Youth Justice Board
Bwrdd Cyfiawnder Ieuenctid

Fine art or science?

Sentencers deciding between community penalties and custody for young people

Contents

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[1] The Policy Research Bureau was an independent social policy research centre based in London. The Bureau closed in March 2007.

Summary

Introduction and research aims

This report presents the findings of a study of sentencing decisions made by courts to identify why some young people are sentenced to custody and others to community sentences. The research examines cases involving young offenders aged 10 to 17, and explores the issues that may have an impact on sentencing at an individual level. It gives an account of the sentencing decisions made by a sample of 62 sentencers, including magistrates, district judges and Crown Court judges across 16 youth offending team (YOT) areas in England and Wales. It documents their approaches to sentencing and the decision-making process, as well as offering an insight into their attitudes towards custodial and non-custodial penalties. The research highlights a wide range of different factors that were reported by sentencers to encourage or discourage the use of custody in borderline or 'cusp' cases – cases that were deemed to lie on the brink between a custodial and a community sentence (Tombs and Jagger, 2006).

Sections 1 and 2 set out the background context to the study and the research aims and methods.

This research focused on:

- determining the reasons why custodial or community sentences had been made in borderline 'cusp' cases
- understanding the differences between sentences made by magistrates, district judges and Crown Court judges
- establishing the views of sentencers on making custodial or community sentences.

The study had several subsidiary aims:

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

Methodology

Sample of areas

The research was conducted in 16 YOT areas. The YJB collects monitoring and performance data on the use of pre-court, community and custody disposals imposed on young people aged between 10 and 17 years passing through the (pre-court) and court system. Areas were ranked according to their use of custody and 16 YOT areas were

purposively selected to ensure a full range of likely relevant factors was taken into account, including:

- a spread of high, medium and low custody-using areas
- a regional spread of YOT areas across England and Wales (e.g. north and south)
- inclusion of areas that ensured a satisfactory urban and rural mix
- inclusion of courts with specialist youth panels and youth district judges
- inclusion of courts that were reasonably accessible to allow for a number of visits to be made within a short period of time.

Table 1 provides details of the 16 YOT areas involved in the research sample. The areas have been allocated pseudonyms to protect the confidentiality of interview participants. Area names beginning with the letter 'H' have been assigned to high custody-use areas, 'M' indicates medium custody use and those with the letter 'L' were relatively low custody-use areas.

Table 1: Sample of YOT areas*

Area type	Area pseudonyms	Total number of disposals n	Custodial sentences %	Community-based sentences %
High custody-use areas	Hancock	55	18	82
	Hyannis	196	14	86
	Hartland	233	14	86
	Hunsford	660	13	87
	Hinesburg	1117	12	88
	Hubbardton	701	11	89
Medium custody-use areas	Midwich	232	9	91
	Meridianna	193	8	92
	Midston	241	6	94
	Middleton	175	4	96
Low custody-use areas	Lakehurst	542	3	97
	Lawndale	492	3	97
	Lindbergh	667	3	97
	Logan	189	3	97
	Littleton	281	3.5	96.5
	Leydon	68	0	100

* Shaded rows denote that the research was conducted in the both the youth and Crown Court.

Sampling of courts

In each of the 16 sample areas research was carried out in the magistrates' court sitting in its capacity as the youth court. To ensure that the research engaged with the full range of sentencing styles and cultures, the study was extended in eight areas to include the corresponding Crown Court. These areas were Hancock, Hartland, Hinesburg, Midwich, Midston, Middleton, Lakehurst and Lindbergh.

Sampling of sentencers

Within each area, two magistrates were identified for in-depth interview. Wherever possible, one was the chair of the youth panel and the other was the deputy chair. If the court included youth district judges then wherever possible we requested the co-operation of one district judge with the greater (number of sittings) youth court experience. If the court did not include disctrict judges then we requested to speak with a third magistrate. In each of the eight areas where research was conducted in the Crown Court we identified two judges for interview – the resident judge and the youth liaison judge. The idea behind selecting these particular sentencers was to ensure that we spoke with those who had the greater experience of sentencing young people.

Sources of data

Three main sources of data were collected from across the 16 sites. The core of the study was predominantly qualitative and comprised interviews with sentencers. One-to-one interviews were carried out with 37 magistrates, 10 district judges and 15 Crown Court judges. The interview schedule included questions about:

- approaches to sentencing, factors that encouraged or discouraged the use of custody
- the influence of the local media and public opinion
- national and local policing initiatives.

Interviewees were also asked to provide details of two borderline 'cusp' cases, that is, cases in which they imposed a community sentence, but which might have given rise to a custodial sentence and vice versa. Sentencers were asked to describe the cases, the specific factors which led them to pass such a sentence and make considerations as to 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.

Specific limitations of the study

The study was based on in-depth, qualitative interviews conducted with a purposive sample of 62 sentencers from a total of 16 'high custody', 'medium custody' and 'low custody' areas across England and Wales. We purposefully identified sentencers who had the most experience of presiding over court cases involving young people. The interviewees, therefore, provided a range of views but were by no means a representative sample of sentencers across, and within, the 16 areas.

In addition, 66 case studies recounted by sentencers involving young people who were reported to have been on the borderline between a community-based disposal and custody, were examined. Of these, 28 resulted in custodial sentences and the remaining 38 led to community-based sentences. Given the small and unequal sample sizes it was not possible, or appropriate, to analyse the data according to sentencer type or geographical area. Once again, it can not be assumed that the case studies or the decisions, approaches and attitudes of those who were interviewed are necessarily typical of, or specific to, all Crown and youth courts in all parts of England and Wales.

Research results

In the report we split the results into six main sections. We present here the main findings within each of those sections:

1. Approaches to sentencing (Section 3)

- Judges highlighted a lack of specific guidelines for sentencing young people, although they acknowledged that this was an area being developed by the Sentencing Guidelines Council.
- The main aims of sentencing, described by sentencers, were applied on the basis of three (mutually inclusive) factors. They were seriousness of the offence, the circumstances of the offender and aspects that were unique to the individual.
- Sentencers felt that striking a balance between different sentencing aims was not always clear-cut. Most agreed that some thematic considerations, such as 'welfare' and 'punishment', did not necessarily sit comfortably together. Different cases were deemed to require different approaches.
- The decision-making process described by magistrates was structured, and closely followed procedures set out in the *Youth Court Bench Book*.
- The approach taken by judges was more intuitive and to an extent based on their professional experience as advocates. They suggested that sentencing was akin to a 'fine art' rather than 'scientific' assessment.
- Magistrates voiced concern that they were rarely involved in determining the disposal and length of sentence in cases that needed to be deferred for background reports. Rota arrangements made it unlikely that the same bench would be assembled to review this additional information. Magistrates were, likewise, called upon to pass sentence in cases where they had no previous involvement.
- Most magistrates believed that they enjoyed moderate levels of discretion when determining a sentence, even when applying relevant guidelines. Crown Court and district judges believed they retained considerable levels of discretion, and insisted on their right to depart from sentencing guidelines where there were sound reasons for doing so.

2. Attitudes to custody (Section 4)

- Sentencers were generally sceptical about the effectiveness of custody as a means of preventing reoffending by young offenders. They argued that it:
  - failed to address the underlying causes of offending behaviour
  - did more harm than good, and risked making 'bad people, worse'
  - had little impact on individual deterrence (as evidenced by the high rates of reoffending).
- In so far as custody was deemed effective, this chiefly related to taking young offenders out of circulation for the time that they were imprisoned, allowing the community a period of respite.
- A small number of sentencers believed that a custodial environment could, in some circumstances, benefit young offenders. They maintained that, to their knowledge, secure establishments were sometimes in a better position to provide rehabilitative treatments and programmes than community services. Some also saw custody as a way of introducing boundaries and structures into the chaotic lives of some young offenders.

- Sentencers were aware that prison could be ‘hellish’ and ‘nasty’ for young people. Some, nevertheless, argued that a ‘short, sharp shock’ period in custody (e.g. time spent on remand, first few weeks of custodial sentence) could be a more effective means of deterring some susceptible young people by acquainting them with the reality of life behind bars. It was believed that after this initial period, the shock value of custody was overcome.
- Despite general scepticism concerning the value of custody, there was a widespread and strongly held view among sentencers that custodial sentences were given to young offenders because they had become ‘unavoidable’. This endpoint could be reached because of the seriousness of an offence, but more commonly sentencers described feeling that community alternatives had been exhausted and ‘enough was enough’.
- Many sentencers questioned the value of Detention and Training Orders (DTOs) of between four and six months because they considered the secure estate was unable to provide education and training opportunities for short-term inmates.

3. Factors that encourage and discourage the use of custody (Section 5)
    - Many sentencers identified three main considerations that increased the likelihood of custody for young offenders:
        - The nature and seriousness of the offence for which the young person had been convicted, including aggravating factors such as unprovoked violence, serious injury to a victim, or use of a weapon. Some sentencers felt harsh penalties were also needed to make an example of offenders convicted of crimes that were prevalent in the local community.
        - Previous criminal history, especially if a young person was considered to be a persistent young offender who had failed to change his or her behaviour following a previous community-based sentence/s.
        - An offender’s personal circumstances, including situations where a young offender’s lack of permanent accommodation was deemed to make them unsuitable for an Intensive Supervision and Surveillance Programme (ISSP) in the community. Personal factors were regarded as being less influential, but included a person’s age (approaching 18), lack of engagement in education, training or other purposeful activities and a ‘chaotic lifestyle’.
    - A range of factors were reported to mitigate the need for a custodial sentence. Some required limited judicial discretion, including (young) age, first-time offender, a guilty plea (with personal mitigation), medical problems, and emotional and learning difficulties. Other mitigating factors included a young offender’s characteristics, circumstances and attitude:
        - Sentencers said they tended to look more favourably on young people reported to be ‘of previous good character’ who were constructively engaged in education, training or work. Motivation and ‘willingness to turn one’s life around’ were also considered mitigating factors.
        - Family support and evidence of a stable personal relationship were both well-received by sentencers and they reported feeling encouraged when parent/s accompanied young people to court.

- An offender's remorseful response to prosecution could also discourage the use of a custodial sentence. Sentencers looked for signs of contrition, although what constituted 'genuine remorse' was not entirely clear.
- Sentencers (mostly judges) described circumstances where they had wanted to help young offenders in difficult circumstances by giving them one last chance. This was usually, though not always, for more welfare-oriented reasons.

4. Sentencing decisions in borderline cases (Section 6)
    - Sentencers who passed judgement on a fictional sentencing 'vignette' tended to support a non-custodial disposal. Most accepted a YOT recommendation to make a Supervision Order with an ISSP. Five sentencers, including two Crown Court judges, said the fictional offender would have received a DTO in their courtroom.
    - A number of sentencers, including those who declined to reach a decision on the basis of the vignette, expressed concern about the suitability of the fictional young offender's accommodation – a hostel – as a basis for supervision and surveillance in the community.
    - Altogether, 49 sentencers including 31 magistrates, six district judges and 12 Crown Court judges, described 66 borderline cases. Of these, 28 had resulted in custody and 38 in community-based sentences.
    - A number of the 'cusp' cases described by sentencers involved first-time offenders who had pleaded guilty to serious offences, requiring the court to choose between a Referral Order or custody.
    - In cases that had resulted in custody, the decisive factors identified by sentencers were a young offender's previous history, the seriousness of the offence, the personal characteristics of the offender and the perceived interests of victims and the wider community.
    - In cases that had resulted in community-based sentences, a young person's personal characteristics and circumstances were by far the most frequently cited factors. Other factors that were cited included criminal history, background reports by professionals and the young person's response to prosecution.
    - In cases that involved decision-making between a Referral Order and a custodial sentence, the key factors mitigating the use of custody were to do with the personal characteristics and circumstances of the offender.
5. Alternatives to custody (Section 7)
    - Sentencers interviewed as part of this study were, in the main, satisfied with the range of non-custodial disposals available for young people and were of the opinion that the content and delivery of such disposals had improved in recent years.
    - A notable exception to this was in relation to first-time offenders who pleaded guilty where their choice of disposals was limited to a 'stark choice' between a Referral Order (referring them to a youth offender panel in the community) and custody.

- Sentencers believed the Referral Order lacked rigour as a response to serious offences compared to other community disposals, notably Supervision Orders and ISSP. A few indicated that some first-time young offenders guilty of serious offences might not have been incarcerated if a more demanding, community-based sentence had been available.
- Some sentencers also suggested that the Referral Order was an unsatisfactory option because of the time taken to implement and commence the order.
- ISSP was the community alternative to custody singled out for the most praise by sentencers. Almost half took the view that an ISSP was equally if not more arduous for the young person and struck an appropriate balance between punishment and welfare. A few sentencers expressed scepticism based on recent research into the reconviction rates for the disposal.
- A large proportion of sentencers insisted there was no real community alternative to custody if it was used, as intended, for the most serious offenders or as a last resort.
- Although sentencers were mostly content with the quality of the background information in pre-sentence reports (PSR) prepared by YOTs, there was a strongly held view that YOT workers seldom included custody among the disposal options they discussed and recommended. This caused frustration and led some to believe that YOT sentencing proposals were unrealistic.
- A lack of confidence in YOT sentencing proposals appeared to be crucial to explaining why many sentencers insisted that PSRs were of minimal use when deciding between custody and a community sentence in 'cusp' cases.
- Those sentencers who reported that PSRs were of moderate use when choosing between community sentences and custody tended to be those sitting in areas that made relatively low use of custody in comparison to the high custody use areas.
- There was general satisfaction expressed with the quality and commitment of YOT staff. However, some sentencers complained that the level of attendance by YOT officers in their courts was unsatisfactory. This was attributed to financial and staffing shortages.
- The majority of sentencers said they would find it helpful to receive feedback from the YOT about the impact of community and custodial sentences. They especially regretted a lack of feedback in cases where they felt they had taken a sentencing risk. Judges appeared more likely to ask for – and receive – feedback than magistrates.

6. Other influences on sentencing (Section 8)

- The magistrates who were interviewed described obtaining authoritative information from their court's legal adviser on case law, sentencing guidelines and tariffs. However, it was noticeable that most did not mention the legal adviser as a major influence on their sentencing decisions.
- Few sentencers thought the media exerted any significant influence over their sentencing decisions, but concern about the way that individual decisions might be reported in the local, and sometimes national, media was widespread.

- Half the sentencers who expressed a view said they took significant account of public opinion, especially when dealing with offences that caused most concern in the community. However, there was also a widespread acceptance that caution was required to ensure that justice was administered impartially. There was a widely held belief that many members of the public took a harsh view of crime and punishment without having access to the full facts revealed in court.

Conclusions and recommendations for future research, policy and practice

The context for the research is the YJB's committment to meet its national target to reduce the population of young offenders in custody. The YJB is firmly committed to a policy of restricting custody to only those who cannot be dealt with by other means. Although the fieldwork and analysis of this study proceeded Lord Carter's review of the prison system in England and Wales, it would appear that the need to better understand the mechanisms and influences that drive decision-making, particularly where it relates to custody, is all the more relevant.

