

# Swift, Certain and Fair Justice: Lifting the barriers to reform

May 2020



# About and acknowledgements

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## This project

Funded by The Hadley Trust, Crest has conducted nine months of qualitative and quantitative research into the principles of 'Swift and Certain' Justice, their application in the UK and where these principles are most important. The full methodology is provided at the annex.

## About Crest

We are crime and justice specialists - equal parts research, strategy and communication. From police forces to public inquiries, from central government departments to tech companies we have helped all these organisations (and more) have their own part to play in building a safer, more secure society.

## Acknowledgements

The authors would like to thank the Hadley Trust for their generous support and all those who shared their insights throughout the course of the project. In particular thanks to:

- the local areas who provided data and all practitioners based within these areas who agreed to be interviewed anonymously
- victims and service-users who agreed to participate anonymously in focus groups and interviews
- Subject matter experts who provided interviews and research materials

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# Executive Summary

# Crest has investigated the role of swiftness and certainty within criminal justice: where and when these principles are most effective and how they are best implemented

## Why this issue?

The Criminal Justice Act 2003<sup>1</sup> kick started a growing emphasis on swiftness and certainty in the criminal justice system:

***Where processes are dealt with in as timely a manner as possible and sanctions are clear and definite.***

With policing and the criminal justice system under increasing pressure, the time was right to re-examine how these principles can inform conceptions of effective justice. The need for this examination of Swift and Certain justice has become even more pronounced in light of the impact of the Covid-19 pandemic on the ability of the criminal justice system to progress cases effectively.

This project acknowledges that the evidence around swiftness and certainty is mixed - how the principles are applied in practice is critical. Crest's research has focused on **where and when in the system swiftness and certainty matters most**, and the various preconditions and enablers of success

It follows a series of projects undertaken by Crest on behalf of the Hadley Trust, focused on justice reform, including: community sentences, justice devolution, women offenders and youth justice.

## Scope of the project

While swiftness and certainty is commonly associated with probation programmes, this project has interpreted the principles in a broader sense, looking at the role of timeliness and certainty right across the core criminal justice agencies (police, crown prosecution service, courts and probation services).

## Methodology

The project has involved:

- academic literature review
- analysis of criminal justice performance statistics
- field research, including two 'deep-dives' in local areas

## Output:

In June 2019 Crest published an interim report. This is the **final report** and sets out our conclusions and recommendations.

# Overview of key findings

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1. Within England and Wales, reforms to drive greater swiftness and certainty have largely missed their mark: with seventeen reforms in seventeen years, the criminal justice system (CJS) still routinely tolerates delay and uncertainty.
2. In particular, investigations are taking longer than ever to complete, victims are waiting longer for their cases to be brought to trial, and magistrates' confidence in community sentences has been undermined in part by the time taken to punish breaches.
3. Application of swiftness and certainty has been silo'd, which has led to some unintended consequences. In particular, there have been concerns that pressure to speed up courts processes have undermined the quality of some pre-sentence advice and therefore the sentencing outcomes. Similarly, changes to police bail legislation intended to reduce police investigation length, has had the opposite effect.
4. The centralised control of courts in England and Wales has reduced the scope for local innovation and the development of approaches which reflect local circumstances and meet local priorities. Despite a multi-million pound 'transformation' programme, the courts remain slow and are not delivering certainty for defendants or victims.
5. The 'Transforming Rehabilitation' reforms have weakened the ability of probation services to provide consistency and certainty for offenders, and have weakened the local element.
6. Looking ahead, the restructuring of the probation service and the new Royal Commission on Criminal Justice provide an opportunity to rethink the role of swiftness and certainty within our justice system
7. 'Swift and Certain' Justice programmes have been proven to be effective in the reduction of reoffending in some areas and in certain contexts. However, recent evaluations suggest there are other critical success factors (beyond timely and consistent sanctioning) required to effectively deter offending. Crucially, swiftness must not become a substitute for procedural fairness.

# Key recommendations

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- 1 The police, CPS and Judiciary should work together to strengthen and expand the range of pre-court avenues for tackling offending, for example, through broader use of civil orders or out of court disposals and diversion. Where necessary these alternative options should be underpinned legislatively
- 2 The Home Office and Ministry of Justice should establish a joint task-force to review why 'offence to charge' times have increased and set out a joint action plan for the police and CPS to take action once these agencies have started to return to business as usual following the Covid-19 pandemic
- 3 The last decade illustrates how hard it is to drive swiftness and certainty from the top-down. We recommend a more devolved approach, whereby PCCs and directly elected Mayors are given responsibility (and where possible, budgets) for driving greater swiftness and certainty locally at every stage of the 'offender journey'
- 4 The end of 'Transforming Rehabilitation' is an opportunity to 'reset' the relationship between probation and the judiciary, improving the quality of pre-court advice and making it easier to bring offenders back to court when/ if they breach community orders
- 5 The new Justice Commission should commit to reviewing swiftness and certainty across the CJS - including the efficacy of existing targets - and ensure existing measures are appropriately balanced with the principle of procedural fairness

# **Crest is now undertaking research to understand how Covid-19 is impacting the criminal justice system. We want to understand what long term reforms this crisis may drive forward or hinder**

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Our work will consist of three phases within which we will concentrate on particular questions:

## **1. Quantifying the short-term and long-term impact of COVID-19 on the justice system using modelling techniques and data analysis:**

- How resilient has the justice system been?
- How will the crisis change supply and demand in the system?

## **2. Assessing the response and performance of the justice system to the current crisis:**

- What tools have the system adopted to cope with the crisis?
- Have the tools used to cope with the crisis been effective?
- Have the tools used to cope with the crisis ensured justice?

## **3. Discussing the implications of the crisis to inform what a post-COVID-19 justice system looks like**

Findings from our research into the criminal justice system as part of this project on swift and certain justice will feed into the new research investigating the impact of Covid-19. If you are interested in discussing the findings from this research or contributing to the new covid-19 research please get in touch: [contact@crestadvisory.com](mailto:contact@crestadvisory.com)





## **Section 1**

# **Introduction: examining the evidence around swiftness and certainty**

# The principles of 'swiftness and certainty' originated in an offender-desistance programme designed in Hawaii (Project HOPE) working with offenders on probation. These principles were picked up by other programmes across the US

Project HOPE, Hawaii's Opportunity Probation with Enforcement developed in 2004, emphasises the delivery of 'Swift, Certain and Fair' punishment when a probationer violates conditions of probation

HOPE also in part drove the Drug Court movement in the US. Drug courts employ a program designed to reduce drug use and criminal recidivism risk through judicial supervision and graduated sanctions

## Core components of HOPE model<sup>1</sup>



Warning hearing from a judge at the beginning of probation period



Mandatory drugs testing. Rehabilitative support available if requested



Zero tolerance of breaches to probation order



All breach sanctions are fixed term custodial sentences

## Core principles of Drug Courts<sup>2</sup>



Multi-disciplinary staff involved, and communities engaged in process



Judicial supervision and monitoring of offender



Sanctions are generally graduated according to number and level of breach



Use of incentives, and rehabilitative support available

# They are underpinned by a number of behavioural science studies, which have looked at what works to deter offenders...

The basic premise of deterrence theory is that people are motivated to obtain pleasure and avoid pain. Criminal sanctions are therefore intended to act as deterrents to those motivated to commit crime by inflicting 'pain'

According to Gibbs (1975)<sup>1</sup>, there are three central premises of deterrence theory:

1. The greater the actual certainty, celerity, and severity of legal punishment, the greater the perceived certainty, celerity, and severity of legal punishment.
2. The greater the perceived certainty, celerity, and severity of legal punishment, the less the likelihood of crime.
3. The greater the actual certainty, celerity, and severity of legal punishment, the less the likelihood of crime.

The HOPE model was founded on this theory. Swift responses to breaches, consistently carried out, will lead the offender to an increased perception of the likelihood of being caught and punished, therefore reducing the likelihood of recidivism

There is also considerable evidence that the deterrent effects of legal punishment are stronger for 'certainty' (the likelihood of being caught and punished) than 'severity' of the punishment

- Future [delayed] consequences - even if severe (e.g. a long prison sentence) are often given less weight than present consequences, possibly even more so for offenders.
- Most crimes, including serious ones, do not result in an arrest and conviction. The perpetrators of the vast majority of offences that do come to the attention of the police as recorded crimes are neither detected nor punished.
- This further suggests that the severity of a potential punishment will only weakly influence people who do not believe they will be caught: to the extent that actions and consequences come into play there is an optimism bias underpinned by a belief that they will not be caught.
- The theory that offenders will be deterred by the severity of a punishment is dependent on the awareness of sentencing guidelines, which are not broadly understood.

# ...however, more recently, both the theory and practice of deterrence have been challenged...

Contemporary deterrence theory has developed to incorporate understanding of its limitations. Recent studies have shown that other factors may have greater weighting on motivation to commit crime...

Contemporary deterrence theorists have recognised several important limitations, including distinctions between specific and general deterrence, absolute and restrictive deterrence, and actual and perceived punishments.<sup>1</sup>

Recent studies also suggest the benefits of deterrence are likely to be outweighed by the risks of "labelling".<sup>2</sup> (This is the idea that contact with the criminal justice system is itself a negative turning point, exacerbating chances of future offending by labelling individuals as inherently "offenders").

For example, a recently published study - drawing on a nationally representative sample of British adolescent twins - concluded that formal engagement with the criminal justice system made offenders more likely to commit further offences, rather than deterring offenders.<sup>3</sup>

...Further to this, a subsequent evaluation of the expanded HOPE programme failed to find any impact on recidivism of the participating probationers

The original 2009 evaluation of the Hawaii HOPE programme found that probationers assigned to HOPE had large reductions in positive drug tests and missed appointments, and were significantly less likely to be arrested during follow-up compared to Probation As Usual.<sup>4</sup> On the back of this evaluation, the HOPE model was widely adopted across several US States.

However, a recently published US Department for Justice evaluation of four locations conducting the HOPE model found that "there is little to support a conclusion that HOPE or HOPE-like programs will produce substantial improvements over PAU [*probation as usual*] when implemented widely".<sup>5</sup>

The results showed that programme fidelity was "good to excellent" across the sites with "strong buy-in to the HOPE concept" but despite this HOPE did not reduce recidivism and costs were higher overall.

# ...nonetheless, it is widely understood that there is value in swiftness and certainty - provided it is applied in the right way and balanced against other, important objectives

Despite some theories challenging the concepts of swiftness and certainty as stand-alone principles, they remain a central part of a well functioning justice system

Equally, the implementation of swift and certain principles must be balanced against the other pillars of our justice system

**Victims want faster justice:** on the whole and to reduce the harm caused by offending, victims of crime want to see offenders apprehended sooner rather than later so that they can move on.<sup>1</sup>

**Proportionality:** 'Swift and Certain' responses to crimes and breaches of probation orders must also be proportionate to be perceived as legitimate by both offenders and victims alike.

**Better courts act swiftly:** the Centre for Justice Innovation found that *"delays between the offence and the completion of a case undermine the effectiveness of the sentence in the eyes of both victims and offenders. When courts respond swiftly to non-compliance with court orders, the evidence suggests they are more effective. Swift resolution of cases is not just about processing efficiency; it is also about the system treating the cases it hears seriously and being seen to do that."*<sup>2</sup>

**Fairness:** 'swift justice' is not necessarily fair justice, speed must be balanced with 'procedural due process'. For example, while digital courts are an effective way to speed up justice, they can also isolate offenders from support and the important interaction with the courtroom itself, which may adversely affect justice and rehabilitation, and deny victims validation and their 'day in court'.<sup>4</sup>

**Early intervention with substance misusers works:** an evaluation of the Drugs Intervention Programme (DIP) and Tough Choices in 2007 showed some positive indications that levels of offending reduced following the swift intervention of drug rehabilitation services at the point of arrest.<sup>3</sup> The introduction of a sanction for those who missed drug appointments also led to lower attrition from the programme.

**Protecting the public and rehabilitating the offender:** similarly the response to a crime/breach must take into account the needs of the offender, the victim and the public. The sanction should be tailored with the needs of the offender in mind to ensure the best chance of rehabilitation. This may mean spending longer on the preparation of pre-sentence reports to ensure that sentences are designed effectively.

# For the purposes of this report, we have adopted a broad definition of swiftness and certainty, focusing on the speed at which offenders are brought to justice following a crime, and the consistent application of justice

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'Swift and Certain' principles (in the criminal justice system) have mainly been studied in the context of dealing with prolific low level offenders, rather than being applied to the whole system and to different offence types.

We are considering swiftness and certainty in the criminal justice system *as a whole*, looking at these principles from the perspective of both victim and offender, and taking into account how they interact with other principles underpinning our justice system.

**We are using these definitions of the principles of 'Swift and Certain' in the context of the criminal justice system:**

	Swift	Certain
<b>Victim perspective</b>	Perpetrators are brought to justice as quickly as possible (without any negative impact on the likelihood of rehabilitation) and communications from agencies to victims are received in a timely manner.	Victims can see that a conviction has been imposed and are clear about its implications for the offender, so that they feel something is being done/that they are being protected.
<b>Offender perspective</b>	Punishments are imposed immediately after the violation and risk or needs assessments are quickly carried out by agencies in contact with offenders.	Sanctions are communicated clearly and imposed consistently after every violation to address the optimism bias of offenders who tend to believe that they will not get caught.



## **Section 2**

# **The national policy context**

# The 2003 Criminal Justice Act kick-started two decades of government policy focused on 'swiftness and certainty' with 17 strategies and policy reforms in the last 17 years

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**2003 - Criminal Justice Act:** introduces sentence discount principle for guilty pleas; sets up Drug Rehabilitation Requirements, evidence can be via video link

**2006 - 'Doing Law Differently' white paper:** pledges to expand the use of summary justice

**2010 onwards - Court Estate Reform Programme:** begins ongoing series of court closures (since then over 250 courts have shut down)

**2011 - 24-hour court openings:** some courts open 24-hours to increase capacity in wake of riots (*not policy, but important demonstration of capability for multi-agency swiftness*)

**2012 - 'Swift and Sure Justice' white paper:** designed to secure guilty pleas earlier, improve efficiency, and reduce paperwork and process times

**2012 - Early Guilty Plea scheme:** reduction in sentence for those who plead guilty at the Early Guilty Plea Hearing

**2012 - Stop Delaying Justice policy:** limits trials to six weeks in magistrates' courts

**2012 - Prosecution of Offenders Act 1985:** statutory instrument allows police to make charging decisions without CPS involvement in some cases

**2012/13 - Abolition of committal hearings:** cases go to Crown Court as soon as deemed to be serious enough

**2013 - 'Transforming the CJS':** action plan to digitise courts and streamline hearing process for low-level crimes

**2013/14 - Transforming Rehabilitation programme:** new performance framework consisting of timeliness and quality measures for CRCs and NPS

**2014 onwards - CJS 'Common Platform':** creates a single, unified platform allowing the CPS and courts to manage cases more efficiently

**2014 - 'Swift and Certain justice' by Policy Exchange:** proposals to improve timeliness, with a focus on targeting prolific offenders

**2014/15 - Streamlined disclosure in summary cases:** removed the need to serve schedule of unused material in cases expected to end in a guilty plea

**2015 - Review of Efficiency in Criminal Proceedings:** Sir Brian Leveson warns of 'transformation exhaustion'

**2015 - 'Transforming Summary Justice' initiative:** CPS to review case files before hearings to reduce delays, streamline disclosure, and increase efficiency of trial listings

**2015-20 - Spending review:** £1bn for courts modernisation and digitisation

**2016 - 'Efficiency in the CJS' by NAO:** finds that delays still undermine confidence in CJS and waste scarce resources

**2016 - 'Transforming Our Justice System' white paper:** sets out plans for further digitisation and closures of inefficient court buildings

**2017 - Policing and Crime Act:** pre-charge bail largely replaced by release under investigation

**2018 - 'Fit for Future':** consultation on principles of court closures

**2019 - Sentencing (Pre-consolidation Amendments) Bill:** creates Sentencing Code to present the law in one place and in simpler terms, reducing the risk of error, appeals and delays



# In recent years, swiftness and certainty has usually been invoked by government in service of other wider objectives, rather than for its own sake

**Reducing reoffending:** in 2004 government introduced the 'Prolific and Priority Offenders' scheme, with an emphasis on 'faster processing' to reduce reoffending.

