simple, Speedy, Summary* (CJSSS) initiative, and the statutory charging scheme has strengthened police and CPS relationships.

2.2 The development of a range of out-of-court disposals for adults and youths since 1998 is one such development. Out-of-court penalties and other similar interventions have been available for a long time, and the principle of dealing with routine, low-level offences without the need for bringing the matter to court is well established. The 'police caution', in which an officer warns an offender about their conduct and records the matter for future reference, has existed formally for decades and informally since the advent of policing; and volume motoring offences such as speeding are routinely dealt with by way of a fixed penalty notice issued by the police allowing the offender to discharge liability for the offence by paying a financial penalty or request a hearing at court. (The review has examined the use of Penalty Notices for Disorder, but has not considered the wider use of Fixed Penalty Notices.)

2.3 Out-of-court disposals are designed to provide simple, swift and proportionate ways of responding to antisocial behaviour and low-risk offending and to save courts the time of listening to minor and undisputed matters. In the case of conditional cautions and restorative justice, they also support rehabilitation and reparation, especially by young people, and provide prompt resolution to victims. Finally, 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 serious offending.

Out-of-court disposals for adults

2.4 The out-of-court disposals available within the adult scheme were introduced separately over a period of years, and each has its own aims set out in published guidance. It was not until after all these disposals had been introduced that overarching guidance on the use of out-of-court disposals for adults² was produced in 2007. This guidance stated:

“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 *Out-of-court disposals for adults: A guide to alternatives to prosecution*, produced by OCJR, 2007.

2.5 There is no hierarchy of out-of-court disposals for adults, and so no enforced escalation of response as an offender re-offends. Instead disposals are to be used as appropriate to the offence and the offender, and in line with the criteria set out in guidance.

Adult out-of-court disposals

Cannabis warning – a formal warning from a police officer for simple possession of cannabis.

Penalty Notice for Disorder (PND) – an offender is offered the chance to pay a fixed penalty of £50 or £80 to discharge liability for an offence. The suspect has 21 days to pay or request a hearing for the original offence. Failure to do either of these results in a fine being registered at court for one and a half times the penalty amount.

Simple caution – a formal warning from a police officer about an offender's conduct following an admission of guilt.

Conditional caution – a caution with conditions attached which are set by the Crown Prosecution Service to tackle offending behaviour. If the offender fails to comply with the conditions they may be prosecuted for the original offence.

2.6 Annex C sets out in detail the out-of-court disposals available for adults, applicable criteria, decision-making arrangements and the implications for individuals of receiving them. Annex D lists all current guidance on the use of out-of-court disposals.

Out-of-court disposals for youths

2.7 The White Paper *No More Excuses – A New Approach to Tackling Youth Crime in England and Wales*³ published in November 1997 set out the Government's view on how to deal with young offenders before the need for a court appearance. It identified problems with the system of cautions that then existed, and in particular that no follow up action took place. This was seen as a lost opportunity to stop further offending.

2.8 This led to the introduction of the Final Warning Scheme by the Crime and Disorder Act 1998 (the Act), which saw reprimands and warnings replace the use of cautions for under 18s. Section 37 of the Act said "*It shall be the principal aim of the youth justice system to prevent offending by children and young persons*", and the Final Warning Scheme complemented that objective by setting up a process for early intervention with young offenders.

2.9 Unlike the adult system, the youth out-of-court framework operates hierarchically. There is an escalating system of out-of-court disposals that will lead to an appearance in court if the young person offends repeatedly. Although the previous system of 'repeat cautioning' was abolished with the introduction of reprimands and warnings in 2000, the Final Warning scheme has since been seen as being too restrictive, so a number of pilots are now being undertaken to

³ [No More Excuses: A new approach to tackling youth crime in England and Wales | Home Office](#)

increase the flexibility and range of options available to practitioners in dealing with young offenders, but with safeguards to protect against a return to the repeated use of out-of-court disposals.

Youth out-of-court disposals

Youth Restorative Disposal – a restorative justice approach by which the victim can explain to the offender the impact of their crime, and the offender can apologise. Voluntary reparation can also be agreed. Currently being piloted.

Penalty Notice for Disorder – available for 16-17 year olds on the same basis as the adult PND scheme. PNDs for 10-15 year olds are available in a number of police forces, but a decision on national roll-out has not been taken.

Reprimands and warnings – the equivalent of simple cautions for youths. A reprimand is given for a first offence, and a warning for a second, triggering referral to the youth offending team. A further offence would normally result in prosecution.

Youth conditional caution – operates on the same basis as the adult conditional caution, but with the youth offending team involved in setting the conditions. A youth conditional caution may be used when an offender has received a warning but their offending does not merit prosecution.

2.10 Annex C sets out in detail the out-of-court disposals available for youths, applicable criteria, decision-making arrangements and the implications for individuals of receiving them.

Basis of figures used in this report

2.11 Data used in this report are extracted from a range of administrative and management information databases across the criminal justice system. Consequently figures are compiled on different bases, which may be irreconcilable. The basis on which information is presented must be carefully considered when interpreting the data.

Definitions of bases used

Offence basis – each offence is counted individually, i.e. one offender convicted of five offences at court would result in five offence counts.

Offender basis – offenders are only recorded once for each set of cautions given or court proceedings resulting in a final outcome, against the principal offence involved. On this basis, for one offender convicted of five offences at court, one count would be recorded against the principal offence. For further details see *Criminal Statistics: England & Wales 2008, Appendix 2*.

Notifiable offences – includes all indictable offences as well as some associated summary offences. This is on the same basis as recorded crime.

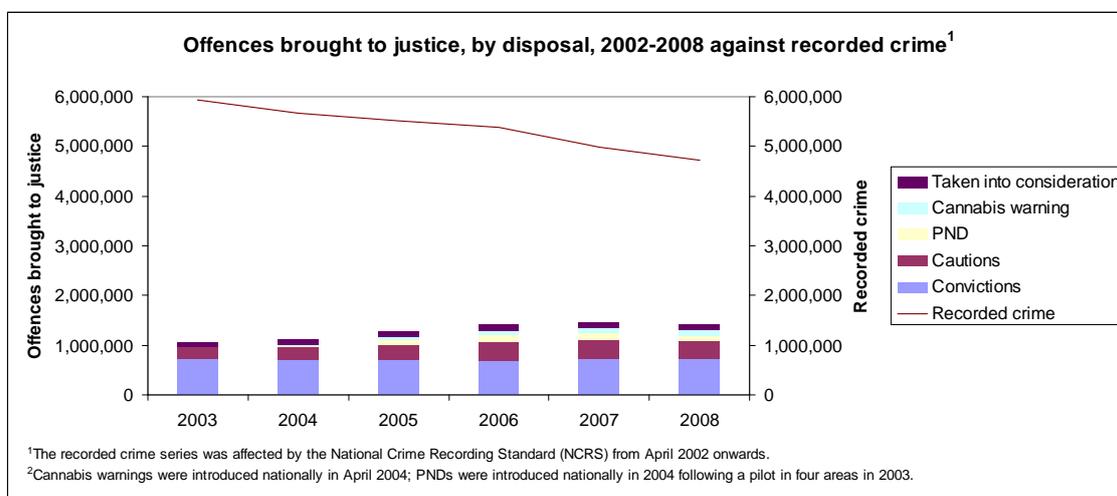
All offences – includes all indictable-only, triable-either-way and summary offences. (See annex C for a definition of these offence categories.)

Offences Brought to Justice (notifiable offence basis) – an offence is considered to have been brought to justice when an offender receives a conviction, simple or conditional caution (including reprimands and warnings for youths), penalty notice for disorder or cannabis warning for a notifiable offence (recorded crime), or has a notifiable offence taken into consideration following a conviction.

3. National trends in the use of out-of-court disposals

Overview

3.1 The performance of the criminal justice system has improved significantly since 2003. Recorded crime fell by 20% between 2003⁴ and 2008 while the number of offences brought to justice rose by 32%; ineffective trial rates in the Crown Court almost halved between 2003 and 2008 and also fell considerably in the magistrates' courts, and the average time from first hearing to sentence in the magistrates' courts reduced from 32 days in 2003 to 26 days in 2008. In addition, the proportion of prosecutions resulting in a conviction rose from 75% to 83% over the decade from 1998 to 2008, and re-offending has fallen.



3.2 As the chart above shows, the increase in the number of offences brought to justice over this period was not the result of a uniform increase in all the criminal justice disposals. The number of convictions has remained at approximately 700,000 per annum, while there has been a marked increase in the use of cautions⁵, PNDs and cannabis warnings. The result is that the proportion of offences brought to justice outside court rose from 23% in 2003 to 40% in 2008 (the most recent year for which verified data are available). This represents a fundamental shift in the criminal justice landscape.

Disproportionate use by gender, age and ethnicity

3.3 Data show that female offenders are more likely to receive an out-of-court disposal than male offenders who commit a similar offence. Overall figures for 2008 show that of all offences committed by men that resulted in a conviction or caution, 29% were cautioned. The corresponding figure for women was 46%. This difference is likely to be heavily influenced by the profile of offences which are committed by these two groups. Between 2004 and 2008, 41% of retail theft

⁴ The introduction of the National Crime Recording Standards (NCRS) in April 2002 resulted in significant increases in the number of crimes recorded. Data before and after the introduction of NCRS are not directly comparable.

⁵ Statistics on cautions are a count of simple and conditional cautions for adults, and reprimands and warnings for youths.

offences committed by males which were brought to justice were disposed of via a caution (24%) or penalty notice for disorder (17%), compared with 77% of retail theft offences committed by female offenders (50% caution + 26% PND). While this category of offences shows the highest level of difference between the likelihood of men and women receiving an out-of-court disposal, the trend is consistent across all offence types. However, it may not be that women are disproportionately more likely to receive such disposals once factors such as offending history, severity of offence or willingness to admit the offence are taken into account.

3.4 Evidence of the relative use of out-of-court disposals between adults (18+) and juveniles (10-17) is less clear as a range of factors will influence how these two groups of offenders are dealt with by the criminal justice system. This includes differences between the disposals available for youths and adults, and the likelihood that a young person's offending behaviour is less established than an adult's. However, a high-level comparison shows that of the adults cautioned or convicted for notifiable offences in 2008, 25% received a caution, while for juveniles, 47% received a reprimand or warning.

3.5 Equivalent analysis of the use of out-of-court disposals in relation to offender ethnicity is not currently feasible due to the quality of available ethnicity data for court disposals. Measures have been implemented to address this, including the definition of a Minimum Data Set of ethnicity that local criminal justice boards are required to collect to support better monitoring of disproportionality.

