

Sentencing and the prison population

This briefing looks at the growth in the prison populations in England and Wales and in Scotland. Drawing on findings from two research studies on the use of custody and other sentences, it identifies some of the main reasons for the increase and suggests possible ways of putting a stop to the growth.

Key lessons

- Sentencers are imposing longer prison sentences for serious crimes, and are more likely to imprison those appearing before the courts today than they were ten years ago.
- Tougher sentencing results from several factors: a punitive climate of political and media debate; legislative changes and in England and Wales; new guideline judgements; and sentencers' perceptions that offending has become more serious.
- Sentencers, while not unduly constrained by pressure to 'get tough', argue that they have a duty to ensure that their sentencing decisions reflect and reinforce the norms of wider society.
- Personal mitigation plays a crucial part in cases that are on the borderline with custody but result in non-custodial sentences.
- Sentencers claim to send people to prison as the last resort – either because the offence is so serious that no other sentence is possible, or because past convictions or failure to respond to past sentences rule out community options.
- Sentencers are not sending people to prison for lack of satisfactory or appropriate community options; they argue that they impose community penalties whenever the facts of a case merit it.
- Sentencers are generally satisfied with the quality and range of community sentences, and with the management and enforcement of these sentences, but are concerned about under-funding of the Probation Service in England and Wales and that community service is under-funded in Scotland.

rethink

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Overview

A combination of legislation and guidance to sentencers to use imprisonment less often, and where it is used to pass shorter sentences, could make an important impact on bringing down the prison population. Providing a wider range of tougher and more demanding community penalties would, however, probably result in 'net-widening' – where the new sentences are used with offenders who would previously have been fined or served a conventional community penalty. The courts could make more use of realistic fines, which would defer the time at which the 'last resort' of imprisonment is used. There is a need to improve sentencers' and the public's awareness of existing community penalties and their benefits. Above all, there needs to be clear, consistent political leadership to effect change.

The studies

Both studies (details of which appear at the end of this briefing) began from the assumption that politicians may wish to curb the use of imprisonment in England and Wales and Scotland and that if so, they need to know the best ways of doing so. Thus, the main aims were to understand how sentencing practices affect the prison population; and to identify what might discourage sentencers from making use of custody and encourage them to make use of alternative community sentences. To this end the studies focused primarily on the process by which sentencing decisions are made by sentencers, especially in relation to cases that are on the borderline between custody and community sentences. As a preliminary, the studies examined Home Office and Scottish Executive statistics on convictions and general sentencing patterns, and reviewed other relevant research.

The core of both studies comprised interviews with sentencers. In England and Wales eleven focus groups were organised for a total of 80 magistrates. Those who took part also completed a detailed questionnaire that asked about sentencing decisions and explored views on non-custodial penalties. One-to-one interviews were carried out with 48 Crown Court judges, recorders and district judges. In Scotland,

one-to-one interviews were carried out with 34 sheriffs from across Scotland and with a stipendiary magistrate. The Crown Court judges, recorders and district judges and the sheriffs were asked to provide details of four cases which lay on the borderline between custodial and non-custodial penalties. Five members of the senior judiciary in England and Wales and five in Scotland were also interviewed.

Explaining the growth in the prison population

Home Office and Scottish Executive statistics show that the growth in the prison population in both jurisdictions is not the result of more convictions. Neither can the rise be explained simply by greater use of remand, though in Scotland the 57% increase in the use of adult remands over the period of study has undoubtedly contributed. Two main factors have driven up the prison populations in England and Wales and in Scotland: a higher proportion of convicted offenders has been sent to prison, and sentence lengths have gone up.

In England and Wales over the period of detailed study (1991–2001) the custody rate for magistrates' courts increased from 5% to 16% and for the Crown Court it rose from 46% to 64%. Over the same time period there has been greater use of long sentences at the expense of middle-range sentences; sentence length has increased particularly in relation to convictions for sexual offences and burglary. In Scotland custody rates also increased in the Sheriff Summary and Solemn Courts over the period of study¹, albeit less dramatically than in England and Wales. Similarly, there has been greater use of long sentences in Scotland, mainly at the expense of short sentences; the numbers of adults arriving in prison with sentences of four years and over, excluding life, increased by 51%.