**Restoring public confidence:** the Swift and Sure White paper in 2012 sought to reassure the public that justice processes - from prosecution through to sentencing - would become speedier.

**Increasing consistency in sentencing:** sentencing council guidance seeks greater consistency in punishments, and aims to increase public understanding of sentencing.

**Improving efficiency and delivering better value for money:** along with other public services, the criminal justice system has been under pressure to do more with less. Achieving swiftness has frequently been invoked in support of a leaner, more efficient criminal justice system, which achieves 'more for less'.

**Improving victim experiences:** the Victims' Code of Practice sets out timeliness expectations for a number of criminal justice agencies. This is currently under public consultation.

## Case Study: Swift and Sure White Paper (2012)<sup>1</sup>

Following the 2011 riots, the Swift and Sure White Paper set out a series of measures designed to:

- provide an effective deterrent to crime
- respond swiftly and effectively when crime does take place, so that offenders are quickly made to face the consequences of their actions
- ensure that offenders are punished, and supported to reform

Measures included schemes which encouraged faster processing of cases through magistrates courts using the early guilty plea scheme and Stop Delaying Justice.

Police-led prosecutions were also extended and simplified to reduce the amount of time engaging with the Crown Prosecution Service at the point of charge. Neighbourhood justice panels were also rolled out in some areas to intervene with low level cases early through restorative justice approaches to prevent escalation.

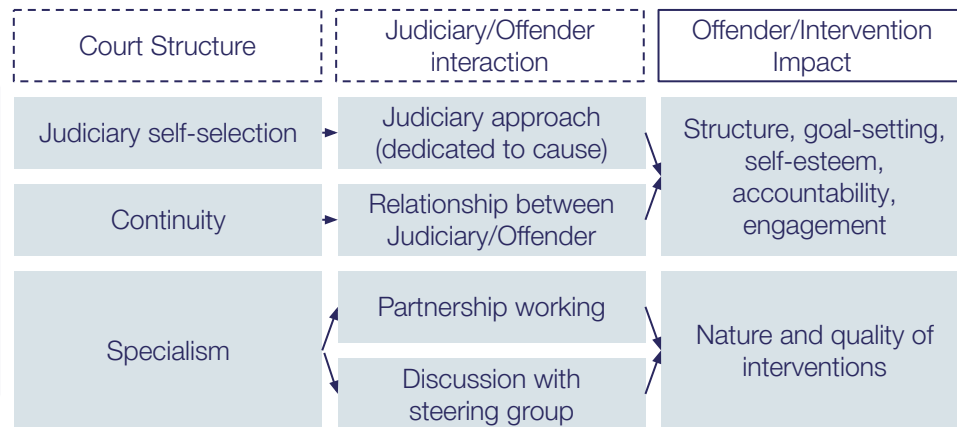
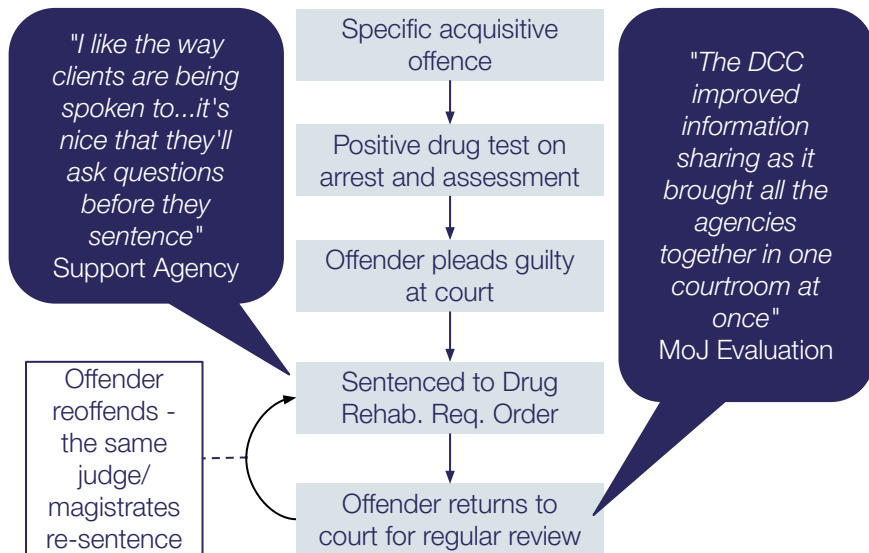
**However, while the White Paper introduced a series of micro-initiatives to encourage swiftness and certainty, there was no overarching framework for CJS agencies to work towards**

# Dedicated Drug Courts (DDCs) were successful in improving perceptions of certainty and incorporated the HOPE model of supervision. However, the 2013 DDC pilot was not extended

Dedicated Drug Courts only deal with specific acquisitive crime trigger offences. Staff are trained on the DDC model, and partnership working is a key element.

The DDC evaluation highlighted a number of specific mechanisms which could contribute to a reduction in drug use and offending. These relate much more to certainty than swiftness.

Dedicated Drug Courts/ Drug Rehabilitation Requirement Order Process<sup>1</sup>



The DDC pilot completed in 2013 and the Ministry of Justice left it for local areas to decide if they wished to run them locally. Most of the DDCs were not able to continue due to staffing and funding issues

# Crest's work with PCCs to measure performance in local criminal justice systems suggests a growing number of local areas value the principles of 'Swift and Certain' justice throughout the system

Many local areas have Local Criminal Justice Boards. Crest's field research suggests many of these (more than 50%) include a focus on 'Swift and Certain' Justice

Local performance frameworks measure 'swiftness and certainty' through a number of key indicators:

- Charge and out of court disposal rates
- Police case file quality
- Average number of days between offence and charge
- Average number of days between charge and sentencing
- Proportion of trials which are effective
- Conviction rates
- Sentencing outcomes

## Case study: Northumbria's Police and Crime Plan (2017-2021)<sup>1</sup> makes several references to 'Swift and Certain' justice:

*"First responders will respond swiftly"*

*"Provide early intervention to offenders and secure swift justice through effective community resolutions and out of court disposals where appropriate."*

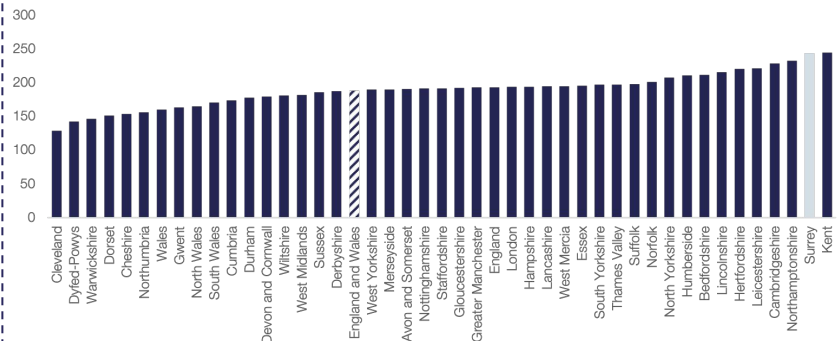
*"ensuring a swift and strong response"[to hate crime]*

## Case study: Surrey Courts Timeliness

At 244 days (over ⅔ of a year) Surrey has the second longest 'offence to completion' times in the country (see chart)

Surrey's Police and Crime Commissioner commissioned Crest to undertake a 'deep dive' to explore the drivers of this lack of timeliness. Key issues included the closure of 2 magistrates courts since 2011 and a growth in more protracted investigations and trials, due to a change in the crime mix.

Average (mean) number of days from offence to completion by Police Force Area in England and Wales, 2018/19<sup>1</sup>



# Prior to Covid-19 there were already a number of opportunities in train for government to rethink the role of swiftness and certainty from first principles

## Transforming Rehabilitation <sup>1</sup>

'Swift and Certain' Justice, applied according to its original incarnation in the HOPE model, relates specifically to probation. Whilst the founders of the programme assert that the principles can be effectively applied to the justice system more widely, there are certain elements of the programme that mean it is tailored mostly to offenders who are currently being supervised through a probation model.

The Transforming Rehabilitation programme was largely agnostic on the subject of Swiftness and Certainty, however did introduce greater supervision of lower-level offenders to the probation model, reflecting one component of the HOPE model.

As probation services re-integrate from next year onwards, there is an opportunity for government to embed 'Swift and Certain' principles at the heart of the new operating model, empowering probation staff to act quickly and effectively on breaches of probation orders.

## Royal Commission on Criminal Justice <sup>2</sup>

The previous royal commission in 1993-6 examined the efficiency of the criminal justice system. There is potential for the forthcoming Commission to focus on the principles of 'Swift and Certain' Justice following the Queen's speech which announced: *"My government is committed to a fair justice system that keeps people safe. My ministers will establish a Royal Commission to review and improve the efficiency and effectiveness of the criminal justice process"*

## Integrated Offender Management <sup>3</sup>

Integrated Offender Management approaches involve criminal justice and other agencies working together to target high risk reoffenders with the aim of reducing recidivism and increasing public confidence. A core principle of the strategic framework is the: *"promise of swift justice for those who continue to offend. The 'offer' to the offender is to be set against a robust and responsive enforcement regime"*

HMIC recently reviewed Integrated Offender Management schemes nationally and made recommendations to improve schemes. There will be an opportunity for local areas to embed 'Swift and Certain' Justice through IOM schemes.

# In the new Covid-19 context there will be a further opportunity for the criminal justice system to think carefully about these principles as it returns to 'business as usual'

Agency	Issue	How will this shape the implementation of swift and certain justice post-covid emergency?
<b>Police</b>	Police are likely to decrease levels of immediate response deployments to lower harm offences due to a decreased workforce; Covid-induced demand has seen a general 50% increase in domestic abuse demand	When 'normality' resumes, police will face a considerable challenge to resume business as usual whilst trying to progress backdated investigations. Out of court disposals may be preferred
<b>Crown Prosecution Service (CPS)</b>	Reduced court hearings over the coming months are likely to result in a backlog of prosecution cases, resulting in frustrations for the victim and gradual disassociation for the offender	The CPS will face a challenge in progressing a backlog of cases to court. They may be able to consider recommending greater use of out of court disposals to ensure justice is as swift and certain as possible
<b>Courts/ Sentencing</b>	Courts are likely to operate a pared back model of high-harm cases hearings as a priority. This may exacerbate existing perceptions of a slow system which does not prioritise low-level prolific offending. Courts are also expected to make greater use of video-enabled technology	Digital courts will be thoroughly tested over the courts of the next few months. When the courts go back to business as usual an evaluation should guide the expansion of this method of employing 'Swift and Certain' justice. If victims have lost too much faith in the system, certain cases may struggle to get to court due to lack of victim support
<b>Probation</b>	Probation services face a challenge in the supervision of offenders and managing reporting requirements. There is a risk of a decrease in certainty of breach procedures being maintained and the speed at which they are heard in court	Online/virtual supervision will have been tested. It will be important to ensure that if this is driven forward, it is by effectiveness and efficiency, rather than cost-savings alone. We may need more research to understand the right balance of face-to-face versus virtual contact for best value for money
<b>Prison</b>	Up to 4,000 prisoners are due to be released to prevent the spread of covid-19 although only 30 were released by 23rd April 2020. Use of remand is likely to be limited in this same period, both of which could impact perceptions of certainty of the system.	Prisons will have to make challenging decisions about recall of those prisoners who have been released, balancing perceptions of certainty with the benefits experienced by those who have been released in re-engaging with communities. <sup>21</sup> There will undoubtedly be lessons to be learned from the impact of early release.