3.6 Relative to their distribution in the general population⁶, Black people received the greatest number of cautions in 2007, with 17.0 people per 1000 population being cautioned. White people received 6.6 per 1000; Asian people 7.1 per 1000; and people categorised as 'Other' received 9.1 per 1000. However, this is predominantly explained by the fact that Black people are arrested in far greater numbers than other groups relative to their distribution in the general population. In 2007/08 the arrest rate for Black people was 104 per 1000 population, for White people it was 28 per 1000 population, and for Asian and Other people it was 35 per 1000 population. Conversely, though, Black people have the lowest rate of cautions as a percentage of arrests⁷ at 16%. This compares to White people at 24%, Asian people at 20% and people categorised as 'Other' at 26%. The type and seriousness of the offence, the preparedness of the individual to admit guilt and whether the police regard the offender as showing remorse may all contribute to these variations⁸.

⁶ Caution should be exercised when using these per 1,000 population figures as they rely on estimates of the BME population based on the ethnicity breakdown of the population from the 2001 Census. As such, minority ethnic populations may be under (or over) estimated.

⁷ Arrest data is from the financial year 2007/08. Caution data is from the calendar year 2007.

⁸ Data from this paragraph can be found in, *Statistics on Race and the Criminal Justice System 2007/8*, Ministry of Justice, April 2009 - <http://www.justice.gov.uk/publications/raceandcjs.htm>

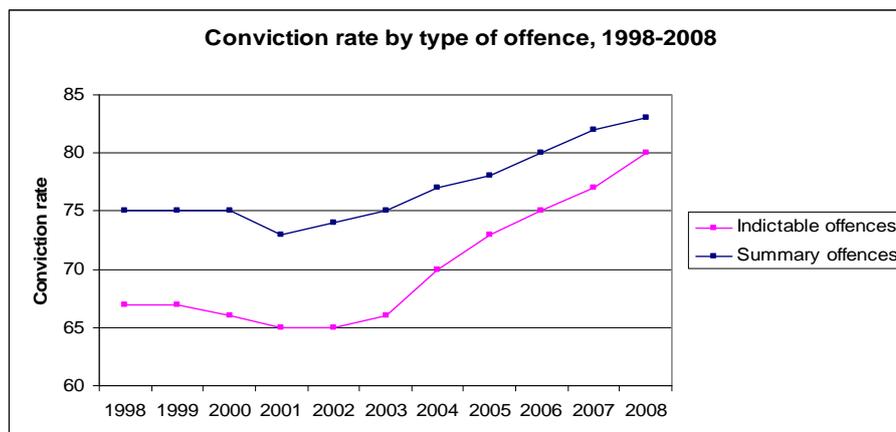
Diversion from court or net-widening?

3.7 Out-of-court disposals serve two purposes for the criminal justice system:

- (i) they provide the police with opportunities to deal quickly and efficiently with offences which might previously have resulted in no formal action being taken; and
- (ii) they provide an alternative to prosecution in appropriate cases.

3.8 Since 2003 the number of defendants proceeded against in the magistrates' courts has fallen by 19%⁹. Yet despite the falling caseload, the number of convictions has been maintained during this period.

3.9 One suggested reason for this is the introduction of the statutory charging scheme between 2004 and 2006 which required the Crown Prosecution Service (CPS), rather than the police, to take the charging decision in all but the most minor offences. The result of this scheme is accepted to have been a strengthening of those prosecution cases coming before the court, and a filtering out of those weaker cases which may have been discontinued or resulted in acquittals. This hypothesis appears to be borne out by the increase in the rates of prosecutions resulting in a conviction in the chart below.



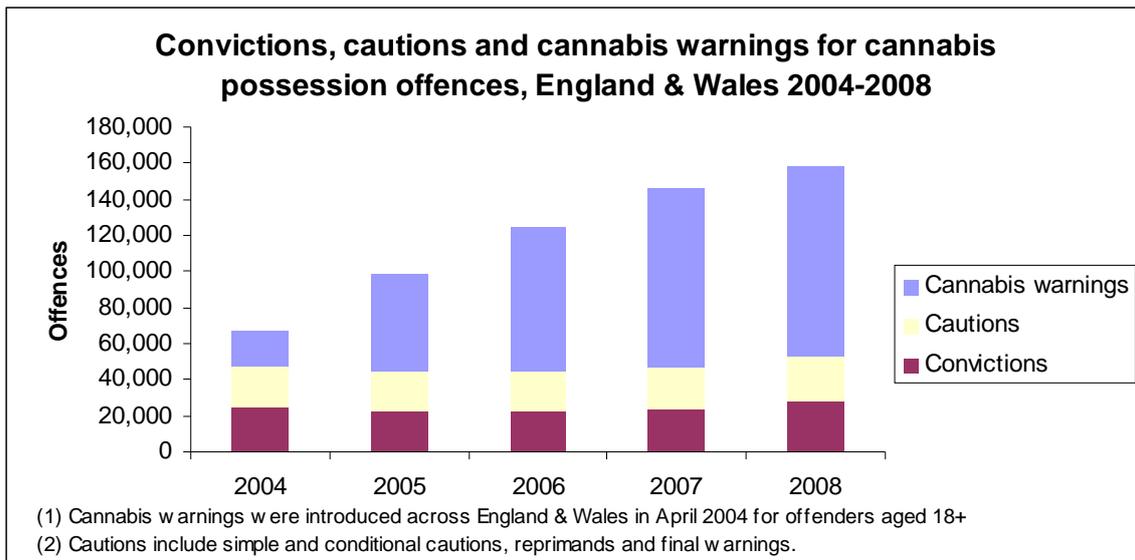
3.10 Other likely contributors to the fall in the magistrates' courts caseload are the impact of the CJSSS initiative which reduced the average number of hearings in each case and the average time from first hearing to sentence, and the falling level of crime.

3.11 However, there is also some evidence that after an initial fall between 2003 and 2004, the magistrates' courts have been dealing with more serious cases (with the proportion of defendants proceeded against for indictable offences increasing from 18% to 20% from 2004 to 2008). There is no evidence that the detected crime mix has increased in seriousness.

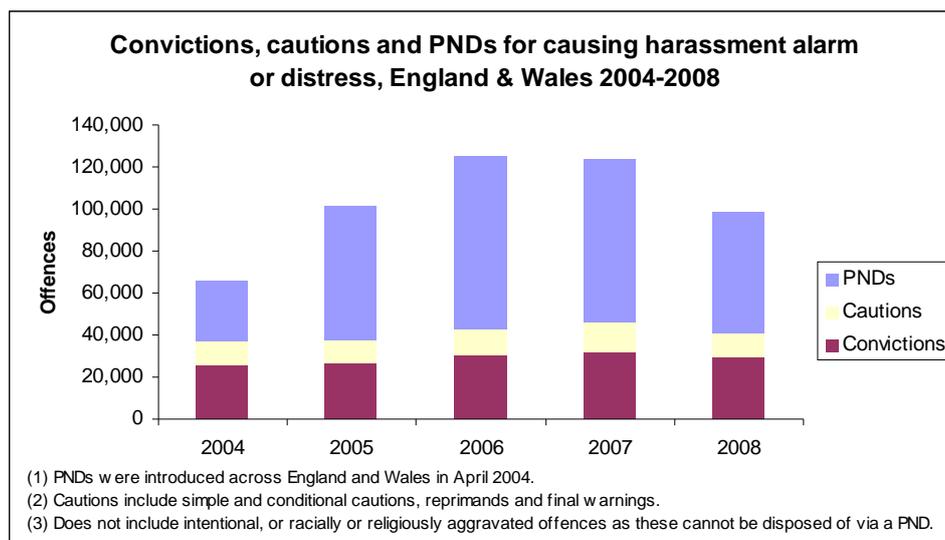
3.12 There appears to be a clearer indication that the increase in out-of-court disposals is in part the result of 'net-widening'. The chart below shows that

⁹ Criminal Statistics: England & Wales 2008 table 5.1

following the introduction of cannabis warnings there was a significant rise in offences of cannabis possession brought to justice, but that there were no marked changes in the numbers of convictions and cautions for this offence. This would support assertions that the disposal provided the police with a quick and effective means of dealing with offences which would previously have resulted in no sanction.



3.13 The chart below shows a similar trend in relation to the public order offence of causing harassment, alarm or distress following the introduction of the PND. The proposition that the availability of the PND for this offence resulted in 'net-widening' is further supported by an increase in these crimes recorded by the police from 2004 onwards at a time when overall recorded crime was falling.¹⁰



¹⁰ Recorded crimes of causing harassment, alarm or distress increased by 48% between 2002/03 and 2006/07.

3.14 Suggestions of 'net-widening' are further supported by a 17% increase in the number of adult and youth first-time entrants¹¹ to the criminal justice system between 2003 and 2007, and most notably a rise in the proportion of adults entering the criminal justice system by way of a caution from 49% in 2004 to 56% in 2007. The introduction of 16,000 Police Community Support Officers since 2004 – who can be given the power by Chief Officers to issue cannabis warnings and PNDs – and a growth in the number of police officers are also likely to have contributed to a greater number of offences being brought to justice outside court.

3.15 There are clearly potentially serious implications to individuals from out-of-court disposals being used to deal formally with matters that might previously have resulted in no criminal sanction, and the merits of these decisions can only be assessed on a case-by-case basis. However, it is also clear that the introduction of out-of-court disposals such as PNDs and cannabis warnings has provided the police with a set of tools to deal quickly and proportionately with offending which would previously have resulted in either a potentially disproportionate response (prosecution or caution) or a potentially inadequate response (no formal action).

Performance landscape

3.16 From April 2004 to March 2008 the criminal justice system had a public service agreement (PSA) to increase the number of offences brought to justice to 1.25 million. This national target was delivered by local criminal justice boards seeking to achieve specific annual targets on the number of offences they were to bring to justice (reflecting the level and profile of crime in the area), and was supported by a strong focus on police forces' sanction detection¹² performance by the Home Office.

3.17 This target did not distinguish between the types of offences brought to justice nor whether these were the result of in-court or out-of-court outcomes. Performance management arrangements were developed within police forces to increase sanction detection rates, with many resulting in targets for individual officers on the number of sanction detections they were to achieve each week, or the number of out-of-court disposals they were to administer. These arrangements created a strong incentive for officers to deal formally with low-level offences by administering an out-of-court disposal in order to secure a sanction detection and an offence brought to justice.

