Briefing

Centre for Justice Innovation

Delivering a Smarter Approach: Reforming Out of Court Disposals

Commitment in the White Paper

Page 12 of 'A Smarter Approach to Sentencing' states:

"We will simplify the Out of Court Disposals (OOCDs) framework so very low-level offenders can be dealt with swiftly and proportionately, without coming before a court. We believe it is time to move a two-tier legislative framework, comprising community resolutions and conditional cautions."

Purpose of this paper

As the White Paper states, out of court disposals are an "important tool in addressing early stages of offending behaviour. They allow the police to deal promptly with low-level offending without recourse to the courts. They can maximise the use of officer time –achieving a satisfactory outcome for the public while allowing officers to spend more time on frontline duties tackling more serious crime."[1]

Currently, when an individual receives an out of court disposal, there are six possible formal outcomes that police forces can use.[2] In addition, there is a range of positive, rehabilitative informal diversionary activity which currently occurs that fits below the formal out of court disposal framework. The Ministry of Justice's Sentencing White Paper, published in September 2020, proposes to legislate so all forces move away from the current framework, which has been criticised for being overcomplicated and confusing,[3] into a streamlined two tier framework, consisting of either an 'upper tier' disposal (akin to the current conditional caution) or a 'lower tier' disposal (akin to the current community resolution).[4]

The Government is right to streamline the out of court disposal framework but, in this paper, we outline the key lessons that must guide the implementation of this reform— most importantly, to use this opportunity to both de-escalate the contact individuals have with the criminal justice system and to give victims better information and reparation.

Background

Effective out of court disposals

For a number of years, there have been six formal statutory out of court disposals that can be given out following an offence. In addition, many forces have developed less formal out of court disposal projects, which provide short, rehabilitative interventions, which do not result in a statutory out of court disposal at all, and are generally either recorded on police systems as a No Further Action (NFA) or, increasingly, an Outcome 22 (a relatively new recording category that allows forces to properly record the activity they have conducted in this more informal space).[5]

There is extensive evidence that greater contact with the criminal justice system, especially for individuals committing low level offences (even where that offending is repeat), makes their re-offending more, not less, likely.[6] This is because of the negative consequences of contact with criminal justice system: These include both the practical consequences that having a criminal record can have on employment and other opportunities, as well as the psychological and social consequences that arise from being labelled a criminal and the negative peer influences that can occur from being in the system. We know this contact is especially damaging for children, young adults and vulnerable adults with substance misuse and mental health needs.[7]

Because of this, out of court disposals are often a more effective and appropriate response to low-level offending than prosecution in the courts. [8] Out of court disposals are most effective when they interrupt an individual's upward trajectory into the criminal justice system, in a process known as de-escalation. In its best forms, de-escalation means people who would have gone to court would get an out of court disposal and people who would have got a formal out of court disposal will receive a lesser, shorter diversion.

Moreover, when implemented effectively, out of court disposals are often more problem solving than a court fine or conditional discharge. They provide an opportunity to help people address and begin to resolve the problems that often underlie criminal behaviour. This ranges from facilitating access to treatment for drug, alcohol and mental health problems, to supporting people to understand the impact of their crime and to make reparations to the victims and/or community.[9]

Steps toward a simplified framework

In 2013/14, a joint government and police review of out of court disposals sought views on the existing statutory framework from the public and practitioners within the criminal justice system. The consultation responses confirmed that the out of court disposal framework was in need of simplification and reform, and so, in November 2014, the joint government and police response set out plans to reduce the number of disposals from six to two. In 2014/15, the Government piloted this 'two-tier framework' in three police forces. In 2017, the National Police Chiefs' Council (NPCC) published a strategy which encouraged forces to voluntarily move to the two-tier framework, using conditional cautions and community resolutions.[10]

As of mid-2020, some forces have moved fully to the two-tier model, some are in transition and others retain the full six out of court disposal options. In the Government White Paper published in September 2020, the Ministry proposed to legislate to "simplify the out of court disposals framework, so that there is consistency across police forces in the way low-level offenders are dealt with, making the system easier to understand,"[11] which will make the two tier framework mandatory, once legislation has been passed.

Reforming out of court disposals effectively

While the White Paper's reforms follow what has been a general direction of travel for some years, it is critical that these changes are implemented in the right way to ensure that future out of court disposals offer a truly effective way to addressing low-level offending. The evidence base on both formal and informal out of court disposals (what we term collectively as pre-court diversion), the pilot of the two tier framework in 2014 and, crucially, developments since 2014 all provide a wealth of information on what 'the right way' ought to look like.

