and the Vetting and Barring Scheme have been designed for that purpose (following the Soham murders by the school caretaker Ian Huntley), and it remains to be seen how they will operate. However, *R.(X)* went further than was necessary. An increasing number of jobs require an ECRC and the release of information (including allegations which have not been tested at trial or led to conviction) effectively closes off entire sectors of employment and voluntary work. It is therefore essential that information is not disclosed without appropriate justification. The opportunity to make representations *prior to disclosure* is also crucial. Hansard records a pertinent example of the detriment caused by inappropriate disclosure: a student nurse was suspended when her ECRC revealed that she was on bail for suspected fraud, but she had in fact been the victim of identity theft, HL Deb. vol. 713, col. 664 (20 October 2009). Unfortunately, she lost her university place as a result of the ECRC, but if she had been given the opportunity to make representations then this may not have occurred. The police are attempting to follow correct procedure and they have clearly designed their policy to follow the guidance that was issued in *R.(X)*. Unfortunately that guidance was seriously flawed. *R.(L)* was therefore essential to ensure that a policy that affects millions of people is compliant with human rights.

KIRSTY HUGHES

OUT-OF-COURT (OUT OF SIGHT) DISPOSALS

ON 14 December 2009 the Lord Chancellor, the Home Secretary, and the Attorney-General published the terms of reference for a review of the use of out-of-court disposals by criminal justice agencies, to be carried out by the Office of Criminal Justice Reform. Announcing the terms of reference, they said that they are concerned by reports of these disposals being used for apparently serious offences, including violent assaults, by the apparent variation between areas in the number of crimes brought to justice through the use of out-of-court disposals, by reports of the repeated use of such disposals even for low-level offences and by the "robustness" of their enforcement.

Recent case law illustrates some of the problems. In *Gore and Maher* [2009] EWCA Crim 1424, [2009] 1 W.L.R. 2454 the two appellants unsuccessfully appealed their convictions for inflicting grievous bodily harm. An assault (recorded on CCTV) took place in Liverpool city centre in the early hours of 28 October 2007, and police officers were alerted by the CCTV operators. Both Gore and Maher were given Fixed Penalty Notices ("FPNs"), one for being involved in an altercation in a public place when drunk, the other for behaviour likely to

cause harassment, alarm or distress. The following day the police reviewed the evidence and decided that the FPNs were inappropriate. On 5 January 2008 they were charged with inflicting grievous bodily harm. At the Crown Court they applied for the indictment to be stayed as an abuse of process. The judge refused, Gore pleaded guilty and a jury convicted Maher. Their appeals were dismissed. As the Lord Chief Justice explained:

> There was here no improper escalation of charge, nor any departure from any reasonable expectation that either appellant would not be prosecuted, if any more serious consequences of their conduct, and evidence justifying prosecution for an offence of violence, came to light after the issue of the notice. The reality is that on the night in question the defendants must have been thanking their lucky stars that they got away with the serious violence they had perpetrated. It was not an abuse of process for justice to catch up with them (at [16]).

The number of FPNs is large: 176,164 were issued in 2008 (perhaps surprisingly down from 207,544 in 2007). More extraordinary is the cautioning rate (i.e. the number of offenders cautioned as a percentage of those found guilty or cautioned) which in 2008 was 37% (down from an even higher 40% in 2007), for indictable (*i.e.* serious) offences (see Criminal Statistics, 2007 and 2008). The "conditional caution" was introduced in the Criminal Justice Act 2003, giving the Crown Prosecution Service (CPS) the power to impose cautions, with conditions attached. By March 2009, there had been 15,384 conditional cautions nationally ("full rollout" was only in March 2008; see CPS Annual Report, 2008–9). Again, the number is likely to be rising fast. The facts of *R. (Guest)* v. *DPP* [2009] EWCA Crim 650; [2009] 1 W.L.R. 1999 may not be untypical. Allegedly, Guest had sent text messages to another man, Watts, accusing him of mortgage fraud. Watts then entered Guest's home when he was asleep in bed with his partner and kicked and punched him for 5–10 minutes. Guest suffered severe bruising to his eye, and had to have four stitches. He also suffered bruising to his thigh, and severe bleeding from his nose. Watts, a man of 50 with no previous convictions, wrote a letter of apology to Guest, and a case worker at the CPS subsequently decided that Watts should not be prosecuted, but should be given a conditional caution, with the condition that he pay £200 to Guest. After Guest complained, and refused to accept the £200, the CPS accepted that the decision to give a conditional caution was flawed and that Watts should have been charged with causing actual bodily harm. However, they also concluded that they had no power to rescind or quash the original caution. The DPP maintained in the Divisional Court that, although the decision should not have been made, it should not now be quashed as to do so would be

counter-productive: any subsequent prosecution, at least by the CPS, would have no reasonable prospect of success because the court hearing it would regard it as an abuse of process (relying on the decision of the House of Lords in *Jones* v. *Whalley* [2006] UKHL 41, [2007] 1 A.C. 63, noted at [2007] C.L.J. 11). The Divisional Court strongly disagreed, quashing the decision not to prosecute. The Court stressed the "very considerable responsibility" placed on the CPS: by a decision to offer a conditional caution to an offender, the court is effectively bypassed:

> In this case, decisions were taken without regard to the Code for Crown Prosecutors, the Director's guidance on Conditional Cautioning and the Secretary of State's Code of Practice. It seems to me astonishing, as it would no doubt to many members of the public, that the CPS could seriously contemplate not prosecuting someone who, it was alleged, deliberately went to a person's house at night, attacked him inside that house with some ferocity (including kicking him) in the presence of his (obviously very frightened) partner (Goldring L.J., at [57]).

The Court strongly disagreed that any subsequent prosecution would be an abuse of process, Sweeney J. going so far as to say that "it is troubling, to say the least" that the DPP and his senior lawyers did not appear to see that a prosecution in this case would be the reverse of an abuse (at [59]). He stated that the affront to justice of the decision not to prosecute would be put right by a prosecution. This decision illustrates the flood of arguments based on abuse of process which has reached trial and appellate courts. It will not stop them.

Transparency is one key to good decision-making. Yet the pressure to save money has encouraged the Government to bypass the criminal courts: this Government has presided over the closure of 150 courts since 1997 (see House of Commons Written Answers for 5 February 2009, Hansard col. 1401W). On 13 October 2009 it announced plans to close 21 more. Instead, we have largely invisible alternative "disposals" by a wide variety of criminal justice agencies. Very little research has been undertaken into the use and enforcement of these disposals. In particular, qualitative research into decision-making operational practices is crucial. And, if the Government truly wants to develop greater confidence in the criminal justice system, why don't they encourage open and local justice in magistrates courts?

NICOLA PADFIELD

NEGLIGENCE AND DEFENDANTS WITH SPECIAL SKILLS

DISCUSSIONS of the objective standard of care in the criminal law tend to focus on its treatment of incompetent defendants. Relatively little