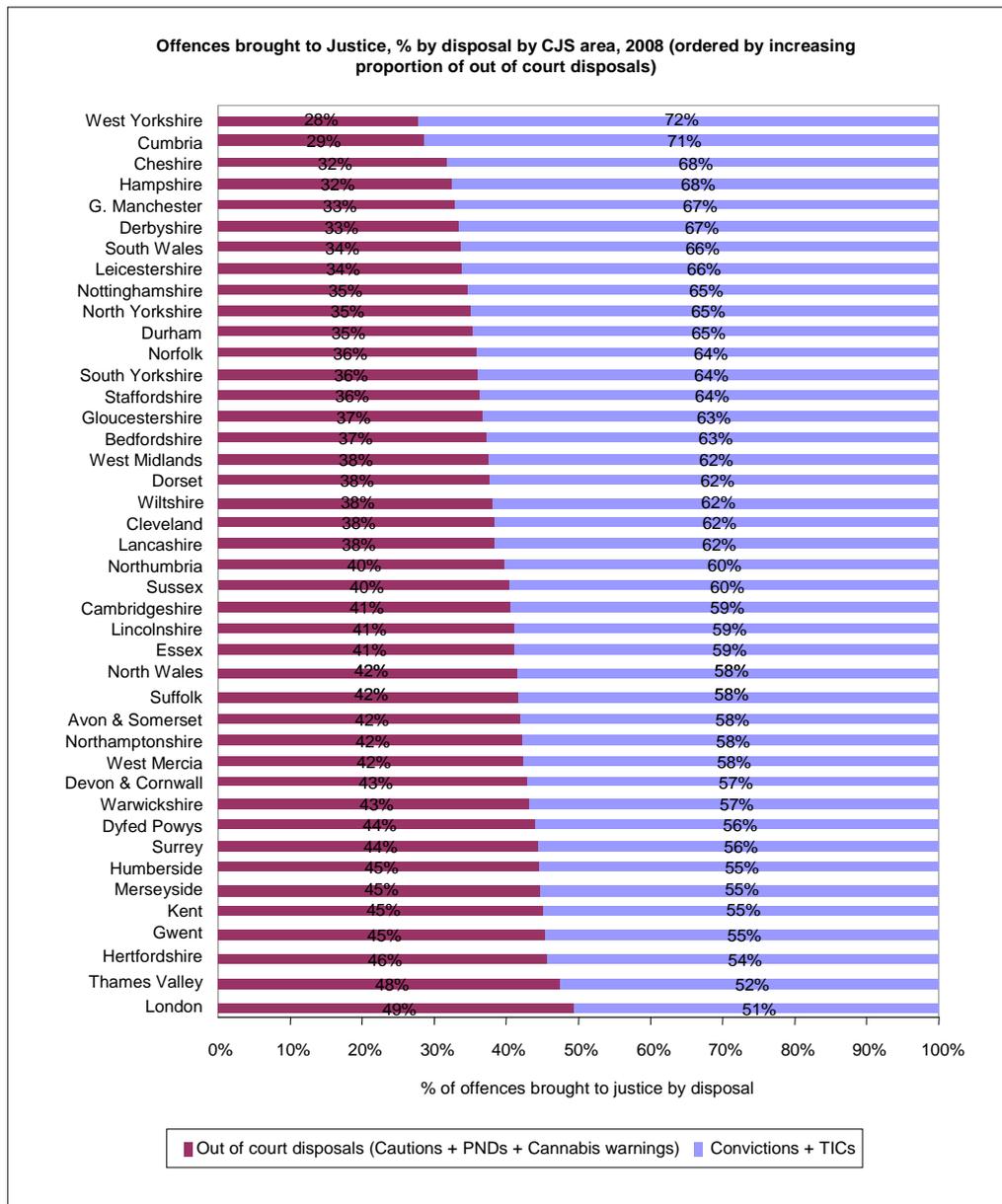
¹¹ In this report an offender is considered to have entered the criminal justice system on the day they received their first reprimand, warning, caution or conviction. Receipt of a penalty notice for disorder (PND) is not included. A PND does not require an admission of guilt or give the offender a record of criminal conviction.

¹² A sanction detection is recorded when a recorded crime results in a charge, caution, PND, or cannabis warning, or an offender agreeing to have an offence taken into consideration. The sanction detection rate is the proportion of recorded crime that results in a sanction detection.

3.18 The performance targets for both the police service and broader criminal justice system changed in April 2008 to promote a focus on the most serious offences, and there was a 9% drop in the number of out-of-court disposals administered between 2007 and 2008.

4. Local variation in the use of out-of-court disposals

4.1 Beneath these national trends there is considerable variation between criminal justice areas in the number of out-of-court disposals they are using and the proportion of offences brought to justice they represent. In England and Wales in 2008 the proportion of offences brought to justice accounted for by out-of-court disposals was 40%, but the diagram below shows that this figure varied from 28% in West Yorkshire to 49% in London¹³.



¹³ Cannabis warnings account for 21% of all offences brought to justice in London.

Factors contributing to variation between areas

4.2 Although variation between areas in their use of out-of-court disposals will to some extent reflect the local offender profile (age, gender and ethnicity of the offending population, and the number of persistent offenders) and the crime mix (for example, the prevalence of low-level offences), analysis shows that these factors alone cannot explain the extent of this variation. Similarly, there is no clear relationship between an area's use of out-of-court disposals and its use of alternative formal responses such as antisocial behaviour orders.

4.3 From our site visits and consultations with practitioners, we found that among those factors which directly influence how areas use out-of-court disposals are training and guidance, quality assurance and performance management arrangements, and the extent and nature of local and national strategic oversight.

Training and guidance

4.4 The police officer plays a vital role as the gatekeeper to the criminal justice system. The decisions that officers take as they respond to crimes determine how suspects and offenders are dealt with. In encountering an incident, a police officer has a number of options open to them:

- they can deal with the incident informally at the scene, perhaps by offering words of advice or arranging for some restoration to the victim;
- they can deal with the incident formally at the scene by issuing a PND or cannabis warning in appropriate cases, or reporting the offender for process; or
- they can arrest the suspect and make further investigations into the case with a view to:
 - (i) administering a simple caution (or equivalent for a young offender), PND or cannabis warning in appropriate cases, or referring the case to the CPS for a decision to simple or conditionally caution; or
 - (ii) charging them with an offence in appropriate cases, or referring the case to the CPS for a charging decision.

4.5 The two key target audiences in the police service for training on out-of-court disposals are therefore constables who can issue PNDs and cannabis warnings on the street, and custody sergeants who will decide whether an arrested suspect should be charged, given a simple caution, PND or cannabis warning; whether the case should be referred to the CPS for a decision to charge or give a simple or conditional caution; or whether the individual should be released without any formal action.

4.6 The Initial Police Learning and Development Programme requires all forces to adhere to certain criteria governing learning outcomes, support structures and funding. The use of PNDs and cannabis warnings is a mandatory module in this programme and is delivered to new recruits prior to independent patrol. However, while the National Policing Improvement Agency's (NPIA)

Safer Detention Learning Programme¹⁴ provides some training on the use of out-of-court disposals to custody officers, there is no mandatory standard training on these disposals for officers beyond their probationary period. Police forces are therefore responsible for developing and delivering their own training on the use of out-of-court disposals, and these arrangements vary from force to force. As such, some forces have designed bespoke training packages for frontline staff which are delivered in a classroom environment, while others rely on e-learning packages or staff orders, or simply 'on the job' training.

4.7 In addition to centrally produced guidance¹⁵ on out-of-court disposals, the Association of Chief Police Officers (ACPO) has developed a Gravity Factors Matrix to provide officers with guidance on the appropriate criminal justice outcome based on the offence, the offender and taking into account any relevant mitigating or aggravating factors

Quality assurance

4.8 Training is vital to ensure police officers and prosecutors have the skills and information they need to do their jobs, but it is clear that this needs to be reinforced by quality assurance arrangements which review whether guidance is being adhered to. This is particularly important where only a single agency is involved in administering an out-of-court disposal. (The CPS scrutinises police investigations in cases where they are asked to consider conditionally cautioning an offender.) However, like the training arrangements, the extent of quality assurance undertaken in criminal justice areas is variable.

4.9 The vast majority of police forces report having in place some kind of quality assurance processes on the use of out-of-court disposals beyond standard line management supervision. In some forces rigorous quality assurance arrangements are in place to examine individual decisions, feedback to officers and supervisors where there are concerns, rescind out-of-court disposals issued inappropriately and cleanse information on case outcomes both for entry on the Police National Computer and for reporting official statistics. In others, though, the arrangements for assuring decision-making appear inadequate.

¹⁴ The Safer Detention Learning Programme was produced in 2007 and is currently being updated to reflect developments in the out-of-court disposals frameworks for adults and youths.

¹⁵ A list of national guidance on the use of out-of-court disposals is included at annex D.

Lancashire's quality assurance arrangements

Following concerns raised by the judiciary about the use of out-of-court disposals in Lancashire, the Constabulary introduced a policy of reviewing every PND issued to ensure it was for an offence within the PND scheme, that the offender was eligible for the disposal (i.e. had no live court orders and had received no more than three PNDs in the previous three years) and that all details were recorded correctly. Any errors result in the PND being cancelled and the case being returned to the supervising manager to ensure lessons are learned. Following introduction of the scheme, force compliance with guidance increased from 89% to 97%. The force also operates a similar scheme with simple cautions in which divisions must dip sample 20 cases a month to review whether all the criteria to caution were met. Data on the inappropriate use of out-of-court disposals are considered by chief officers during quarterly divisional performance reviews.

4.10 Many police forces report that a level of quality assurance in the use of out-of-court disposals is provided by crime management units or force crime registrars. It is for chief officers to assure themselves that their agency is operating in accordance with guidance and legislation, and to institute arrangements which support this requirement.

Strategic oversight of the use of out-of-court disposals

4.11 Different approaches by areas to the use of out-of-court disposals are evidenced in a number of ways:

- The conditional caution was introduced in criminal justice areas in 2006, but even now some areas use only a handful of these disposals each month, while others use hundreds each year¹⁶;
- Schemes are operating in some parts of the country to refer female offenders to women's centres as part of a conditional caution;
- The PND for 10-15 year olds was introduced in a number of areas in 2005, but a decision on national roll-out has yet to be taken, meaning that this disposal continues to be available in some places but not in the majority of areas;
- In London, the community's concerns about the efficacy of PNDs in tackling shoplifting and disorder offences has led to a pilot seeking to increase prosecutions for such offences in Westminster; (See case study below.)
- Some police forces are providing suspects who receive a PND with the opportunity to reduce the value of their penalty if they attend an educational session or participate in a restorative justice approach; and

¹⁶ In 2009 Gwent and Gloucestershire administered only 38 conditional cautions, while London and Lancashire administered 728 and 710 respectively.

- Restorative justice approaches are evident in many areas of the country as an informal addition to the out-of-court disposals landscape. (See paragraphs 4.15 to 4.18 below.)

Westminster pilot

In December 2009 the Metropolitan Police Service (MPS) began a positive arrest pilot scheme in Westminster to reduce the number of PNDs issued for shoplifting and public order offences, and to increase the number of offenders put through the court system. Following consultation with local businesses, the MPS decided that issuing PNDs for these offences did not reflect the community's level of concern about these offences, and that courts should take the decisions in such cases. Initial findings suggest that the pilot has seen a rise in the number of simple cautions administered and a slight increase in the number of cases going to court. The pilot will end in Westminster at the end of March 2010.