## **Section 3**

# **Assessing swiftness and certainty in England and Wales**

# In seeking to assess swiftness and certainty, Crest have focused on the following indicators

Bringing offenders to justice

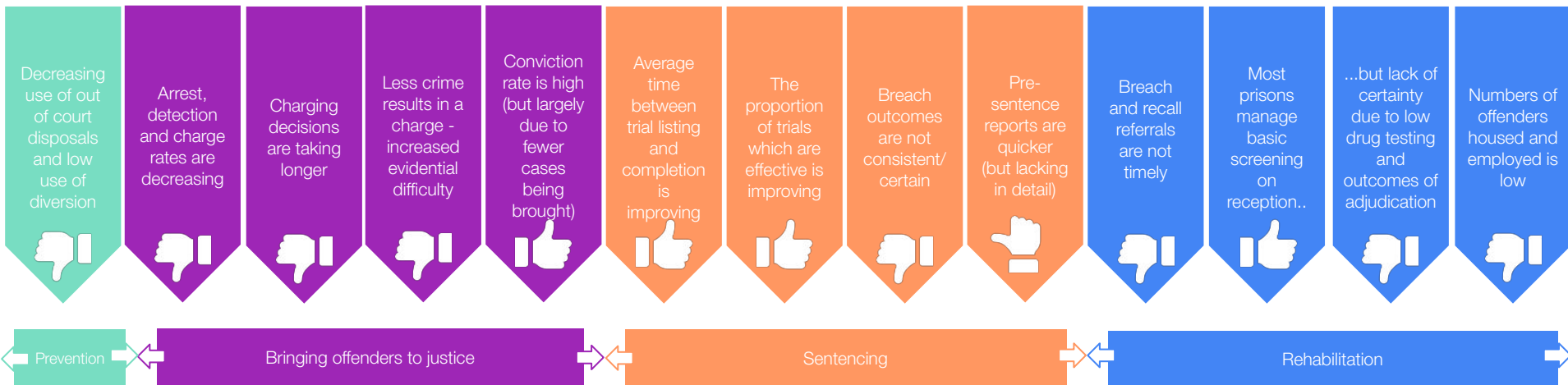
Prevention

Sentencing

Rehabilitation

Agency	Measure of swiftness	Measure of certainty
Police	<ul style="list-style-type: none"> <li>➤ Use of out of court disposals/diversion schemes</li> <li>➤ Incident response times</li> <li>➤ Average days from offence to charge</li> <li>➤ Use of police bail</li> </ul>	<ul style="list-style-type: none"> <li>➤ Use of out of court disposals/diversion schemes</li> <li>➤ Arrest rate</li> <li>➤ Charge rate</li> <li>➤ Rate of victims disengaging with the CJS</li> </ul>
Crown Prosecution Service (CPS)	<ul style="list-style-type: none"> <li>➤ Proportion of trials which are cracked due to late guilty pleas</li> </ul>	<ul style="list-style-type: none"> <li>➤ Proportion of prosecutions resulting in a conviction/dropped</li> <li>➤ Proportion of cases referred to CPS charged</li> </ul>
Courts/ Sentencing	<ul style="list-style-type: none"> <li>➤ Average days from charge to completion</li> <li>➤ Effectiveness of trials</li> </ul>	<ul style="list-style-type: none"> <li>➤ Concordance between pre-sentence reports and the sentence given</li> <li>➤ Sentencing decisions for breaches</li> </ul>
Probation	<ul style="list-style-type: none"> <li>➤ Proportion of pre-sentence reports given on the day of conviction</li> <li>➤ Timeliness of first contact with probation</li> <li>➤ Timeliness of breach/recall referrals</li> </ul>	<ul style="list-style-type: none"> <li>➤ Proportion of cases in which a pre-sentence report is prepared</li> <li>➤ Completion of community and suspended sentence orders</li> <li>➤ Proportion of cohort in accommodation</li> </ul>
Prison	<ul style="list-style-type: none"> <li>➤ Timeliness of basic custody screening</li> </ul>	<ul style="list-style-type: none"> <li>➤ Drugs testing targets met</li> <li>➤ Quality of purposeful activity</li> <li>➤ Number of prisoners in work</li> <li>➤ Adjudication outcomes</li> </ul>

# In summary, despite the numerous policies intended to improve the swiftness and certainty of the criminal justice system, the extent to which it is embedded effectively is patchy



The following slides examine these trends in swiftness and certainty across these key domains of criminal justice in more detail



## **3.1 How 'Swift and Certain' is the CJS in preventing crime?**

# Non criminal sanctions and diversion of low-level offenders away from the formal CJS can be an effective way of improving both timeliness and certainty...

**Civil injunctions** can be applied for by local authorities. Injunctions can make requirements of or place restrictions on an individual whether convicted of a criminal offence or not. Similarly, domestic violence protection notices and orders can be applied for to prevent suspected perpetrators from contacting victims prior to charge/conviction.

**Out of court disposals** provide the police with the ability to sanction an offender immediately after an admission of guilt without having to take a case through a court process. These generally comprise of either a caution (formal recorded warning) which conditions can be attached to, or a community resolution involving engagement between police, victim and offender.

**Diversion schemes** offer a swift and meaningful response to low-level offending. Diversion schemes generally divert offenders away from more serious sanctions to instead engage in meaningful activities designed to address the drivers of their offending. This reduces the negative consequences of formal criminal justice sanctions and prevents recidivism.

All three tools are likely to enhance perceptions of swiftness, certainty and fairness for victims and offenders. Conditions can be attached that are designed to tackle drivers of offending behaviour without the negative impact of a formal touchpoint with the criminal justice system<sup>1</sup>

## Case Study: Durham's Checkpoint Scheme <sup>2</sup>

Checkpoint aims to divert offenders early on in an offending pathway from further offending. It offers offenders a 4-month contract as an alternative to prosecution. If they complete the 4-month contract, no conviction is recorded.

If an individual accepts the Checkpoint offer, the first meeting is scheduled usually within 24–72 hours. A Navigator assesses the individual's circumstances and tailors the contract accordingly. Offenders must sign the contract and are told that if they reoffend, they will be prosecuted.

Swiftness and Certainty are key principles: *"Checkpoint is grounded in research from empirical deterrence studies, suggesting that the swiftness and certainty of punishment are more important than the severity. It is also based on the 'Sword of Damocles' theory; the notion that the imminent threat may be more effective than the punishment itself"*

However, Checkpoint also acknowledges: *"The process of desistance from crime can be explained by maturation and ageing, developmental, life course, rational choice, social control, and social learning theories, and it is these sub-components that many rehabilitation interventions based on desistance derived their intervention logic from"*

## ...but the evidence suggests use of such tools is declining and varies widely

The number of out of court disposals used by the police has continued to fall despite rising police-recorded crime rates...

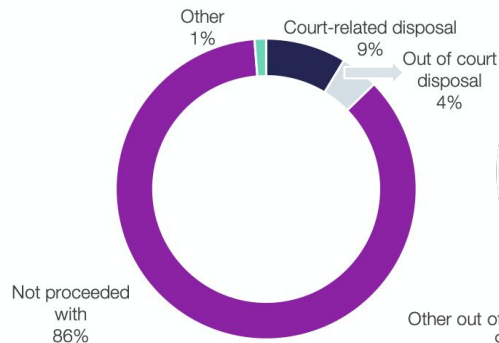
Number of out of court disposals (cautions and penalty notices for disorder) used by police in England and Wales, year ending March 2004 - year ending March 2019<sup>1</sup>



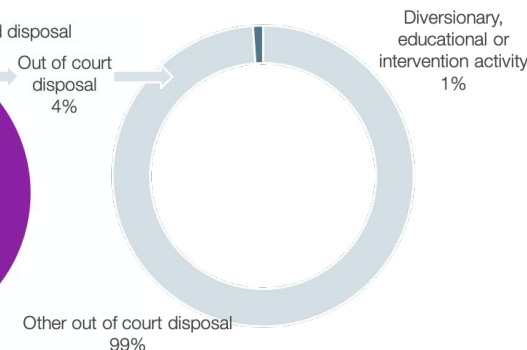
Whilst there is no systematic recording of civil injunctions, we were told by local authorities during the course of field-work that their use has declined as local authority resources are squeezed

...and there are huge variations in the proportions of crime that police forces deal with by means of out of court disposal, from less than 2 per cent of crime in Avon and Somerset to 12 per cent in Durham

Proportionate crimes outcomes recorded in England and Wales, Q1 & Q2 2019/20<sup>2</sup>



Proportion of all out of court disposals recorded in England and Wales which were diversionary, Q1 & Q2 2019/20<sup>3</sup>



Only 14 out of the 43 police forces in England and Wales (33 per cent) recorded use of a diversion scheme in Q1 or 2 2019/20



## **3.2 How 'Swift and Certain' is the CJS in bringing offenders to justice?**

# The Police and Crown Prosecution Service (CPS) have joint responsibility for bringing offenders to justice...

How is swiftness and certainty relevant to policing?

While policing lacks hard numerical targets, most forces continue to measure swiftness:

- **Response times:** each force has its own benchmarks for responding to calls of different priority within a certain timeframe.
- **Offence-to-charge time:** this is measured as part of criminal court statistics but there are no specific targets for the police.

And certainty:

- **Arrest and charge rates:** these are frequently used in the media and by politicians as a proxy for effectiveness or certainty.

Though targets were abolished nationally in 2014, Chief Supt. Irene Curtis's review of police targets found some forces do still set their own locally.<sup>1</sup> This may be driven in part by the accountability of PCC's to their communities. There is a public expectation that police will respond quickly to incidents and investigate without delay.

How is swiftness and certainty relevant to the CPS?

The CPS do not publish targets, but swiftness is in effect measured through:

- **Effectiveness of trials** (average number of hearings per case and early guilty pleas)

Whilst certainty is reflected in:

- **Prosecutions:** the number of cases charged by the CPS and the quality of charging advice provided to the Police
- **Conviction rates:** the conviction rate is measured. The CPS does not publish/work to targets, but has in the past set ambition levels for conviction rates in certain areas (rape, domestic abuse and hate crime)

*"CPS and courts operate in an increasingly 'target driven' environment with pressure for hearings to go ahead, whether or not all the disclosure tasks have been performed"*<sup>2</sup>

Dr Hannah Quirk, written evidence to Justice Select Committee

# ...however in recent years, both agencies have struggled to achieve swiftness and certainty

**The ability of the Police and CPS to intervene and progress cases swiftly has been weakened**

**The certainty (or likelihood) of bringing an offender to justice in the current system is not clear cut**

**Police response times are increasing** meaning the golden hour for evidence collection is likely to be missed, and may be impacting victim and witness engagement in the criminal justice system.<sup>1,2</sup>

**Both arrest and charge rates are falling** and the proportion of cases where the suspect is identified but the **victim does not wish to proceed has doubled** since 2015.

**The average number of days from offence to charge is increasing.** Police resources are stretched but the lengthening time between the reporting of the crime and its outcome is likely to impact perceptions around the certainty of being caught and convicted.

Between 2016/17 and 2018/19 the **proportion of cases referred to the CPS that resulted in a charge decreased** whilst the proportion of **prosecutions later dropped increased**.<sup>3</sup>

One driving or facilitating factor of increased investigation times seems to be the **introduction of release under investigation (RUI) and restrictions on use of police bail**. Those who are RUI are likely to be under investigation for far longer than those on bail.

Overstretched police and CPS staff are causing **disclosure issues** which impacts on the certainty of a case to proceed.<sup>4</sup>

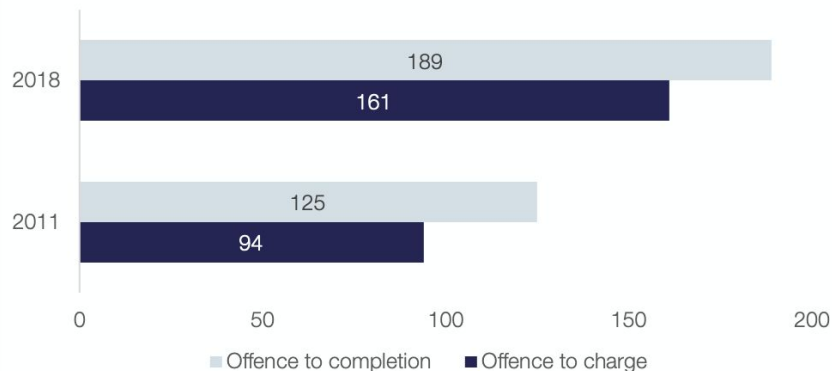
The **proportion of trials which are effective has been increasing**, but this is in the context of the total number of **dependents going to court decreasing**. A large proportion of trials are **still cracked due to late guilty pleas**.

However, overall **cases heard at court now are more likely to result in a conviction than previously**.

# The time between offence and charge has risen by 33% since 2011. Offenders wait on average 4 months to be charged

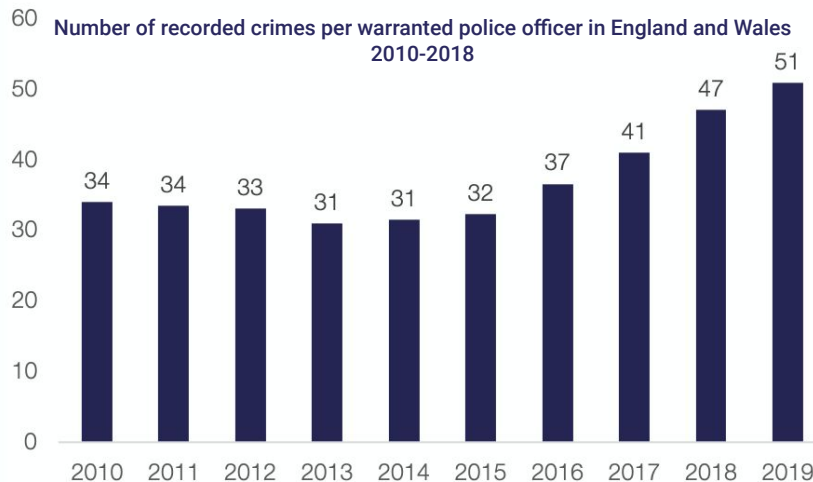
Increases in 'offence to charge' times has driven an overall increase in the average time to progress an offence from offence to completion

Average number of days from offence to completion (2011-2018)<sup>1</sup>



For both victim and offender the delay between offence and conviction can lead to negative effects such as the lack of association for the offender between the offending behaviour and the consequence

Increases in offence to charge times are partly a function of growing demand (with fewer officers per crime) and the growing complexity of crime (with a growth in offences that take longer to investigate)



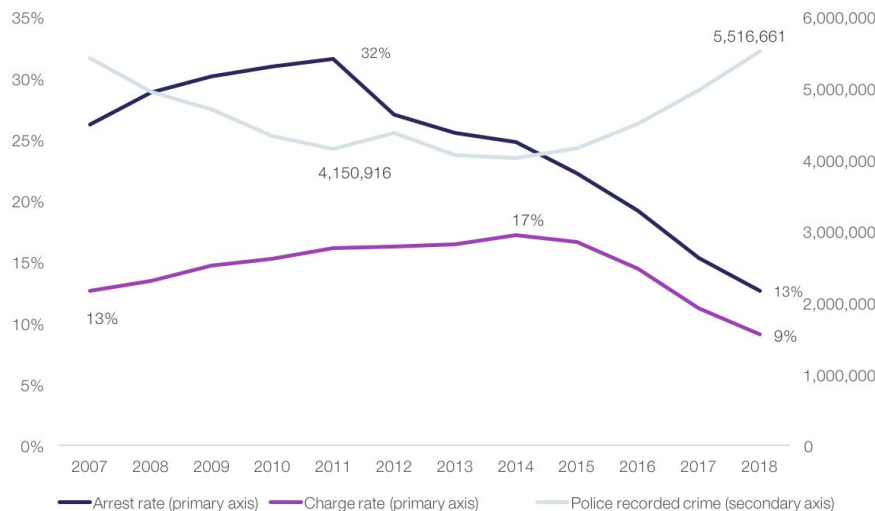
Changes to bail legislation in 2017 is also suspected to have reduced the incentive to progress investigations expeditiously

# Arrest and charge rates are falling as recorded crime rises

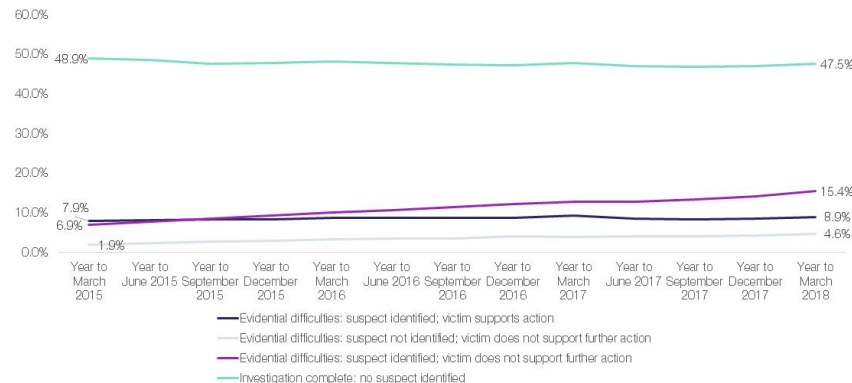
In the year ending March 2018, only 12.7 per cent of total recorded crime led to arrest, whilst only 9.1 per cent of offences led to charge. This has fallen from 31.6 per cent and 16.2 per cent respectively in 2011.