Other factors in both jurisdictions relevant to the increase in the prison populations include large increases in the numbers of persons found guilty of drugs offences. Some procedural changes have pushed up the prison population, including changes in parole and automatic release and in England and Wales

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changes in committal practice. Both jurisdictions have also experienced declines in the use of fines, though again less dramatically in Scotland. Reduced use of fines may have contributed to the rise in the prison populations since offenders who receive community penalties (rather than fines) early in their criminal careers exhaust alternatives to imprisonment more rapidly.

Tougher sentences

The increase in custody rates and sentence length strongly suggest that sentencers have become more severe in their practices. This greater severity undoubtedly reflects, in part, a more punitive legislative and legal framework of sentencing. In England and Wales, legislation, guideline judgements and sentence guidelines have all had an inflationary effect on sentences passed. In Scotland, while there is little experience of guideline judgements and no sentencing guidelines, at least some inflationary drift in sentencing flows from more severe legislation over the past decade. At the same time, in England and Wales and to a lesser extent in Scotland, the climate of political and media debate about crime and sentencing has become more punitive and is also likely to have influenced sentencing practice.

In England and Wales and in Scotland members of the senior judiciary were unanimous in saying that sentencing practice had become more severe. This was at least in part a response to media and political pressures on sentencers. Crown Court judges and recorders and some sheriffs also referred to external pressures on them to pass more severe sentences. District judges and magistrates were less likely to talk in terms of sentencing becoming more severe. Magistrates and some sheriffs said that sentencing practice had remained unchanged but that there had been a shift in the nature of the cases coming before them.

Whether or not they responded to pressure to pass tougher sentences, most of those interviewed, though less so in Scotland, were aware of these pressures. In England and Wales several sentencers referred

to 'mixed messages' coming from politicians and the senior judiciary, with calls for tougher sentences contradicting calls on sentencers to use prison less; sentencers in Scotland made no reference to such messages.

Perceptions of offending

On the whole sentencers were more inclined to cite changing patterns of offending, rather than changing sentencing practice, as the underlying cause of the rise in the prison populations in both jurisdictions. However the study in England and Wales² found little statistical evidence of changes in offending behaviour that would produce more severe sentencing; offenders do not appear to have become more prolific and offences within offence categories do not appear to be more serious. Nevertheless, the views of sentencers about changes in patterns of offending – that offending had become more serious – were strongly held in both jurisdictions. These perceptions are undoubtedly a factor in sentencing practice and are real in their consequences; if sentencers regard offending behaviour as more serious than in the past, it is reasonable to conclude that they will pass heavier sentences than in the past.

Sentencing decisions

Sentencers in England and Wales and in Scotland were asked how they made decisions in cases that lie on the borderline between custodial and non-custodial sentences. A custodial decision was typically based on the perceived seriousness of the offence and/or the offender's criminal record. Hence the use of custody as a 'last resort' had two meanings for sentencers: first, it could refer to the offence itself, which merited a prison sentence; second, it could refer to the history of the offender, who might be convicted for a relatively minor offence but was deemed to have run out of options because of the number of past convictions and/or failure to respond to past community sentences.

In contrast, a wider range of factors were of greatest significance in borderline cases resulting in non-custodial sentences. Of particular significance were the present circumstances of the offender, for example,

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employment status and family responsibilities; the offender's condition, for example, suffering from severe mental or physical health or addiction problems; the offender's response to prosecution, especially evidence of remorse or willingness to co-operate with the courts; and the offender's status as being 'of previous good character'.

Sentencers did not identify a lack of satisfactory community options as a factor tipping decisions towards custody in borderline cases. When describing the borderline cases, sentencers cited lack of community options as a key factor in the sentencing of only two of the 150 cases that went to custody in England and Wales, and none of the 48 cases that went to custody in Scotland. The sentencers stressed that they pass community sentences when the facts of a given case merit a non-custodial disposal.