4.12 It is clear that local criminal justice boards, police forces and CPS areas frequently consider the use of out-of-court disposals in the context of performance in bringing offences to justice.

4.13 The Justice Select Committee's report of August 2009 on the Crown Prosecution Service¹⁷ identified the lack of national scrutiny of the use of out-of-court disposals as a particular concern:

"the growth in the number of out-of-court disposals represents a fundamental change to our concept of a criminal justice system and raises a number of concerns about consistency and transparency in the application of punishment. Different patterns of fines may simply reflect local priorities and be argued to be a feature of community engagement. However, we believe the use of these disposals requires systematic scrutiny, and we recommend that as a first step they should be the subject of a multi-inspectorate review. The Attorney General should assemble a comprehensive map of the offences and relevant penalties in operation across England and Wales to assist this scrutiny."¹⁸

4.14 The use of out-of-court disposals is not currently subject to routine scrutiny by the criminal justice inspectorates, but the inspectorates have consulted on conducting a thematic review of their use in their draft business plan for 2010/11.

Restorative justice

4.15 Although restorative justice does not fall within the terms of reference for this phase of the review, we encountered a great deal of support for such

¹⁷ 'The Crown Prosecution Service: Gatekeeper of the Criminal Justice System', Ninth Report of Session 2008-09, Justice Select Committee (published 6 August 2009)

¹⁸ Paragraph 59, 'The Crown Prosecution Service: Gatekeeper of the Criminal Justice System'.

interventions in our discussions with practitioners and believe it is worth noting the current position as a further illustration of variation between areas in their use of out-of-court disposals.

4.16 Restorative justice is a process by which victims, offenders and communities can be brought together to decide the appropriate response to a particular crime. It puts the victim's needs at the centre of the criminal justice process by providing the offender with an opportunity to make direct reparation to the victim and to face up to the implications of their actions. In some areas similar principles are applied to approaches described as 'community resolutions'.

4.17 Restorative justice approaches can form part of a formal criminal justice outcome, such as a conditional caution, or can supplement a criminal sanction, as in victim-offender conferences conducted while the offender is serving a custodial sentence. However, restorative justice approaches are now often used as a bespoke out-of-court response to low-level offending where the police and victim agree that an informal resolution would provide the most appropriate outcome for all concerned. This is particularly true of offending by young people where restorative justice approaches can provide an opportunity for the offender to understand the consequences of their conduct, make reparation and avoid the criminalisation associated with a formal criminal justice outcome.

Youth restorative disposal (YRD)

The YRD was developed by the Youth Justice Board, Joint Youth Justice Unit and ACPO and was piloted in eight areas between April 2008 and September 2009. It holds to account 10-17 year old, mainly first-time offenders for minor crime and disorder through the use of restorative approaches that can lead to the removal of graffiti or repair of damaged property and an apology to the victim. The YRD must be agreed by the victim and offender, is recorded on local police systems (thereby avoiding disproportionate criminalisation) and triggers a referral to the youth offending team for an assessment. The YRD promotes officer discretion and allows the police to deal quickly with minor offending while remaining on frontline duty. The pilots are currently being evaluated.

4.18 Research evidence on the effectiveness of restorative justice interventions suggests that they can have a positive impact on victim satisfaction¹⁹ but their impact on re-offending is less clear^{20 21}. However, in our consultations with practitioners we have found both a great appetite for restorative justice approaches, especially in dealing with young offenders, and a great deal of local activity to deliver such interventions either established or in development.

¹⁹ Shapland, J., Atkinson, A., Atkinson, H., Chapman, B., Dignan, J., Howes, M., Johnstone, J., Robinson, G. and Sorsby, A. (2007) Restorative justice: the views of victims and offenders: the third report from the evaluation of three schemes. MOJ Research Series 3/07.

²⁰ Restorative Justice Projects: The National Evaluation of the Youth Justice Board's Restorative Justice Projects. London: Youth Justice Board.

²¹ Shapland, J., Atkinson, A., Atkinson, H., Dignan, J., Edwards, L., Hibbert, J., Howes, M., Johnstone, J., Robinson, G. and Sorsby A. (2008) Does restorative justice affect reconviction? The fourth report from the evaluation of three schemes. Ministry of Justice Research Series 10/08

The Youth Restorative Disposal pilots represent an opportunity to codify and standardise restorative interventions with young offenders, but there is much practice in areas which has been developed locally.

5. Compliance with existing legislation and guidance

5.1 Legislation and guidance on the use of out-of-court disposals is clear that they are intended for low-level, mostly first-time offenders, and in the case of cannabis warnings, PNDs and conditional cautions, the offences for which these disposals are available is limited.

Use of simple cautions for serious offences

5.2 Simple cautions are available for any offence, and though guidance states that they should not normally be used for serious offences, data show that they are on occasion administered for very serious offences such as rape and grievous bodily harm (GBH), and for a range of other serious offences²².

5.3 There are arrangements for police forces to validate data on simple cautions administered for rape. It should also be noted that cautions figures include reprimands and warnings given to youths, and with some categories of offences (for example, sexual offences involving children), a significant proportion of the cautions figures are accounted for by these youth disposals.

Offences brought to justice in England and Wales in 2008			
Offence	Convictions	Cautions	Total
Rape	2,086 (98%)	36 (2%)	2,122
Sexual assault*	7,522 (91%)	783 (9%)	8,305
GBH with intent	1,897 (95%)	103 (5%)	2,000
GBH without intent	4,960 (91%)	497 (9%)	5,457
Actual bodily harm	18,800 (41%)	27,079 (59%)	45,879

* Sexual assault includes offences under the Sexual Offences Act 2003, sections 2, 3, 6, 7.

5.4 Guidance lists five criteria that must be met for an offender to be eligible to receive a simple caution:

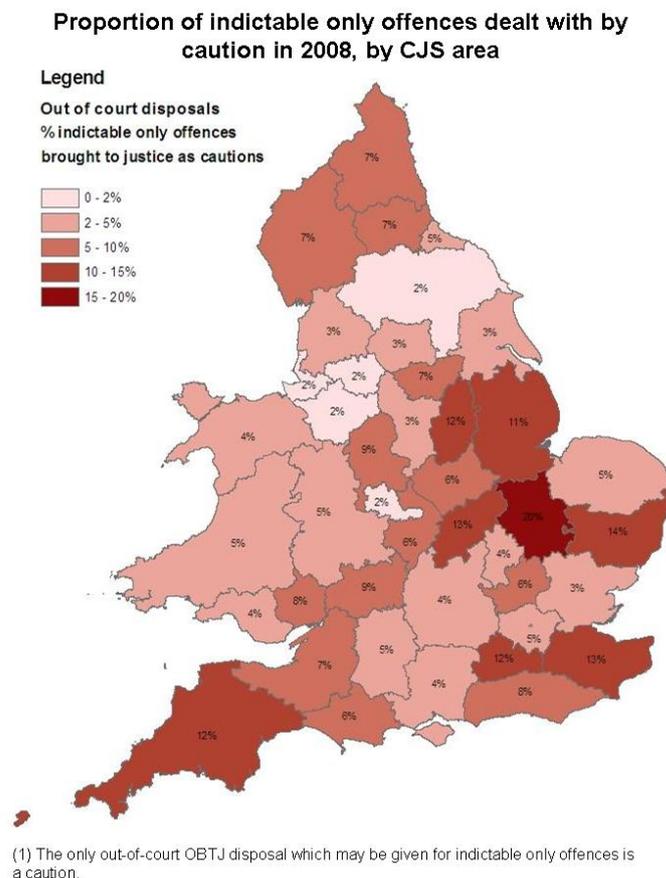
- (i) the suspect must have made a clear and reliable admission of the offence;
- (ii) there must be a realistic prospect of conviction if the offender were to be prosecuted in line with the Code for Crown Prosecutors, 'The Full Code Test';
- (iii) it must be in the public interest to use a simple caution as the means of disposal, taking account particularly of the seriousness of the offence;
- (iv) the suspect is 18 years of age or older at the time the caution is to be administered; and
- (v) a simple caution is appropriate to both the offence and the offender.

²² For definitions of indictable-only, triable-either-way and summary offences, and a range of violent offences, see annex F.

5.5 The first two of these criteria set the evidential standard required to caution at the same level as the evidential standard required to charge. A simple caution should therefore only be administered where the public interest would be better satisfied by a caution rather than a prosecution. All the practitioners we spoke to believed that the guidance on simple cautions was clear and the criteria for their use correct.

5.6 To safeguard against simple cautions being inappropriately administered for the most serious crimes, guidance also requires that the CPS takes the decision to caution an offender for an indictable-only offence. For all summary and triable-either-way offences the police may take the decision to caution an offender, though they are also able to seek CPS advice should they want it.

5.7 Without conducting a review of individual cases it is not possible to test whether there were genuinely exceptional circumstances that justified the use of simple cautions for very serious offences. It is also clear that there is considerable variation between areas in the extent to which serious offences are brought to justice through the use of simple cautions, and in some areas the figures would suggest such outcomes are not exceptional. The diagram below shows that the proportion of indictable-only offences brought to justice as a result of simple cautions ranges from 2% in Cheshire to 20% in Cambridgeshire.



5.8 Simple and conditional cautions and reprimands and warnings have been brought within the ambit of the Rehabilitation of Offenders Act 1974, meaning that they become spent immediately or, in the case of conditional cautions, after three months²³. Although this means that an offender does not have to declare a spent caution, it nevertheless remains on their criminal record permanently and would have to be disclosed to employers if the individual sought work in certain professions, would appear on a standard or enhanced criminal record check and could prevent entry to some foreign countries. In addition, a simple or conditional caution for a relevant offence can result in the offender being placed on the sex offenders register. It is vital that adult offenders understand these potentially profound implications in order to give informed consent to accepting a caution, and that young offenders who receive a reprimand or warning are made aware of these implications. It is imperative, therefore, that police officers fulfil their duty to the offender in this regard.

Use of out-of-court disposals for repeat offenders

5.9 Out-of-court disposals are intended for use in dealing with low-level, mainly first-time offending. In the case of young offenders, the hierarchy of out-of-court disposals specifically limits the number of each type of disposal they may receive – reflecting the previous concern about the repeat cautioning of young offenders which led to the introduction of the Final Warning Scheme – but there is no such hierarchy of adult out-of-court disposals.

5.10 In 2008, 97.4% of all reprimands and warnings were given to young offenders who had received no more than one such disposal previously, indicating that practitioners are complying with guidance on the Final Warning Scheme. The scheme does allow a second final warning to be administered in a limited set of circumstances, and only 2.6% of warnings given in 2008 were to young offenders who had received two or more such disposals before.

5.11 In the case of adult offenders there is no hierarchy of out-of-court disposals, and guidance often allows police officers and prosecutors discretion in determining whether individual disposals are suitable in cases where the offender has a criminal history.

