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THE DECISION TO IMPRISON: KEY FINDINGS

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This study addresses one of the central problems facing contemporary penal policy. The prison population in England and Wales has been rising steeply and progressively. Prisons are overcrowded, budgets are stretched to the limit. Despite this, there has been remarkably little debate about the reasons for this increase, and whether ways can be found of putting a stop to it. This study is intended to go some way to filling the gap.

It found:

- The adult prison population of England and Wales has grown from 36,000 in 1991 to 62,000 in 2003 – an increase of 71%.
- There are two main reasons why the prison population has grown. Sentencers are now imposing longer prison sentences for serious crimes, and they are more likely to imprison offenders who 10 years ago would have received a community penalty or even a fine.
- Tougher sentencing practice has come about through the interplay of several factors: an increasingly punitive climate of political and media debate about punishment; legislative changes and new guideline judgements; and sentencers' perceptions of changes in patterns of offending.
- The statistics do not lend support to sentencers' beliefs that offenders are becoming more persistent, and committing more serious crimes; however more research is needed on this topic.
- Sentencers consistently say that they send people to prison only as the absolute 'last resort' – either because the offence is so serious that no other sentence is possible; or because the offender's past convictions or failure to respond to past sentences rule out community options.
- Personal mitigation (relating to an offender's condition, circumstances, response to prosecution, and good character) plays a crucial part in cases that result in non-custodial sentences, but are on the borderline with custody.
- Sentencers are not sending people to prison for lack of satisfactory or appropriate community options; they say that they impose community penalties whenever the facts of a case merit it.
- While sentencers are generally satisfied with the quality and range of community sentences, and with the management and enforcement of these sentences, there are widespread concerns that the Probation Service is under-funded.
- Community sentences that carry the provision for review, such as Drug Treatment and Testing Orders, are favoured by sentencers.
- Sentencers say that they are able to resist pressures to 'get tough' from the media and the public, and that it is critically important to do so. At the same time, they feel they have a duty to ensure their sentencing decisions reflect and reinforce the norms of wider society.

The study's conclusions

The best way of bringing down the prison population is to issue guidance to sentencers to use imprisonment less often, and where it is used, to pass shorter sentences. Providing a wider range of tougher and more demanding community penalties will 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. There is a need to improve sentencers' and the public's awareness of community penalties and their benefits. The courts should make more use of fines, freeing up probation resources and deferring the time when the 'last resort' of imprisonment has to be used. But above all, there needs to be clear political leadership in stressing the need to end the uncontrolled rise in the prison population.

The study

At a time when crime has been falling, the prison population in England and Wales has been rising steeply. Today, England and Wales have the highest per capita prison rate in the European Union. Prisons are overcrowded, budgets are stretched to the limit. Despite this, there has been remarkably little debate about the reasons for this increase, and whether ways can be found of putting a stop to it.

Whether to restrict prison numbers is a contentious and thus a political decision. While the case for doing so may be strong, the issue is not explored by this study. Rather, the starting point of the research is the assumption that politicians may wish to curb the use of imprisonment in this country and that if so, they need to know the best ways of doing so. Thus, the study's main aims were to look at what might discourage the use of custody by sentencers, and what might encourage the use of non-custodial alternatives, thereby reversing the rise in the prison population. To this end, the study explored the process by which sentencing decisions are made by judges and magistrates – particularly in relation to cases that are on the borderline between custody and community sentences.

As a preliminary, the study analysed Home Office statistics on convictions and sentencing, and reviewed other relevant academic and policy research.

The core of the study comprised interviews with sentencers. 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. Interviewees were asked to provide details of four cases which lay on the 'cusp' between custody and community penalties. Five members of the senior judiciary were also interviewed.

Explaining the rise in the prison population

Home Office statistics show that the rise in the prison population cannot be explained simply by greater use of remand, and that it is not the result of more convictions. Two main factors have driven up the prison population: offenders are being imprisoned who previously would have received community penalties; and those who would previously have been sent to prison are being given

longer sentences. Between 1991 and 2001, the custody rate for magistrates' courts increased from 5% to 16%. Use of custody by the Crown Court rose from 46% to 64%.

The average length of sentence passed by magistrates' courts was slightly lower in 2001 than it was ten years before. Over the same period the average length of sentences passed by the Crown Court has increased. There has been greater use of long sentences at the expense of middle-range sentences. Within offence categories, sentence length has increased particularly in relation to convictions for sexual offences and burglary.

Other factors relevant to the prison population include a large increase in the number of defendants found guilty of drugs offences. Some procedural changes have pushed up the prison population, including changes in committal practice and in parole and automatic release. There was a decline in the use of fines, which may have contributed to the prison population since offenders who receive community penalties (rather than fines) early in their criminal careers exhaust the alternatives to prison more rapidly.

Tougher sentences

The increases in custody rates and sentence length strongly suggest that sentencers have become more severe. This greater severity undoubtedly reflects, in part, a more punitive legislative and legal framework of sentencing. Legislation, guideline judgements and sentence guidelines have all had an inflationary effect on sentences passed. At the same time, the climate of political and media debate about crime and sentencing has become more punitive, and is also likely to have influenced sentencing practice.