Non-custodial penalties

For the most part sentencers in England and Wales and in Scotland expressed their satisfaction with the range and content of community sentences available to them. In England and Wales there was strong support for the Drug Treatment and Testing Order (DTTO), which was felt to be a demanding and potentially constructive sentence. The majority of sentencers who had experience with DTTOs in Scotland expressed similar views; many, however, did not yet have DTTOs available in their courts. Some sentencers in England and Wales were equally enthusiastic about curfew orders, while others had mixed feelings and many were poorly informed about them. Such orders were only in their infancy in Scotland though the few sentencers who had used them expressed positive views.

Sentencers in England and Wales appeared largely satisfied with the work of the Probation Service: in particular it was observed that the quality of pre-sentence reports (PSRs) and the enforcement of community orders have improved markedly in recent years. However, many also had concerns that under-funding and under-staffing of probation have repercussions for the availability and timeliness

of PSRs, and for the supervision of offenders on community sentences. Similarly, the majority of sentencers in Scotland spoke highly of the provision of local authority criminal justice social work services. They were satisfied with the 'broad palate' provided by existing community sentences though more imagination in the content and flexibility in the ability to 'tailor-make' non-custodial sentences were desirable.

Some sentencers in both jurisdictions were not well informed about the full range of community penalties available to them and about their benefits. Most recognised that the general public was ill-informed about community penalties; several sentencers in Scotland expressed dissatisfaction at the way in which community service in particular is portrayed to the public by the media. They emphasised the need to educate the public and politicians about community sentences in general; in particular, they felt that efforts should be made to change the image of community service in the eyes of the public.

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Conclusions

Whether or not the growth in the prison population should be reversed is a political decision. But if there is political will to do so, then success in reducing prison numbers will depend on changes both to sentencing practice and to the context in which sentencing is carried out.

One approach that has been tried in England and Wales and in Scotland is to provide sentencers with a wider and more attractive range of community penalties. However, despite substantial investments in community sentences, the prison populations have continued to rise. Moreover, sentencers in the two research studies did not say that they were using prison sentences due to a lack of adequate non-custodial options. The further enhancement of community penalties might result simply in 'net-widening' – where the new sentences are used with offenders who would previously have been fined, or served a conventional community penalty. Encouraging the use of realistic fines could be a useful part of any strategy to reduce the prison population. In terms of outcomes this could at best deflect some offenders entirely from further offending without resort to community sentences or imprisonment; and at worst it could defer the point in their criminal career at which prison becomes 'unavoidable'.

The analysis presented in both studies suggests that policies to restrict prison numbers should involve three levels of intervention:

- Adjusting the legislative and legal framework of sentencing to reduce custody rates and/or sentence lengths.
- Improving understanding of the range of non-custodial penalties among sentencers and the wider public.
- Altering the climate of political and public opinion on crime and punishment in ways that would assist sentencers to make minimal use of custody.

Changing the legislative and legal framework for sentencing — for example, by reducing the length of prison sentences — is clearly the most direct and immediately tangible way to restrain sentencers' use of custody. However, this will not by itself be sufficient to produce sustained changes in sentencing practice. Measures are also required to promote more rational and less punitive political and public debate about crime and punishment. This will not be possible without determined political leadership.

Notes

¹ The period of study for Scotland was from 1993 – 2002 but for custody rates it was from 1995 – 2002; 1995 was used as that is the earliest year for which separate comparable figures for the Sheriff Summary and Solemn Courts are available.

² Statistics are not available in Scotland to test out these possibilities.

For the full report on England and Wales see Mike Hough, Jessica Jacobson and Andrew Millie, 2003, *The Decision to Imprison: Sentencing and the Prison Population*, London, Prison Reform Trust; and for the full report on Scotland see Jacqueline Tombs, 2004, *A Unique Punishment: Sentencing and the Prison Population in Scotland*, Edinburgh, Scottish Consortium on Crime and Criminal Justice.

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