1. Use the reforms to place informal diversion on a formal basis

As we have outlined, the current formal out of court disposal framework co-exists with a more informal set of diversion responses, which tend to focus on offering access to rehabilitative interventions in exchange for a non-statutory disposal, either recorded as a No Further Action

(NFA) or an Outcome 22. The reason for the existence of this informal tier is twofold: (i) it can avoid the criminal record consequences of the existing formal out of court disposals, all of which carry the risk of disclosure on an enhanced criminal records check (even where the offence is not one of those on the list that require mandatory disclosure); (ii) informal disposals do not require a formal admission of guilt, an issue identified by the Lammy review as a possible contributory factor in inadvertently up-tariffing BAME individuals at the front end of the justice process.[12]

Our work over the past four years with forces has shown the great strides and successes that have been achieved in this informal diversionary area. However, there are major drawbacks to keeping this work on an informal basis: (i) because data recording on these approaches is less formalised, there is no national data on the extent or efficacy of these approaches; (ii) as they do not count as formal disposals, it is not clear that the work done on them is recognised in existing funding settlements.

Our hope is that the lower-tier disposal outlined by the Government becomes the major vehicle into which all of the existing informal diversion cases and all of the existing formal out of court disposals, save those who currently already receive a conditional caution, transfer to. However, in order for this to work effectively, the lower-tier disposal needs to be crafted so that (i) it can be offered to individuals who accept responsibility for their actions but who do not have to make a formal admission of guilt; and (ii) having accepted one, it will not be disclosed on a criminal records check, except if it is for an offence that will never be filtered from a DBS certificate (see below).

Without this, the risk is that either the reforms will lead to net-widening — a term that describes the inadvertent expansion of the number of people who come into contact with more formal elements of the criminal justice system— or that they will simply replicate the existing system, where forces continue to provide informal diversion below the statutory framework.

2. Give police forces freedom and discretion to make decisions

Since 2014, there has been an invaluable growth in data and evidence on effective practice when it comes to pre-court diversion. One area where there has been considerable emerging best practice is in how forces make decisions about who gets pre-court diversion, and restrictions that might need to be in place.

There is some evidence from existing schemes that overly strict eligibility criteria regarding the number and types of offences can lead to very low referral numbers. In our work with a number of forces, the use of gravity scores, rather than strict offence type restrictions, seems to provide a more nuanced approach, allowing forces to better take account of mitigating and aggravating factors, and therefore better target the use of its formal and informal options. We would be keen therefore that offence restrictions for the use of the new disposals are kept to minimum. We would propose that legislation sets out that the upper-tier disposal is not used for indictable offences except in exceptional circumstances (as is the case with the conditional caution currently) and the lower-tier disposal is not used for indictable offences, certain either way offences set out in an order by the Secretary of State and certain summary offences also set out by order, in line with the restriction on use of simple cautions set out in section 17 of the Criminal Justice and Courts Act 2015.

This discretion is needed not only about who gets diverted and into what, but also in making judgements about the use of diversion when faced with repeat offending. We know that pre-court diversion is often the best response to low-level offending (i.e. the one most likely to result in lower re-offending) even when an individual has previously not complied with diversion before. Therefore, restrictions which prevent diversion being offered more than once or twice to an individual tend to be less effective than those that take a more discretionary approach. Our practical experience with forces shows that they find a more nuanced assessment of repeat

offending makes for more balanced judgements. For example, we have seen examples where any potential repeat diversion offers in a certain specified time frame go via a scrutiny panel (which already exist in most forces) so it is not down to one high ranking officer. This is more in line with what we know about desistance from crime.

We recognise that, in the absence of a strong steer from the evidence about which offences are most suitable for diversion and how many times diversion should be offered, eligibility criteria for pre-court diversion are always going to be partly determined by what is publicly acceptable. Yet even here there is good practice to share. In Durham, a diversion scheme, called Operation Checkpoint, uses a multi-agency Governance Board, including representatives from police, probation, health, youth offending and others to define eligibility criteria and decision-making processes.

Finally, we are aware that there is an understandably reticent attitude to using pre-court diversion for domestic abuse cases. For example, conditional cautions cannot be used for domestic abuse cases, without authorisation from the Crown Prosecution Service. However, we are aware that there is promising evidence from a diversion programme for first time domestic abuse offenders, Project Cara, which suggests that it can "reduce the future harm of domestic abuse among first offenders who admit their crime."[13] Other forces that we are in contact with would like to trial the use of this approach but have currently been frustrated by not receiving CPS approval. It would be useful for the Government to set out clearly the criteria that any project that proposed to use pre-court diversion for domestic abuse needs to meet in order to be authorised.

CASE STUDY 1: Checkpoint, Durham Police[14]

Durham Police's Checkpoint programme provides an alternative to prosecution, for people who have committed a low or moderate level offence. Participation is voluntary, and does not require an admission of guilt or a plea. The programme consists of a four-month contract, which requires participants not to reoffend, and commits them to undertake a combination of restorative justice activity (at the victim's discretion), voluntary work in the community and a tailored rehabilitation programme. If the scheme is successfully completed, the offence outcome becomes a deferred prosecution, and the participant exits the justice system with no criminal record.