Lord Carter's review *Securing the future: Proposals for the efficient and sustainable use of custody in England and Wales* (2007) highlighted that demand for prison places will continue to outstrip the supply of prison places in the short, medium and long terms unless measures to increase the capacity of the prison estate, and improve the way custody is used, are taken to address this imbalance. Although the review includes only young offender institutions (YOIs) so far as young people are concerned (it excludes secure children's homes and secure training centres [STCs]), it could be argued that his recommendations are also relevant to managing and responding to young people involved in the youth justice system.

The review acknowledges the complexity and uncertain effects that external factors have on the sentencing framework. Moreover, he notes that predicting the factors that determine and influence sentencing is difficult and this can have implications for Government decision-making and planning on the use of resources. He makes a recommendation that a working group be establishned to consider the advantages, disadvantages and feasibility of a structured sentencing framework and a permanent sentencing commission to bring greater transparency, predictability and consistency to sentencing and the criminal justice system.

By examining the sentencing activities and perceptions of magistrates, district and Crown Court judges from selected areas, this study has been able to shed new light on the influences and reasoning that lead sentencers to choose between custody and community alternatives. It adds to existing evidence that there are interlinked factors influencing sentencing outcomes that go beyond merely considering the seriousness of a particular offence. The chosen interview sample and methods did not yield all the insights we would have wished; a smaller than expected response to the request for sentencers to identify two cusp cases each made it impossible to analyse the resulting data by sentencer type and area, as hoped. Nevertheless, the decision to focus on borderline cases yielded a wealth of data that indicates a number of areas where changes in policy and practice might lead to greater consistency in sentencing.

- While magistrates reported making extensive use of the *Youth Court Bench Book* in their sentencing decisions, judges highlighted a lack of specific guidelines for sentencing young people. Although judges often favoured a more intuitive 'fine art' approach to sentencing, a decision by the Sentencing Guidelines Council to prioritise

the production of new guidance could help to reduce the current variations between courts (Section 3).

- It is acknowledged that the proportion of cases where sentencing is deferred pending reports may be small and that sentencers will typically hear a great deal of evidence. Nevertheless, some magistrates expressed concern that a decision to defer sentencing made it unlikely that they would determine sentence when the young offender returned to court. While rota arrangements may make it difficult for magistrates to 'reserve' cases (as judges may do), it may be worthwhile exploring the possibility of ensuring that at least one member of the original bench is sitting at the time of sentence to help bring about consistency (Section 3).

- Sentencers were generally sceptical regarding the effectiveness of custody beyond its ability to take a young offender out of circulation for a time. Even so, there was a widespread view that custody became 'unavoidable' in certain cases due to the seriousness of the offence or in regard to repeat offenders, that community alternatives had been exhausted. Views of what defined this 'endpoint' where sentencers feel 'enough is enough' often appeared vague and subjective. Further research around this 'endpoint' is recommended to determine whether or not there are differences between sentencers in reaching this decision. In addition, once this is known, there could be scope for producing guidelines to ensure greater consistency in determining when the endpoint is reached (Section 4).

- A few sentencers considered there were circumstances where custody could benefit young offenders by making rehabilitative treatments available which they thought could not be accessed while serving a community sentence. At the same time, it was apparent that not all magistrates and judges were familiar with the availability or effectiveness of drug treatment facilities and other relevant interventions in the community. This may suggest gaps in the availability of community treatments as well as a lack of awareness among some sentencers of what is available in their area. A need for improved community rehabilitation services and better information for sentencers both appear to be indicated (Section 4).

- A number of sentencers maintained that custody could set boundaries and offer structure to some young people who lead chaotic lives and that, for susceptible individuals, a 'short, sharp, shock' period of imprisonment could act as a deterrent. Primary research may be justified to further examine the outcomes of short-term custody (periods of less than a four-month DTO) in relation to young offenders (Section 4).

- A larger group of sentencers expressed doubts about DTOs of between four and six months, on grounds that the secure estate was unable to provide sufficient education and training for this group of young people. Rather than justifying longer, standard sentences, this may suggest a need to re-examine and intensify the education and training components of short, 'entry-level' DTOs (Section 4).

- Some sentencers took a view that harsh penalties were justified to 'make an example' of young people who committed offences that had become especially problematic and prevalent in their area. These localised problems (for example, a spate of car crime) may help to explain some sentencing discrepancies within and between areas. National policy makers may wish to explore the reasons why (a) particular offences are dealt with by means of a custodial sentence in one area when they would receive

a less severe, community disposal elsewhere and (b) investigate if there is disparity between sentencers in the same local court and jurisdiction (Section 5).

- Greater equity remains a consideration in the treatment of young offenders whose lack of a permanent address was seen to place them at greater risk of custody than those whose accommodation or family arrangements were more secure. Sentencers were generally clear that, in cusp cases, a young person's lack of permanent accommodation often made them unsuitable for ISSP as a demanding alternative to custody. Action to tackle the reported shortage of age-appropriate accommodation for young people without a permanent home, including those formerly in public care, could play a significant part in reducing the current resort to custody (Sections 5 and 6).

- Sentencers said they tended to look more favourably on young people who were constructively engaged in education, training or work and who came from 'a good home'. Having a parent present in court was identified as one of a number of mitigating factors when sentencing in cusp cases. This could place the most excluded and vulnerable offenders at added risk of custody. One potential solution may lie in the wider use of promising community alternatives for young offenders that include intensive family-based support (Utting et al, 2007) – for example, multidimensional treatment foster care (Chamberlain, 1998) and multisystemic therapy (Henggeler, 1998) (Sections 5 and 6).

- An offender's remorse, provided it was taken by sentencers to be sincere, was another factor cited as discouraging the use of custody. Given the value they placed on evidence of genuine contrition, it is possible that there may be scope for enhancing the attraction of intensive community sentences by adding to the existing components for achieving reparation to victims and 'restorative justice' (Section 5).

- The value of a guilty plea in borderline cases involving adult offenders has been found to be exceptionally important in deciding whether or not to impose a custodial sentence. Previous research (see Hood, 1992) suggests that a significant amount of the differential in sentencing between Black and White adult offenders is due to the greater reluctance of Black defendants to plead guilty. Further research to explore whether credit for the guilty plea has a discriminatory effect on juvenile offenders who 'prefer to have their day in court and take their chances before a jury' (Wasik, 2004) may be justified (Section 5).

- Although sentencers were largely satisfied with the range of non-custodial disposals available to them, the use of Referral Orders for first-time offenders pleading guilty was a notable exception. Many complained of a 'stark choice' in serious cases between immediate custody and referring the young person to a youth offender panel, which they considered insufficiently rigorous. Some said the lack of a demanding alternative had, on occasions, persuaded them to impose a DTO. A more 'demanding' alternative to the Referral Order might be considered for use as an alternative to custody in serious cases (although there would be a risk of courts moving 'up tariff' and reducing their use of Referral Orders rather than their use of custody). However, it might be preferable as a first step to ensure that sentencers are properly familiar with the work of youth offender panels and their capacity, through a demanding restorative approach, to repair the harm caused by an offence and tackle the causes of offending behaviour (Section 7).

- Another complaint about Referral Orders concerned the time taken to implement them. Action to reduce time-lags in bringing young people before youth offender panels and implementing the order could help to strengthen confidence among sentencers (Section 7).
- Despite some doubts about reconviction rates, the sentencers interviewed took a generally positive view of the ISSP imposed alongside Supervision Orders or Community Rehabilitation Orders. Almost half considered the ISSP to be at least as demanding on young offenders as custody and approved of the balance struck between punishment and welfare provision. Although reconviction rates of 90% have been recorded, ISSPs have been associated with reductions in the frequency and seriousness of reoffending compared with the DTO (Gray et al, 2005). The views of sentencers underline the value of finding ways to make the ISSP more effective in reducing reoffending so their benefits and cost effectiveness are made clear when compared with custody (Section 7).
- One of the most intriguing findings from the study concerns the opinions that sentencers gave concerning PSRs prepared by YOTs. Although mostly content with the quality of the background information provided on young offenders, many sentencers expressed disappointment that custody seldom figured in the options and recommendations for sentencing. Seemingly as a consequence, it was commonly maintained that PSRs exerted little influence when deciding cusp cases. Further research should be undertaken to explore if greater willingness to discuss custodial options might lead to YOT proposals being given more credence (Section 7).
- Other research contemporaneous with this study (see Tata, 2007) has found that sentencers and lawyers have often made comments about PSRs not being 'realistic'. It could be argued that realism is subjective and therefore poses some difficulties for the report writer. This issue may merit further research that focuses on inter-sentencer disparity.
- Despite the general satisfaction expressed with the quality and commitment of YOT staff, some sentencers complained that attendance by YOT court officers was unsatisfactory and that the local YOT had – on occasions – been represented in court by staff who were not familiar with the individual cases being determined. Assuming these complaints are justified, there is a case for remedial action to restore confidence and prevent court time being wasted (Section 7).
- The majority of sentencers interviewed were keen to receive feedback from YOTs about the impact of sentencing – especially in cases where they felt they had taken a risk by deciding on a non-custodial alternative. Moreover, judges reported making use of progress reports on young people by way of congratulating those who demonstrated compliance with the community penalty. On this basis, it is worth considering the utility of providing feedback to sentencers on a routine basis. It could prove a valuable tool to inform sentencers of the outcomes (both positive and negative) of those young people who are serving community-based sentences (Section 7).
- Most of the magistrates interviewed did not mention the legal adviser as a major influence in their sentencing decisions. There is considerable literature that suggests that while sentencers enjoy wide discretion, the informal agenda of cases may be shaped by others, for example, legal advisers (previously referred to as clerks) and defence solicitors. It was not within the remit of this study to include legal advisers

and defence solicitors in the interview sample. However, it would be useful to undertake future research that includes these stakeholders to explore the extent to which they play a part in the sentencing decision process (Section 8).

- While sentencers reported that local and national media exerted very little influence over their decisions, around half said they did take public opinion into account, especially when dealing with offences believed to cause particular concern among the community. Sentencers also felt that the public, without access to the full facts of a case, tended to take a harsher view of crime and punishment than the courts. Given the indications that concern for public opinion can translate into tougher penalties for locally prevalent offences (see above), it may be worthwhile considering the efficacy of local campaigns to make the public more aware of the demanding nature of ISSPs and other community-based alternatives to custody (Section 8).
- The main element to the empirical research conducted for this study was one-to-one interviews with sentencers. It is important to note that the interviews provided sentencers' accounts of what they do rather than observing sentencing in-situ. With this in mind, we advocate that future studies of this kind employ a variety of different methods (e.g. pre- and post-sentencing interviews; observations of sentencing hearings; focus groups; simulated sentencing hearings; a follow-through of the trajectory of borderline cases, etc.) that may help to better focus on exploring the interpretation of borderline 'cusp' cases. Particualar consideration should be given to creating an exercise based on fictitious case papers. This could enable consideration of 'typical' borderline cases without the need to discuss real cases (if this poses an issue). Moreover, the use of either real or mocked-up case papers would be especially helpful in understanding how sentencers interpret case material.

1 Introduction and background

Introduction

The YJB commissioned the Policy Research Bureau (PRB), working with Nacro, to undertake a study of sentencing decisions made by courts and identify why some young people are sentenced to custody and others to community sentences. The research builds on existing work by Bateman and Stanley (2002) and Nacro (2000), which showed much geographical variation in the rates of sentencing young people to custody. Both studies concluded that no single factor could be readily isolated to account for differential sentencing across geographical areas. Moreover, the present research is similar, in some aspects, to the study carried out by Hough et al (2003). The starting point of that research was based on the assumption that politicians may wish to curb the use of imprisonment for adults. The main aims of that study were to look at what might discourage the use of custody by sentencers, and what might encourage the use of non-custodial alternatives, thereby reducing the prison population. The present study, to some extent mirrors that conducted by Hough et al (2003) in that it explores the process by which sentencing decisions are made by judges and magistrates, particularly in relation to juvenile cases that are on the borderline between custody and community sentences.

The present report adds to the pool of research by looking in more detail at actual cases involving young offenders aged 10 to 17, and exploring the issues that may impact on sentencing at an individual rather than general level. It gives an account of the sentencing decisions made by a sample of 62 sentencers, including magistrates, district judges and Crown Court judges across 16 YOT areas in England and Wales. It documents their approaches to sentencing and the decision-making process, as well as offering an insight into their attitudes towards custodial and non-custodial penalties. It highlights a wide range of different factors that were reported by sentencers to encourage or discourage the use of custody in borderline or 'cusp' cases – cases that were deemed to lie on the brink between a custodial and a community sentence (Tombs and Jagger, 2006). The report concludes by suggesting ways to help bring about greater consistency and equity in sentencing outcomes for young offenders.

Background to the study

The sentencing framework for children and young people

The sentencing framework for children and young people is more complicated than that for adults (Nacro, 2003). Sentencing practice is informed by a number of distinct principles (for a fuller description see Nacro, 2003). Section 37 of the Crime and Disorder Act 1998 introduced a statutory aim for the youth justice system:

> *It shall be the principal aim of the youth justice system to prevent offending by children and young persons. In addition to any other duty to which they are subject, it shall be the duty of all persons and bodies carrying out functions in relation to the youth justice system to have regard to that aim.*

The principle, suggesting that the welfare of the child should inform court decision-making, is taken from s 44 of the Children and Young Persons Act 1933, which states that:

> *Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person…*

However, the Court of Appeal has since made it clear that, in sentencing:

> *The welfare of young offenders is never the only consideration to be taken into account.*
>
> (Attorney-General's References in Ball et al, 2001)

The sentencing framework introduced by the Criminal Justice Act 1991, now contained in the Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S)A), is based on the notion of 'just deserts'. It depends upon the idea that:

> *The sentence for a given offence should reflect primarily the seriousness of the offence which has been committed.*

The legislation provides a structure for this principle by establishing thresholds that must be reached before certain penalties are deployed. In so doing, it creates, what are sometimes referred to as, three sentencing bands:

- custodial sentences
- community sentences
- 'lower-level' disposals (e.g. Referral Orders, discharges, financial penalties and Reparation Orders).

More recently, the Court of Appeal has issued a substantial number of guideline judgements designed to regulate the exercise of discretion. In addition, the Crime and Disorder Act 1998 gave the Court of Appeal a duty to issue new sentencing guidelines and to revise those that already exist. A Sentencing Advisory Panel was set up to assist in that task. This development was taken further by the 2003 Act which established a Sentencing Guidelines Council (SGC), chaired by the Lord Chief Justice (Esmeé Fairbairn Foundation, 2004a).

Policy context

The YJB set itself a national target to reduce the population of young offenders in custody by 10% between October 2002 and March 2007 and adopted a series of measures at a national level in order to support the achievement of this target. Consequently, YOTs have performance indicators requiring them to limit the use of custodial sentences and remand. PA Consulting Group was commissioned by the YJB to work with 10 selected YOTs to identify factors influencing custody at a local level and develop areas of good practice. Their report (Bickle and Jones, 2003) found that generally there was a disparity between the 10 areas in the proportion of different offences resulting in custody. Offence and offender seriousness were acknowledged as important contributing factors to sentencing decisions, but it appeared there were other factors influencing the levels of custodial sentencing.