- A simple caution may be administered if there has been a sufficient lapse of time (two years or more) since a previous caution, or if the current offence is trivial or unrelated to any previous cautions or convictions.
- A conditional caution may be administered where the offender has received cautions for dissimilar offences, or where more than five years has elapsed since a caution or conviction. Any failure to comply with a previous conditional caution would normally rule out another.
- A PND may not be appropriate where it is known that the suspect has previous convictions for disorder offences, has been issued with a

²³ This applies unless the offender is subsequently prosecuted and convicted for the original offence for which the conditional caution was given, in which case the rehabilitation period is extended so that it is the same as the rehabilitation period for the offence if a conviction had been received in the first instance.

number of PNDs in the recent past or has been cautioned for disorder offences.

5.12 There would appear to be greater repeat cautioning of adults than of youths. In 2008, 88.2% of cautions were administered to adults who had received no more than one caution previously, while 11.8% of adults receiving a caution that year had had two or more before. This is perhaps not surprising, though, given that the 'adult' category (18 years plus) covers a much longer period in the offender's life than the 'youth' category (10-17 years), thereby providing greater opportunity to have offended previously.

5.13 The guidance on PNDs for offences of retail theft and criminal damage was strengthened in July 2009 to restrict the value of goods stolen or damage caused. An individual should only ever receive one PND for retail theft and criminal damage, and one for cannabis possession as part of the escalating enforcement procedure.

5.14 PNDs are intended for use in relation to low-level offending, much of which might not have resulted in a formal sanction prior to the introduction of the disposal. Figures show that 15% of adults receiving a PND in 2008 had been issued with at least one within the previous two years, while the equivalent figure for youths was 12%. There was, though, a small proportion of cases in 2008 – 4,895 or 3.4% of all adult PNDs, and 421 or 2.6% of all youth PNDs – in which individuals had received two or more such disposals in the last two years.

5.15 In 2008, 54% of all PNDs were issued at a police station, while 46% were issued on the street. Clearly the principal benefit of the PND is that it can deliver an on-the-spot sanction to an offender without taking the police officer off frontline duty, but it is often difficult and time-consuming for the officer to check the suspect's criminal history on the Police National Computer over a radio link (and therefore their suitability to receive a PND), and there is no power to take fingerprints and DNA samples on the street that might provide evidence of further offending. In addition police officers do not have a mobile recognition device that allows them to identify an individual on the street, and so there is a risk of false identity documentation being presented. It is for this reason that some forces have adopted a policy of only issuing PNDs following an arrest.

5.16 The technology solution to problems associated with establishing an offender's criminal history on the street is the Penalty Ticket Process (Pentip) computer system developed by the NPIA. (See paragraphs 6.4 to 6.6 below on compliance and enforcement of unpaid PNDs.)

Penalty Ticket Process (Pentip) computer system

Pentip will provide a single national data sharing system to process all fixed penalty notices and PNDs. It will provide a record of all PNDs and cannabis warnings issued nationally, as well links to offending history information on the Police National Computer allowing the officer to make thorough checks on an individual's suitability to receive a PND or cannabis warning. Pentip will also contain information on whether previous PNDs have been paid and whether the suspect has outstanding fines. Pentip will be tested in four areas and rolled-out nationally by early 2012.

6. Effectiveness of out-of-court disposals

6.1 The growth in use of out-of-court disposals has attracted criticism from some criminal justice stakeholders and the media, but so far there has been little evidence available to demonstrate the effectiveness of these disposals and raise confidence in their use.

Compliance and enforcement of out-of-court disposals

6.2 While simple cautions, reprimands and warnings immediately create a criminal record which may have potentially significant consequences for individuals, the effectiveness and credibility of both conditional cautions and PNDs as a criminal sanction is dependent on their recipients complying with the requirements these disposals place on them.

6.3 Data from the CPS have been used to estimate that approximately 87% of conditional cautions are complied with by offenders²⁴. In the 13% of cases in which the offender fails to comply with the conditions, the prosecutor must then decide whether to prosecute the offender for the original offence, vary the conditions attached to the caution or take no further action. CPS data for the third quarter of 2009 (October to December) show that of the 331 cases of non-compliance with a conditional caution during this period, 75% resulted in prosecution, 8% in a variation of the conditions and 17% in no further action being taken.

6.4 Data from 2008 on initial payment rates for PNDs indicate that 52% were paid prior to being registered as a fine at court²⁵, 3% were either contested by the suspect at court or were considered for prosecution, a further 2% were cancelled, and the remaining 43% were registered as a fine at court for enforcement action. Perhaps not surprisingly given that it is an offence of dishonesty, the lowest initial payment rate for PNDs of all the notifiable offences within the scheme was for retail theft, which stood at 46% in 2008. Data on the enforcement of fines resulting from unpaid PNDs are not available from HM Courts Service.

6.5 While it would be unreasonable to expect police officers to assess a suspect's means to pay a PND, it must also be recognised that unpaid PNDs which are registered as fines and fall to be enforced by the courts entail resource implications for HM Courts Service.

6.6 At present, the HM Courts Service IT system (Libra) cannot distinguish fines resulting from unpaid PNDs from the totality of fines falling to be enforced by the courts. We have worked with the NPIA and HM Courts Service to

²⁴ This compliance rate is a proxy measure that has been calculated by comparing the total number of conditional cautions where there was non-compliance during 2009 with the total number of conditional cautions given out in the same year. This is likely to overestimate the actual compliance rate, which should ideally be calculated by tracking conditional cautions across their lifespan (conditions can apply for up to six months).

²⁵ 40% of PNDs are paid within the 21-day suspended enforcement period, and a further 12% beyond this period but prior to registration of a fine at court.

complete a provisional analysis of data from Norfolk which shows that the area's 60% initial payment rate for PNDs rises to an overall compliance rate of 70% following enforcement action²⁶. It must be stressed, though, that Norfolk's higher than average initial payment rate means it is unlikely to be representative of the national picture, and considerable further work would be needed to establish this.

Impact of out-of-court disposals on re-offending

6.7 Data show that only 19% of adults that receive a caution and 26% of youths that receive a reprimand and warning go on to re-offend within the following 12 months. Overall out-of-court disposals have re-offending rates that are lower than court disposals, though the variation in re-offending rates by disposal primarily reflects differences in the type of offender given these disposals and their propensity to re-offend, reflecting for instance their age, gender and offending history. Given this, the figures below are presented in a table for convenience only, and should not be directly compared.

Table showing re-offending rates for juveniles and adults receiving a PND, caution, reprimand or warning, or conviction in 2007		
<i>Disposal</i>	<i>Re-offending rates</i>	
	<i>Juveniles</i>	<i>Adults</i>
PND ¹	34.1	25.2
Juveniles and adults receiving a reprimand, warning or caution in 2007 ²	26.0	18.6
Juveniles released from custody, commencing a non-custodial court disposal or receiving a reprimand or warning in first quarter of 2007 ³	37.5	N/A
Adults released from custody or commencing a court order in first quarter of 2007 ⁴	N/A	39.0

- 1 Unpublished analysis based on PNC data. Re-offending rate includes cautions or convictions given for offences committed within 12 months of the original disposal.
- 2 Unpublished analysis based on PNC data. Re-offending rate includes cautions or convictions given for offences committed within 12 months of the original disposal.
- 3 Re-offending of juveniles: results from the 2007 cohort. Ministry of Justice. Re-offending includes court convictions and cautions.
- 4 Re-offending of adults: results from the 2007 cohort. Ministry of Justice. Re-offending includes court convictions only.

²⁶ This analysis is based on figures for the period September to December 2008.

6.8 In order to be able to compare re-offending following different types of disposals, it is therefore necessary to control for as many of the differences between offenders and their offences as possible. In an unpublished example of this kind of analysis, offenders who had received an out-of-court disposal (in this case a caution, reprimand or final warning) were matched on five characteristics which were thought to be linked with the likelihood of re-offending (age, gender, ethnicity, offence committed, and number of previous convictions or cautions) to those having received a fine or conditional discharge. Although the results are not representative of all offences and offenders with these disposals, the comparisons provide evidence that in terms of their effect on re-offending, out-of-court disposals, fines and conditional discharges are broadly similar.

Victim satisfaction with out-of-court disposals

6.9 Guidance on the use of out-of-court disposals states that police officers should engage with the victim (where there is one) to establish their view of the offence and the proposed method of disposal, the nature and extent of any harm or loss and its significance to the victim, and whether the offender has made any form of reparation. Although the victim's views should be taken into account in deciding whether to administer an out-of-court disposal, they will not necessarily be conclusive to the outcome. The Victim's Code requires police officers to inform victims if an offender receives an out-of-court disposal within five days of it being administered, or within one day for vulnerable or intimidated victims.

6.10 It appears that victims are often closely involved in the process of administering a conditional caution, including considering the appropriate conditions. An evaluation of the implementation of the early conditional cautions schemes between 2004 and 2005 showed that although overall an equal proportion of victims reported being satisfied or dissatisfied to some degree, victim satisfaction was highest where the aims of the scheme had been explained to them and they were consulted on whether the offender should get a conditional caution²⁷. The experience of practitioners we consulted was that conditional cautions are now having a very positive effect on victims.

6.11 At present there is no centrally available data on victim satisfaction in cases in which an offender receives an out-of-court disposal, as the Witness and Victim Experience Survey (WAVES) only captures cases that resulted in a charge. Although we learned that 13 out of 39 police forces²⁸ had conducted victim satisfaction surveys on the use of out-of-court disposals and that the majority of these reported favourable responses from victims, the sample sizes and methodologies used were often not robust enough to support firm conclusions or indicate wider relevance.

²⁷ OCJR (2007). Conditional Cautions: Key findings from a victim satisfaction survey. CJS Online.

²⁸ This information was requested from all police forces in England and Wales. 39 police forces responded to this question.

Public attitudes to out-of-court disposals

6.12 The most recent significant study of public attitudes to out-of-court disposals in England and Wales was research commissioned by OCJR and conducted by Ipsos MORI in 2006. This study supported findings from other public surveys, including the British Crime Survey, that tend to show the public are supportive of alternatives to prosecution for minor offences and first-time offenders in particular, be they adult or juvenile²⁹. The MORI study found:

- Out-of-court disposals were favoured to court for minor offences with only one in ten survey respondents preferring court for minor offences in general. On balance the rehabilitative approaches to out-of-court disposals were the most favoured – particularly for second offences.³⁰
- Although there was general agreement that re-offending should attract more severe penalties, the consensus from discussion groups was a preference for a flexible response that recognised the circumstances of the offence.³¹

6.13 From our consultations with practitioners we found little evidence of public engagement activity to increase the public's understanding and confidence in out-of-court disposals, and only 2 out of 39 police forces³² reported carrying out public confidence surveys that included questions on out-of-court disposals.