The proportion of crimes with an unidentified suspect has decreased, whilst the proportion with an identified suspect *but* not proceeding to charge due to victims withdrawing support has increased since 2015.

**Total recorded crime, arrests as a proportion (%) of recorded crime, and proportion (%) leading to charge, years ending March, England and Wales<sup>1</sup>**



**Proportion of crimes not proceeding due to evidential difficulties, 2015-18<sup>2</sup>**



An increase in the number of identified suspects with no increase in charge or out of court disposals could be having an impact on public perceptions around the certainty of getting caught and punished.

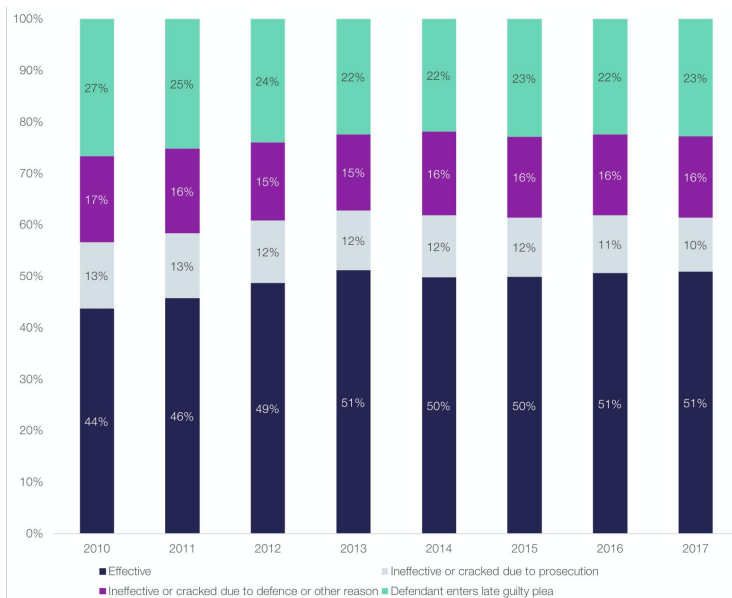


# The rate of effective trials has increased, but over a fifth of trials still result in a late guilty plea

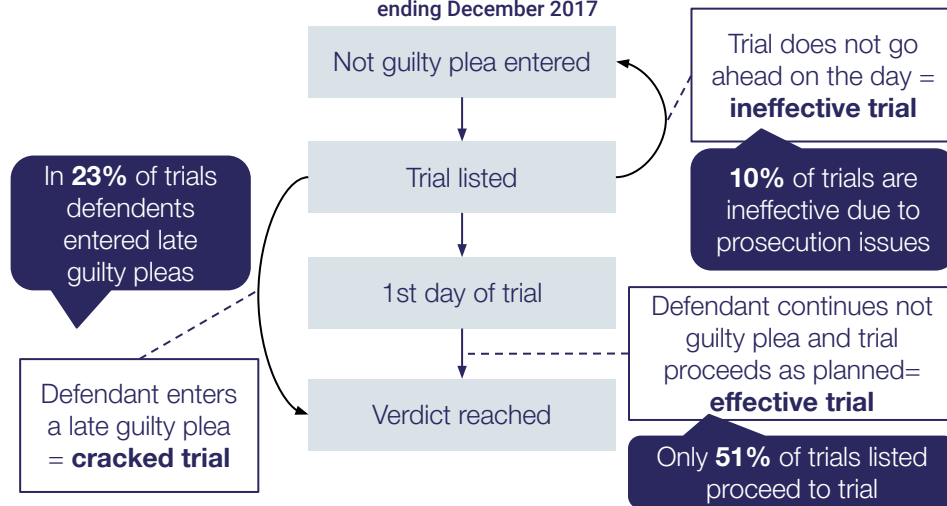
Whilst the proportion of trials which are effective has increased ...

...the benchmark is relatively low

Proportion (%) of all trials which were effective, cracked and ineffective, by reason, 2010-2017



Process for trials in criminal court cases, and proportions of trials which are effective, year ending December 2017



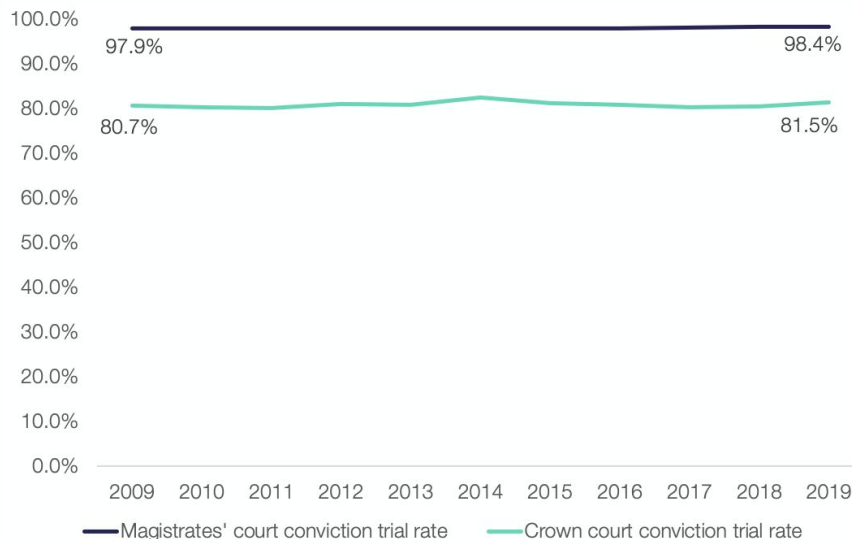
An increase in the proportion of effective trials is positive. However, the prosecution could play a greater role in reducing the number of late guilty pleas, which add unnecessary time to the length of the process and affect perceptions of both swiftness and certainty for both victims and offenders

# Conviction rates have remained stable and high, but this is in the context of a decreasing number of cases going to court

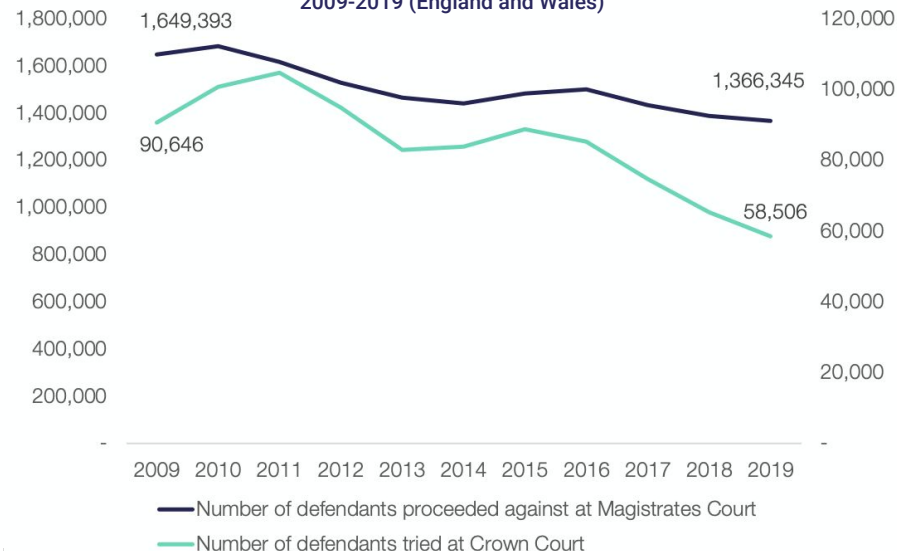
The proportion of defendants tried at court who are convicted has remained stable and high since 2009. In theory this should mean that offenders perceive there to be a relatively high certainty of sanction...

...however the absolute numbers of defendants proceeded against in court has decreased over the same period of time, suggesting that certainty of conviction may be undermined by the likelihood of detection

Conviction ratios in the Magistrates Court and Crown court, year ending June 2009-2019 (England and Wales)<sup>1</sup>



Number of defendants proceeded against at Magistrates Court (primary axis) and number of defendants tried at Crown Court (secondary axis), year ending June 2009-2019 (England and Wales)<sup>2</sup>



### **3.3 How 'Swift and Certain' is the sentencing process?**

# Swiftness and certainty is key to an effective sentencing process...

How is swiftness and certainty relevant to the role of the courts in bringing the offender to the point of sentence?

Swiftness and certainty is at the heart of HMCTS' current reform programme:

- **Court timeliness:** courts are measured on the average number of days between charge and first listing and court, and between first listing and completion
- **Effectiveness of trials:** the proportion of trials which are ineffective as a result of court administration

How is swiftness and certainty relevant to the sentencing process?

Certainty plays a key role in sentencing decisions:

- **Concordance between pre-sentence reports and sentence given:** sentencing certainty can be measured by the proportion of pre-sentence recommendations which result in the recommendation being heeded by sentencers
- **Sentencing for breaches of sentences:** sentencers must also decide what outcome should be given in the case of a breach of post-sentence supervision or community order

How is swiftness and certainty relevant to probation services?

Probation Services, both National Probation Service and Community Rehabilitation Companies, have swiftness targets, for example:

- **Proportion of pre-sentence reports delivered on the day:** where possible probation should provide either a written or verbal report on the day of conviction

Certainty is reflected in:

- **Proportion of cases where a pre-sentence report is prepared:** where pre-sentence reports are prepared, it is more likely that the sanction given will be suitable for the offender

Both probation services are subject to service level agreement targets covering a range of indicators linked to swiftness and certainty. The targets for NPS and CRCs are often different reflecting the nature of the cohort.

# ...but within court reforms, swiftness has often been a proxy for short-term 'efficiency' and driven by fiscal needs rather than the needs of victims

The HMCTS programme is driven by a desire to speed up the justice process, but also to cut costs.<sup>1</sup>

Concerns have been raised about the impact of these 'swiftness' or 'efficiency' measures on procedural fairness

Swift	Certain
Reducing demand on courts by limiting activity in courtrooms through measures such as online services, digital case files and the use of video hearings	Improve certainty in the enforcement of court orders by upgrading systems in the National Compliance and Enforcement Service
Developing a digital case management system, the Common Platform, to share information between HMCTS, the CPS and the police	Creating national teams to deliver more consistent service in areas such as call handling

Senior judges have recently expressed concern that a shortage of magistrates is negatively impacting certainty:

*"There are far too few magistrates at the moment. Far too often only two magistrates will sit as a matter of course. That can result in differences of opinion on points of fact or on the exercise of discretion in sentencing."*<sup>3</sup>

Lady Justice Macur, Senior Presiding Judge

There are also questions around whether efforts to increase efficiency are impacting procedural fairness and the quality of sentencing:

*"Our qualitative research suggests that video hearings reduce defendants' understanding of, and respect for, the process. When separated by a screen, defendants are more likely to shout or walk out of a hearing"*<sup>4</sup>

Penelope Gibbs, October 2017

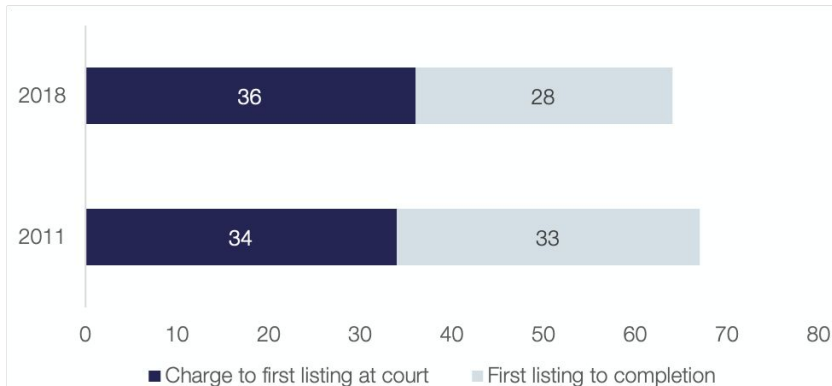
The courts have also been subjected to efficiency measures previously including a series of court closures. One study in Suffolk found the closure of two magistrates courts has resulted in an increase in defendants failing to appear in court.<sup>2</sup>

# Court timeliness has improved in the magistrates court, but cases sent to crown courts take longer to deal with than before

Across all criminal courts, the average (mean) number of days between an offence being charged and the first listing of the case at court has increased by 2 days, but the average number of days between first listing and completion has decreased from 33 in 2011 to 28 in 2018.