A criminal justice report by the Audit Commission (2004) revealed that on average just over half of magistrates considered reoffending rates for particular sentencing disposals when reaching their decisions, although this proportion reached 80% when local community programmes were being considered. They also acknowledged that sentencing decisions were related to magistrates' levels of confidence in the YOT's

delivery of community sentences. The report suggested that confidence was higher in areas where custody rates were low, and vice versa.

In October 2004 the House of Commons Committee of Public Accounts examined the effectiveness of aspects of public spending on addressing youth offending. One of eight key recommendations was for the YJB to work more closely with courts to plan the number of custodial places likely to be needed and to enhance the court's confidence in community sentences.

Use of sentences for young people

Data supplied by the YJB to the Sentencing Guidelines Council (SGC) (see *The Sentence: The Sentencing Guidelines Newsletter*, 2007) show that in England and Wales the number of court disposals for young people under the age of 18 years has been steadily rising from 94,000 in 2002/03 to 118,000 in 2005/06. Self-report data suggests that offending levels have remained stable (Wilson et al, 2006). Thus, the most likely explanation for the increase in court disposals is more detection and more cases being prosecuted. The proportional use of non-custodial sentences has increased over this period, with a corresponding reduction in the use of custodial sentences. However, in numerical terms, custodial sentences are still rising.

Custodial sentences

In 2002/03 the number of young people who received a custodial disposal was 7,061 and while there were minimal reductions during 2003/04 and 2004/05, this figure crept back up to 7,096 in 2005/06. In 2001, 82% of males discharged from a YOI were reconvicted within two years of release. For those with three to six previous convictions, the rate of reconviction was 92% and 96% for those with seven to 10 previous convictions. Of those who reoffended, 56% were returned to custody within that 24-month period (Home Office, 2005). However, it is worth noting that generally those who receive custodial sentences are deemed to have commited more serious offences and/or are more persistent than those who receive community-based penalties, and will therefore be more likely to reoffend.

Community-based sentences

The Youth Justice and Criminal Evidence Act 1999 (now consolidated in the Powers of Criminal Courts [Sentencing] Act 2000) introduced the Referral Order, a new sentence for young offenders pleading guilty and convicted for the first time. The intention behind the order was to prevent reoffending by young people and provide for a restorative justice approach within a community context (Home Office/Lord Chancellor's Department/YJB, 2002). The Referral Order was rolled out nationally in April 2002. As a result of its near mandatory nature for children and young people appearing in court for the first time who plead guilty, it has rapidly become the most frequently used court sentence. During 2005/06, Referral Orders accounted for almost one in four (24%) of all court penalties. It has primarily displaced the Reparation Order and Action Plan Order, both of which had initially proved popular with the courts from their introduction in 2000.

Variations in custodial sentencing

Information collected by the YJB from each of the YOT areas shows noticeable differences in sentencing outcomes across England and Wales. This does not appear to be wholly attributable to the type of offence being heard before the courts. For example, figures based on 2005/06 data indicate that on average, the ratio of custodial sentencers to all sentences is 9%. However, this figure varies from 7% (in the North East, South

East and South West) to 11% (in London, Wales and the West Midlands) and shows considerable variation across individual YOT areas as well as regions.

Variations in custodial placements can occur for a wide range of reasons, ranging from population changes to changes in the law. However, it is crucial, particularly with regard to children and human rights legislation and conventions, that any variations in the custodial rates are not simply the result of inequalities or inefficiencies in the system. To this end the activities and perceptions of magistrates, district judges and Crown Court judges are of central importance in the custody decision.

Aims of the study

This study builds on the evidence (e.g. Hough et al, 2003; Bateman and Stanley, 2002; Nacro; 2000; Parker et al, 1989) that shows there are a number of complex and dynamic factors influencing sentencing outcomes that go beyond offence seriousness. Previous studies have concentrated on the overall level of rates of custody, and magistrates' general views on local youth justice provision, adequacy of pre-sentence reports, and effectiveness of inter-agency communication. This research develops this work by looking at a series of cases, both real and hypothetical, exploring the issues that have an impact on decision-making at an individual level. It is based on an underlying assumption that, in order to ensure greater equity and consistency in the way young offenders are sentenced, there is a need to understand the mechanisms and influences that drive decision-making with young offenders who are on the 'cusp' of custody.

The research was focused on the following aims:

- determining the reasons why custodial or community sentences had been made in borderline 'cusp' cases
- understanding the differences between sentences made by magistrates, district judges and Crown Court judges
- establishing the views of sentencers on making custodial or community sentences.

The study had several subsidiary aims:

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

Note on terminology

From this point onwards, when referring to 'community-based' sentences or penalties, the report makes no distinction between what the YJB refer to as 'first-tier penalty' and 'community-based penalty'. Throughout this report 'community-based sentence' refers

to all statutory orders made at court (including bind over; Compensation Order; discharge; fine; Referral Order, Reparation Order and sentence deferred).

2 Research methodology

Introduction

The overall approach of this study relied principally on qualitative methods. The main aims of the study were pursued through face-to-face in-depth interviews, with a total of 62 magistrates, district judges and Crown Court judges in 16 YOT areas. Data including: demographics and personal characteristics of the offender, offence and offending history, type of disposal made and aggravating/mitigating circumstances which led to the sentence were collected for 66 individual sentencing decisions involving young offenders that were on the borderline between custody and community disposals. In addition, qualitative data were collected from 55 sentencers who responded to a standardised, fictional sentencing 'vignette' of a 'cusp' case. Data collection was undertaken during the months January to April 2006. Table 2.1 summarises the research methods used listing data sources and sample details.

Table 2.1: Summary of sources and methods of data collection

Method/Data source	Sample	Total number
1. Interviews with Magistrates	Chair and deputy chair of youth panel and other magistrate with youth court experience in the absence of district judge	37
2. Interviews with district judges	District judge with youth court experience	10
3. Interviews with Crown Court judges	Resident and youth justice liaison judge	15
4. Borderline cusp cases	Sentencers participating, in-depth interviews	66
5. Sentencing vignette	Sentencers participating, in-depth interviews	55

Methodology

Sampling

The YJB collects monitoring and performance data on the use of pre-court, community and custody disposals imposed on young people aged 10 to 17 years passing through the (pre-court) and court system. Disposals are available by region and individual YOT areas, and are broken down by four categories:

- age
- sex
- ethnicity
- total.

Data for the period April 2004 to March 2005 were used as a framework from which to purposively select a sample of 16 YOT areas that ensured a full range of likely relevant factors was taken into account, including:

- a spread of high, medium and low custody-using areas
- a regional spread of YOT areas across England and Wales (e.g. north and south)
- inclusion of areas that ensured a satisfactory urban and rural mix
- inclusion of courts with specialist youth panels and youth district judges where decision-making may be different
- inclusion of courts that were reasonably accessible to allow for a number of visits to be made within a short period of time.

Table 2.2 provides details of the 16 YOT areas involved in the research sample. The areas have been allocated pseudonyms to protect the confidentiality of interview participants. Area names beginning with the letter 'H' were assigned to high custody-use areas, 'M' indicates medium custody-use and those with the letter 'L' were relatively low custody-use areas.

Table 2.2: Sample of YOT areas*

Area type	Area pseudonyms	Total number of disposals n	Custodial sentences %	Community-based sentences %
High custody-use areas	Hancock	55	18	82
	Hyannis	196	14	86
	Hartland	233	14	86
	Hunsford	660	13	87
	Hinesburg	1117	12	88
	Hubbardton	701	11	89
Medium custody-use areas	Midwich	232	9	91
	Meridianna	193	8	92
	Midston	241	6	94
	Middleton	175	4	96
Low custody-use areas	Lakehurst	542	3	97
	Lawndale	492	3	97
	Lindbergh	667	3	97
	Logan	189	3	97
	Littleton	281	3.5	96.5
	Leydon	68	0	100

*Shaded rows denote that the research was conducted in the both the youth and Crown Court

Sampling of courts

In each of the 16 sample areas research was carried out in the magistrates' court sitting in its capacity as the youth court. To ensure that the research engaged with the full range of sentencing styles and cultures, the study was extended in eight areas to include the corresponding Crown Court. These areas were Hancock, Hartland, Hinesburg, Midwich, Midston, Middleton, Lakehurst and Lindbergh.

Sampling of sentencers

Contact with sentencers was arranged through the local justices' clerk office, court service manager or director of legal services. Within each area, two magistrates were identified for an in-depth interview. Wherever possible, one was the chair of the youth panel and the other was the deputy chair. If the court included youth district judges then wherever possible we requested the co-operation of one district judge with the greater (number of sittings) youth court experience. If the court did not include district judges then we requested to speak with a third magistrate who usually sat as a chair (rather than a 'winger') on the youth bench. In each of the eight areas where research was conducted in the Crown Court we identified two judges for interview – the resident judge and the youth liaison judge. The idea behind selecting these particular sentencers was to ensure that we spoke with those who had the most experience of sentencing young people.

Data collection

Changes to original methodology and data sources

Initially we had planed to identify a sample of between six to eight 'real-life' 'borderline' cases, where a real choice between custody and community options may have existed on the basis of case history and offence seriousness. The intention was to develop a recording system to rate aspects of background factors and reasons for sentencing decisions collected from the relevant courts and local YOTs. This would have been followed up with case-focused interviews with the relevant sentencers who were involved in the decision-making for these sample cases.

However, when we consulted with the research advisory group to discuss our data collection methods and negotiate access to court records and interviewees, it was apparent that some potential key stakeholders had grave concerns. A few magistrates (representing the Magistrates' Association) in particular raised objections to the proposed data collection methods and voiced their concerns over being interviewed about actual cases in which they had passed judgement. Their concerns were mainly to do with communicating specific aggravating and mitigating factors and the use and application of discretion in real life cases, for which we would have access to court and YOT records. Consequently, after lengthy consultation with key sentencers and legal advisers, the original methodology was amended in favour of the one detailed below. This change in research methods was unfortunate and the specific limitations of this approach are discussed later in this section.

Interview with sentencers

One-to-one in-depth interviews were held with the relevant sentencers across the 16 areas and lasted approximately 90 minutes. Interviews were scheduled to take place before or after court sessions to avoid disruption to daily court business. In all, 59 interviews were recorded with the participant's consent and fully transcribed. The remaining three sentencers declined to have the interview recorded and researchers took full notes throughout.

The interview schedule incorporated questions to explore the complex factors that were considered when sentencing borderline cases, and the extent to which each of these factors influenced the decision-making of magistrates, district judges and Crown Court judges. The following thematic areas were included in the interview schedule:

- views on, and approaches to, sentencing (e.g. sentencing philosophy, sentencing aims and decision-making process)

- factors that encourage or discourage the use of custody
- definition and frequency of borderline cases appearing before the courts
- general perceptions of the effectiveness of custodial sentences for young people
- attitudes towards community sentences (e.g. availability, quality and confidence in non-custodial disposals)
- relationship with the local YOT (e.g. communication, quality of reports, breach policy and practice, etc.)
- influence of the local media and local public opinion on sentencing practice
- influence of national and/or local policing initiatives.

Borderline or 'cusp' case studies

Sentencers were asked to describe in detail a typical 'cusp' case in which they imposed a custodial sentence, but which could have given rise to a community-based sentence. They were asked to explain which factors had determined the sentencing outcome and give reasons why. They were also asked to consider what might have encouraged them to pass a community sentence instead. This exercise was then completed the other way round, focusing on a typical case in which they had imposed a community-based sentence but where custody might have been the outcome.

Sentencing vignette

Finally, sentencers were presented with a vignette (a brief illustrative scenario of a fictional offender awaiting sentencing) and asked to pass sentence on the fictional character, stating the aggravating and/or mitigating circumstances that influenced their decision. The purpose here was to allow for responses to be measured and compared by sentencer type and area using a standardised instrument (i.e. one illustrative scenario to be used with all sentencers regardless of sentencer type and area).

Data analysis

The qualitative material from interviews was transcribed verbatim and in full. In the case of non-taped interviews, notes were included for analysis. Analysis was undertaken using an agreed and standardised procedure involving the 'framework' technique developed by Ritchie and Spencer (1994). This involved 'indexing and charting' interview transcripts (a form of qualitative coding) according to key themes to highlight dominant themes. All quantifiable data were entered and analysed using MS Excel. The quantitative analysis was double coded by two senior researchers to ensure consistency in recording practices.

Specific limitations of the research design

Before embarking on the main body of this research, it would be useful to put this research and its subsequent findings in context. The study was based on in-depth, qualitative interviews conducted with a purposive sample of 62 sentencers from a total of 16 'high custody', 'medium custody' and 'low custody' areas across England and Wales. We purposefully identified sentencers who had the most experience of presiding over court cases involving young people. These sentencers included resident and youth liaison judges, district judges and chairs and deputy chairs of the youth court panel in the magistrates' court.

In addition, 66 case studies (provided by 49 out of a possible 62 sentencers) were examined involving young people reported to have been on the borderline between a community-based disposal and custody. Of these, 28 resulted in custodial sentences and the remaining 38 led to community-based sentences. It is worthwhile noting that although most of the interviewees were able to recall at least one borderline case, this tended to be one that was fairly recent. Moreover, caution should be exercised given the use of self-report data. For example, it is possible that sentencers may have selected cases that presented them in a more favourable light. Given the small and unequal sample sizes, as well as differences in response rate, it was not possible, or appropriate, to analyse the data according to sentencer type or geographical area.

The interviewees provided a range of views and cases but it cannot be assumed that the case studies or the decisions, approaches and attitudes of those who were interviewed are necessarily typical of all Crown and youth courts in all parts of England and Wales. In addition, while sentencers in the sample were asked for their views about the role of YOTs and other parts of the youth justice system, it was not our brief to seek their corresponding views and response.

There was one main element to the empirical research conducted for this study and that was one-to-one interviews with sentencers. It is important to note that the interviews provided sentencers' accounts of what they do rather than observing sentencing in-situ. With this in mind, we advocate that future studies of this kind employ a variety of different methods (e.g. pre- and post-sentencing interviews; observations of sentencing hearing; focus groups; simulated sentencing hearings; a follow-through of the trajectory of borderline cases) that may help to better focus on exploring the interpretation of borderline 'cusp' cases.

The reader is reminded that the scope of this research was acutely focused on the role of sentencers and their decision-making in relation to borderline cases involving young people. However, there is a considerable literature that suggests that while sentencers enjoy wide discretion, the informal agenda of cases may be shaped by others including legal advisers (previously referred to as clerks) and defence solicitors. This is discussed later in the report.

For the reasons given above, we have deliberately refrained from translating the findings into firm proposals for practice and policy. However, we believe the research indicates a number of areas where further research could be undertaken, and where the YJB, Ministry for Justice (MoJ) and other policy-making bodies could consult across the youth justice system with regard to cases on the cusp of custody.