Costs of out-of-court disposals

6.14 A key benefit of out-of-court disposals for criminal justice agencies is that they represent an efficient and cost-effective alternative to prosecution in appropriate cases. Some work has been done previously to estimate unit costs for the administration of certain types of disposals, and these have been used by agencies within some areas to claim substantial savings as a result of using these disposals.

6.15 We have undertaken an initial analysis of the cost implications for criminal justice agencies of different types of disposals, including out-of-court disposals. While we have not been able to gather and analyse comprehensive cost information from all criminal justice areas, resource use information has been gathered from a number of areas and has informed our analysis. Certain gaps in data have meant that a complete analysis of all of the stages of the process and their resource costs was not possible. However, given what was available, the following indicative resource costs can be determined³³.

²⁹ Mattinson & Mirrlees-Black (2000) Attitudes to crime and criminal justice. Home Office Research Findings No. 111

³⁰ MORI (2006) Public Attitudes to Alternatives to Prosecution. London: OCJR.

³¹ MORI (2006) Public Attitudes to Alternatives to Prosecution. London: OCJR.

³² This information was requested from all police forces in England and Wales. 39 police forces responded to this question.

³³ These cost data include police and CPS costs only. HMCS costs and the costs of investigating non-compliance and enforcing breaches are not included.

Table showing indicative resource costs of disposals		
Disposal	Youth	Adult
Prosecution (amount depends on who took charging decision and the outcome)	£400 to £1400	£400 to £1400
Street disposal (such as PND or for youths the YRD)	£5 to £40	£5 to £40
PND following arrest ³⁴	£250 to £350	£250 to £350
Simple caution or reprimand/warning following CPS advice	£350 - £450	£300 to £450
Conditional caution	Not yet available	£300 to £450
No further action following CPS advice	£350 to £450	£300 to £450
Simple caution or reprimand/warning without CPS advice	£250 to £400	£250 to £350
Street-issued cannabis warning	N/A	£10 to £20
Cannabis warning following arrest	N/A	£250 to £350

³⁴ Earlier analysis had suggested £91 as the average cost of administering a PND. This was the cost of a PND issued following arrest, and included all possible subsequent outcomes (e.g. the PND being contested, and the costs of any subsequent enforcement action by the courts). The cost to the police service of issuing a PND following arrest was estimated to be £68 when the suspect complied with the penalty notice. However, this analysis was based on data on police costs and activities that have since been updated, and our analysis supporting this report uses data from a recent survey and modelling, and makes more realistic assumptions about the level of resources used to issue a PND following arrest. Hence our estimate to the police service of costs of £250 to £330.

7. Data on the use of out-of-court disposals

7.1 To support the effective use of out-of-court disposals by criminal justice agencies, it is important that relevant and accurate data and management information on their use are available both locally and nationally. From the wide range of evidence we have considered and presented in this review, it is clear that a great deal of information is already available on the use of out-of-court disposals.

7.2 The concern about police forces accurately recording the offence for which an out-of-court disposal was given relates to a broader concern about presenting information on the performance of the criminal justice system. The Home Office Counting Rules for Recorded Crime require that a crime is classified on the basis of the victim's report, unless there is evidence to the contrary. A charge or out-of-court disposal, however, is administered for the offence in law for which there is sufficient evidence, and for which the public interest would be met. Inevitably, therefore, an offender may be charged or receive an out-of-court disposal for an offence different to that recorded as a crime by the police. This is particularly common in relation to violent or sexual offences where the full extent or nature of the injury may not be known at the point the crime is reported, or the presence or otherwise of intent established.

7.3 These differences – together with a number of more technical counting issues – mean that criminal justice outcomes are not directly comparable to recorded crimes. As such, this presents difficulties for the public in interpreting the performance of the criminal justice system and understanding how crimes are dealt with. While this is an issue beyond the scope of this review, it is an obstacle to increasing transparency in how out-of-court disposals are used, and therefore to public confidence in these disposals. The Ministry of Justice is undertaking a feasibility study to look at whether use of data matching for statistical purposes only, could help resolve some of these issues by linking information held on the Police National Computer with information held by the CPS and the courts. This review further highlights the importance of this work.

7.4 The Ministry of Justice has already announced its intention to review its statistical outputs to make them more accessible, transparent and easier to interpret, and the process of undertaking this review of out-of-court disposals has helped criminal justice agencies move towards a shared understanding of what is needed.

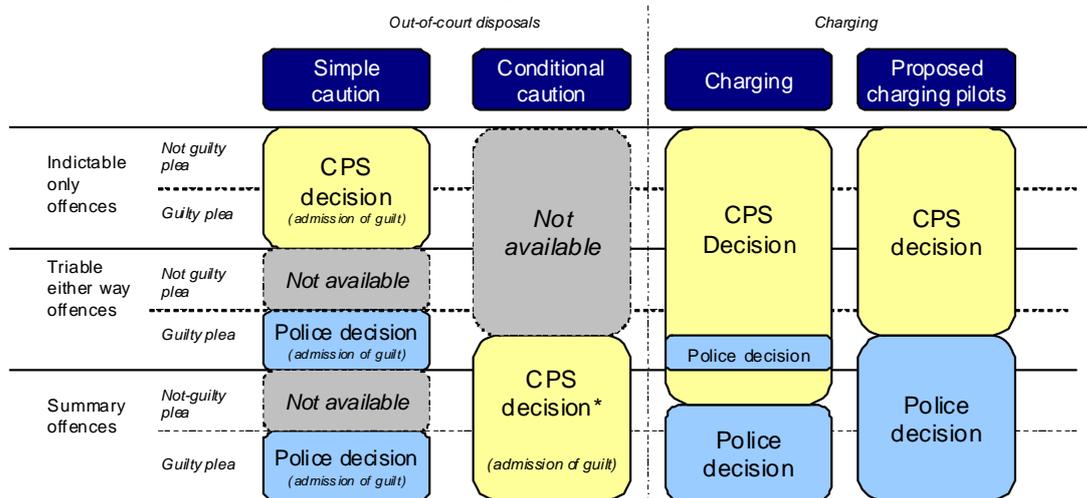
8. Out-of-court disposals frameworks for adults and youths

8.1 Since 2000 the criminal justice system has introduced reprimands and warnings for youths (the Final Warning Scheme), cannabis warnings for adults, PNDs for adults, 16-17 year olds and in some areas 10-15 year olds, conditional cautions for adults and a range of informal restorative justice approaches with a particular focus on young people. In addition, the youth conditional caution is currently being piloted in a number of areas alongside a punitive condition in the adult conditional cautioning scheme.

Police and CPS decision-making arrangements

8.2 This period since 2000 has also seen fundamental changes in the relationship between the police service and the CPS with the introduction of the statutory charging scheme between 2004 and 2006. This scheme requires that the CPS takes the decision to charge in all but the most minor cases, but these arrangements are not reflected in the decision-making responsibilities for administering out-of-court disposals. Guidance allows police officers to take the decision to administer a simple caution without reference to the CPS for all but indictable-only offences, whereas the statutory conditional caution scheme requires that it is the CPS that takes the decision to administer a conditional caution in all cases. These different arrangements (illustrated in the diagram below) mean that the same offence will often require different decision-making processes to be followed depending on the proposed method of disposal.

Decision-making boundaries between the police and CPS



In any case referred to the CPS, the CPS will take the decision even if the police would otherwise have had the authority to caution/charge. There are also a number of exceptional offences for which the CPS must take the decision to caution/charge – eg domestic violence, hate crime, terrorism, some assaults, etc.

* Conditional cautions are available for all summary offences (excluding most road traffic offences), and some of the volume triable-either-way offences (including some theft, criminal damage, fraud and misuse of drugs offences).

8.3 The operational impact of these arrangements is that in individual cases the police officer's consideration of the appropriate disposal will often be influenced by the practical implications of pursuing particular options.

8.4 The CPS and ACPO are working together to modernise the charging arrangements and improve police access to prosecutorial advice and decision, including through the provision of telephone advice through CPS Direct. As part of this work they are intending to test in a small number of areas from April 2010 changes to the current statutory charging arrangements.

Offences for which simple and conditional cautions are available

8.5 While a simple caution is theoretically available for any offence, the offences for which a conditional caution is available are limited in the Director of Public Prosecutions' Guidance on Conditional Cautioning to summary offences and a few triable-either-way offences. In addition, conditional cautions are not available for hate crimes and domestic violence incidents.

Simplifying the adult and youth out-of-court disposals frameworks

8.6 In responding to any criminal offence, the police officer performs a critical function as gatekeeper to the criminal justice system. Decisions taken at the start of the process determine whether an offender will enter the criminal justice system and, if so, the route through it they will take. Police officers must have discretion to act in the best interests of the victim, the offender and the public in responding to crime, but the boundaries within which this discretion is exercised

must support the officer in taking proportionate and appropriate decisions, promote consistency and inspire confidence in these decisions.

8.7 It is vital that the public has confidence that out-of-court disposals are being used appropriately and proportionately; that they are effective; that there is consistency in their use across England and Wales and that the system is both understood by the public and its operation is transparent.

8.8 We therefore believe the time is right to undertake a wider policy review of the out-of-court disposals frameworks for adults and youths with the aims of making these simpler, consistent (where this is desirable) and more coherent.

Office for Criminal Justice Reform
February 2010

Annex A

Written Ministerial Statement by the Secretary of State for Justice and Lord Chancellor, 14 December 2009

“On Monday 9 November I announced our intention to review the use of out-of-court disposals by criminal justice agencies. Today the Home Secretary, the Attorney-General and I are publishing the terms of reference for this review.

Out-of-court penalties and other similar interventions in one form or another have been available for a long time. They are designed to provide simple, swift and proportionate ways of responding to antisocial behaviour and low-risk offending and to save courts the time of listening to minor and undisputed matters. They also support rehabilitation and reparation, especially by young people, provide quick resolution to victims and free up time for the police and courts to focus on more serious offending.

Existing legislation and guidance on the use of out-of-court disposals is clear, but we have been concerned by reports of these disposals being used for apparently serious offences, including violent assaults. We are also concerned by the apparent variation between areas in the number of crimes brought to justice through the use of out-of-court disposals, by reports of the repeated use of such disposals even for low-level offences, and by the robustness of their enforcement.

We have therefore asked the Office for Criminal Justice Reform to conduct a review of the use of out-of-court disposals with the following terms of reference:

To examine evidence on the use and enforcement of out-of-court disposals for adults and youths by criminal justice agencies;

To identify any issues with current operational practices, including current performance and regulation frameworks, and compliance with legislation and published guidance;

To report to Ministers in order that they can issue a written statement to Parliament in March 2010 on emerging findings and the focus for the next phase of the review, including any further work required to improve the compliance of criminal justice agencies with legislation and guidance and to consider possible changes to the out-of-court disposals frameworks for adults and youths to improve transparency and confidence in the criminal justice system.

