

# **fine art or science**



Youth Justice Board  
Bwrdd Cyfiawnder Ieuencid

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# Fine art or science – A summary of findings from the fine art or science study

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## BACKGROUND

A recent study of sentencing decisions involving young offenders aged 10 to 17 sheds new light on the influences and reasoning that leads sentencers to choose between custody and community alternatives. The study focused on:

- reasons why custodial or community sentences had been made in borderline or ‘cusp’<sup>1</sup> cases
- understanding the differences between sentences made by magistrates, district judges and Crown Court judges
- establishing views on making custodial and community sentences.

The study also aimed to:

- assess whether differences between sentencers accounted for uneven patterns of sentencing
- identify the factors that can encourage or discourage a decision towards or away from use of custody
- explore views on sentencing philosophy and the process of decision-making
- assess confidence in custodial sentences and community penalties
- explore the impact of the social and political climate on sentencing decisions
- produce recommendations on how to address variations in sentencing outcomes.

## METHODOLOGY

The study used a sample of 62 sentencers, including magistrates, district judges and Crown Court judges, across 16 youth offending team (YOT) areas in England and Wales. In each of the 16 sample areas, research was carried out in the magistrates’ and corresponding Crown Courts (sitting in its capacity as the youth court). The main source of data was interviews with sentencers.

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<sup>1</sup> Borderline or ‘cusp’ cases are those that are deemed to lie on the brink between a custodial and a community sentence.

Interviewees were asked to provide details of two borderline ‘cusp’ cases, and:

- describe the cases
- discuss the specific factors that led them to pass such a sentence
- consider what might have encouraged them to sentence in the opposite direction.

Those who participated were also invited to pass judgement on a sentencing vignette, which presented a hypothetical sentencing situation of a fictional young offender.

### **APPROACHES TO SENTENCING**

The three main aims of sentencing, as described by sentencers, are applied on the basis of three (mutually inclusive) factors:

- seriousness of the offence
- circumstances of the offender
- aspects unique to the individual.

### **Guidelines**

The decision-making process is structured around procedures in the Youth Court Bench Book. Magistrates report making extensive use of this; however judges highlight a lack of specific guidelines for sentencing young people.

### **Decision-making**

Judges take a more intuitive approach and, to an extent base it on their professional experience as advocates. They suggest that sentencing is akin to a ‘fine art’ rather than ‘scientific’ assessment.

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Magistrates are concerned about rarely being involved in determining the disposal and length of sentence in cases that need to be deferred for background reports, and rota arrangements make it unlikely that the same bench will be assembled to review the additional information (as judges may currently do). Likewise, magistrates are called upon to pass sentence in cases where they have no previous involvement.

### **Discretion**

Most magistrates believe that they enjoy moderate levels of discretion, even when applying relevant guidelines. Crown Court and district judges believe they retain considerable levels of discretion, and insist on their right to depart from sentencing guidelines where there were sound reasons for doing so.

**“Most magistrates believe that they enjoy moderate levels of discretion, even when applying relevant guidelines.”**

### **Custody**

Sentencers are generally sceptical about the effectiveness of custody as a means of preventing reoffending, apart from allowing the community a period of respite from the young person's behaviour. They argue that custody:

- fails to address the underlying causes of offending behaviour
- does more harm than good, and risks making ‘bad people, worse’
- has little impact on individual deterrence (as evidenced by the high rates of reoffending).

Despite general scepticism concerning the value of custody, there is a widespread view that custodial sentences are given to young offenders because it has become ‘unavoidable’. This endpoint could be reached because of the seriousness of an offence, but more commonly, sentencers describe feeling that community alternatives had been exhausted and ‘enough was enough’.

Many sentencers question the value of Detention and Training Orders (DTOs) of between four and six months because they do not believe this is sufficient time to provide effective education and training opportunities.

### **FACTORS THAT ENCOURAGE THE USE OF CUSTODY**

Three main considerations are believed to increase the likelihood of a custodial sentence:

- the nature and seriousness of the offence, including aggravating factors such as unprovoked violence, serious injury to a victim, or use of a weapon; or as a way of making an example of offenders convicted of crimes prevalent in the local community
- previous criminal history, especially if a young person was a persistent offender who had failed to change their behaviour following previous community-based sentence/s
- the young offender's personal circumstances, including situations where lack of permanent accommodation was deemed to make them unsuitable for an Intensive Supervision and Surveillance Programme (ISSP) in the community.