Research shows that 90% of those who agree to the scheme complete it successfully.[15] Analysis by Cambridge University found that those who took part in the scheme had reoffending rates that were 13% lower than a sample cohort of offenders.[16]

A participant of Checkpoint spoke of their experience: "Instead of kicking me when I was down and charging me, I was supported instead. It has completely changed my life. I didn't realise it at the time because I was drunk all of the time. I am so much more confident and independent".

3. Implement safeguards against up-tariffing

As we have seen, one of the reasons effective pre-court diversion is likely to produce better outcomes than more formal sanctions is that it de-escalates.

Another of the risks of the Ministry's proposals is that this process of de-escalation could be reversed, leading to up-tariffing—a term that describes an observable process where people

who would have otherwise got a lower intensity disposal get a more intense one following a change in policy or practice. This process can happen because decision makers, consciously or unconsciously, believe that a more intense (and/or more punitive) sanction will be more effective than a less intense one. It is worth highlighting that the Ministry of Justice's two-tier out of court disposal pilot evaluation highlighted the dangers of up-tariffing within out of court disposals. [17] It showed that, contrary to the principle of de-escalation, people who would have received simple cautions were given conditional cautions instead. Conditional cautions involved people having to complete more interventions than they otherwise would and came with the threat of enforcement in the case of non-compliance.

To avoid this, guidance for practitioners should make it clear in eligibility criteria that pre-court diversion should always be used as an alternative to a more serious sanction (e.g. a conditional caution in place of a court prosecution; a community resolution in place of a conditional caution). For example, all those who would have received a simple caution under the current regime should be presumed to be eligible for the lower-tier disposal and only considered for the upper-tier disposal in specific and limited circumstances.

In addition, we recommend the wider use of practice that some schemes employ, which provides another layer of scrutiny: a staff member will act as 'gatekeeper' and will review all referrals for suitability. It is important that these gatekeepers are empowered not just to reject referrals deemed too high risk, but also those that do not meet the threshold and require a lighter touch disposal or in some cases nothing at all (e.g. no further action - NFA).

4. Use out of court disposal reform as an opportunity to prioritise victim-focused work

Published findings on victim satisfaction from the randomised control trial of Operation Turning Point, a diversion scheme in the West Midlands in which offenders agreed to a contract with the police in exchange for a No Further Action disposal if they complied, found higher levels of victim satisfaction with pre-court diversion participants (contrasted with victim satisfaction found within the court-bound control group). The trial reported that increased victim satisfaction rested on police clearly explaining the process and why Turning Point might better prevent reoffending – 'the quality of procedural factors about the way a case is handled (fair and respectful treatment, etc.) influence victim satisfaction more than the outcome of cases' and that 'it is likely that how out of court disposals are structured and communicated to victims is crucial for victim satisfaction.'[18]

The higher levels of victim satisfaction recorded in this study were linked to victim conversation scripts, ensuring the explanation of pre-court diversion to victims is consistent, regardless of who explains the programme. Clear explanations of why the police believe that pre-court diversion is best for reducing offending behaviour with the person concerned have been shown to be important for fostering the feeling that the police are being proactive about fighting crime. Lastly, there is evidence that meeting the victim's requests regarding their desired level (and timeframe) of follow-up contact was found to be an essential requirement.

The suggestion that communication practice is an important determinant of victim satisfaction is supported by a 2011 Joint Inspectorate report into out of court disposals which found that the 'level of victim satisfaction hinged largely upon the extent to which they have been kept informed and updated'.[19] In addition, the Association of Police and Crime Commissioners put emphasis on the 'integral role' PCCs play in helping victims of crime and in ensuring that the victim is at the heart of the criminal justice system.[20] Therefore it is crucial that PCCs and police prioritise victims of crime in pre-court diversions schemes and ensure they are appropriately supported and receive their entitlements under the Victims' Code.

CASE STUDY 2: Drug Diversion, Thames Valley Police and Violence Reduction Unit[21]

Thames Valley Police run a drug diversion scheme for individuals found in possession of small quantities of illegal drugs. Participants are able to avoid a court hearing, in exchange for completing a 6-week course. Individuals are incentivised to engage with the scheme by the prospect of avoiding prosecution if they do so. Engagement involves individuals being open about their drug use and undertaking an assessment of their needs, and therefore acts as a gateway to support.

The course is tailored to each individual, and delivered in a non-stigmatising and non-punitive way, using harm reduction materials to enable individuals to make healthy and positive changes in their life. The scheme is open to anyone, regardless of their previous convictions, reflecting the evidence base around cycles of addiction.