The objective of this first phase of the review is to ensure we have a proper understanding of the operation of the existing out-of-court disposals framework. To this end, and in consultation with key criminal justice partners, the review will examine:

i) national trends in the numbers of out-of-court disposals in the context of the level of crime, charged cases, court caseloads and convictions;

ii) local variation in the number of out-of-court disposals and operational practice, including performance management and quality assurance arrangements;

iii) the use of out-of-court disposals for serious offences, and the consultation with victims in such cases;

iv) evidence of the effectiveness of out-of-court disposals, including operational issues such as the repeat issue of disposals to offenders, compliance and enforcement, and any evidence of the outcomes they deliver for offenders, victims and the public's confidence in the criminal justice system; and

v) the efficiency of using out-of-court disposals, including evidence of their costs and benefits to criminal justice agencies, and any concerns about bureaucracy.

The findings from this first phase of the review will determine the work to be undertaken in the second phase of the review. The programme of work that will form the second phase of the review, and the timescales for this, will be set out in the further written statement I will issue to Parliament in March 2010.”

Annex B

Methodology

1. The Office for Criminal Justice Reform (OCJR) undertook an evidence-gathering exercise during December 2009 and January 2010 on the use of out-of-court disposals. The review team was supported by members of the National Policing Improvement Agency (NPIA), Crown Prosecution Service (CPS), Association of Chief Police Officers (ACPO), the Metropolitan Police Service (MPS) and analysts and statisticians from OCJR and the Ministry of Justice. The review comprised a series of meetings with key criminal justice partners, site visits to three criminal justice areas, two regional practitioner focus groups, a round-table event on youth out-of-court disposals, a survey of all 43 police forces in England and Wales and data analysis conducted centrally.

Meetings with key criminal justice partners

2. A full list of those organisations consulted during the first phase of the review is included below.

Site visits

3. The areas selected for visits were Lancashire (strong proponents of out-of-court disposals), Northumbria (high users of simple cautions) and Hampshire (low users of out-of-court disposals). Specific issues explored during the site visits included:

- compliance with guidance and quality assurance processes, including the impact on bureaucracy;
- accountability and performance management;
- effective working between the police and CPS (on cautions and conditional cautions);
- training in the use of out-of-court disposals;
- analysis of trends;
- engagement with the judiciary and magistrates;
- communication with victims;
- transparency for the public; and
- relevant information on the cost-effectiveness of out-of-court disposals.

4. Discussions were held with police operational staff including probationers and sergeants, individuals responsible for training, performance management and quality assurance of out-of-court disposals, as well as CPS prosecutors, HM Courts Service staff, magistrates and agency leaders.

Regional Practitioner Events

5. These two events were held in the East Midlands on 6 January and the North West on 14 January 2010. The objectives of these events were:

- to inform stakeholders of the nature of the review and respond to their questions;

- to understand the reasons for variations between areas in their trends of the use of out-of-court disposals;
- to establish if and why there are variations in local strategies, operational practice and performance management in the use of out-of-court disposals;
- to identify examples of effective practice and evidence of the local effectiveness of out-of-court disposals;
- to obtain views on the strengths and weaknesses of existing practices, including the involvement of victims in out-of-court disposals processes; and
- to obtain views on the coherence of the current out-of-court disposals frameworks for adults and youths.

6. Practitioners from the region included representatives from police forces, the CPS, HM Courts Service, Youth Offending Teams and magistrates.

Round-table event on youth out-of-court disposals

7. The Youth Justice Board, on behalf of OCJR, facilitated a round-table discussion on 5 January 2010 in London with key partners. The event focused on:

- the use of out-of-court disposals for children and young people;
- obtaining views on the strengths and weaknesses of existing practices, including the involvement of victims in out-of-court disposals processes for children and young people;
- obtaining views on the coherence of the current out-of-court disposals frameworks for children and young people;
- evidence of the effectiveness of out-of-court disposals for children and young people, including operational issues such as the repeat issue of disposals to offenders, compliance and enforcement, and any evidence of the outcomes they deliver, including re-offending rates, victim satisfaction and public confidence; and
- the efficiency of using out-of-court disposals for children and young people, including evidence of their costs and benefits to criminal justice agencies, and any concerns about bureaucracy.

8. Representatives included ACPO, the CPS, Joint Youth Justice Unit, Association of YOT Managers, Magistrates Association, Local Government Association, Standing Committee for Youth Justice, and the Welsh Assembly Government.

Survey of all 43 police forces

9. All 43 police forces were asked to provide the review team with a range of information on their use of out-of-court disposals, including information on:

- victim satisfaction and public attitudes to the use of out-of-court disposals;

- any examination of the costs of out-of-court disposals (e.g. estimated cost or time taken to issue a PND, a caution or cannabis warning), including how they compare with alternative outcomes;
- domestic violence cases which resulted in a caution;
- any quality assurance procedures in place;
- delivery of national or local training packages to officers;
- the contribution of out-of-court disposals to force targets and performance monitoring arrangements;
- examples of good practice; and
- delivery of bespoke restorative justice interventions independent of existing formal disposals.

Data analysis

10. Data used to inform the review were extracted from the databases held by the Ministry of Justice which are used to compile the annual report *Criminal Statistics, England and Wales*.

11. These data have been extracted and supplied to the Ministry of Justice by the courts and police forces from a variety of administrative data systems. Every effort is made to ensure that the figures presented in this publication are accurate and complete. Although care is taken in collating and analysing the returns used to compile these figures, the data are of necessity subject to the inaccuracies inherent in any large-scale recording system. Consequently, although figures are shown to the last digit in order to provide a comprehensive record of the information collected, they are not necessarily accurate to the last digit shown.

12. The re-offending figures are based on unpublished analysis by the Ministry of Justice of an extract of data taken from the Police National Computer. As with any large scale recording system, the Police National Computer is subject to possible errors with data entry and processing. The figures are provisional and subject to revision as more information is recorded by the police.

13. Additional data were supplied by the CPS and police forces from their administrative data systems.

14. A key concern informing the review of the use of out-of-court disposals was reports of the use of simple cautions for apparently serious offences. While a certain amount of light can be shed on practice through analysis of existing statistical data and from discussions with practitioners, these sources of data have their limitations. For example, it is possible that the offence category assigned to a crime may not always accurately reflect the gravity of the offence; or there may be recording inaccuracies. Therefore case file analysis is needed to thoroughly examine reasoning behind cautioning decisions. The proposed study is scheduled for any subsequent phase of the out-of-court disposals review, and will look in detail at a sample of serious offences in up to four study forces (drawn from Suffolk, Lancashire, Northumbria and Hampshire). A preliminary feasibility study found that, while there are significant differences across the forces in the quality and accessibility of data held in case

files, it would be practicable to select a random sample of serious cases in order to review the available documentary evidence.

Out-of-court disposals review steering group

15. The work of the review team was overseen by the Out-of-Court Disposals Review Steering Group which comprised senior officials and leaders from across the criminal justice departments and agencies. This group provided direction and oversight to the review team. The key findings and recommendations contained in the draft report were agreed by this group.

List of bodies consulted by OCJR

Association of Chief Police Officers
Attorney General's Office
Children's Society
Crown Prosecution Service
Department for Children, Schools and Families
Her Majesty's Court Service
Her Majesty's Inspectorate of Constabulary
Home Office
Joint Youth Justice Unit
Legal Services Commission
Local Criminal Justice Boards
Local Government Association
Magistrates' Association
Ministry of Justice
National Bench Chairmen's Forum
National Policing Improvement Agency
Senior Presiding Judge
Standing Committee for Youth Justice
Welsh Assembly Government
Youth Justice Board
Youth Offending Service

Annex C

Summary of adult and youth out-of-court disposals

See tables below.

Adult disposal	Description	Introduced	Criteria for use	Decision-making arrangements	Eligible offences	Implications for offender	Implications for victim
Simple caution	A non-statutory disposal in which a police officer gives an offender a formal warning for their conduct.	Has existed for decades.	(i) the offender must admit the offence; (ii) there must be evidence sufficient to provide a realistic prospect of conviction; (iii) the offender must agree to accept a caution in full understanding of the implications; (iv) the offender has not received a simple caution in the last two years, or if they have it was for an unrelated offence.	The police can take the decision to offer a simple caution for summary and triable-either-way offences. The decision to caution for an indictable-only offence must be taken by the CPS.	Simple cautions can theoretically be used for any offence, but guidance makes it clear that they should not be used for serious offences other than in exceptional cases.	Simple cautions form part of an offender's criminal record. They are immediately spent, but can be disclosed in court and as part of CRB standard and enhanced checks. A caution for a relevant offence requires the offender to be placed on the sex offenders' register.	The victim is consulted on the use of the disposal, but cannot insist that the matter is disposed of in a particular way. The victim's views may be relevant to determining seriousness.
Conditional caution	A statutory disposal that is an alternative to prosecution. It is a caution with conditions attached which are set by the CPS. If the offender fails to comply with the conditions they may be prosecuted for the original offence.	Criminal Justice Act 2003.	Same as for simple caution, except offender must also accept the conditions set by the prosecutor.	The decision to offer a conditional caution is always taken by the CPS following police referral.	A conditional caution can only be given for summary offences (excluding motoring offences) and a few designated either-way offences (criminal damage, theft). These are set out in the Director of Public Prosecutions' Guidance on Conditional Cautions.	Conditional cautions form part of an offender's criminal record. They are spent after 3 months, but can be disclosed in court and as part of CRB standard and enhanced checks.	The victim is consulted but cannot insist the matter is disposed of in a particular way. If appropriate, the victim can be awarded compensation or reparation and/or take part in restorative justice approach. The victim's views may be relevant to determining seriousness.
Penalty Notice for Disorder (PND)	A statutory disposal by which a suspect can discharge any liability to be convicted for the offence by paying a fixed penalty of £50 or £80. The suspect has 21 days to pay or request a hearing for the original offence, or a fine will be registered at court of one and a half times the penalty amount.	Criminal Justice and Police Act 2001.	(i) the suspect has committed an offence covered by the scheme (ii) there is sufficient evidence to prosecute; (iii) the suspect understands the procedure, but no formal admission of guilt is required (iv) the offence is not part of a pattern of offending.	The decision to issue a PND is always taken by the police, unless the case is referred to the CPS for advice.	A PND can be issued for the following notifiable offences (recorded crimes): (i) Retail theft up to a value of £100; (ii) Criminal damage up to a value of £300; (iii) Causing harassment, alarm or distress (s5 Public Order Act); (iv) Cannabis possession. A PND can also be issued for other recordable offences such as drunk and disorderly and the illegal buying of fireworks.	A PND does not form part of an offender's criminal record, but is kept on local police systems and can be made available as evidence of bad character, and disclosed as part of CRB enhanced checks at the Chief Constable's discretion.	The victim is consulted if appropriate.
Cannabis warning	A non-statutory disposal in which a verbal warning is given for simple possession of cannabis and the cannabis confiscated.	By ACPO in 2004.	(i) the offender must admit the offence; (ii) the offender has not received a cannabis warning previously. If they have a PND or arrest would be appropriate.	The decision to administer a cannabis warning is always a police decision only.	Possession of cannabis only.	A cannabis warning does not form part of an offender's criminal record, but is kept on local police systems and can be made available as evidence of bad character, and disclosed as part of CRB enhanced checks at the	No specific victim.