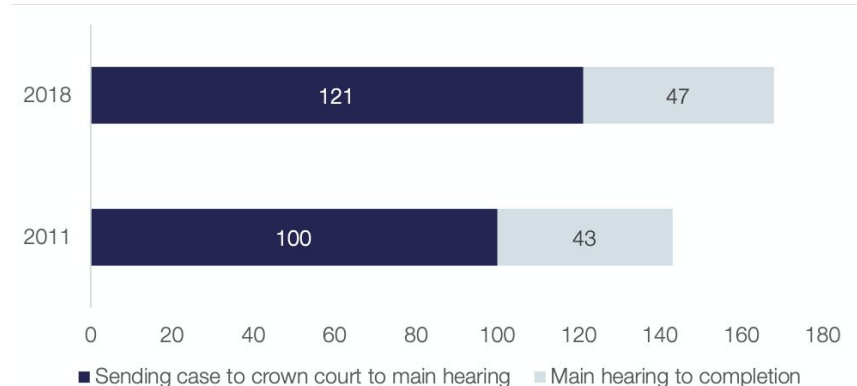
This is likely a result of a push to speed up summary justice in the magistrates courts

Average (mean) number of days from charge to completion in all criminal courts in England and Wales (2011-2018)



Meanwhile in the crown courts the average number of days between sending a case to the crown court and the main hearing has increased from 100 in 2011 to 121 in 2018. The number of days from main hearing to completion has also increased meaning the overall average time from send a case to crown court and its completion is 168 days (5 and a half months)

Average (mean) number of days from sending a case to the crown court and its completion in England and Wales (2011-2018)

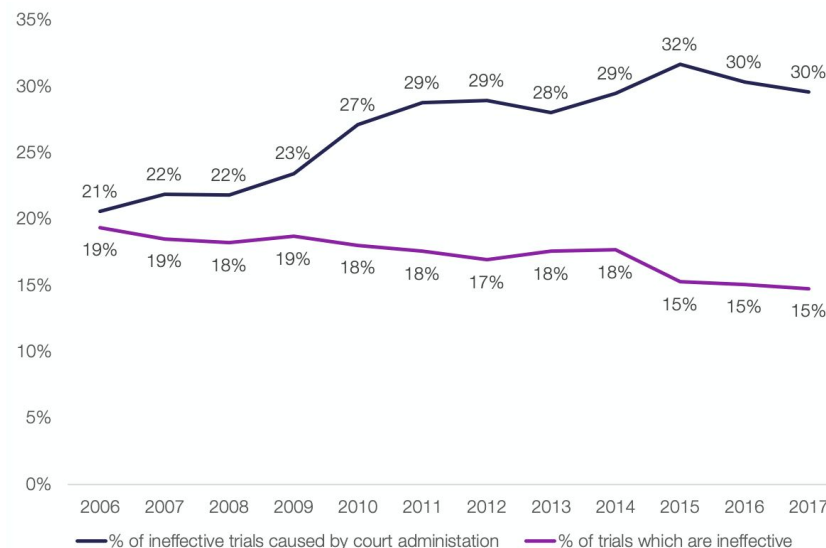


# Timeliness hasn't improved for all offence types, and poor court administration is responsible for a growing proportion of ineffective trials

	Average (median) number of days between charge and first listing at court	Average (median) number of days between first listing and completion of case
<b>Sexual offences</b>		
2011	11	173
<b>2018</b>	28	183
<b>Robbery</b>		
2011	2	109
<b>2018</b>	1	112
<b>Criminal Damage and Arson</b>		
2011	12	28
<b>2018</b>	17	44
<b>Drug offences</b>		
2011	13	2
<b>2018</b>	18	7

Although the proportion of all magistrates court trials which are ineffective is decreasing, the reason for those that are ineffective is proportionately more likely to be as a result of court administration (rather than prosecution/defence)

**Proportion of trials in the magistrates courts which were ineffective and proportion of ineffective trials due to court administration in England and Wales (2006-2017)**

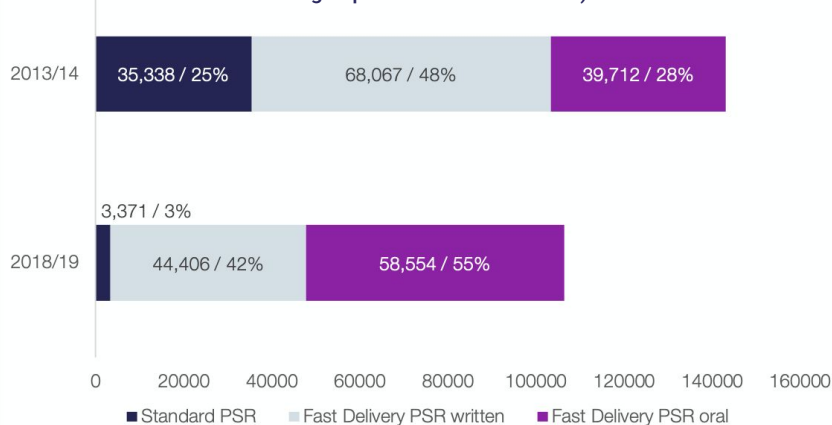


# Pre sentence reports are now more likely to be provided on the day of conviction, enabling swift sentencing. However there are concerns about the quality of reports

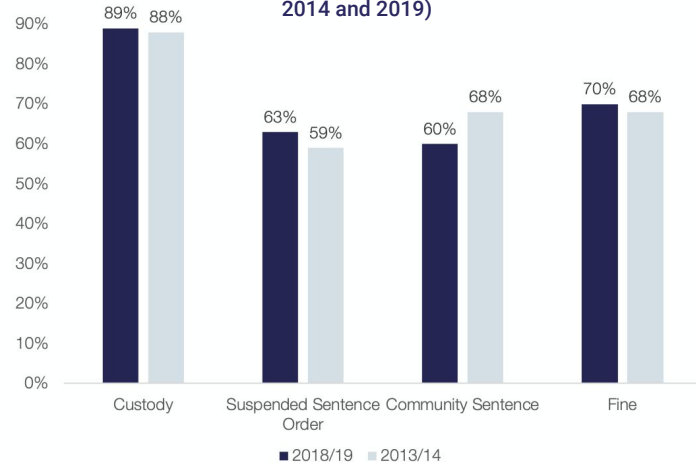
20 per cent of offenders were subject to a pre-sentence report in 2018/19 (up from 12% in 2013/14).

Concordance (the proportion of sentences recommended in pre-sentence reports that are actually given) does not seem to have been affected by the change in method of delivery

Delivery and number of pre-sentence reports prepared in England and Wales (year ending September 2014 and 2019)



Concordance between sentences proposed and sentences given where a pre-sentence report was prepared in England and Wales (year ending September 2014 and 2019)



However there are concerns that on the day reports don't contain a rigorous analysis of offending histories and individual needs, and that therefore sentences are less tailored/less likely to rehabilitate

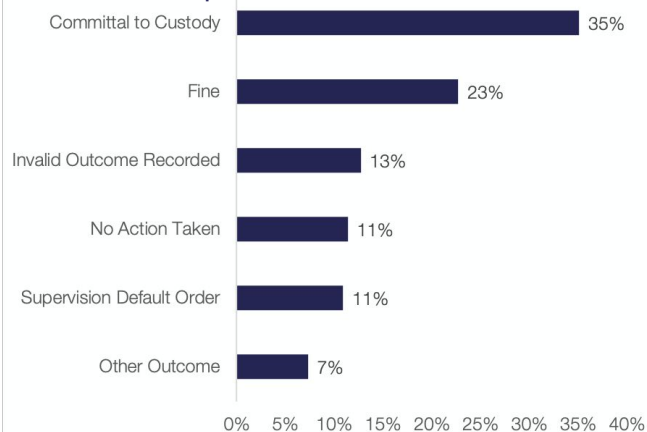
However the level of concordance is not high. In 2018/19 only 60% of offenders recommended for a community sentence were given one. This could affect both victim and offender perceptions of certainty



# Sentencing outcomes for breaches do not appear to be consistent

In 13 per cent of post-custodial sentence supervision breaches heard at court in 2017 an 'invalid outcome' is recorded, while in 11 per cent of cases no further action is taken

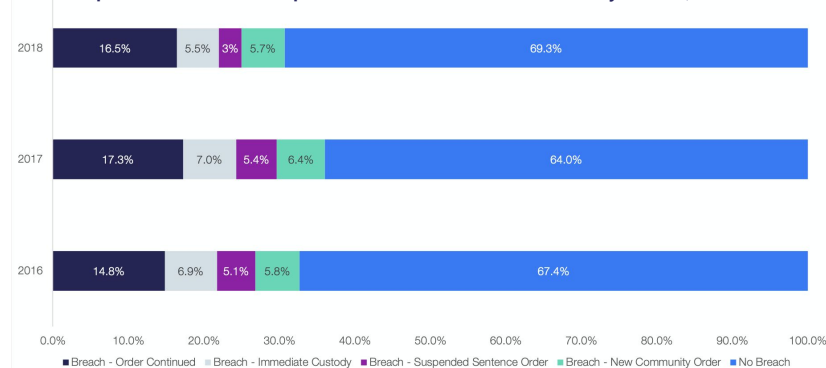
Post-Sentence Supervision Breaches Outcomes at Court in 2017<sup>1</sup>



"I can breach someone on a suspended sentence who's disappeared and arguably could do with going into custody for a short period so we can try to re-engage them. Then before I know it the court has heard the case without notifying me and has given him one more chance. Then I have to do it [report a breach] again"  
Senior Probation Officer

There is a similar level of inconsistency applied to breaches of community orders. The most likely disposal for a breach in 2018 was continuing with the order

Proportionate use of disposals for breaches of community orders, 2016-2018<sup>2</sup>



More information is needed to establish if this is justified depending on the context of the breaches, but it is important to note the relevance of consistency in 'swift and certain' sanctions. Whilst evidence around the need for consistency as a deterrence effect is mixed<sup>3</sup>, the sentencing council considers "that it is important that penalties for these breaches are consistent and sufficiently robust to avoid the objective of the sentence being undermined and to promote public confidence in these sentences".<sup>4</sup> Probation staff interviewed as part of this project suggested breach hearing outcomes were often opposed to their recommendations.

## **3.4 How 'Swift and Certain' is the CJS in rehabilitating offenders?**

# Swiftness and certainty is fundamental to the rehabilitation of offenders...

Swiftness and certainty is highly relevant to the work of the National Probation Service (NPS) and Community Rehabilitation Companies (CRCs)

Both the NPS and CRCs are subject to a number of timeliness targets including:

- **Timeliness of first contact:** following sentencing or on release from prison offenders should have a face to face contact with one of the probation services within a set period
- **Timeliness of breach and recall referrals:** probation services must report breaches and recalls with set times

And some certainty targets including:

- **Completion of orders:** both probation providers must report on the proportion of community and suspended sentence orders completed
- **Accommodation:** CRCs have recently started measuring the number of offenders with accommodation on release

While 'swiftness' is less obviously relevant to the functioning of prisons, the principle of 'certainty' remains central

'Swiftness' is less obviously relevant to the functioning of prisons but still plays a role in offender perceptions of the wider system:

- **Timeliness of basic custody screening:** when offenders are first brought into prison they should have a basic custody screening within a set period of time

The principle of certainty remains central to the functioning of prisons:

- **Access to work/activity:** the proportion of offenders engaged in purposeful activity is an indicator of certainty of rehabilitation
- **Drugs testing:** Prisons must report against a mandatory target for the proportion of prisoners subjected to random drugs tests
- **Adjudication outcomes:** Prisons mostly deal with offending and rule-breaking inside prison through the prison adjudication system. The outcome of the adjudication process will affect perceptions of certainty

# ...however whilst both probation and prisons are meeting targets, the targets themselves appear unlikely to drive swiftness and certainty effectively

Whilst both CRCs, NPS and Prisons are meeting the majority of their timeliness targets, a series of inspectorate reports suggests speed is being prioritised at the expense of quality

**CRCs and NPS are meeting timeliness targets** for meeting with offenders post-sentencing or release from prison, but CRCs are **missing timeliness targets for recall referrals by 22 per cent.**<sup>1</sup>

**Prisons are just 2 per cent below the target** for the proportion of basic needs assessments in custody completed on time.

2016: Inspection into Unpaid Work (UPW) – probation staff were **not using UPW to effectively** assist the offender to desist offending.<sup>3</sup>

2017: Inspection into Rehabilitation Activity Requirements (RARs) – **"RARs are playing a significant role in the move to faster court processes** by increasing the proportion of cases that can be sentenced on the day" **but in the majority of cases inspected, "less detailed information was available** for sentencers, and subsequently the relevant responsible officer."<sup>4</sup>

2018: HMIP inspection of **enforcement and recall** – "the extent to which individuals participate in the process of supervision fell considerably short of the expected standard."<sup>5</sup>

Similarly with targets that relate to certainty, prison and probation services perform well against relatively low targets, however inspections have found a lack of purposeful activity

**CRCs and NPS are meeting certainty targets** such as the proportion of completed suspended sentence and community orders. However CRC's are **missing the target for the proportion of offenders in accommodation**

**The number of prisoners working in custody is increasing, but still makes up a small proportion of total prisoners.** HMIP found 47 per cent of prisons were not providing adequate purposeful activity

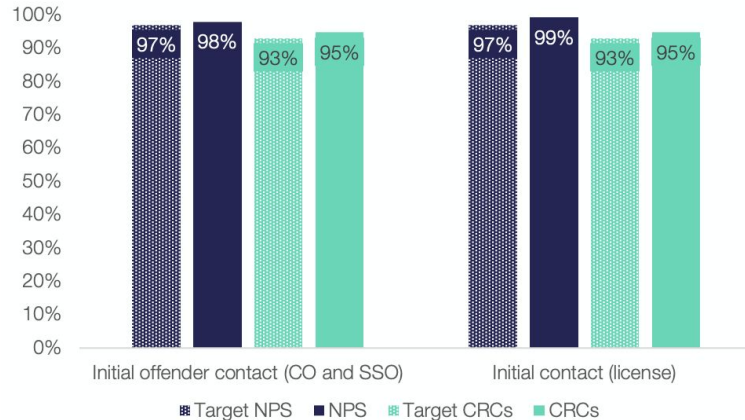
**Drugs testing targets are being met, but this still means less than 10 per cent of prisoners are subject to testing**

**The proportion of adjudication outcomes which are not proceeded with or dismissed has increased**

# Timeliness of first contact targets are generally met along with those for breach referrals, but in light of damning inspection reports, are these the right targets?

CRCs must make contact with offenders within 1 working day if they are on license and within 5 working days if they are on a suspended sentence or community order

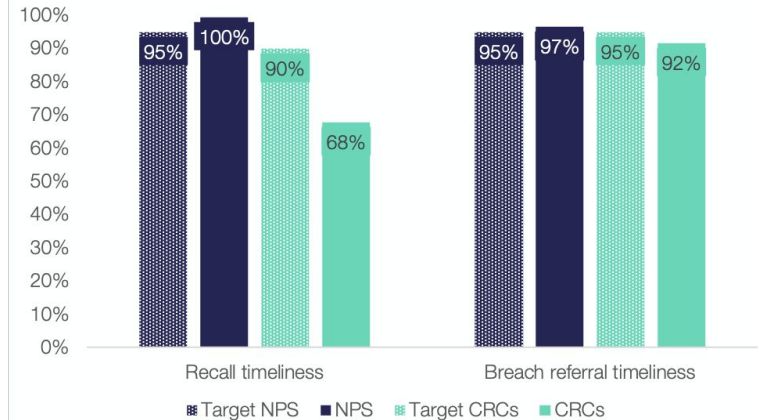
Target and actual proportion of initial contacts made within specified time limit for NPS and CRCs (year ending September 2019)



Whilst both CRCs and NPS are generally meeting targets, we found in our fieldwork that these were sometimes met with counter-intuitive work arounds, and that the targets themselves do not necessarily support rehabilitation. We were told that to get around first contact targets offenders attend group inductions without their case manager present

CRCs must make referrals for a breach of order within 8 working days and a recall to prison referral within 1 day, and documents submitted within 10 days. CRCs are missing their recall targets by 22 per cent

Target and actual proportion of breaches and recalls made within specified time limit for NPS and CRCs (year ending September 2019)

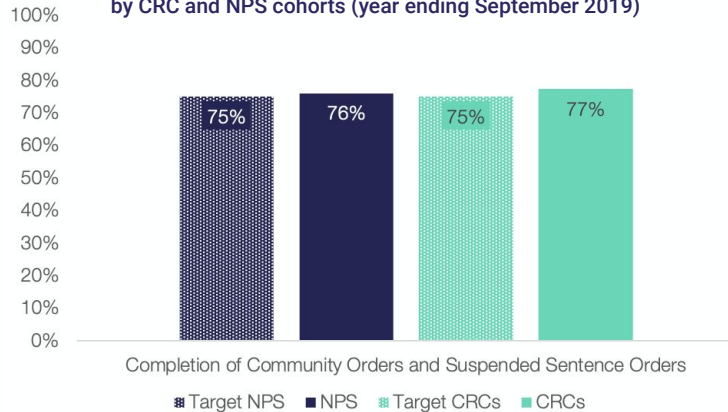


"So what you get is that officially there is face to face contact within 2 days, but it doesn't serve any practical purpose, in fact it causes more problems than it solves" Senior Probation Officer  
"The group induction damages our relationship with the individual before we've even met them" Senior Probation Officer