Structure of the report

The report on the findings begins in Section 3 by exploring the experiences of magistrates, district judges and Crown Court judges in relation to the youth court and their adherence to the legislative and legal framework. Section 4 investigates sentencers attitudes towards the use of custodial sentences for young people aged 10 to 17 years old. Section 5 provides a comprehensive discussion about the range of factors relating to the offender, the offence and other circumstances, that can tip a borderline case towards custody or away from it. Section 6 focuses specifically on decision-making in borderline cases by drawing on sentencers responses to hypothetical and real cases involving young offenders. This allows us to determine the specific factors that are influential with courts and sentencers. Section 7 explores sentencers' satisfaction with, and confidence in, community-based disposals and the relationship between the courts

and local YOTs. Section 8 collates the perceptions of interviewees regarding other potential sources of influence on decision-making, for example the role of legal advisers, the media and public opinion. Section 9 summarises the main findings of the study and draws out recommendations for policy, practice and further research.

3 Approaches to sentencing

Introduction

To contextualise sentencing practice and the specifics of how sentencers arrive at their decisions, this section begins by exploring the experiences of magistrates, district judges and Crown Court judges in relation to the youth and Crown courts, and adherence to the legislative and legal framework.

Knowledge of youth sentencing and legislation

Sentencers' experience in court setting

The 37 magistrates who were interviewed had between five and 28 years of experience in the youth court and magistrates' court. When sitting, almost all (n30) did so as chair of the panel. Depending on factors that included the number of magistrates available locally and personal commitments, justices sat in on anything between two to three half-day sessions a week, to one day a month.

The 10 district judges who participated in the study had experience in their jurisdiction ranging from 18 months to 12 years. The 15 Crown Court judges who took part in the study had between three and 20 years experience on the bench.

Relevant training

Sentencers were asked to recall any training that they had received that was specifically to do with youth legislation and/or sentencing young people. Each of the magistrates stated that upon being assigned to the youth court, they were required to attend an initial two-day training event which was delivered by the in-house team of legal advisers (formerly clerks). It would appear that this was the most intensive training that had been made available to magistrates (who, as indicated above, had been sitting in on youth cases for at least of five years).

Thereafter, voluntary training seminars, delivered by legal advisers, were offered in the evenings as and when new legislation was introduced. It is not suggested that sentencing outcomes in this study were in any way related to the amount of training received. Nevertheless, magistrates' accounts suggested a greater commitment to on-going training events in areas where the use of community penalties was relatively high. It was also noticeable that the local YOTs were more likely to be involved in making presentations to magistrates on various aspects of the youth justice system in these areas.

District judges had been required to attend a two-day residential course upon taking up their post. In addition, a small number reported that they also attended yearly 'refresher' meetings. By contrast it appeared that the Crown Court judges had received little, if any, formal training in relation to sentencing young people. Two Crown Court judges mentioned that they had attended criminal justice refresher seminars that included one session about sentencing young people. However, judges often emphasised the importance and relevance of their legal training and experiences in legal practice. Many went as far as to argue that it was the best training of all when it came to understanding the young people who came before them.

Sentencing guidelines for young people

All the magistrates interviewed reported making extensive use of the most recent *Youth Court Bench Book*, which was produced in 2005 by the Judicial Studies Board. This was viewed as a key source of information about case management, court disposals, sentencing options and pronouncements. The various checklists and sentencing matrix (see Figure 3.1) were singled out as especially valuable tools that assisted the decision-making process.

> *Without that* [Youth Court Bench Book] *we'd be a bit rootless really. It actually gives us a basis from which to work.*
>
> (Magistrate, Lawndale)

District and Crown Court judges made reference to the Court of Appeal Guidelines and materials produced by the Sentencing Guidelines Council (SGC), since its creation as part of the Criminal Justice Act 2003. Many judges also noted that at the time of the fieldwork there were no specific sentencing guidelines for young people, although they recognised that this was part of the SGC's intended work programme.

Unlike their lay colleagues, professional judges maintained that they were far less reliant on specific guidance material. The reasons put forward for this included their legal background and knowledge, along with the fact that they presided over complex cases on a daily basis. There was a sense that familiarity and 'routine' reduced the need to regularly consult with key guidance. Moreover, one district judge observed that such documents were issued as guidance materials and not directives so they alone were responsible for decision-making.

> *Everything I do is based on my experience. I'm supposed to know what I'm doing. So basically I don't look at guidelines – I just do it as I go along.*
>
> (District judge, Littleton)

Purpose of sentencing

Sentencers were presented with the following shortlist of eight generally agreed sentencing purposes as cited in legal texts and research findings:

- deter others from committing the same crime (general deterrence)
- deter the offender so he/she won't do it again (individual deterrence)
- express society's disapproval of the crime (declarative)
- make amends to the victim or society for harm done (restitution)
- prevent reoffending by changing attitudes/behaviour (rehabilitation)
- punish
- restrict opportunities to offend (incapacitation)
- welfare issues (e.g. to try to help with substance misuse problems, etc).

They were asked to rank the aims according to the importance that they generally attached to each of them when preparing to pass sentence on a young offender. Just under half who provided an answer to this question (n16/37) asserted that it was impossible to grade these sentencing aims so that they could be generally applied to the young offender population at large.

Almost all district and Crown Court judges shared this view, in contrast with a smaller proportion of magistrates, suggesting a difference of opinion between the professional and lay sentencers on this matter.

> *Sentencing is very much an individual exercise to fit the needs of each individual case. The most difficult thing a judge has to do is… to strike a balance between the need to see [that] the offender is properly punished, at the same time [the judge] needs to see that the potential for rehabilitation is not ignored. But each sentence has to depend on its own individual facts and should be tailored to meet the individual needs of the case.*
>
> (Crown Court judge, Hancock)

In the instances where sentencers, who tended to be magistrates, were able to rank the purposes of sentencing, a large proportion agreed that one of the principal aims of sentencing was to prevent further reoffending. This was closely followed by the need for 'a certain amount of punishment', particularly when the offender was reported to have repeatedly failed to comply with previous court orders. Rehabilitation was also deemed to be important, albeit to a lesser extent when compared with punishment. The welfare principle appeared to be of more modest importance. Nine sentencers, all except two of whom were magistrates, regarded it to be a priority concern when sentencing young offenders. Two magistrates stated that, in their view, welfare issues did not fall within the remit of the youth court.

Striking a balance

Many sentencers remarked that 'striking a balance' between different sentencing purposes was not always a clear cut matter. A large proportion observed that the different themes (e.g. welfare and punishment) did not necessarily sit comfortably together. The tensions between these concepts were managed by adopting a case-by-case approach. Judges and magistrates asserted that sentencing aims were not set in stone, or pre-determined, but rather they were applied with a 'best-fit' approach in mind. This notion was thought to take into account the nature of the young offender's offence in addition to establishing what other aims were important in an attempting to prevent further offending.

> *Well they're all important. I don't think it is right to categorise them… different cases require different approaches.*
>
> (Magistrate, Lawndale)

> *It is impossible to always strike a balance between condemnation of the offence, protection of the public and the welfare and rehabilitation of the offender.*
>
> (District judge, Meridianna)

Approaches to decision-making

Magistrates – a structured approach

The magistrates interviewed described a decision-making process that was, to varying degrees (e.g. fairly to highly), structured. They recounted how they systematically worked through the guidelines set out in the *Youth Court Bench Book* (see Judicial Studies Board, 2005).

Well the structure is the same whether it is a young person or not, which is always to start with the gravity of the offence and the seriousness of it… Then it is looking at anything that is aggravating and mitigating for the offence itself… and then the offender.

(Magistrate, Hyannis)

Sentencers' accounts revealed that the main aims of sentencing were applied on the basis of three (mutually inclusive) factors:

- offence seriousness
- offender circumstances
- case-by-case approach given the uniqueness of each presenting case.

They generally agreed that the first and foremost consideration in determining the appropriate action was to establish the nature and seriousness of the offence. The *Youth Court Bench Book* makes provision for offence seriousness indicators, scoring offences as either low, medium or high. For example, the seriousness indicator for burglary and robbery is high, taking a motor vehicle without consent is deemed to be of medium seriousness and possession of a Class C drug (e.g. cannabis) is an offence of low level seriousness. Thereafter, while working their way through checklist 10, 'Sentencing – A structured approach' (see Judicial Studies Board, 2005:30), magistrates are encouraged to examine any aggravating and mitigating features of an offence (or as was often the case, the offender). As will be seen in later sections of this report, the range of aggravating and mitigating factors that were taken into account and the relative weighting attached to each of these factors varied enormously.

We are looking at previous offending; I mean I suppose our main things are previous offending behaviour to indicate level of seriousness and response to any previous orders, type and seriousness of the crime, attitude towards their offending behaviour and victims as well.

(Magistrate, Middleton)

To carry out the final stage of sentencing – deciding upon the most appropriate disposal – magistrates said they always referred back to the sentencing matrix in the *Youth Court Bench Book*. This matrix, which correlates offence seriousness with the risk of reoffending, guided the panel towards a range of between three and seven possible disposals to which the young person could be made subject (see Figure 3.1).

Figure 3.1: Sentencing matrix

Sentencing Matrix

The Correlation of "Seriousness" and the Risk of Re-offending

	LOW RISK OF RE-OFFENDING	MEDIUM RISK OF RE-OFFENDING	HIGH RISK OF RE-OFFENDING
OFFENCE(S) OF LOW LEVEL SERIOUSNESS	Conditional discharge Fine Compensation Reparation Order	Conditional Discharge Fine Compensation Reparation Order	Fine Compensation Reparation Order
OFFENCE(S) OF MEDIUM LEVEL SERIOUSNESS	Action Plan Order Attendance Centre Order Reparation Order	Action Plan Order Attendance Centre Order Supervision Order Community Rehabilitation Order Community Punishment Order	Action Plan Order Drug Treatment & Testing Order Supervision Order Community Rehabilitation Order (with requirements) Community Rehabilitation Order Curfew Order
OFFENCE(S) OF HIGH LEVEL SERIOUSNESS	Action Plan Order Supervision Order Community Rehabilitation Order Community Punishment Order Detention & Training Order Community Punishment & Rehabilitation Order	Action Plan Order (high requirements) Supervision Order Community Rehabilitation Order Curfew Order Community Punishment Order Community Punishment & Rehabilitation Order Detention & Training Order	Drug Treatment & Testing Order Supervision Order Community Rehabilitation Order (with requirements) Community Punishment & Rehabilitation Order Detention & Training Order

The purpose of this table is to guide the court towards an appropriate sentence. The court must exercise judgement in deciding the type and length of sentence. The sentence must be suitable to the needs of the offender. Reparation orders must reflect the needs and wishes of the victim. Requirements in Action Plan Orders and Supervision Orders must address the causes of offending. Consider the attached schedule of available orders to determine the scope of your powers. After deciding a provisional sentence the court should consider the following factors before announcing its proposal to the court.

NB The use of Conditional Discharges is restricted

Bear in mind always the provisions of REFERRAL ORDERS where appropriate and the various types of reports required before considering particular Orders and local Protocols on how such reports can be made available.

Source: *Youth Court Bench Book 2005* (Judicial Studies Board, 2005:2–9)

It might be argued that a structured approach, such as that prescribed in the Magistrates *Youth Court Bench Book*, would help control against any bias or discrimination in sentencing. It is, however, worth noting an example given by one magistrate in a high custody-use area in this context. This magistrate suggested that while the checklist could be followed to a point, it created particular tensions where a sentencer empathised with an offender. In such cases, a sense of wanting to help along with an attempt to correct previous injustices, introduced a 'human' element to the decision-making process.

> *We might want to say, "Yes there's got to be some punishment here". But again it's not the same in every case because someone might come along and you say, "I really want to help this young man, he's had the most horrible life. He's got parents who don't look after him at all."*
>
> (Magistrate, Hyannis)

Decision-making by committee

The interviews with magistrates indicated some difficulties that they associated with decision-making by committee. Many hinted that the personalities of colleagues were influential to the final sentencing outcome. The selection or 'make-up' of benches

varied considerably and consequently different permutations of magistrates could potentially yield different outcomes.

> *I mean I have to say that sometimes it [i.e. sentencing decision] depends on the personality of the three magistrates on the bench because some people have very definite opinions, let's say about how they feel certain things should be dealt with and others are perhaps more open to discussion.*
>
> (Magistrate, Midwich)

Others believed that one's seniority also had the potential to affect dynamics in the retiring room. For example, one magistrate was of the opinion that when sitting as a 'winger' it was crucial she conveyed her thoughts in an authoritative and steadfast manner and be prepared to reach a compromise where necessary.

> *The dynamic in the retiring room actually is very important. When you are a winger I would say it's very important to learn how to put your case and stick to it. Learning all of that is quite tricky. Very, very often it will be… If it's a custody one... it will either be… one in favour and two against, and we spend quite a lot of time bartering.*
>
> (Magistrate, Hartland)

However, one magistrate felt strongly that where cases were on the custody – community cusp, it was preferable to have more than one person involved in the decision-making.

> *I think it's important that three people sit on these [borderline] cases, and not just one, and that's where I think that the district judge is not a good idea for the youth court, and certainly should not sit as judge and jury on trials.*
>
> (Magistrate, Midston)

Deferring sentence for reports

A major criticism of the sentencing system, voiced by a large number of magistrates concerned the occasions where sentencing needed to be deferred pending the production of a PSR or full medical or psychiatric report. A full PSR is required before imposing a custodial sentence and it is also recommended when considering more intensive community sentencing options or where a more detailed assessment is needed (Judicial Studies Board, 2005). The magistrates interviewed said it typically took three or more weeks for PSRs reports to be prepared (although PSRs prepared for earlier proceedings could occasionally be and were used provided they were recent).

While many magistrates generally acknowledged the need and benefits of waiting for PSRs and/or other reports, they were concerned that this made it unlikely that they would be involved in the sentencing decision, despite having heard the case. Whereas district judges and Crown Court judges could request that specific cases be reserved for them to follow-up once the relevant reports became available, this was not the case for magistrates. Their varied and sometimes limited availability, coupled with the day-to-day workload of the court, was considered to make it all but impossible to reconvene the same panel a few weeks later to pass sentence. Only one sentencer reported that the listings team in their area tried to ensure that at least one of the panel members was available for the forthcoming sentencing panel:

> *If it's a trial, and you have heard all the evidence – everybody's said guilty – and you've seen it – most of the time you try to at least have one of the bench*

back for sentencing who's been at the trial. You've seen the defendant and their attitude, you've seen the victim – so that all comes in to the seriousness of it, because what is on paper sometimes can seem trivial – or maybe it's not.

(Magistrate, Littleton)

Magistrates, conversely, highlighted the complexities of dealing with sentencing decisions in cases that other members of the bench had adjourned for reports. They reported feeling less well informed than they would like about the young offender and any aggravating or mitigating factors that might have been apparent at the previous court hearing. They frequently mentioned lacking a 'feel' for the case or offender, which meant they were to some extent sentencing 'blind'.

If you just come in cold on sentencing, you have no feel for the case at all do you? You really have to have a feel for it all.

(Magistrate, Hancock)

We don't follow cases through. So the ones that I've sentenced I don't have very much of a flavour for, if they've been as a result of a trial.

(Magistrate, Hartland)

It's reading half a book or most of a book, but not always seeing the final page or two, or seeing the synopsis, but not actually getting the whole story.