Youth disposal	Description	Introduced	Criteria for use	Decision-making arrangements	Eligible offences	Chief Constable's discretion. Implications for offender	Implications for victim
Youth Restorative Disposal (YRD)	The YRD is a non-statutory disposal that uses Restorative Justice techniques to allow the victim (if they agree) to explain the effect on them of the offence and for the young person to apologise at the scene. Voluntary reparation can also be agreed.	Was piloted in seven areas between April 2008 and September 2009.	(i) no more than one can be given; (ii) the offender must not deny responsibility for the offence. (iii) the victim and young offender must agree with the approach.	The decision to use the YRD rests with the police.	It can only be used for low-level offences. These are level 1 and 2 on the ACPO gravity score matrix and there are also excluded offences such as drug and sexual offences.	It is not recorded on the PNC and does not form part of an offender's criminal record (although it can be disclosed as part of an enhanced CRB at Chief Officer's discretion).	The victim must agree to take part in the process The victim's views may be relevant to determining the reparation and take part in restorative justice.
Penalty Notice for Disorder (PND) (16 and 17 year olds)	A PND is a type of fixed penalty notice which can be issued for specified range of minor disorder offences. Payment of the penalty discharges the liability to conviction for the offence.	Criminal Justice and Police Act 2001. Came into effect January 2004.	(i) the suspect has committed an offence covered by the scheme (ii) there is sufficient evidence to prosecute; (iii) the suspect understands the procedure, but no formal admission of guilt is required (iv) the offence is not part of a pattern of offending.	The decision to issue a PND is always taken by the police, unless the case is referred to the CPS for advice.	A PND can be issued for the following notifiable offences (recorded crimes): (i) Retail theft up to a value of £200; (ii) Criminal damage up to a value of £500; (iii) Causing harassment, alarm or distress (s5 Public Order Act); (iv) Cannabis possession. A PND can also be issued for other recordable offences such as drunk and disorderly and the illegal buying of fireworks.	A PND does not form part of an offender's criminal record, but is kept on local police systems and can be made available as evidence of bad character. It can be disclosed as part of an enhanced CRB check at a Chief Officer's discretion.	The victim is consulted if appropriate
Penalty Notice for Disorder (PND) (10 to 15 year olds)	As above, but has a lower level of fine than adult PNDs and the parent/guardian of the offender is liable for the penalty.	PNDs for 10-15-year-olds have been available in seven pilot areas since July 2005.	As above, but: (v) The recipient does not have any welfare needs that require different approach or disposal.	The decision to issue a PND is always taken by the police, unless the case is referred to the CPS for advice.	Available for offences including criminal damage (up to the value of £300), shoplifting (up to the value of £100) and causing harassment, alarm or distress (section 5 public order offence).	A PND does not form part of an offender's criminal record, but is kept on local police systems and can be made available as evidence of bad character. It can be disclosed as part of an enhanced CRB check at a Chief Officer's discretion.	The victim is consulted if appropriate

Youth disposal	Description	Introduced	Criteria for use	Decision-making arrangements	Eligible offences	Implications for offender	Implications for victim
Reprimand and warning	A statutory scheme providing an equivalent of the simple caution for young people. A reprimand would be given for a first low-level offence if a restorative diversion was not appropriate. A warning is normally given for a further low-level offence and triggers a formal assessment by the Youth Offending Team (YOT), but can be given in place of a reprimand if the offence is serious enough. A further offence would normally result in a prosecution. Reprimands and warnings are considered a formal entry into the CJS for purposes of measuring first-time entrants.	Crime and Disorder Act 1998. Introduced June 2000.	(i) the offender must admit the offence; (ii) there must be evidence sufficient to provide a realistic prospect of conviction; (iii) the offender must understand the disposal being given but does not need to provide consent. (iv) the offender must not have been previously convicted in court or have received a more serious pre-court disposal previously. (v) the offender can only receive one reprimand. A second warning may be issued if two years have elapsed since the first warning. (vi) the police are satisfied that it would not be in the public interest to prosecute.	The decision to issue lies with the police. YOT assessment can also be requested prior to issue.	Reprimands can only be used for offences rated 1 and 2 on the ACPO Gravity Matrix and 1, 2 and 3 for a Warning.	Reprimands and warnings form part of an offender's criminal record. They are immediately spent, but can be disclosed in court or as part of standard and enhanced CRB checks. A caution for a relevant offence requires the offender to be placed on the sex offenders' register.	The victim's views may be relevant to determining seriousness.
Youth conditional caution (YCC) 16/17 year olds.	A statutory disposal enabling the CPS, in consultation with the police and YOT, to offer an offender a caution with conditions attached. If the offender fails to comply with the conditions they may be prosecuted for the original offence. The YCC will normally be used if a young person has already received a warning but their offending does not warrant prosecution. The conditions can serve the purpose of punishment, rehabilitation and reparation.	Criminal Justice and Immigration Act 2008. Being piloted in five areas for 16 and 17-year-olds from January 2010.	The same as for reprimands and warnings except the offender must also accept the conditions set by the prosecutor.	The decision to offer a conditional caution is always taken by the CPS following police referral and YOT input.	A conditional caution can only be given for summary offences (excluding motoring offences) and a few designated either-way offences (criminal damage, theft). These are set out in the Director of Public Prosecutions' Guidance on Youth Conditional Cautions.	Conditional cautions form part of an offender's criminal record. They are spent after 3 months, but can be disclosed in court and as part of CRB standard and enhanced checks.	The views of the victim should be obtained wherever possible. These should be taken into account in deciding whether a YCC is appropriate and in determining suitable conditions. The victim's consent must be obtained in any case where direct reparation or restorative justice approaches are being considered.

Annex D

Existing Guidance on out-of-court disposals

Adults

In July 2007, the Criminal Justice Service published a booklet for police officers to use when exercising their discretion about the appropriate and proportionate use of out-of-court disposals for adults.

Out-of-court disposals for adults: A guide to alternatives to prosecution

(available at

[http://frontline.cjsonline.gov.uk/includes/downloads/related/Out Of Court Disposals.pdf](http://frontline.cjsonline.gov.uk/includes/downloads/related/Out_Of_Court_Disposals.pdf).

In July 2008, the Home Office published a circular '**Simple cautioning of adult offenders**' which provides guidance to the police and prosecutors on the use of the simple cautions and in particular reminds practitioners that simple cautions should generally be used for low-level offending.

<http://www.homeoffice.gov.uk/about-us/publications/home-office-circulars/circulars-2008/016-2008/>)

'**The Director's Guidance on Conditional Cautioning**' published in October 2007 specifies the information that must be sent to Crown Prosecutors to enable a Conditional Cautioning decision to be made and the practical arrangements for the referral of cases and for dealing with any non-compliance.

http://www.cps.gov.uk/Publications/directors_guidance/conditional_cautioning.html)

Adult and Youths

The Home Office published guidance in the use of Penalty Notices for Disorder in November 2009 '**Penalty Notices for Disorder: Police Operational Guidance**'. This provides operational guidance for the use of Penalty Notices for Disorder for both adult and young offenders

<http://police.homeoffice.gov.uk/publications/operational-policing/penalty-notices-guidance/index.html>

There is ACPO guidance on cannabis warnings contained within the broader guidance within '**ACPO guidance on cannabis possession for personal use**' published in January 2009.

http://www.acpo.police.uk/asp/policies/Data/Guidance_on_possession_of_cannabis_for_personal_use.pdf

Youths

The Home Office circular provides additional guidance to support and in part update the Final Warning Scheme: **Guidance for the Police and Youth**

Offending Teams published in November 2002 on the reprimanding/warning of young offenders.

<http://www.homeoffice.gov.uk/about-us/publications/home-office-circulars/circulars-2006/014-2006/>

Annex E

Definitions

Indictable-only, triable-either-way and summary offences

Indictable-only offences – These are the most serious crimes and must be tried at the Crown Court. The first hearing is dealt with at the magistrates' court, and the case is then transferred to the Crown Court. Depending on the nature of the case being heard, the maximum sentence available to judges sitting in the Crown Court is life imprisonment.

Triable-either-way offences – These are crimes that can be tried in either the magistrates' courts or Crown Court. The magistrates decide if the case is suitable to be heard in the magistrates' courts. If they decide that the case is either too serious or too complex, they can send the case to the Crown Court in which case the defendant has no say in the matter. If the magistrates decide that the case is suitable to be heard by them then the defendant is asked for consent to do so. The defendant can then either consent to be tried by the magistrates or opt for trial by jury at the Crown Court provided that they have pleaded not guilty. If they have pleaded guilty then they have no say in the matter. If the defendant is tried summarily in the magistrates' courts and is convicted, there may still be a committal to the Crown Court for sentencing if the magistrates think that their sentencing powers are inadequate.

Summary offences – These are the least serious offences and are tried in the magistrates' courts. Magistrates cannot normally order sentences of imprisonment that exceed 6 months (or 12 months for consecutive sentences) or fines exceeding £5,000. The majority of summary offences heard in magistrates' courts are motoring offences.

Definitions of violent offences

Common Assault, contrary to section 39 Criminal Justice Act 1988

An offence of common assault is committed when a person either assaults another person or commits a battery. The level of injury includes grazes, scratches, abrasions and a black eye. It is a summary offence.

Assault occasioning actual bodily harm, contrary to section 47 Offences Against the Person Act 1861

Bodily harm has its ordinary meaning and includes any hurt calculated to interfere with the health or comfort of the victim. Such hurt need not be permanent, but must be more than transient and trifling. The level of injuries range from minor cuts and psychiatric injury to extensive bruising and minor fractures. It is a triable-either-way offence.

Section 20 assault – Unlawful wounding/inflicting grievous bodily harm

The offence is committed when a person unlawfully and maliciously, either wounds another person or inflicts grievous bodily harm upon another person.

Examples of injuries which amount to grievous bodily harm include broken or displaced limbs or bones, a fractured skull and psychiatric injury. It is a triable-either-way offence.

Section 18 assault – Wounding/causing grievous bodily harm with intent

The distinction between charges under section 18 and section 20 of the Offences Against the Person Act 1861 is one of intent. Factors that may indicate the specific intent include a repeated or planned attack, or using an offensive weapon to carry out the attack. It is an indictable-only offence.