The five members of the senior judiciary who took part in the study were unanimous in saying that sentencing practice had become more severe, and that this was at least in part a response to political and media pressure on judges and magistrates. Crown Court judges and recorders also tended to refer to external pressures on them to pass tougher sentencing. District judges and magistrates were less likely to talk in terms of sentencing becoming more severe. Magistrates in particular tended to say that sentencing practice had remained unchanged, but that there had been a shift in the nature of cases coming before them.

Whether or not they responded to pressure to pass tougher sentences, almost all of those interviewed were aware of these pressures. Several referred to 'mixed messages' coming from politicians and the senior judiciary, with calls for tougher sentences contradicting calls on sentencers to use prison less.

Perceptions of offending

Sentencers, and magistrates in particular, were more inclined to cite changing patterns of offending, rather than changing sentencing practice, as the underlying cause of the rise in the prison population. While there has been no significant shift in the 'offence mix' of cases coming before the courts, it is possible that statistics on convictions mask some changes in offending behaviour that impact on sentencing.

These changes may be of two main kinds: offenders may be more prolific, and offences within offence categories may be more serious. There is very little statistical support for this, but the views of sentencers were strongly held, and may have some plausibility, given, for example, increases in problematic drug use and in binge drinking. But it may also be that their views have been shaped by the increasingly punitive climate.

Certainly, sentencers' perceptions of changing patterns of offending, whatever the extent to which these perceptions are based on actual changes in offending behaviour, are a factor in sentencing practice. The perceptions are thus real in their consequences: if sentencers regard offending behaviour as more serious than hitherto, one might expect them to pass heavier sentences than hitherto.

Sentencing decisions

Sentencers who took part in the study were asked how they had made decisions in cases on the 'cusp' between custodial and non-custodial sentences. It emerged that where a decision was made to impose custody, this was usually based on considerations of the seriousness of the offence, and/or the criminal history of the offender. (The latter played a particularly important part in magistrates' courts.) Hence the use of custody as a 'last resort' had two meanings for sentencers: first, it could refer to the nature of the offence itself; secondly, 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.

In contrast, a wider range of factors were of greatest significance in cusp cases resulting in non-custodial sentences. Issues relating to the present circumstances and condition of the offender were viewed as particularly important in such cases. So too were the offender's response to prosecution (for example, in terms of a show of remorse or willingness to co-operate with the courts) and his or her status as being 'of previous good character'. This emphasis on personal mitigation makes the sentencing process a highly subjective one, in which the sentencer has to make assessments about the attitudes, intentions and capabilities of the offender; assessments which feed judgements about responsibility and culpability.

Sentencers did not identify a lack of satisfactory community options as a factor tipping decisions towards custody in cusp cases. According to the analysis of the cusp cases described by the sentencers, only in two of 150 cases that went to custody was a lack of community options cited as a key factor in the sentencing decision. The sentencers stressed that they pass community sentences whenever the facts of a given case make a non-custodial sentence an option.

Community penalties

For the most part, sentencers expressed their satisfaction with the range and content of community sentences available to them. There was strong support for the DTTO, which was felt to be a demanding and potentially constructive sentence. Some sentencers were equally enthusiastic about curfew orders, while others had mixed feelings about these. Many were poorly informed about them.

Sentencers appeared largely satisfied with the work of the Probation Service: in particular, it was observed that the quality of pre-sentence reports 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.

Some sentencers were poorly informed about the full range of community penalties and about their benefits. Most recognised that the general public were ill-informed about most community penalties. This suggests a need to improve awareness of community penalties both amongst sentencers and amongst the wider public.

Conclusions

Whether the growth of the prison population should be contained is a political decision that falls beyond the boundaries of this study. But if there is some 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 by successive governments is to provide sentencers with a wider and more attractive range of community penalties. This may go some way to reducing prison numbers. However sentencers in this study did not say that they were using prison for want of adequate non-custodial options. The enhancement of community penalties could simply result 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 fines could prove a sensible option. This would relieve pressure on the Probation Service; in terms of outcomes it could at best deflect some offenders entirely from further offending without resort to imprisonment or community penalties; and at worst it could defer the point in their criminal career where prison becomes inevitable.

The analysis presented here suggests that policies to contain the numbers of people in prison should involve three levels of intervention:

- Adjustment to the legal and legislative framework of sentencing, so as to bring down custody rates and sentence lengths.
- Softening of the climate of political and public opinion on crime and punishment, so that sentencers feel at liberty to make more sparing use of custody, and greater use of the alternatives to custody.
- Improving understanding of the range of non-custodial penalties – including the fine – both among sentencers and the wider public.

However, none of these interventions is likely to meet with much success unless there is clear political will to stop the uncontrolled growth in prison numbers, and visible, consistent, political leadership in stressing the need to do so.

The Decision to Imprison: Sentencing and the Prison Population

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