(Magistrate, Midston)

Judges – an intuitive approach

Like magistrates, judges described taking account of factors such as the severity of the offence and the offender's circumstances, along with any aggravating and mitigating features. But there were discernable differences in their approach. The process adopted did not appear to be particularly formulaic. Experience and intuition were, instead, identified as being central to their decision-making process.

It's a gut reaction built over years and years of experience… they make us judges to exercise our judgement.

(Crown Court judge, Hinesburg)

Judges suggested that the sentencing process was akin to that of a 'fine art' rather than something that required a 'scientific' assessment. They maintained that decision-making was, to a large extent, based on the 'feel' for a case and it is this that enables sentencers to 'square the coin'.

Well it is not easy. And you see it is not a science, it is more of an art, I think, and it is very hard, you couldn't sit down and write a computer programme for sentencing at all really, sentencing youths is far more difficult. Because there are so many variables that make up the full picture.

(District judge Hunsford)

It's not a mental tick list. I think you know – the offence, the age of the offender, previous convictions, then pre-sentence report, particular mitigation – a balance between the gravity of the offence, the aggravating features and then the mitigating features. And I don't list them up and balance them off, or cross them off, it's an organic process.

(Crown Court judge, Midwich)

The sentencing process is more art than science. It is bound to be because you are dealing with individuals.

(District judge, Hubbardton)

Judges believed that their legal backgrounds coupled with the frequency of the sittings they presided over enabled them to eliminate potential disposals without the need to retire to deliberate over the sentencing outcome. A small number declared that they were able to begin to form a judgement while hearing a case.

Well the decision is starting to form itself into alternatives whilst you are hearing about the facts and read the reports. You are mentally narrowing it down and I don't mean making the decision in advance, but you are narrowing it down, things are being eliminated as you are hearing about the case.

(District judge, Hunsford)

As I start to hear the case my mind fills up with all the different bits of information and so my thought processes start working on the sort of sentences. I would very rarely have to retire to consider it [sentence]. Generally from the outset it is clear that it is going to be one of a few sentences, you are not going to be looking at everything from custody to a conditional or absolute discharge for most cases, and you know whereabouts the level is generally pitched.

(District judge, Midwich)

Exercising discretion

All the sentencers interviewed were asked to reflect upon how much discretion they felt they had in the decision-making process of sentencing. On a scale of one to five, with one being none and five being entirely, the majority (n45/49) of sentencers believed that they had average powers of discretion (three and above).

Crown Court and district judges believed that they retained considerable levels of discretion, particularly in relation to the sentencing of young offenders. They reiterated that there was nothing to prevent them from departing from guidelines, so long as they were able to provide a sound explanation for doing so. Moreover, judges asserted that an appropriate level of discretion was needed to ensure that they had the flexibility to deal with young offenders in a way that was distinctly different to adults.

There is nothing to prevent a judge from departing from them [guidelines] as long as he is able to explain his reasons for doing it and does do it. At the end of the day, I think it is a matter for the judge – if five is the highest score [entire discretion], I would say I have level five discretion in my courtroom.

(Crown Court judge, Hancock)

In the case of the Crown Court, I would say that we retain the appropriate amount of discretion – which is a fair amount. That is important because with youths, an even greater flexibility of approach is required.

(Crown Court judge, Hartland)

Well I think I have entire discretion.

(District judge, Meridianna)

Crown Court judges were especially emphatic about the need to preserve the level of discretion they were allowed. Some were anxious that the amount of discretion they were afforded was being increasingly curtailed. One Crown Court judge, from Hancock, the highest custody-use area, was adamant that complete discretion needed to rest with the local courts to allow for the administration of justice. He went on to suggest that guidelines arising from national policing initiatives impeded local justice.

> *[The] Government seeks to grasp more and more away from us. Our discretion as judges is becoming curtailed.*
>
> (Crown Court judge, Hinesburg)

> *I think ultimately things have to be left to the discretion of the local court – it is after all the administration of local justice and the particular needs of the locality, and I don't know that giving examples of offences from other parts of the country is of assistance.*
>
> (Crown Court judge, Hancock)

Sentencers were, meanwhile, unanimous in condemning their lack of discretion in sentencing first-time offenders who pleaded guilty to an offence. It was evident that many were uncomfortable with being presented with only two possible options, a Referral Order or DTO, starkly placed at either end of the spectrum of disposals. This issue is discussed in detail in Section 7.

Engagement with the defendant

Following the implementation of the *Youth Court 2001 Good Practice Guide* (Home Office/LCD, 2001), youth court magistrates were encouraged to engage with young offenders and their family members as part of the court process. It was not within the remit of this study to report on the advantages and disadvantages of this, but a few magistrates and judges explained the importance of engagement as they saw it.

For some, engagement afforded them the opportunity to better understand the young person and his or her family, and provide a context within which to place the young person and his or her offending behaviour. Others claimed that direct communication with the defendant revealed a truer and more 'honest' profile of the young person.

> *Since the introduction of engagement we can actually speak to the young person and we find out far more about them. They are often much more honest in what they say than perhaps their solicitor has given you to believe.*
>
> (Magistrate, Hunsford)

While only a minority of magistrates spoke about engaging with a young person, almost all the judges expressed an opinion. Unlike their lay counterparts, who saw engagement as a way to glean more about a young person's background and behaviour, judges regarded this one-to-one interaction as an opportunity to reprimand young offenders. In the Crown Court specifically, it was apparent that judges took advantage of the court's imposing surroundings (e.g. judge's robes and room layout) as well as the general anxiety that the young person may have been experiencing to highlight the seriousness of the situation in the hope that a severe 'telling-off' could prevent further offending.

> *In my case you are sitting there, this red judge being looked at by this youngster and therefore this is a moment, an opportunity when you may be able to have an effect upon him because he knows the powers you have got… I lean forward and try and be avuncular, "now look Jim, you can't go on like*

this. This is silly"… in the hope that you're going to be able to touch something inside him to just make him think again.

(Crown Court judge, Hinesburg)

If I think it is someone who is genuinely anxious and the report suggests repeat behaviour is minimal I will call the young person into the witness box and I will probably scare the living daylights out of him.

(Crown Court judge, Lakehurst)

A couple of district judges questioned the value of engagement and went as far as to suggest that it could have a negative effect. In addition, most judges had previous experience of prosecuting and/or defending this client group and expressed awareness that allowing a young person to speak with a sentencer could lead to the unexpected.

You engage with the youngster and then he undermines everything that his solicitor has said. It can be detrimental to him, but it is actually far better for us because we get the true picture, we don't have the distortion of seeing it through the rose coloured spectacles.

(District judge, Hunsford)

Sentencers' accounts indicated a difference of opinion as to the purpose and benefit of engaging with a young person as part of the sentencing process. At best it provided the opportunity to gain a deeper insight into the individual. It also allowed some judges, most notably those in the Crown Court, to seize the opportunity to play 'good cop, bad cop'. These rather unconventional steps were regarded to be of great importance in attempting to prevent young people from reoffending and appearing before the courts in the future.

The threat of future custody

Where 'cusp' cases had resulted in a community-based penalty, rather than custody, virtually all the Crown Court judges, and to a lesser extent magistrates and district judges, stressed the importance of communicating the risk that they had taken to the young offender. There was a dual purpose in doing this. The first was to ensure that the young person was aware that the judge had taken a 'gamble' and consequently that he or she was fortunate enough to have escaped custody. Secondly, and more importantly, judges indicated that when making their pronouncement they used this opportunity to alert the young person to what the consequences might be if they were to breach the community order.

Crown Court judges were especially insistent on the need to draw young people's attention to what might face them should they appear before the courts in the future. The fact that judges had a greater chance of reserving specific cases resulting in a breach of order it made it easier for them to issue the intended warning:

I say to him, "look you have got my happy smiling face today but I will fix a date in a minute and that is when you come back before me I want to hear good things. If I don't, then bring your toothbrush because you are going to prison and you are going for a long time".

(Crown Court judge, Hinesburg)

When I think I'm taking a risk it's less to do with dialogue than me trying to make the point. I will say,"do you realise what this means, do you realise what'll happen to you?" Sometimes I'll even get them into the witness box so

that they're that little bit closer and I'm looking at them, and I'll say, "I'm going to reserve this to myself so that I'm remembering what I'm saying to you, and I want you to remember what I'm saying to you. If you breach this order you know what's going to happen".

(Crown Court judge, Midwich)

I always say, "if I ever see you again, I'm locking you up!".

(Magistrate, Littleton)

Here again, the seriousness of the Crown Court setting (e.g. witness box and robed judges) was used for maximum effect to ensure that the threat appeared realistic. One judge claimed that although he had made the decision to pass a community penalty, he occasionally delayed making the pronouncement to ensure that the young person experienced a little discomfort and unease beforehand. The inference being that the young person is left with little doubt that he has been given a last minute reprieve. One judge, in particular, explained his firm belief that this would deter the young person from reoffending.

An hour downstairs locked up over lunch in the cells and then I gave him an ear full. Finally, I gave him a community sentence and I said, "I'm writing down in my book exactly what I will give you if you come back. If you come back don't bother to get a barrister, don't bother getting a solicitor. You are just wasting money, wasting your effort. Just come back and I'll give you the 12 months I was going to give you anyway". It's astonishing how few of them come back. I have noticed over a period of time. I watch these cases. One or two come back, not very many at all. When they come back I give them the 12 months, too. I think that moment when you've got an individual there in the dock it can be a moment when you can touch him.

(Crown Court judge, Hinesburg)

Key findings from Section 3

- Magistrates made extensive use of the *Youth Court Bench Book* to provide them with guidelines on sentencing young people.
- Judges highlighted a lack of specific guidelines for sentencing young people, although they acknowledged that this was an area being developed by the Sentencing Guidelines Council.
- The main aims of sentencing differed according to seriousness of the offence, the circumstances of the offender and aspects that were unique to the individual.
- Sentencers felt that striking a balance between different sentencing aims was not always clear-cut. Most agreed that some thematic considerations, such as 'welfare' and 'punishment' did not necessarily sit comfortably together. Different cases were deemed to require different approaches.
- The decision-making process described by magistrates was structured and closely followed procedures set out in the *Youth Court Bench Book*.
- The approach taken by judges was more intuitive and based on their professional experience as advocates as well as their time on the bench. They suggested that sentencing was akin to a 'fine art' rather than a 'scientific' assessment.
- Magistrates voiced concern that they were rarely involved in determining the sentence in cases that needed to be deferred for background reports. Rota arrangements made it unlikely that the same bench would be assembled to review

this additional information. Magistrates were, likewise, called upon to pass sentence in cases where they had no previous involvement.

- Most magistrates believed that they enjoyed moderate levels of discretion when determining a sentence, even when applying relevant guidelines. Crown Court and district judges believes they retained considerable levels of discretion, and insisted on their right to depart from sentencing guidelines where there were sound reasons for doing so.
- There was a difference of opinion among sentencers regarding the value of engagement with young offenders and their families as part of the court process.

4 Attitudes to custody

Introduction

Youth justice policy in England and Wales explicitly maintains that there are some young people who commit offences so serious that they must, for a while, be taken out of circulation and placed within secure establishments. But how do sentencers differentiate between those who need to be removed from wider society and those who can be sanctioned in other ways? This section explores sentencers' attitudes towards the use of custody. In an attempt to understand their personal sentencing philosophy and how this may or may not affect their choice of disposal, the research study collated sentencers' thoughts on the effectiveness (or otherwise) of custody as a means of preventing reoffending by young people under 18 years old.

Positive views of custody

Incapacitation and community respite

For most sentencers, custody had an immediate effect in that it had the ability to incapacitate young people, prevent reoffending and provide the community with a period of respite. However, it was also acknowledged that any preventive effect might only be limited to the period of incarceration.

> *It is effective but only for the time they're in there!*
>
> (Magistrate, Hancock)

> *I tell offenders that I need to give society a rest from you and that is exactly what is going to happen, and I want to send out a clear message to people like you, that if you are caught for this kind of offence then a draconian sentence will be passed.*
>
> (Crown Court judge, Hinesburg)

Rehabilitation

A small number of sentencers in this study believed that incarcerating certain young people could benefit the young people concerned. They argued that some secure establishments were in a good position to provide offenders with access to rehabilitative treatments (e.g. for drug and alcohol abuse) and programmes (e.g. anger management, sex offender treatment programmes, etc.) which they believed were not available in the community. A few others voiced the hope that time spent in custody would not only serve as a punishment, but also provide young people whose lifestyles were deemed to be chaotic with 'boundaries and structure'.

> *[Custody] can also provide access to education and improve confidence… a framework of opportunities to pursue when out.*
>
> (District judge, Hubbardton)

> *[Some young people]haven't had [any] discipline or proper square meals and actually, in prison at least, they get fed and are kept warm, and somebody*

may be showing a bit of interest in them there, which doesn't happen at home. It's probably a cynical way of putting it, but it's true.

(Magistrate, Lawndale)

'Short, sharp shock'

Sentencers were well aware that prison could be a very unpleasant experience for young people. Nevertheless, some magistrates and district and Crown Court judges argued that a short period in custody could occasionally prove effective through acquainting young people with the harsh realities of life behind bars. (N.B. This is not a reference to the 'Scared Straight' programme, which involved a visit to an adult prison or YOI but rather a court-ordered period of custody [e.g. remand or custodial sentence]). Judges who had previously been advocates recalled how defendants had frequently maintained that the early part of their remand period and/or custodial sentence was the most difficult to serve. After this initial period, prisoners were reported to have said that the trauma or shock lessened or dissappeared and they soon became acclimatised or 'institutionalised' to what was once a disturbing environment.

Sentencers, who expressed this view, were generally in favour of implementing custodial sentences that were shorter than the current minimum tariff (e.g. four-month DTO with half of the sentence being served in custody). There was a further suggestion that the introduction to custody needed to be 'hellish' to achieve the desired effect of deterrence.

Most impact occurs during their first custodial sentence, and the first three or four days. You could make them as hellish as possible, and then release them with support. Two weeks in, they're institutionalised, they've got used to it, and it's not as horrendous as they thought.

(Magistrate, Midston)

The type I've got in mind is really no more than a week … very short and very hard. It would be quite deliberately nasty… prison officers wouldn't be trying to make little Johnny feel at home. This would be something to make the eyes water and the memory remember. When I was a barrister a lot of clients said that the first time they went inside was the worst. I have heard that said umpteen times and they all remember it.

(Crown Court judge, Hinesburg)

It was suggested that this 'shock' approach should be reserved for particularly susceptible individuals. It could be inferred that proposal would only work with young people who had not previously experienced custody, but even sentencers who were in favour had difficulty explaining how suitable offenders would otherwise be identified.

I am still a believer that a very short, sharp, shock, will work for the right people in the right circumstances, the real difficultly I think is trying to pick out those cases where this might be appropriate.

(District Judge, Logan)

Negative views of custody

Although some sentencers described circumstances where they believed custodial sentences could prove effective in rehabilitating young offenders and preventing crime, this was far from being a majority view. On the whole sentencers were sceptical about

custody as a means of preventing reoffending by offenders generally and, young offenders specifically. The reasons listed below were advanced to support this argument.