### **FACTORS THAT DISCOURAGE THE USE OF CUSTODY**

Factors that reduce the likelihood of custody are:

- (young) age
- first-time offender
- demonstrated remorse
- a guilty plea (with personal mitigation)

**“Many sentencers question the value of Detention and Training Orders (DTOs) of between four and six months because they do not believe this is sufficient time to provide effective education and training opportunities.”**

- medical problems, or emotional and learning difficulties
- circumstances, characteristics and attitude (eg. if the young person is constructively engaged in education, training or work, or comes from a ‘good home’ and has a parent present in court).

### **ALTERNATIVES TO CUSTODY**

Sentencers are mostly satisfied with the range of non-custodial disposals available and feel that the content and delivery of such disposals has improved in recent years. However, a notable exception to this is alternatives for first-time offenders who plead guilty; in these situations, sentences feel they faced a ‘stark choice’ between a Referral Order (referring them to a youth offender panel in the community) and custody.

Sentencers feel generally positive about ISSP being imposed alongside Supervision Orders or Community Rehabilitation Orders; almost half consider the ISSP to be at least as demanding on young offenders as custody and approve of the balance struck between punishment and welfare provision.

They also feel that Referral Orders lack rigour as a response to serious offences compared to other community disposals (notably Supervision Orders and ISSP), and that it is an unsatisfactory option because of the time it takes to implement and commence.

ISSP is the most favoured community alternative to custody; almost half feel it was equally, if not more, arduous for the young person. However, a large proportion of sentencers insist there is no real

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community-based alternative to custody for the most serious offenders or as a last resort.

### **YOT'S ROLE**

Although sentencers are mostly content with the quality of the information in pre-sentence reports (PSRs), it is felt that YOT workers seldom include custody among the disposal options. This leads sentencers to feel that YOT sentencing proposals are unrealistic, and explains why many sentencers insist that PSRs are of minimal use when deciding 'cusp' cases. Those sentencers who reported PSRs being of moderate use when choosing between community sentences and custody tended to sit in areas that made relatively low use of custody.

**“a large proportion of sentencers insist there is no real community-based alternative to custody for the most serious offenders or as a last resort.”**

Sentencers expressed:

- general satisfaction with the quality and commitment of YOT staff
- some complaint about the level of attendance by YOT officers in their courts; however, this was attributed to financial and staffing shortages
- a desire for feedback from the YOT about community and custodial sentence outcomes, especially where they felt they had taken a sentencing risk.

### **OTHER INFLUENCES ON SENTENCING**

Magistrates describe obtaining authoritative information from their court's legal adviser on case law, sentencing guidelines and tariffs. However, most did not mention the legal adviser as a major influence on their sentencing decisions.



Few sentencers thought the media exerts any significant influence over their sentencing decisions, but concern about the way individual decisions might be reported in the local (and sometimes national) media was widespread.

Half the sentencers said they took significant account of public opinion. However, caution was required to ensure that justice was administered impartially. Sentencers feel that the public, without access to the full facts of a case, tend to take a harsher view of crime and punishment than the courts.

## **CONCLUSIONS AND RECOMMENDATIONS**

While the fieldwork and analysis of this study proceeded in accordance with the recommendations of Lord Carter's review of the prison system in England and Wales, there is a need to better understand the mechanisms and influences that drive decision-making, particularly where it relates to custody.

Recommendations include:

- prioritising the production of new guidance to help reduce the sentencing variation between courts
- exploring the possibility of having at least one member of the original bench sitting at the time of sentence for consistency
- further research into what constitutes the 'endpoint'<sup>2</sup> to achieve greater consistency in sentencing
- increasing sentencers' knowledge of availability and effectiveness of treatment facilities and other relevant interventions available in the community
- re-examining and intensifying the education and training components of short 'entry-level' DTOs to enhance the value of custody for short-term sentences
- action to tackle the reported shortage of age-appropriate accommodation for young people without a permanent home

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<sup>2</sup> The 'endpoint' signifies the point in certain cases at which sentencers feel that custody is the only alternative after exhaustive use of community sentences.

**“Sentencers feel that the public, without access to the full facts of a case, tend to take a harsher view of crime and punishment than the courts.”**

- enhancing the attraction of intensive community sentences by increasing their restorative justice components and ensuring sentencers are properly familiar with the work of youth offending panels
- finding ways to make the ISSP more effective in reducing reoffending to make their benefits and cost effectiveness clearer when compared with custody
- providing feedback to sentencers on a routine basis to inform them of the outcomes (both positive and negative) of young people’s community-based sentences
- considering local campaigns to increase public awareness of the demanding nature of ISSPs and other community-based alternatives to custody.

The full report on which this summary is based  
is available on the Youth Justice Board website.

Further copies of this summary can be obtained from:

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