# Completion of order targets are also generally being met. Accommodation and employment at termination are new measures and targets are relatively low

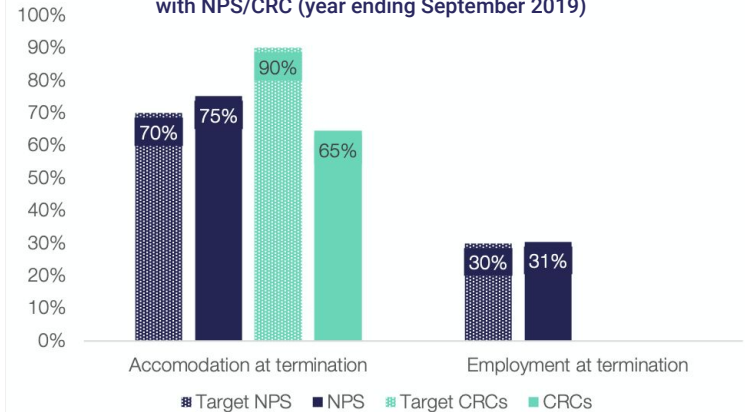
Both CRC and NPS cohorts are meeting targets for the proportion of suspended sentence and community orders completed

Target and actual proportion of suspended sentence and community orders completed by CRC and NPS cohorts (year ending September 2019)



New employment and accommodation targets are being met by NPS cohorts, but 35 per cent of CRC-managed offenders are not in accommodation at the end of supervision

Target and actual proportion of offenders in employment at termination of engagement with NPS/CRC (year ending September 2019)



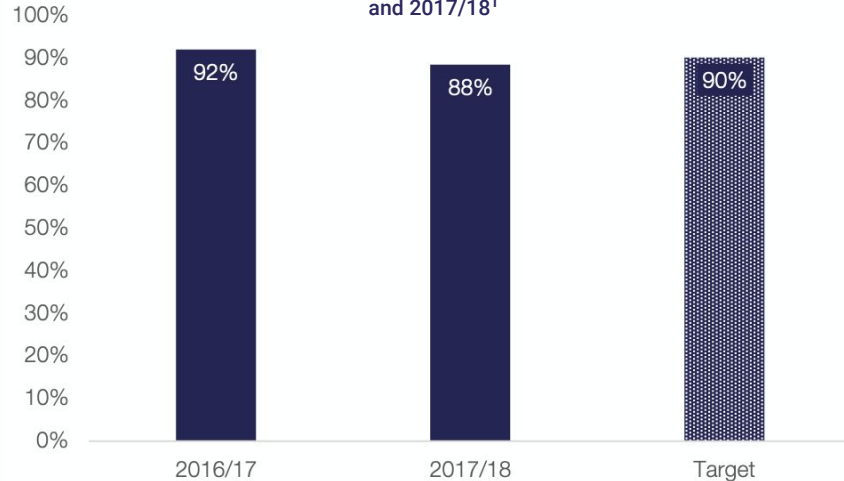
However, this still means 24 per cent of NPS-managed offenders and 23 per cent of CRC managed offenders are not completing community orders and suspended sentences

There is a strong body of evidence to suggest that homelessness is a key criminogenic need factor. Whilst a focus on 'Swift and Certain' sanctions can be an effective deterrent, this may only be in the context of having something to lose in the first place

# 30 per cent of prisons failed to meet basic custody screening timeliness targets in 2018/19 and 47 per cent of prisons are not providing adequate purposeful activity

30 per cent of prisons in England and Wales failed to meet the target (within 72 hours) for basic needs assessments in 2017/18, up from 21 per cent in 2016/17, meaning a vital point of engagement is delayed

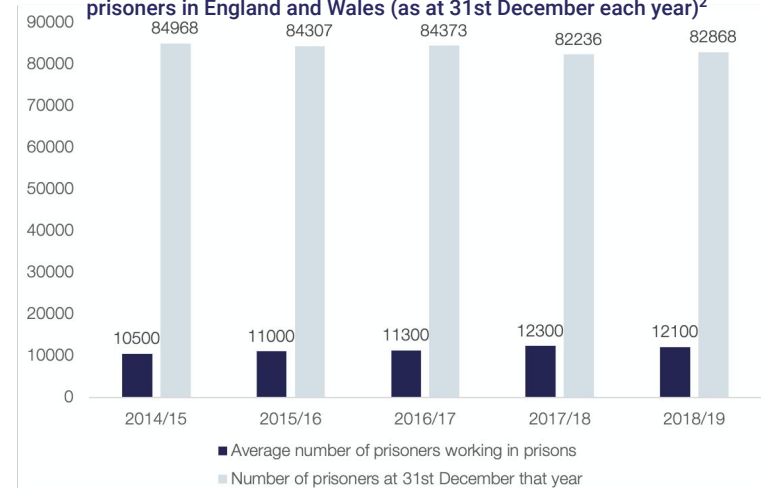
Proportion of basic needs assessments completed on average versus target, 2016/17 and 2017/18<sup>1</sup>



Crest's fieldwork suggests that missing basic screening is particularly critical for offenders who have received short custodial sentences, as it can impact release plans disproportionately

The average number of prisoners working in prisons has increased year on year since 2014/15 but from a very low base. As of 2018-19, only around 15 per cent of prisoners were working

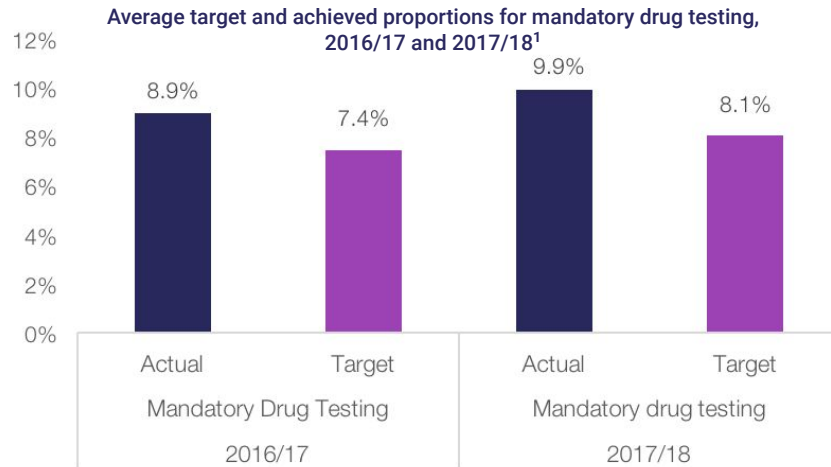
Average number of prisoners working in prisons (year ending March) and number of prisoners in England and Wales (as at 31st December each year)<sup>2</sup>



Furthermore, in the most recent HMIP inspection 47% of prisons were found not to be providing adequate purposeful activity<sup>3</sup>

# Few prisoners are subjected to drugs testing, whilst adjudication processes are most likely to be dismissed

The certainty of drug testing can act as a deterrent to further offending. Whilst prisons are actually meeting the targets for drug-testing, this involves testing fewer than 10 per cent of prisoners



Internal prison adjudication processes were more likely to result in being dismissed or not proceeded in 2018 than 2011

Adjudication outcomes in custody in England and Wales (2011 and 2018)<sup>2</sup>



The misuse of drugs in prison has been recognised as “one of the biggest challenges facing the CJS today” by the 2019 Drugs in Prison Strategy.<sup>2</sup> In particular, establishments where testing yields the highest positive rates are the most violent and unstable ones. Therefore, tackling drug use in prison is a top priority for safety and rehabilitation

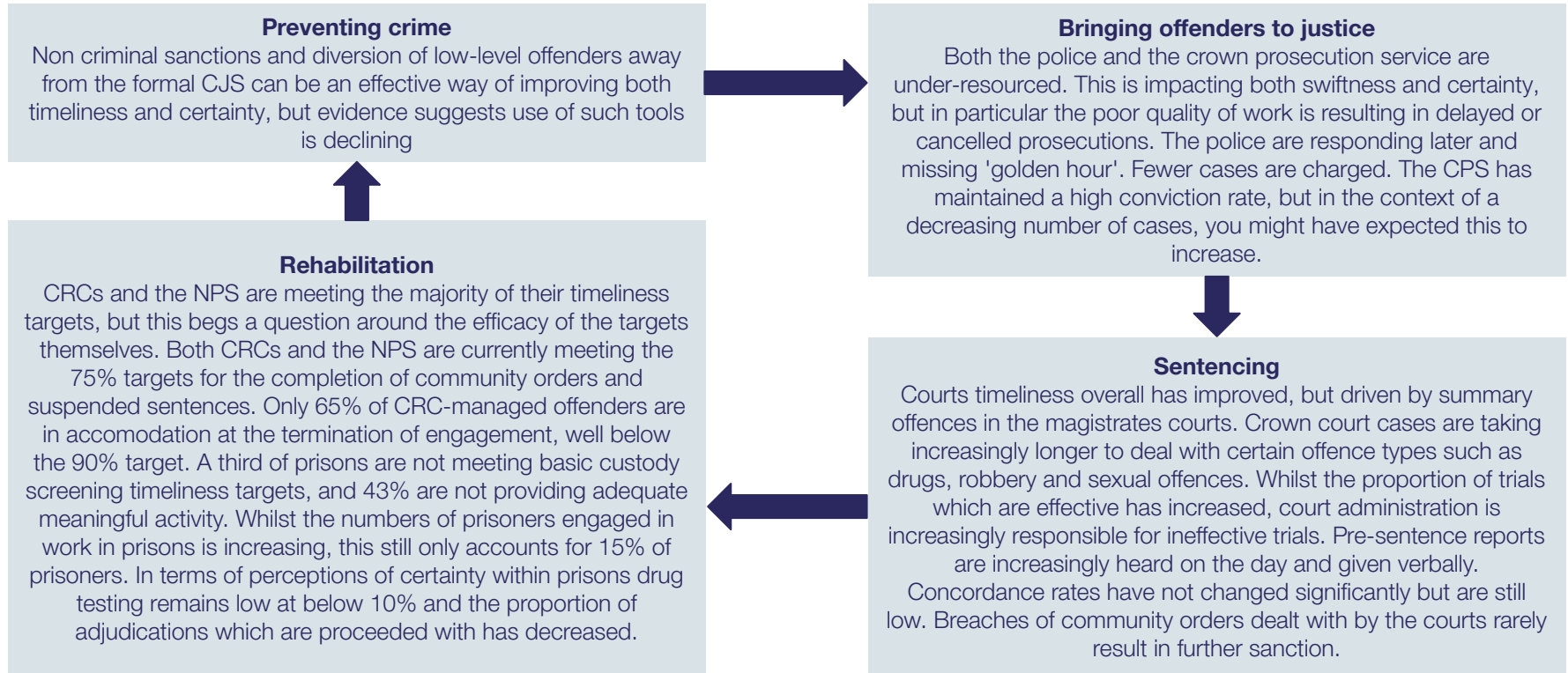
In mid 2019 the MoJ announced a new incentives policy framework, based on evidence that places emphasis on the importance of positive reinforcement and fair application of punishment influencing behaviours and deterrence. The new framework is designed to still allow governors to swiftly punish prisoners <sup>3</sup>



## **3.5 Overview of evidence of swift and certain justice in the criminal justice system in England and Wales**

# Despite significant policy reform to drive greater swiftness and certainty, the CJS as a whole is slow, and the likelihood of apprehension and sanction remains low

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## **Section 4**

# **Applying the principles of swiftness and certainty**

# The right application of 'Swift and Certain' justice is crucial to achieve the intended impact

## **6.1 In some cases a silo'd application of swift and certain justice has led to unintended consequences**

### **1. Restricting use of bail seems to have inadvertently led to delays**

In 2017 the Policing and Crime Act brought in changes to pre-charge (or police) bail designed to speed up investigations. In fact the changes have had an adverse effect on the length of investigations so far

### **2. Faster pre-sentence reports may not always drive effective sentencing**

Fast Delivery pre-sentence reports reduce the time between conviction and sentencing, but there are concerns that this reduces quality

### **3. Less 'risky' cases taken forward to improve conviction rates?**

There are concerns that CPS 'conviction ambitions' for rape and hate crime created perverse incentives not to pursue more difficult cases, though this is denied by the CPS and an HMCPSI investigation into rape found no evidence of this

## **6.2 Swiftness and certainty has to be balanced with other, sometimes competing objectives, such as procedural fairness and sustained engagement**

This includes weighing up the risks of criminalising behaviours too early, ensuring quality/fairness of process is not neglected, and factoring in criminogenic needs. Looking at domestic abuse there are important trade-offs around the balance of swift action and victim engagement

## **6.3 There are barriers to the effective application of 'Swift and Certain' justice, and a number of enablers to overcome these**

**An overarching strategy:** to ensure a whole system approach, rather than siloed delivery

**Adequate infrastructure:** agencies need access to the right tools to enable the effective delivery of 'Swift and Certain' justice

**Adequate resourcing:** swiftness should not just become a proxy for 'justice on the cheap'

**Culture:** the system needs to become more open to experimentation/innovation e.g. bringing an offender back in front of the judge

**Devolution:** the system needs to be less centralised, so decisions can be made more flexibly

**Fairness:** swift and certain principles must be supported by perceived and real fairness, from both offender and victim perspectives

## **4.1 Silo'd application of swiftness or certainty can result in unintended consequences**

# Case study 1: efforts to speed up police investigations by restricting use of bail and bail conditions have inadvertently led to longer delays for suspects and more uncertainty for victims who feel they are not protected by bail conditions

In 2017 the Policing and Crime Act brought in changes to pre-charge (or police) bail designed to speed up the time between the police identifying a suspect and agreeing a charge/no further action

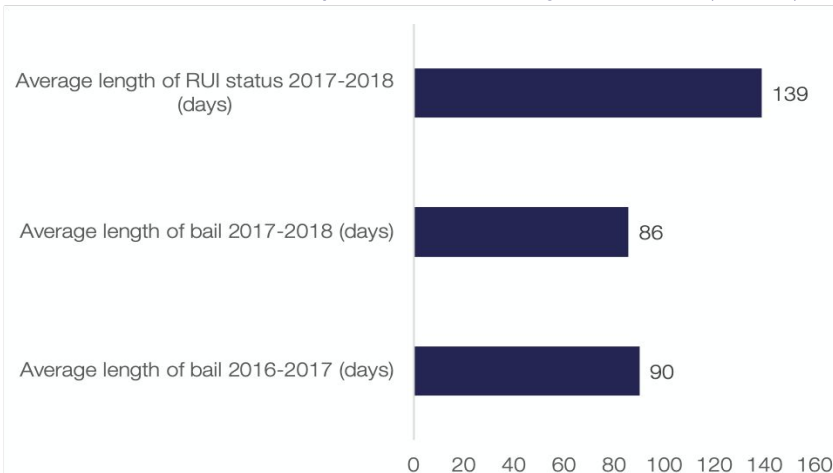
Police bail can place conditions on individuals to restrict where they go and who they interact with. The aim is to protect victims and witnesses and reduce the risk of further offending. Prior to the 2017 Act, concerns with the existing system were that:

- It was allowing suspects to be subject to stringent conditions for long periods of time without being charged with an offence
- It was not supporting a drive towards 'Swift and Certain' justice - investigations were lethargic

Provisions in the Police and Crime Act 2017 restricted bail to a maximum of 28 days (extendable with senior officer sign off) but also set out a presumption against the use of police bail "in almost all cases." Most suspects are now "released under investigation" (RUI). The police have no powers to require RUI suspects to report to them, no powers to place conditions on them and no time limits within which to complete their investigation against them. The Home Office has just completed a public consultation on proposals to reverse the changes made in 2017<sup>1</sup>

Research undertaken by the Law Society has actually shown that since the use of release under investigation (RUI) started the average length of investigation has increased

**Average length of time on pre-charge police bail vs released under investigation in 2016/17 and 2018/19 for 10 police forces across England and Wales (FOI data)<sup>2</sup>**



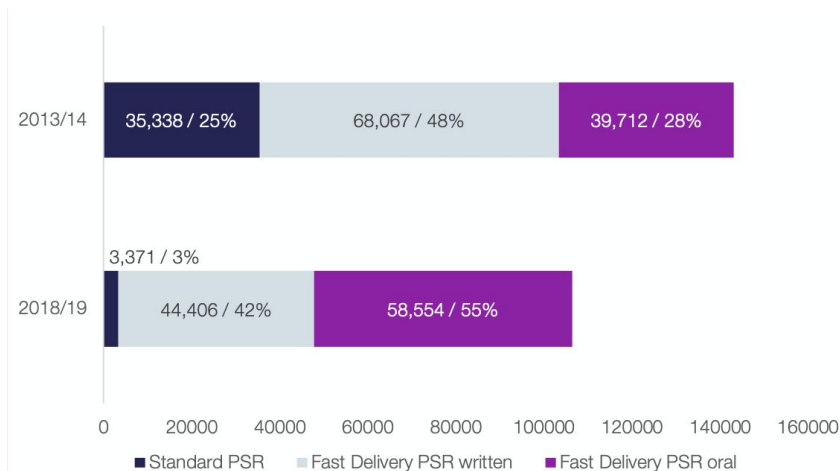
HMICFRS have raised concerns that without bail conditions victims are not properly protected. The Joint Committee on the Draft Domestic Abuse Bill recommended legislation create a presumption that suspects in domestic abuse cases are released on bail.

## Case study 2: speeding up the delivery of pre-sentence reports (PSRs) has increased the number of sentences that can be given on the day of conviction but have left some probation staff less confident about the likelihood of effective sentencing

Oral delivery is the most common form of pre-sentence reports and allows sentences to be given on the day of conviction.

There are mixed views on the impact this has had on sentencing and rehabilitation.

Delivery and number of pre-sentence reports prepared in England and Wales (year ending September 2014 and 2019)<sup>1</sup>



Dame Glenys Stacey praised oral delivery PSRs in 2017: *"We found that oral reports consistently provided good advice to courts about what sentence to consider. We found judges and magistrates much less likely to follow sentencing advice in short written reports"*<sup>3</sup>

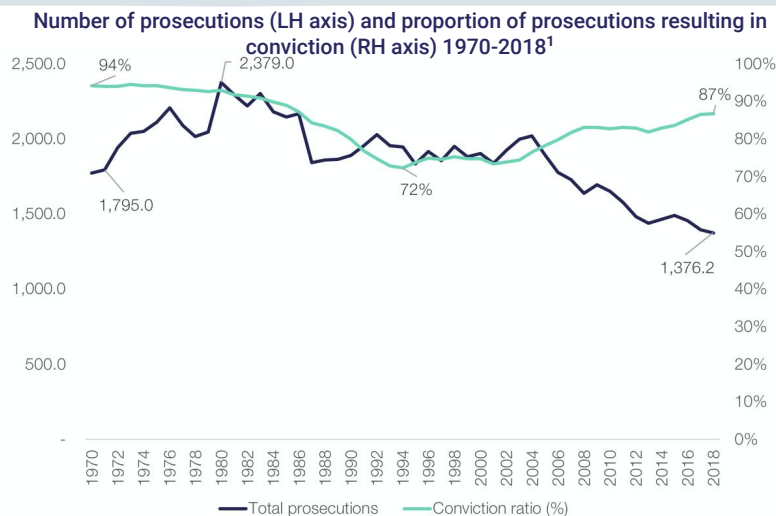
Whilst a 2017 research report into PSRs found that although timeliness is an important quality, *"as a sole measure of quality it leaves a great deal to be desired"* and that swift sentencing can lead to more punitive sentencing through rushed pre-sentence reports.<sup>4</sup>

Our interviews with CRC probation staff also found frustrations with on the day PSRs:

*"Sentencing used to be adjourned so you could get all of the information but now clumsy decisions are made on the day without the time taken to identify motivating factors"* Probation Officer

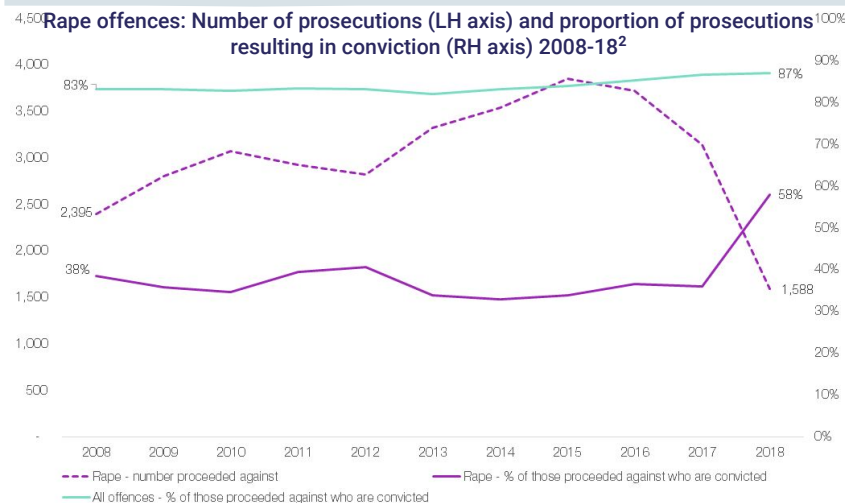
# Case study 3: there have been concerns that the drive to increase the 'certainty' of convictions may have created a perverse incentive for the CPS not to pursue more 'difficult' cases, though this is vigorously denied

While the total number of prosecutions has fallen since 2004, the proportion that result in a conviction has risen



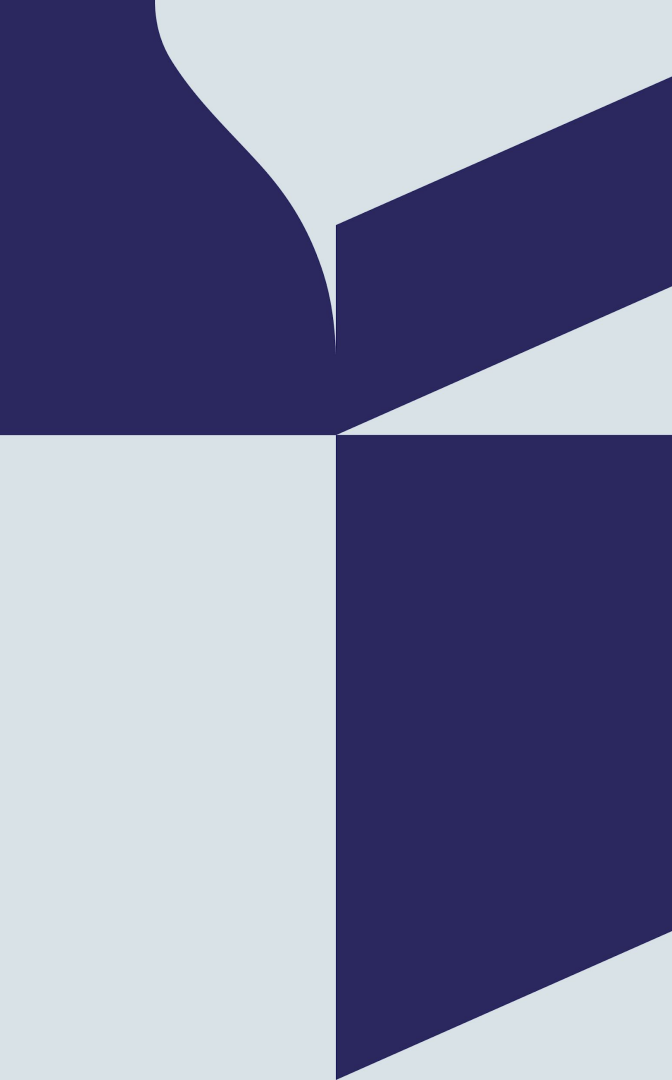
The CPS has never publicly issued formal guidance to prosecutors to remove weak cases from the system, but it is widely suspected that this is a method employed by the CPS to keep conviction rates high<sup>3</sup>

This trend is particularly extreme for rape offences – the number of cases proceeded against has dropped rapidly in the last two years, but the conviction ratio has increased



From 2016 to 2018 the CPS had a conviction rate 'ambition' of 60 per cent for rape cases. In the 2019 HMCPSI Inspection of Rape the Chief Inspector found that although there were numerous concerns that the CPS were choosing easy cases to prosecute inspection findings did not support this.<sup>4</sup>





## **4.2 Balancing swiftness and certainty with other principles of effective justice and rehabilitation**

# Swiftness and certainty has to be balanced with other, sometimes competing objectives, such as procedural fairness and sustained engagement

## Balancing the benefits of swift deterrence with the risks of labelling

While the increasing scale and scope of summary justice allows for faster and more certain punishment, it also risks criminalising persons and behaviours unnecessarily.

The results from one study have shown the labelling impact is greater than the deterrence effect, and that, where public safety or victim concerns weigh less heavily, diversionary approaches are likely to be more effective with more durable outcomes for offenders.<sup>1</sup>

## Balancing efficient processes with procedural fairness

'Swift justice' is not necessarily fair justice. There are some concerned that 'procedural due process' competes with the objectives of economics and speed.

Transform Justice conducted research into the growing use of video hearings in 2017, stating *"many practitioners and magistrates feel that the disadvantages of virtual justice outweigh the advantages. And it is not at all clear what the outcomes are in terms of justice, for witnesses or defendants."*<sup>2</sup> An evaluation of a virtual courts pilot in 2010 by the MoJ found that defendants who appeared on video from police stations were more likely to get custodial sanctions.<sup>3</sup>

## Balancing speed with quality and availability of resource

Similarly, the speed of justice can sometimes undermine the preparation and presentation of evidence, which actually result in later delays or worse outcomes. The NAO reported in their review of the criminal justice system in 2016 - *"inefficiencies are created where individuals and organisations do not get things right first time"*.<sup>4</sup> There is a risk that in increasing the speed of processes without adequate consideration of resources and quality of work, outcomes would worsen. A Senior Probation Officer interviewed as part of this research said: *"In recent years the quality of our work, the efficacy of our work has been compromised by an increasing focus on speed"*

## Balancing blanket procedures with individual need

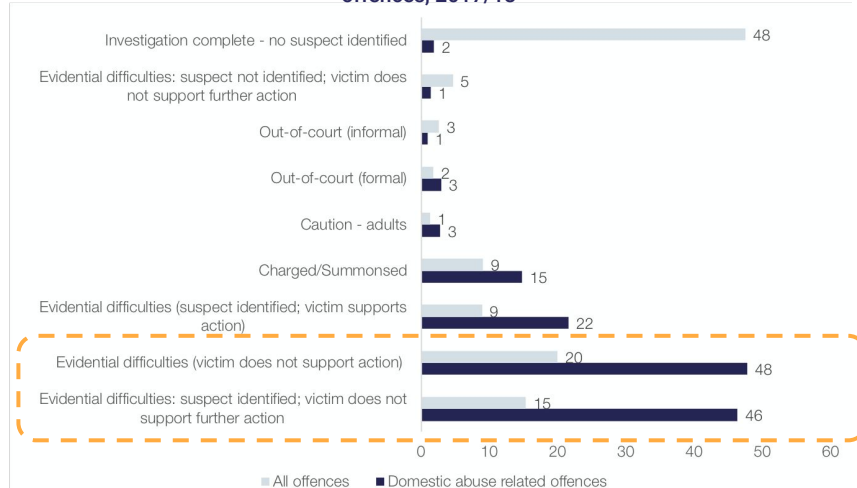
It is hard to argue with swiftness and certainty in principle, however when these principles are applied with blanket policies they can impact the ability of the system to respond to individual need.

In response to the Swift and Sure White Paper in 2012 the Criminal Justice Alliance suggested that the plans to reduce the time between offence and conviction didn't provide assurance that vulnerable offenders would receive rigorous enough assessments prior to giving evidence. It also highlighted a concern that the pursuit of speedy justice could *"prove an obstacle to building links with appropriate support agencies, as well as missed opportunities for screening and assessment."*<sup>5</sup>

# Looking specifically at domestic abuse offences, there are some clear trade-offs around the balance of speed and victim engagement

Domestic abuse offenders are more likely to be arrested and charged compared to other offenders. They are also more likely to proceed quickly to the point of charge...

Proportionate (%) crime outcomes for all offences and domestic abuse-related offences, 2017/18<sup>1</sup>



...however, a greater proportion than average do not proceed due to evidential/victim difficulties, and the average conviction rate for domestic abuse offences is 76 per cent vs 87 per cent for any offence.