Higher rates of reoffending

As already noted, even when sentencers saw merit in taking some young offenders 'out of circulation' for a while, they readily acknowledged that the preventive effect might only last as long as the period of incarceration. Sentencers were generally well aware that the reconviction rates for ex-prisoners and specifically those for young offenders showed that custody, at best, delivered a very limited, deterrent impact.

> *It's totally useless. Locking anyone up is pointless. It's only about containment. It's only really useful for the man who abducts and kills small children – you need to lock him up for the rest of his life. Sooner or later – you're going to have to release people. And prison, as they always say, makes bad people worse… But as I say, it depends on the circumstances of the case. If it's a bad case you've got no choice but to lock them up.*
>
> (District judge, Littleton)

> *I suppose the high reoffending rate demonstrates that prison is ineffective for most people doesn't it?*
>
> (District judge, Lakehurst)

Failure to tackle the root causes of offending

The use of custody was sometimes described as a missed opportunity to address the many issues that were deemed to lie behind a young person's offending behaviour.

> *Well the custody that we dish out, generally speaking, is a very short custodial sentence. There is insufficient time to work on their problems in a custodial environment, and when released there may not be the community-based systems in place to address the problems, so the important thing is to stop reoffending.*
>
> (Magistrate, Littleton)

'Makes bad people worse'

A number of sentencers suggested that custody was only a 'punishment', which at best achieved little, and at worse drew young people deeper into crime and anti-social behaviour. This echoed the classic perception that time spent in custody 'makes bad people worse'. For example, a magistrate in one of the low custody-use areas argued that she seldom advocated custody because this would involve the offender interacting with other juveniles 'from the cities' and returning as a more 'sophisticated criminal', and that this was to be avoided.

> *It's not always effective especially if they meet up with more sophisticated youths from the cities… When you live in a rural community you must be aware of this.*
>
> (Magistrate, Leydon)

The 'unavoidable' use of custody

Seriousness of the offence

Given the strong scepticism most sentencers expressed regarding the effectiveness of youth custody, one obvious and important question to ask was why they, nevertheless, continued to use it?

This uncovered a widespread and strongly-held view that the use of custody was not actually based on sentencers' personal beliefs or on scientific evidence regarding its efficacy in preventing reoffending. Instead, most sentencers insisted that custody was used because it had become *unavoidable*. As might be expected, one explanation of such circumstances was when sentencers felt the seriousness of a young person's offence left them with no other option.

> *I appreciate they [YOIs] are not the best of places to be in but sometimes young people have done something so bad that it deserves a long sentence.*
>
> (Crown Court judge, Hinesburg)

Offender's circumstances

Albeit a rare occurrence, a small number of sentencers recollected occasions where under normal circumstances they might have been considering making a community-based order, however, the young person openly invited the court to consider a custodial sentence. This request was generally said to be made by young people who had previously failed to comply with community disposals and/or who doubted that they had the determination and/or 'environment' (e.g. negative but highly influential peer group, exposed to drug and alcohol substances, etc.) in which to do so in future. These young people maintained that a custodial sentence would enable them to serve out their punishment without unwanted distractions and reduce the likelihood that they would be breached for non-compliance.

> *…if it is an offence that doesn't fall into the 'so serious' it could be that the defendant's circumstances determine that it goes up the scale, in other words, a defendant says I am not going to do this [community-based sentence]. Refusal to cooperate…very occasionally you get young people who actually want to go inside, terribly sad.*
>
> (Magistrate, Midston)

'Enough is enough'

More commonly, sentencers described reaching an 'endpoint' (Tombs and Jagger, 2006) where they felt an offender had to go to prison because 'enough is enough'. There appeared to be a largely unspoken assumption that all sentencers were able to identify when the endpoint was reached thus presenting 'no option' but to impose a custodial sentence.

However, a few sentencers did elaborate to the extent of insisting that the endpoint, that is custody, was usually also the last resort. In other words, they were convinced that there was no alternative because of the seriousness of the offence, because of a need to follow official sentencing guidelines or because all other appropriate community disposals had been exhausted.

At some stage I think some people do have to go to custody because they just keep committing offences and offences and for the protection of the public they have to go at some stage.

(Magistrate, Hyannis)

Short custodial sentences

Sentencers' were also invited to comment on the value of short custodial sentences for young offenders in the form of DTOs imposed for between four and six months. Many observed that a major disadvantage of imposing orders of this length was the system's inability to provide education and training opportunities for short-term inmates. A number of sentencers said they had been advised by secure estate professionals that there was little opportunity to work with young people serving a sentence of less than eight months. This created a tension between the need to impose a short custodial sentence, while also realising that incarceration might achieve very little.

Even if they believed that a longer sentence might be more desirable in terms of access to education and training, they were also aware that sentence length needed to be determined in relation to the offence and offender and not in response to what time period could bring about the desired individual outcomes.

I have heard so many times from other professionals, "Please never send people on four months detention and training orders − we can't do anything with them. They are only in for two months. In order for it to be worthwhile we need at least an eight month order and probably longer." Now this is a dilemma for people like us because we might be dealing with an individual who has to receive a custodial sentence but the offence doesn't merit more than four or six months. Now is it legitimate to give people a longer sentence simply because professionals tell us that they have more chance of working with them to keep them out of trouble when they leave? No!

(District judge, Hunsford)

I've been told by prison officers that they can't do anything meaningful with them. I am thinking I would be better giving the top end of eight rather than to the four because they would have had more chance, but on the other hand it is not bad enough to be sending them for four months, so I suppose we settle on six.

(Magistrate, Hubbardton)

In some ways four months is a waste of time, because they serve two months, and there's not a lot you can do with a 15-year-old in two months to change their behaviour. It's not actually going to have a huge impact. In some ways you want them in there for two years so they can do a complete GCSE programme. But we can't sentence for two years for something that only warrants four months… it has to be appropriate and proportionate to the crime.

(Magistrate, Midston)

Although their value was disputed, there were some sentencers who claimed that shorter tariff DTOs had a place within the sentencing tariff. The four and six month DTO was observed as having three main purposes. The first was to act as suitable punishment and prevent reoffending for the duration of a young person's sentence.

Restrict the opportunity to reoffend for a very short period of time.

(Crown Court judge, Lindbergh)

It may be useful just to detain that person over a very difficult part of their growing up. Four to eight months is quite a long time for a youngster and it might just be the time that they need away from the problem.

(Magistrate, Leydon)

According to some sentencers, the second purpose of the shorter DTO was that it enabled them and others to impose short custodial sentences when they believed that previous community disposals had proved ineffective and the 'last resort' had been reached.

Four and six months DTOs have a place. Not so much for rehabilitation, that may be too short a time to effect any change – but they have a role as a last resort where everything else has been tried time and time again.

(Crown Court judge, Hartland)

I still think they have a value because sometimes there is the need to, to carry out the threat that you have probably been issuing for the last three to four months and young people will say, well you will never carry it out, but you do need to occasionally.

(Magistrate, Lakehurst)

There are times when a short period in custody makes somebody realise that we mean business.

(Magistrate, Lawndale)

Lastly, some sentencers who saw merit in giving particular young offenders a 'short, sharp shock' (see above) showed some support for the DTO:

No. I think they're definitely useful. And they definitely have an effect. And I would go for much shorter [than a four month DTO] … I'm a short, sharp shock person really.

(Magistrate, Hartland)

A very short custodial sentence, say a four-month DTO can be useful because it hasn't allowed them time to acclimatise to the institution. It is the proverbial short, sharp shock. When they get released after the two months they are still in that trauma stage. Eight months, I don't think is useful because they are beginning to become used to the regime.

(Magistrate, Midston)

But not all:

I don't think you should take a child away from home for four months if you could achieve the same in 21 days. If the four-month sentence is meant to be a short, sharp shock salutary effect because there isn't time to do any work, then I don't think it needs to be as long as four months.

(District judge, Midwich)

Key findings from Section 4

- Sentencers were generally sceptical about the effectiveness of custody as a means of preventing reoffending by young offenders. They argued that it::

  a) failed to address the underlying causes of offending behaviour

  b) did more harm than good and risked making 'bad people, worse'

  c) had little impact on individual deterrence (as evidenced by high rates of reoffending).

- In so far as custody was deemed effective, this chiefly related to taking young offenders out of circulation for the time that they were imprisoned, allowing the community a period of respite.
- A small number of sentencers also believed that a custodial environment could, in some circumstances, benefit young offenders. They maintained that secure establishments were sometimes in a better position to provide rehabilitative treatments and programmes than community services. Some also saw custody as a way of introducing boundaries and structure into the chaotic lives of some young offenders.
- Sentencers were aware that prison could be 'hellish' and 'nasty' for young people. Some, nevertheless, argued that a 'short, sharp shock' period in custody could usefully deter some susceptible young people by acquainting them with the reality of life behind bars. However, sentencers were unsure of what the optimum length of time a 'short, sharp, shock' period in custody might be.
- Despite general scepticism concerning the value of custody, there was a widespread and strongly held view among sentencers that custodial sentences were given to young offenders because they became 'unavoidable'. This endpoint could be reached because of the seriousness of an offence, but more commonly sentencers described feeling that community alternatives had been exhausted and 'enough was enough'.
- Many sentencers questioned the value of DTOs of between four and six months because they considered the secure estate was unable to provide education and training opportunities for short-term inmates.

5 Factors that encourage and discourage the use of custody

Introduction

Previous research (see Hough et al, 2003; Flood-Page and Mackie, 1998 and Parker et al, 1989) points to numerous factors relating to the offender, the offence or other circumstances that can tip a case towards custody or away from it. This section presents general findings about the factors that sentencers interviewed for this study identified as being important or influential when making sentencing decisions. For simplicity, each of the factors are discussed separately. In reality, of course, they frequently overlap in sentencing decisions and are inter-related.

Factors that encouraged use of custody

Seriousness of the offence

Virtually all sentencers interviewed as part of this study stressed that in the majority of cases that eventually resulted in custody, the key sentencing factor was the nature or seriousness of the offence. The examples they cited in relation to serious offences included those where violence had been used (e.g. robbery and violence against the person) or where there had been a threat of violence. In a similar vein, the use of a weapon was deemed to add to the overall seriousness of a crime. Incidents that were unprovoked or premeditated were also viewed as increasing the severity of an offence. The impact on victims was assessed when determining the gravity of an offence. Offences that had resulted in serious injury or where the victim was judged to be vulnerable (e.g. young, elderly, or with mental health needs or learning difficulties) also increased the potential for custody. Several sentencers also said it was important to make an example of those engaged in prevalent local crimes, imposing harsh penalties where necessary. One striking example was given by a magistrate from Hancock in relation to offences involving motor vehicles.

> *I suppose our biggest crime in Hancock has been car crime and drug crime. And the public are up in arms over car crime obviously… You have to take their opinion into consideration… We've got about half a dozen persistent car offenders who are stealing cars all the time. And you have just got to take that into consideration.*
>
> (Magistrate, Hancock)

Offender's criminal history

Previous criminal history also carried considerable influence when determining the imposition of custodial and non-custodial sentences. A defendant's previous record and the nature and frequency of previous offences were all taken into account. Persistent young offenders (PYOs) and young people for whom the risk of reoffending was considered high were more likely to receive a custodial sentence than those for whom the risk of reoffending was judged minimal. The greater the range and frequency of previous court-ordered disposals, the more likely sentencers were to consider a more severe sentence, reflecting what one previous study described as a 'mechanism for escalation through the tariff' (Parker et al,1989). Repeated failures to comply with

previous community-based sentences (especially an ISSP) were seen as a sign that non-custodial disposals had been tried and that the offender had failed to comply. This, in turn, was consistent with the concept of an 'endpoint' being reached (see above) where sentencers considered there to be no alternative to custody.

> *So in a way they almost sentence themselves [to custody].*
>
> (Magistrate, Hunsford)

> *Someone who continues to offend and you've tried everything and they just continue to offend and it does get to the stage where you say right that's it, that's where you go to custody.*
>
> (Magistrate, Hyannis)

Personal characteristics and circumstances of the offender

On occasions the personal circumstances of an offender also appeared to form an important part of the rationale for imposing or rejecting custody. For example, magistrates and judges described situations where a lack of age-appropriate accommodation in the community had led to a DTO being imposed. Indeed, unsuitable and inadequate accommodation was reported to instantly disqualify a large number of young people from being considered for an ISSP.

> *If they have no accommodation and no fixed abode… It's difficult to put them on an ISSP.*
>
> (Magistrate, Hancock)

> *Certainly one of the cases I was looking at, which ended up in custody, was we wanted to put in an ISSP and we couldn't because he was homeless. I don't know what it is like nationally, but certainly here, 16, 17-year-old children that are thrown out of their home, well we don't seem to have adequate hostels for them. We have things like guest houses and in there you get a collection of 16 and 17-year-old youths and you can imagine what happens from that. So accommodation in one of the cases I looked at was a factor and if accommodation had been secure and there had been a family situation there we would not have gone for custody.*
>
> (Magistrate, Hyannis)

In this context, a few magistrates expressed concern about cases brought by local authorities against children and young people in their care. They believed that cases were being brought to court, which in their view did not always constitute criminal behaviour and could have been resolved informally.

> *The Home is their home, and yet they're not being treated like children. I mean, for example, one little girl she put her television under the shower and turned it on. You know, should we be criminalising children of that age?*
>
> (Magistrate, Midston)

One implication was that cases involving the local authorities and looked-after children were especially carefully scrutinised. But there appeared to be no consistency in the outcomes. In some cases it was maintained that young people being looked after by local authorities were more likely to be given multiple chances before custody was imposed because of their legal care status. But in others, the consequence of a

residential home refusing to accommodate a young person when there was no alternative accommodation available increased the likelihood of, or resulted in, custody.

> *There was this 15-year-old and he'd attacked a worker in the care home where he was. We remanded him into custody for a short while before the case because the local authority wouldn't take him and they couldn't find secure accommodation for him – he was already in care. And I can't remember where we ended up with him. I have a feeling he ended in custody. There wasn't anywhere else that he could go at the time.*
>
> (Magistrate, Littleton)

Other factors concerning a defendant's character were regarded as less influential but could nonetheless influence sentencers in the direction of custody. For example:

- a young person's age (particularly if approaching the age for treatment as an adult offender)
- failure to engage in purposeful activities, for example, education, training or employment
- a 'chaotic lifestyle', for example, drug and alcohol abuse, negative peer group influence, and a poor family support structure.

Family circumstances were also cited as influential including:

- weak and unstable family relationships
- other family members engaged in criminal behaviour
- lack of parental control and poor parenting skills.

However, to place these factors in perspective it should be re-emphasised that sentencers rarely regarded them as key elements in their decision-making. Moreover, as will be seen below, an offender's personal characteristics were most often cited as influential when making non-custodial sentences.

Factors that discouraged use of custody

A wide range of factors were reported to mitigate against the need to impose a custodial sentence. These were largely to do with the offender's characteristics, circumstances and attitude, and underlined the significance of judicial discretion when determining the outcome of cases on the community/custody borderline. Even so, there were some mitigating circumstances that required relatively little discretion or judgement, for example:

- first time offender
- a very young offender
- medical/emotional health problems
- learning difficulties
- a guilty plea.

I don't like locking people up who don't have any previous convictions.