An evaluation of the scheme found that 98% of course participants had been successfully diverted from a court hearing and subsequent criminal record.

Participants on the scheme spoke of feeling treated in a fair and just way by the process and the resulting improvements to their life. One participant explained "I wasn't treated like a criminal. Being with others in the same position was good to communicate with and helped to realise stuff about myself".[22]

5. Tweak the proposed criminal records reforms to strengthen the out of court disposal reforms

At present, the Government states that a "'lower-tier' disposal (along the lines of the current informal community resolution) would not form part of a criminal record." However, under the current regime, community resolutions can be disclosed via enhanced DBS checks, and it is not clear that the current proposals make any changes to this reality. At present, it is up to police forces' discretion to disclose a community resolution under an enhanced DBS check— and they can do so where they think it relevant.

However, from our work with forces, we are aware that this discretion has led to widespread variation and inconsistency, meaning that individuals in one part of the country have these offences disclosed under an enhanced DBS check, while individuals caught for the same offence in another area do not. This lack of clarity is one of the main issues with the current out of court disposal regime— we are aware of police officers and lawyers instructing individuals to accept out of court disposals as they "won't get a criminal record"— only to find that their employment and housing opportunities, and their immigration status and their ability to travel are being affected when an enhanced DBS check is carried out.

To wipe this inconsistency away, we propose that the Government tweak their proposed changes so that the only circumstances in which a lower-tier disposal is disclosed on a DBS check is where it is an offence that will never be filtered from a DBS certificate.

6. Implementing the new framework will take time, guidance, training and resources

Our work with police forces has shown that police can deliver consistent pre-court diversion decisions with the right support tools. This requires time, guidance, training and resources.

The White Paper acknowledges that operational changes take time, and the government must follow its own advice to implement a successful two-tier model. The implementation process must not be rushed. The evaluation of the 2014 pilot of the proposed framework emphasised that officers and providers would have benefitted from a longer implementation period to adequately bed in operational and cultural changes. The evaluation called for a minimum 6-month implementation period, as well as seeking the green light from police areas and providers that they are prepared and ready to go, before initiating implementation.[23]

Plans to enact the reforms must also allow for appropriate time to produce clear and detailed guidance on how the new system will operate. The guidance itself must outline and clarify (i) who is eligible for what and how that ought to be determined; (ii) the definitions of success for each disposal and guidance of effective practice; (iii) the responsibilities of each agency; (iv) what constitutes a breach/non-compliance and the process to deal with this; (v) how to avoid over-dosing; and (vi) examples of best practice, including what works for whom. Similarly, training and guidance for police must address when out of court disposals are an appropriate course of action, and when they are not.

Feedback given by participants of the 2014 pilot called for specific training around making referrals into a diversion scheme.[24] Since then, we have seen that effective implementation of the two-tier framework works well when police officers receive ongoing training, which is as interactive and immersive as possible.

Finally, police forces and providers must be equipped with dedicated resources in advance, to roll out the new framework. The 2014 pilot evaluation emphasised the need for sufficient resources to manage the additional work, especially adequate IT systems, which are essential to enable fast and effective compliance monitoring.[25] Successful systems are simple, streamlined and make the best use of technology, and are overseen by dedicated staff responsible for training and monitoring.[26] Adherence to the training and guidance must be scrutinised to ensure they do not become a tick box exercise.[27]

7. Implement national coordination between diversion schemes

Some forms of pre-court diversion are widely used across England and Wales, but the picture varies from region to region. In 2018, the National Police Chiefs' Council (NPCC) surveyed all 42 police forces on their use of pre-court diversion. Of the 35 police forces who responded, 33 reported running at least one model of diversion. [28] A more comprehensive picture of current practice needs to be built on a national level, to have a true grasp of what is working effectively and why.

While local diversion schemes work best when they are empowered to operate independently, there is also strength to be found in national coordination. Schemes would benefit from hearing about the different practice happening across the country, including examples of innovation and 'what works'.[29] Schemes would also benefit from independent monitoring of practice, which would keep decisions transparent and subject to public scrutiny.[30] A national body should be set up to manage this coordination, complemented by the NPCC working group.

Conclusion

Out of court disposals are an effective and appropriate response to low-level offending – but only if they scale down people's contact with the criminal justice system. Police forces and others tasked with implementing these reforms are not starting with a blank page. The growing evidence and practice base from which we have drawn our seven lessons are the key to ensuring that the delivery of future out of court disposals will not only be simpler, but will deliver on the White Paper's promise of a smarter approach.

Endnotes

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About the Centre for Justice Innovation

The Centre for Justice Innovation seek to build a justice system which all of its citizens believe is fair and effective. We champion practice innovation and evidence-led policy reform in the UK's justice systems. We are a registered UK charity.

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