As part of our research for this project we interviewed victims of domestic abuse who had engaged with the criminal justice system. This process highlighted some hypotheses about why 'Swift and Certain' interventions with domestic abuse perpetrators haven't always led to a positive outcome

## Speed does matter to victims, but communication matters more:

Victims told us a lengthy CJS process deters them from supporting action, but they also told us clear and regular communication was the most important factor

*"At the moment the speed is ok, but I would like to be updated more so I don't have to sit there being worried and too scared to get on with my life"*

*"The update came quickly that they had arrested him (within a day) but the update about him being bailed was about a month"*

**Non-CJS outcomes can be satisfactory:** Of the victims we spoke to, the main concerns were for their safety and normality in daily lives. They were often satisfied if the feelings of safety and normality could be achieved through civil means. This is also supported by Transform Justice research.<sup>2</sup>

*"They were really good when they spoke to him, but yeah they wanted to arrest him and I got cold feet. So they couldn't do anything without my permission"*



## **4.3 Overcoming the barriers to swiftness and certainty**

# Swiftness and certainty requires a number of enablers to be successful. Adequate funding flows across all six enablers are key to successful delivery

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- 1 **An overarching strategy:** to ensure whole system approach, and overcome siloed delivery
- 2 **Adequate infrastructure:** agencies need access to the right tools to enable the effective delivery of 'Swift and Certain' justice
- 3 **Adequate resourcing:** swiftness should not just become a proxy for 'justice on the cheap'
- 4 **Culture:** the system needs to become more open to experimentation/ innovation e.g. bringing an offender back in front of the judge
- 5 **Devolution:** the system needs to be less centralised, so decisions can be made more flexibly
- 6 **Fairness:** swift and certain principles must be supported by perceived and real fairness, from both offender and victim perspectives

# Strategy: A joined up strategy will support more effective implementation of 'Swift and Certain' justice

The silo'd application of swiftness and certainty results in a disjointed journey through the criminal justice system for both victim and offender

**For the offender:** the crossover between agencies is not smooth.

At some points things seem to move quickly, followed by bottlenecks in the system (when waiting for a CPS decision, or a date at court). The number of late guilty pleas resulting in cracked trials suggests miscommunication between the police, CPS and defence, which could be improved with a joined up strategy.

Contradictory or lacking communication with the offender also impacts their perceptions of fairness of the system, and therefore their chance to rehabilitate.

**For the victim:** Speed is important to enable their recovery from the impact of the offence. However, victims would also prefer to spend slightly longer waiting if it means things are done right the first time.

The siloed application of swiftness and certainty combined with resourcing issues means that things are not always done right the first time resulting in longer delays and undermining trust in the system. Above all else victims want clear and open communication from the criminal justice system, which is hard when there are multiple agencies which aren't aligned.

A joined up strategy across the criminal justice system would help overcome these issues

Prevention

In order to drive effective diversion, police need to work together with Youth Offending Teams and local authorities to coordinate action

Bringing offenders to justice

Police and the CPS should work to aligned strategies affecting charge rates and therefore perceptions of certainty in the system

Sentencing

Decisions around court closures and use of virtual courts should be considered alongside reform in other aspects of the criminal justice system

Rehabilitation

Prisons and probation services need a joined up approach, along with the rest of the system to be able to effectively manage risk and increase chances of rehabilitation

# Infrastructure: Agencies must have access to the right tools and infrastructure to deliver swiftness and certainty in the right ways

Police Stations, Custody Suites and Courts have closed over the last decade, whilst Prison spaces are set to increase. Some of these measures are undermining the principles of 'Swift and Certain' Justice

The criminal justice system must make sure digital and physical infrastructure is fit for purpose

An estimated 600 police stations have closed since 2010<sup>1</sup>

Whilst online reporting tools are more readily available, face to face reporting mechanisms have declined - this may have impacted the likelihood of vulnerable victims to report crime and the distance that officers have to travel to reach incidents

Police officers must be able to reach victims quickly and apprehend offenders. Reporting tools must support all victims

Between 2012 and 2017, in London alone, the number of custody suites open dropped from 42 to 27<sup>2</sup>

Following fall in arrest rates many forces opted to close custody suites in response. This means detained suspects have to travel longer distances and forces can be less resistant to emergency custody closures

Custody should remain an option for the police to use to enable swift and effective investigation

50% of magistrates courts have closed since 2010 (from 323 to 161)<sup>3</sup>

Both victims and suspects have to travel further to court, and there are still backlogs in waits for court hearings. There are also concerns that a shortage of magistrates is negatively impacting certainty

The criminal justice system must fully understand the implications of virtual courts and ensure all witnesses can give evidence

The number of spaces in prison is set to increase, with new prisons being built and government plans to shut victorian prisons reversed. A 2016 White Paper set out the issue of the existing prison estate spaces not matching the composition of the offender population and being inflexible.<sup>4</sup>

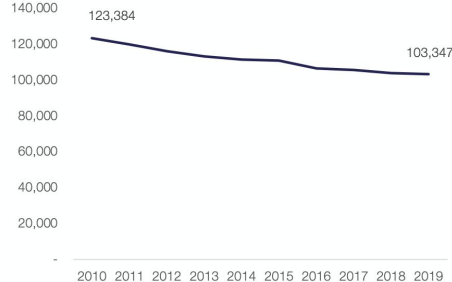
Poor prison conditions and a lack of officers to staff them results in a lack of certainty in prisons as to the likelihood of effective adjudication procedures and access to rehabilitation.

Prison infrastructure must be of a suitable standard to encourage rehabilitation and support reintegration of offenders to the community

# Resources: the criminal justice system must effectively resource across the board to drive a 'Swift and Certain' approach

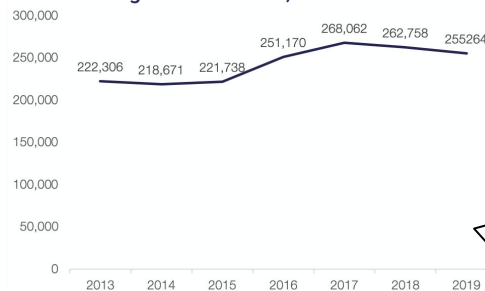
Resources have been affected by cuts across the criminal justice system, whilst demand has increased

Number of frontline officers in England and Wales, 2010-2019<sup>1</sup>



The number of frontline officers in England and Wales has been in constant decline since 2010, whilst police-recorded crime rates are on the rise

Number of offenders supervised by probation in England and Wales, 2013-2019<sup>2</sup>



*"Caseloads are utterly unmanageable its ridiculous. We are talking 70-80 caseloads. Perhaps even more."*  
Senior Probation Officer

The number of offenders supervised by probation services has increased more rapidly than the recruitment of staff

Government has signalled an increase in policing resources, but there are opportunities to go further to harness increased capacity to deliver effective swift and certain justice

**Increased staffing levels across the criminal justice system will mean practitioners can carry smaller caseloads**

**...enabling them to identify offending or breaches more easily and put appropriate responses into action swiftly**

**This will also enable better sharing of information between agencies to ensure the responses are swift and targeted...**

**...as well as enabling better sharing of information between agencies to ensure that responses are swift and targeted**

**Additional resources should help ensure that swiftness and certainty is implemented and supported by high quality interventions to support a reduction in reoffending**



# Culture: to be genuinely 'Swift and Certain', the CJS will need to undergo a culture shift

Current culture is a barrier to innovation

A cultural shift will be needed to signal a move towards genuine joined up working, enabling meaningful implementation of principles of 'Swift and Certain' justice

**Police:** slow uptake of technology prevents a 'Swift and Certain' response

**A shift towards a culture of openness to new technology and sharing of information will support management of offenders throughout the system**

**CPS:** a cultural drive to improve prosecution rates has seemingly resulted in a sticking point in the system for cases which don't have a certain outcome

**A joined up approach between police and CPS should help improve perceptions of certainty across the system and drive appropriate cases forward**

**Courts:** a primary focus on improving timeliness and siloed working has had a perverse effect overall. The judiciary are unable to support local offender services or provide supervision.

**The courts and judiciary should be open to new ways of working, that might vary according to local need**

**Prisons:** 'Swift and Certain' principles have largely not touched prisons, but they should be engaged in the wider aims of the criminal justice system

**Prisons should take an active role in the wider CJS, sharing information and embedding agreed principles of swiftness and certainty within prisons themselves**

**Probation:** Culture has been impacted by the TR programme with officers feeling increasingly overworked and CRC staff in particular feeling external to the CJS

**Bringing probation services back together will be an opportunity to create a positive new culture and enable better management of offenders alongside CJS agencies**

# **Devolution: only a more localised system will be able to deliver a system that is faster and more effective**

## Centralisation is a barrier to swiftness and certainty:

The centralised court system means that individual courts or local justice systems aren't able to test interventions and work flexibly to respond (swiftly) in a way most appropriate to the offender

The CPS work to centralised objectives and are not able to build relationships between local police partners and local CPS decision-makers to improve communication

Whilst individual police forces have more autonomy they are constrained by the rest of the criminal justice system into working in silos. The geographies of the different agencies make joined up working harder

Centralisation prevents Police and Crime Commissioners from convening local criminal justice agencies to work together to achieve common goals, instead targets are allocated to agencies by their disparate Whitehall Departments.

## Localisation could achieve:

- Judicial supervision schemes to be used with priority local cases
- Better channels of communication between agencies to enable better and faster information sharing to ensure the CJS response to individuals is right
- Flexibility to apply 'Swift and Certain' principles according to local offender profiles
- Better communication with victims throughout the criminal justice journey
- Developing explicitly joint targets could encourage and drive the development of local shared services

# Fairness: must be incorporated as a key factor of programmes designed to be swift and certain

Fairness has not always been driven forward as a core principle of 'Swift and Certain' Justice

'Swift and Certain' justice reform has centred on the speed at which offenders are detected, brought before the court, sentenced and supervised, and the likelihood of being caught and convicted. The offenders we interviewed did not hold views that the process they had been through was fair, in terms of proportionality to the offence or consistency in application:

*"25 RAR [rehabilitation activity requirement] days... I don't think that's fair. I got 120 hours. I know other people with the same offence that didn't get tag. I don't know why they gave it to me."*

*"That wasn't correct of them to do that. They lied. They hadn't been to my house. And then they arrested me and I got remanded into custody...but I think that was unfair of them to do"*

Programmes like Checkpoint in Durham have shown the value in engaging offenders in sanctions they feel are fair and proportionate

An evaluation of the Checkpoint programme<sup>1</sup> highlights a key success factor: *"the Checkpoint process must be seen as fair and legitimate, and focus on developing the psychological maturity of offenders particularly in understanding the short- and long-term consequences of their actions"*

The Checkpoint Navigators communicate the aims of the programme to the participants at the start of the engagement and use a range of behaviour change techniques. Offenders are also offered the opportunity to wear a Global Positioning System (GPS) tag, rather than forced to.

"Offenders on the scheme need to comply with a set of contract conditions with the added 'Sword of Damocles' that if offenders do not comply, they will be swiftly prosecuted."

There is potential for these principles of both fairness and communication to be applied more broadly across the criminal justice system alongside a swift and certain approach



# **Section 5**

## **Conclusions and recommendations**

# Conclusions (1/2): The application of 'Swift and Certain' Justice in England and Wales has largely failed due to silo'd reforms...

1

Within England and Wales, reforms to drive greater swiftness and certainty have largely missed their mark: eight years after the MoJ's 'Swift and Sure' White Paper was published, the criminal justice system (CJS) still routinely tolerates delay and uncertainty. This seems in part due to the system being under-resourced across the board. Economies of scale have at times driven the agenda, over a genuinely 'Swift and Certain' approach. Target-setting has been one dimensional and neglected quality for speed.

2

In particular, investigations are taking longer than ever to complete, victims are waiting longer for their cases to be brought to trial, and magistrates' confidence in community sentences has been undermined by the time taken to punish breaches. Since the passing of the 2003 Criminal Justice Act, the CJS has seen a plethora of swiftness or certainty policies which have lead to transformation exhaustion, undermining rather than strengthening 'Swift and Certain' Justice.

3

Application of these principles has been silo'd, meaning that where swiftness *has* been achieved, it has sometimes had unintended consequences. For example, there have been concerns that pressure to speed up courts processes have undermined the quality of some pre-sentence advice and therefore the sentencing outcomes. Similarly, changes to police bail legislation intended to reduce police investigation length, has had the opposite effect. Our system rightly demands that swiftness be balanced by due process and fairness. Too often, policymakers have not got this balance right.

## Conclusions (2/2): ...however 'Swift and Certain' justice programmes have been proven to be effective if applied in the right context

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4

The centralised control of courts in the UK reduces the scope for local innovation and the development of approaches which reflect local circumstances and meet local priorities. Despite a multi-million pound 'transformation' programme, the courts remain slow and are not delivering certainty for defendants or victims.

5

The 'Transforming Rehabilitation' reforms have weakened the ability of probation services to provide consistency and certainty for offenders, and have weakened the local element. Service-level agreements designed to provide assurance in private-sector delivery and reduce risks, are silo'd and remove critical elements of practitioner judgement and experience.

6

'Swift and Certain' justice programmes have been proven to be effective in the reduction of reoffending in some areas and in certain contexts. However, recent evaluations suggest there are other critical success factors (beyond timely and consistent sanctioning) required to effectively deter offending. Crucially, swiftness must not become a substitute for procedural fairness. The system must be swift, certain and fair.

# Key recommendations

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- 1 The police, CPS and Judiciary should work together to strengthen and expand the range of pre-court avenues for tackling offending, for example, through broader use of civil orders or out of court disposals and diversion. Where necessary these alternative options should be underpinned legislatively
- 2 The Home Office and Ministry of Justice should establish a joint task-force to review why 'offence to charge' times have increased and set out a joint action plan for the police and CPS to take action once these agencies have started to return to business as usual following the Covid-19 pandemic
- 3 The last decade illustrates how hard it is to drive swiftness and certainty from the top-down. We recommend a more devolved approach, whereby PCCs and directly elected Mayors are given responsibility (and where possible, budgets) for driving greater swiftness and certainty locally at every stage of the 'offender journey'
- 4 The end of 'Transforming Rehabilitation' is an opportunity to 'reset' the relationship between probation and the judiciary, improving the quality of pre-court advice and making it easier to bring offenders back to court when/ if they breach community orders
- 5 The new Justice Commission should commit to reviewing swiftness and certainty across the CJS - including the efficacy of existing targets - and ensure existing measures are appropriately balanced with the principle of procedural fairness

# Annex



# Methodology

To explore the evidence behind 'Swift and Certain' justice we conducted desk research. To establish the extent to which 'Swift and Certain' justice is embedded in England & Wales we analysed published criminal justice system data as well as locally-provided data. To understand key factors in its application, we conducted focus groups/interviews with practitioners, victims and offenders

## Data and document review

We used several sources of information to underpin our research, provide context and help shape our fieldwork approach. These included:

- Academic research on the topics of behavioural science generally, deterrence theories, and the results from evaluations of interventions designed to reduce reoffending
- Government-published policy and white papers
- Analysis of published Ministry of Justice and Home Office statistics

## Fieldwork

Our fieldwork took place between June and December 2019. This involved:

- **Interviews and 2 focus groups with victims:** Interviews and focus groups tested victims' experiences and perceptions of the speed/certainty of the criminal justice system (CJS), as well as key supporting factors
- **Interviews with victim support staff:** Interviews covered staff experiences of factors impacting the speed of the CJS
- **Interviews with offenders supervised by a community rehabilitation company:** Interviews covered the speed at which offenders were investigated and how they perceived this to impact on rehabilitation during CRC-supervision
- **A focus group with senior probation officers:** The focus group discussed breach and recall procedures and barriers to swiftness and certainty
- **Interviews with anti-social behaviour officers in a local authority:** Interviews covered the use of civil orders for low-level offending
- **Analysis of police control room data** (establishing timeliness to respond and certainty of positive outcomes being achieved)