(District judge, Littleton)

There's no point in actually sending somebody with learning disabilities or mental health needs to custody. You want to get help for them if you possibly can and again you get young people with learning disabilities that have sexual problems. They don't want to be in custody. They need to be in the local mental health hospital.

(Crown Court judge, Hinesburg)

Personal characteristics and circumstances of the offender

Two of the most important matters of personal mitigation were acknowledged to be whether a young offender was 'of previous good character' and free from a criminal record. Sentencers also said they tended to look more favourably on young people who were constructively engaged in education, training and employment. They were reluctant to disrupt young people's future career ambitions with a custodial sentence; something that was especially evident where a young person was planning to join the armed services. In a similar vain, motivation and a 'willingness to turn one's life around' were identified as features that increased the likelihood of a community-based sentence.

Well if we have got a young person who is academically doing very well and this was a very serious offence but as regards the offender, if this is a one-off and he hasn't done anything of this sort before invariably that young person would not go to custody.

(Magistrate, Hyannis)

It has already been noted how accommodation status had the potential to encourage the use of custody. But in some circumstances suitable accommodation had the ability to mitigate against the use of custody, particularly when combined with positive supervision and support from a family network. Sentencers acknowledged that they were impressed when parents took the time to accompany their child to court. If a young person was deemed to have come from 'a good home' or had embarked on a stable relationship since his or her offence then this was also viewed favourably.

[He] might have met a young lady who has had a steadying influence on him.

(Magistrate, Hyannis)

The guilty plea

It is well established that a guilty plea has the effect of reducing a custodial sentence by an amount between one-third and one-fifth, depending on how early the plea was entered (Wasik, 2004). However, the sentencers who were interviewed went further, making it clear that when combined with personal mitigation it also had the propensity to prevent a young person from being sentenced to custody.

If he has pleaded guilty then of course he gets a discount. I think the discount for pleading guilty would be you are not going into custody, but instead this is what we are going to do with you.

(Magistrate, Middleton)

Of course if there was a guilty plea that makes a tremendous difference.

(Crown Court judge, Midwich)

Response to prosecution

One of the key factors that helped discourage the use of custody was evidence of genuine remorse and contrition. However, what constituted remorse was not made clear. Sentencers admitted that remorse, and its genuineness, was frequently difficult to determine. Magistrates and judges both maintained that 'the solicitor saying my client expresses his regret' did not constitute proper remorse, but as documented by Jacobson and Hough (2007), remorse was only taken into account when it was demonstrated. For example, letters to the victim/s, attempts at reparation and submissions made by the YOT as to whether a defendant had admitted and recognised his or her actions (e.g. impact on victim) were factors considered when determining remorse. In addition, as with other research (see Henham, 2001; Shapland, 1987 and Tata, 2007), sentencers also suggested that the timing and circumstances of a guilty plea was a key indicator to sentencers' evaluations of the sincerity of remorse.

Related to this was a concept of 'fear'. Some sentencers suggested that where they were confident that the criminal justice process had proved a terrifying and awakening experience for the young person, this might make them less likely to decide upon custody. In a similar vein, if there had been a change in the young person's behaviour during time spent on remand, then sentencers were inclined to react positively. Indeed, some sentencers treated this as support for their belief in custody as a short, sharp, shock (see above).

[If] he's been on remand now for three weeks... and you can see [a] change and he's frightened to death and it's scared the living daylights out of him. Then I am quite likely to take a lot of notice and I would be quite enthusiastic in those circumstances to let him out as quickly as possible, because I know that if he stays in longer he's going to get used to the institution.

(Crown Court judge, Hinesburg)

The last chance saloon

Some sentencers described situations where they simply wanted to give young offenders a chance. It was mainly judges, although the same did apply to some magistrates, who revealed this inclination to 'help' some (but not other) young people. Sometimes this had occurred where a young person was caring for dependent family members, but more often for reasons of personal welfare. In both instances there was an expressed view that there was still 'time to try something' other than reverting to custody.

Where you think this poor kid has just never had a chance, he was bound to end up like this – you're bound to feel sympathetic towards the offender, and you'll be looking to try and do something to help.

(Crown Court judge, Midwich)

Key findings from Section 5

Most sentencers identified three main considerations that increased the likelihood of custody for young offenders:

- The nature and seriousness of the offence for which the young person had been convicted, including aggravating factors such as unprovoked violence, serious injury to a victim, or use of a weapon. Some sentencers felt harsh penalties were

also needed to make an example of offenders convicted of crimes that were prevalent in the local community.

- Previous criminal history carried considerable influence, especially if a young person was considered to be a persistent young offender who had failed to change his or her behaviour following a community-based sentence/s.
- An offender's personal circumstances, including situations where a young offender's lack of permanent accommodation was deemed to make them unsuitable for intensive supervision and surveillance in the community. Personal factors were regarded as less influential, but included age (approaching 18), lack of engagement in education, training or other purposeful activities and a 'chaotic lifestyle'.

A range of factors were reported to mitigate against the the need for a custodial sentence. Some required limited judicial discretion, including (young) age, first-time offender, a guilty plea (with personal mitigation), medical problems, and learning difficulties. Other factors mostly concerned a young offender's characteristics, circumstances and attitude:

- Sentencers said they tended to look more favourably on young people shown to be 'of previous good character' who were constructively engaged in education, training or work. Motivation and 'willingness to turn one's life around' were also considered mitigating factors.
- Family support, 'coming from a good home' and evidence of a stable personal relationship were both factors that were viewed favourably. Sentencers acknowledged that they were impressed when parents accompanied young people to court.
- An offender's remorseful response to prosecution could also discourage the use of a custodial sentence. Sentencers looked for signs of contrition, although what constituted 'genuine remorse' was not entirely clear.

A small number of sentencers (mostly judges) described circumstances where they had wanted to help young offenders in difficult circumstances by giving them a last chance. This was usually, though not always, for more welfare-oriented reasons.

6 Sentencing decisions in borderline cases

Introduction

This section focuses specifically on decision-making in borderline cases that sentencers deem to lie on the cusp of a custodial or community penalty. The sentencers who were interviewed for this study were each asked to describe two 'cusp' cases – one where they had eventually decided upon custody and one where the young offender had been given a community-based sentence. In addition, all sentencers were shown the same 'vignette' example of a borderline case and asked to determine the most likely sentence that the fictional young offender would receive if they had been sentencing that case. During all these exercises magistrates and judges were asked to explain the factors that influenced their sentencing decisions. In this way it was hoped that it would become possible to untangle with greater confidence the specific sentencing factors that were influential with particular courts and individual sentencers.

The vignette

The hypothetical sentencing situation used for this study is reproduced in Box A.[2] It should be noted that the offence attributed to 17-year-old 'Joe' for this exercise was not especially grave.[3] As such, it would not normally have been heard in the Crown Court unless Joe was co-accused with an adult. For this reason Crown Court judges were asked to read this case as being one where the offence was alleged to have taken place in the company of an adult.

Box A: Vignette (hypothetical case) presented to sentencers – Joe's story

Joe, aged 17, is unemployed, having been sacked from his position as a sales assistant in a car body repair shop following theft from his employers nine months ago. He had been caught selling spare parts to friends to a total value of around £1,000. This offence was dealt with by means of a Referral Order in respect of which the relevant YOT worker reports that he participated and complied adequately rather than wholeheartedly. Prior to this offence, Joe had received a Final Warning from the police in respect of criminal damage. Having spent most of his childhood in residential and short-term foster care, Joe's family links are tenuous, and since completing his Referral Order he has not had settled accommodation, relying on friends to let him stay temporarily. He has recently been hanging around with a delinquent peer group who are involving him in drug use.

Joe has now pleaded guilty to an offence of Aggravated Vehicle-Taking with three further offences taken into consideration (TIC), each involving taking without consent (TWOC), having adopted a pattern (encouraged by his mates) of taking large cars which he drives to the local Tesco's car park, and in which he then sleeps overnight. When approached by the police one night, around 1am, he started up the car and drove at high speed round the car park, at one point causing the police car to swerve in order to avoid him, and eventually crashing into the car park barrier, causing some damage. When finally apprehended, he appeared to be 'high' as a result of cannabis intake and he resisted arrest by kicking out at the officer trying to get him out of the car. The police

[2] The vignette was created by Gwyneth Boswell with assistance from Kevin McCormac.

[3] For defendants aged between 10–17 years, a grave crime is defined as any offence that in the case of an adult carries 14 years or more imprisonment or an offence of indecent assault.

then found a large quantity of cigarettes in the car, and Joe has also pleaded guilty to burglary of the shop from which he took them. He had no driving licence or insurance.

At the police station, Joe admitted he had deliberately planned the vehicle-taking and burglary offences and said he hadn't known what else to do. He intended to sell the cigarettes as he was short of money. He later told the YOT officer writing his PSR that he wanted to become independent and law-abiding, but felt he had no support in respect of his unemployment and homelessness, and couldn't break out of the rut in which he now found himself. His self-esteem was low and he had no confidence, skills or qualifications with which to start turning his life around. The YOT worker's PSR proposes a Supervision Order with ISSP requirements. Joe has, in the meantime, found accommodation at the local YMCA hostel.

Sentencing Joe

Table 6.1 shows the different types of disposal that sentencers considered appropriate in Joe's case. Forty-seven of the 55 sentencers who took part in the exercise came to the decision that they would have agreed with the YOT worker's recommendation of a Supervision Order with ISSP. A further three sentencers suggested alternative community sentences that were either more or less intensive than the YOT worker's recommended disposal. Five sentencers, three magistrates and two Crown Court judges were of the opinion that had Joe appeared in their court then he would most probably have been subject to a custodial sentence. The remaining seven sentencers felt it was impossible or inappropriate to arrive at a decision.

It could be legitimately argued that the exercise is not representative of the sentencing process for magistrates since they do not sit alone but rather have access to the views of colleagues and perhaps legal advisers.

Table 6.1: Sentencing outcomes for hypothetical sentencing exercise.

Sentencer type	Sentencing outcome				Total
	Agree with PSR recommendation (i.e. Supervision Order with ISSP)	Custodial sentence (e.g. DTO)	Other community disposal	No answer	
Magistrate	29	3	2	3	**37**
District judge	9	0	0	1	**10**
Crown Court judge	9	2	1	3	**15**
Total	**47**	**5**	**3**	**7**	**62**

The majority view: support for a Supervision Order with ISSP

Although the vast majority of sentencers interviewed opted for a Supervision Order with ISSP, they invoked a wide and differing range of mitigating factors. Firstly, around a quarter said they did not consider Joe's offence to be serious enough to meet the custody threshold, particularly given the absence of any injured victims. A similar proportion felt that Joe's criminal history was not extensive enough to disregard other non-custodial alternatives, specifically referring to his previous convictions and disposals.

Joe's personal circumstances were also considered to be relevant in supporting the YOT recommended disposal. It was frequently commented that Joe 'had not been dealt the best hand' in life: a lack of family support, a history of being in the care of the local authority and a lack of positive role models in his life. These, coupled with an absence of educational and vocational qualifications and low self-esteem were deemed to present him with a:

> *…total void in his life of anything meaningful.*
>
> (Crown Court judge, Hinesburg)

Many sentencers expressed the hope that Joe would now be provided with the appropriate level of statutory support.

A smaller group argued that Joes's guilty plea, coupled with his family history and a determination to turn his life around was deserving of a community-based penalty. However, Joe's current and previous accommodation caused much concern and revealed a difference in opinion among all types of sentencer. For some, the fact that until recently Joe had no fixed abode was seen as a mitigating factor against custody. In the main, sentencers were encouraged by the fact that Joe had secured 'stable' accommodation, which otherwise would have precluded him from being offered an ISSP package. However, there were a small number of sentencers who, despite having cited other mitigating factors, expressed continuing doubts about the suitability of Joe's type of accommodation.

The minority view: support for custody

There were five sentencers who, if dealing with Joe in court, would have made him subject to a custodial sentence. In their view, the two most serious aggravating features of the case that directed them towards a DTO were the perceived seriousness of the offence and Joe's recent involvement with drugs. Other factors included concerns about the suitability and permanence of his current accommodation and his involvement with a delinquent peer group. It is worthwhile noting that one sentencer made an assumption about the store's opening hours (which were not stated in the vignette) and it is not possible to determine whether or not this influenced a potential custodial sentence.

> *Driving the car in the local Tesco car park and approaching the police, driving high speed, crashing into the barrier. I mean, an all night Tesco[4], you don't know who is around, it could have caused a lot of accidents, and you just don't know what might have happened… Difficult though for ISSP to work from a hostel.*
>
> (Magistrate, Hyannis)

> *I think I'm going to send him down, for a DTO for 12 months. Because of the number and gravity of the offences I think what he really needs – he has an unhappy background – I think this is a chap who needs some sort of firm statement that he can understand, that this is just not acceptable. And then, after the detention period, well then you start to work on him – rehabilitation. I think the supervision on its own, even with the intensive supervision would not work, in his case…*
>
> (Crown Court judge, Middleton)

[4] The store's opening hours were not actually stated in the vignette.

Joe's age was also cited as a reason for deciding upon custody. One of the two Crown Court judges who favoured custody specifically said that if Joe had been a year younger at the time of his offence he might have been spared a DTO.

The undecided

While most sentencers felt able to reach a decision, a small number (n7) argued that it was not possible or appropriate for them to do so. Their reasons included a desire to know more about Joe's demeanour in court, his intent at the time of the offence as well as wanting to hear more about his accommodation at the hostel. Others indicated that without hearing or seeing all the relevant evidence usually presented in court, the exercise was two-dimensional and too artificial for them arrive at a sensible judgement.

> *Well, the artificiality of sentencing on paper is a problem. This as a paper description perfectly sets out the course of an event which when described; particularly with photographs you [may] get a slightly different picture.*
>
> (Crown Court judge, Middleton)

> *It is not entirely clear whether he deliberately drove at the police car or whether he just drove around the car park and the police car happened to be in the way, if I felt that he had deliberately driven at the police car then… I think he may have to go inside for a short time. The key factor here would be the quality of the accommodation at the hostel, I would want to know more about it, I would want to know how strict the regime is and whether they felt they could cope with him. If I felt that there was a way of turning his life around I probably would consider sending him there because the alternative here would probably be a DTO.*
>
> (Crown Court judge, Lakehurst)

Borderline or 'cusp' cases

Prior to discussing specific borderline cases, each sentencer was asked to describe what they understood by the term borderline or 'cusp' cases and whether the concept made sense to them. While the majority of sentencers said that they were able to recognise with relative ease cases that were on the cusp of a community or custodial sentence, many found it difficult to give a clear description. For those who did provide a description, responses suggested that borderline cases were defined on the basis of two main considerations:

- the nature of the offence (i.e. an offence that is so serious that the starting point must be custody)

  > *Offence was so serious that the starting point is custody.*
  >
  > (Magistrate, Hyannis)

  > *Initial seriousness of the offence, for example, does it have an enormous impact on a person or community?*
  >
  > (Magistrate, Midwich)

  > *Offence is serious enough to pass the custody threshold but there are very strong mitigating features which suggest that it should be below the custody threshold.*
  >
  > (District judge, Middleton)

It is sometimes no more than a feeling, but it is a case where very definitely the nature of the offence is one that is so serious and yet there are circumstances, quite often personal, which would make one waiver on community and custody.

(Magistrate, Lindbergh)

- the offender's criminal history, including past convictions and, where applicable, response to previous sentences

  Where the offence itself would appear to require a custodial sentence because it is so serious, and previous response to community penalties and the background causes you to doubt whether the community penalty would be effective.

  (District judge, Hubbardton)

Two supplementary considerations were also noted:

- Crown Court judges remarked that (with the exception of cases where a young person was co-accused with an adult) the very fact that a case had been committed to the Crown Court indicated that it was a grave crime, outside the youth court's normal jurisdiction (and, if resulting in a conviction, could attract a custodial sentence of two or more years).

  Well, there are grave crimes that they have sent up, where I think they [i.e. magistrates] reckon this is a very difficult sentencing exercise and they're quite happy for the Crown Court judge to take the responsibility of taking a brave decision if it's going to be a brave decision. In other words, the sort of offence which might cause public outcry, but really you'd like to pass a custodial sentence.

  (Crown Court judge, Midwich)

  In the Crown Court we tend to get the much more serious cases where the magistrates say well this is too serious for us, so upstairs it goes, and rightly so.

  (Crown Court judge, Middleton)

- A case might involve an offender under the age of 18, who has never been found guilty by a court or bound over in criminal proceedings, pleading guilty to a non-imprisonable offence (or entering mixed pleas to more than one offence). If so, the only the options available to the court are a Referral Order, or custody if the offence is sufficiently serious.

  An example would be a 16-year-old who has pleaded guilty at the first occasion for a very, very serious assault. Not determined at the time as a grave crime, but the victim came within minutes of losing his life had there not been a passing doctor coming down the road. Entry point would be custody; the youth is shortly to undertake his GCSEs, has a promising future, and predicted to do well. No problems reported from the school, no problems reported otherwise. Ordinarily, you would think yes custody. The problem is the alternative is a Referral Order. That is one that is, shall we say, on the cusp.

  (Magistrate, Midston)

Recalling 'cusp' cases

In addition to the sentencing vignette, sentencers were asked to recall two typical borderline or 'cusp' cases in which they had solely or collectively passed sentence during the six month period prior to interview. Interviewees were asked to provide one case study in which they imposed a community sentence, but which equally might have given rise to a custodial sentence, and then to do the exercise in reverse (i.e. a typical borderline case in which they imposed a custodial sentence, but which might have given rise to a community penalty). The following types of information were sought for each case:

- offence seriousness (e.g. offence type)
- brief description of the offence (e.g. nature of the offence, victim, etc.)
- demographics of offender (e.g. age, sex, ethnicity)
- final plea
- offending history (e.g. number of previous offences and convictions, nature of previous offences, most serious offence, etc.)
- risk of reoffending
- full details of sentence passed (e.g. disposal type, length of sentence)
- whether the decision was unanimous (for magistrates only)
- other disposals considered
- key aggravating factors that resulted in custodial sentence/key mitigating factors that resulted in community sentence
- factors that would have moved the decision in the opposite direction (e.g. if the case was one in which a custodial sentence had been pronounced, what factors might have led to them imposing a community based sentence).

To ensure that this exercise generated meaningful information sentencers were sent the above list prior to the interview, so that they could identify typical borderline cases and gather the necessary information ahead of time. The other reasons for supplying this information before the interview were to facilitate sentencer recall and to ensure that they had an opportunity to retrieve accurate information from case files where appropriate. While it was apparent that some sentencers had revisited specific cases and retrieved the requested data, this was not the case for all sentencers. It is worth noting that although most interviewees were able to recall at least one borderline case, and that this tended to be one that was fairly recent, many magistrates referred to their initial training where they were specifically advised against dwelling on cases after they had been dealt with. Consequently, a degree of caution is advised when considering the reliability of the data collected in relation to the borderline case studies exercise.

> *It's difficult to explain, and you can't remember, I mean, I'm sure we've had cases but you're taught not to keep them – once you leave the court, you've left court, and it's over and done with.*
>
> (Magistrate, Midston)

A total of 49 sentencers, including 31 magistrates, six district judges and 12 Crown Court judges recalled a total of 66 case studies. Of these, 28 had resulted in custodial

sentences and in the remaining 38 cases a community-based sentence was passed. Given the small and unequal sample sizes, as well as differences in response rate, it was neither possible nor appropriate to break down the data analysis by the type of sentencer or geographical area.

Nature of the offences

Table 6.2 lists the types of offences that featured in the borderline 'cusp' cases, resulting in custodial and non-custodial disposals by type of sentencer. For illustrative purposes individual offences have been grouped under the main offence group level as set out in the YJB Counting Rules (2006) Appendix C: Offence categories by seriousness scores. The single largest proportion of borderline cases recalled by sentencers included offences involving violence against the person. Robbery and burglary offences also featured in case studies put forward as examples of borderline cases.

Table 6.2: Offence category by disposal and sentencer type

Offence category	Total (n66)	Custodial cases (n28)				Non-custodial cases (n38)			
		Magistrate (n21)	DJ (n3)	CCJ (n4)	Total (n)	Magistrate (n22)	DJ (n6)	CCJ (n10)	Total (n)
Violence against the person (inc. GBH, abduction, wounding with intent, common assault, etc.)	**15**	4	2	0	**6**	5	1	3	**9**
Sexual offences (inc. buggery, indecent assault, other, etc.)	**4**	0	0	0	**0**	1	0	3	**4**
Motoring offences (inc. dangerous driving, driving whilst disqualified)	**3**	0	0	0	**0**	3	0	0	**3**
Robbery	**12**	3	1	2	**6**	3	3	0	**6**
Burglary	**10**	5	0	1	**6**	2	1	1	**4**
Non-domestic burglary	**2**	0	0	0	**0**	1	0	1	**2**
Vehicle taking	**2**	1	0	0	**1**	1	0	0	**1**
Theft	**5**	3	0	0	**3**	1	0	1	**2**
Arson	**1**	0	0	0	**0**	0	0	1	**1**
Criminal damage	**2**	1	0	0	**1**	1	0	0	**1**
Violent disorder	**1**	0	0	1	**1**	0	0	0	**0**
Other	**1**	1	0	0	**1**	0	0	0	**0**
Breach of statutory order	**7**	3	0	0	**3**	3	1	0	**4**
Not known	**1**	0	0	0	**0**	1	0	0	**1**

Choices between Referral Orders and Detention and Training Orders

Six of the cusp cases were serious offences involving first-time offenders who had pleaded guilty, therefore they were on the borderline between a Referral Order and a DTO. These included three cases of violence against the person (including assault on a

police officer, grievous bodily harm (GBH) and wounding with intent to cause GBH, two cases of robbery and one burglary. In all but one of these cases the courts had opted to impose the non-custodial sentence in favour of the Referral Order. The key factors that sentencers described as having mitigated against custody were principally to do with the personal characteristics and circumstances of the offenders. The young men concerned were reported to be remorseful, led astray by negative peer influences or doing well at school with promising careers ahead of them. In each case the sentencer (or sentencers in the case of magistrates) believed that it would be preferable to deal with the needs of these young people outside the secure estate.

Cusp cases that resulted in custody

In the majority of cusp cases that resulted in custody, sentencers said their decisions were based on:

- *the offender's criminal history*, including the number, frequency and type of previous offences, number of convictions and non-compliance with previous community disposals
- *the nature of the offence*, although there were important mitigating factors to take into account, the offence was eventually deemed too serious to allow for a community-based disposal
- the *personal characteristics and circumstances* of the offender (e.g. age, lack of family support, substance abuse)
- *the interests of the victim and/or wider society* (e.g. impact or injury to victim, prevalent crime within the local community, etc.).

Cusp cases that resulted in community-based sentences

When describing reasons why cusp cases had led to a community-based disposal, the young offender's personal characteristics and circumstances were by far the most frequently cited factors. The age of an offender (i.e. too young), his or her welfare needs, his or her engagement in purposeful or constructive activities, a change in behaviour since the offence as well as a declared commitment to turn his or her life around were all given as reasons for having spared a young person from custody. Other factors most frequently recalled in non-custodial cases were the following:

- *criminal history* – no previous or a limited criminal history, previous compliance with community penalties and/or the availability of previously unused and suitable community disposals
- *the content of background reports* – positive reports and recommendations from key professionals (e.g. YOT, psychologists, faith leaders, school teachers)
- *response to prosecution* – entering a guilty plea, co-operation with the police and court process, response to bail conditions and time spent on remand.

A breakdown of all the factors cited by sentencers in cusp cases which resulted in custody or community sentences are provided in Table 6.3 below.

Table 6.3 Factors considered in 66 borderline or cusp case studies by sentencers

	Custodial cases (n28)				Non-custodial cases (n38)			
Factors [1]	**Magistrate (n21)**	**DJ (n3)**	**CCJ (n4)**	**Total**	**Magistrate (n22)**	**DJ (n6)**	**CCJ (n10)**	**Total**

Nature of offence [2]	9	3	3	**15**	5	1	3	**9**
Criminal history	14	2	3	**19**	11	4	3	**18**
Response to prosecution [3]	7	1	0	**8**	7	3	3	**13**
Personal characteristics and circumstances of the offender	11	0	2	**13**	18	6	7	**31**
Victim/wider society	9	3	1	**13**	2	0	3	**5**
Content of reports (e.g. PSR, etc)	2	0	0	**2**	7	3	4	**14**
Programmes and services	2	0	0	**2**	4	3	4	**11**

Notes:

(1) Key factors which tipped decision towards or away from custody

(2) Seriousness of offence

(3) Includes guilty plea, remorse and co-operation with key agencies

The way in which magistrates and judges approached the vignette and cusp cases studies reflects and confirms their general decision-making process described in Section 3. It was evident that sentencers, first and foremost, set about determining the seriousness of an offence and whether it reached the custody threshold. Thereafter, they took account of a wider range of factors, similar to those listed above.

Up to this point the decision-making process described by sentencers appears to be fairly systematic. A blurring of boundaries is, thereafter, apparent – due to the different weightings that individual sentencers attach to different factors that either incline them towards a community-based disposal or lead them to conclude that custody is 'unavoidable'. It could, moreover, be argued from the interview data that the importance attached to particular factors has less to do with the type of sentencer (magistrate, district judge or Crown Count judge) than with individual instinct.

Key findings from Section 6

- The vast majority of sentencers (47 out of 58) who were prepared to pass judgement on the fictional sentencing 'vignette' supported a non-custodial disposal. Five sentencers, including two Crown Court judges, said the fictional offender would have received a custodial DTO in their courtroom.
- A number of sentencers, including those who declined to reach a decision on the basis of the vignette, expressed concern about the suitability of the fictional young offender's accommodation – a hostel – as a basis for supervision and surveillance in the community.
- While most sentencers said that they were able to recognise borderline cases on the 'cusp' of receiving a community or custodial sentence, a significant minority found it difficult to recall a concrete description of such a case.
- Altogether, 49 sentencers including 31 magistrates, six district judges and 12 Crown Court judges, described 66 borderline cases. Of these, 28 had resulted in custody and 38 in community-based sentences.
- A number of the 'cusp' cases described by sentencers involved first-time offenders who had pleaded guilty to serious offences, requiring the court to choose between a Referral Order or custody.

- In cases that had resulted in custody, the decisive factors identified by sentencers were the young offender's previous history, the seriousness of the offence, the personal characteristics of the offender (e.g. aged in mid to late teens and substance abuse) and the perceived interests of victims and the wider community.
- In cases that had resulted in community-based sentences, a young person's personal characteristics and circumstances (e.g. very young in age, welfare needs, behaviour post offence, etc.) were by far the most frequently cited factors. Other factors that were cited included criminal history, background reports by professionals and the young person's response to prosecution.
- In cases that involved choosing between a Referral Order and a custodial sentence, the key factors mitigating the use of custody were to do with the personal characteristics and circumstances of the offender.

7 Alternatives to custody

Introduction

One of the aims of this study was to explore sentencers' satisfaction with, and confidence in, community-based disposals. It explored how far attitudes towards non-custodial alternatives influenced sentencers in borderline cases and also looked at the relationship between the courts and local YOTs.

Attitudes towards community-based sentences

Availability

Few sentencers made comments regarding the availability of community-based sanctions. Among those who did comment, most were satisfied with the range of non-custodial options available for 10–17-year-olds.

Some claimed that the content and delivery of such programmes had greatly improved in recent years. One reason given for this was the ability to combine or 'mix and match' a number of disposals, for example, a supervision order with a curfew order attached to it.

> *The community programmes now are far better than they used to be. There's no doubt about that.*
>
> (Magistrate, Hancock)

> *Nowadays we have a much wider choice, a package of sentencing, so that you can include a curfew order – curfew requirement – with some kind of Enhanced Thinking Skills course, and maybe some community work, unpaid work requirement.*
>
> (Crown Court judge, Midwich)

One notable exception to these positive views related to first-time offenders pleading guilty, where sentencers disliked the fact that their choice was limited to a Referral Order or custody (see below). In addition, a few sentencers voiced dissatisfaction with the lack of treatment facilities available to this young age group. Other criticisms included frustration that the ISSP was not recommended enough for cases that were on the community-custody divide and that too many initiatives (e.g. ISSP) were introduced without adequate time to 'bed down' before being superseded by something new.

It is also worth noting the insistence of one magistrate and two judges that the availability or otherwise of community-based sentences was not taken into account when deciding upon the most appropriate type of disposal. Instead, they maintained that decisions were based entirely on the offence and the offender.

Content and delivery

Confidence in the content and delivery of community-based disposals was mixed. Although no sentencer voiced a complete lack of confidence in any of the non-custodial alternatives, many expressed a variety of concerns that might have influenced their decision-making. There was also a divergence of opinion regarding the monitoring and enforcement of sentences served in the community. In some areas this was raised as a

key concern, but in others sentencers argued that better enforcement had already helped to build confidence in those disposals. Closely related to this issue were complaints that YOTs were taking an 'inappropriate' amount of time to fully implement certain community orders, for example, the Referral Order.

> *Whenever you start to hear reports of non-custodial measures being ineffective and in this area we have a big problem with publicity about electronically monitored curfews, that they are not being monitored and half the breaches are not even detected, you can't help to start lose confidence in them and one day, when you are thinking well, in this particular case it seems to be a choice between a short custodial sentence and a sizeable curfew order, and you think to yourself, if I make a curfew order is anybody going to take any notice of it?*
>
> (District judge, Hunsford)

The community disposal singled out for the most praise by sentencers was the ISSP. This programme was understood to be rigorous and challenging and, for some, the most credible alternative to custody. That said, a couple of magistrates and one Crown Court judge expressed some scepticism, based on research showing reductions in the frequency of offending, but rather disappointing reconviction rates (Gray et al, 2005).

> *There have been some very disappointing results from the Home Office's point of view and indeed from everybody else about this intensive supervision and surveillance package, which doesn't seem to have had a significant impact on reoffending rates.*
>
> (Crown Court judge, Hancock)

Breach policy and procedures

Views on policy for dealing with breaches of community-based court orders varied between areas, but rarely within them. However, some sentencers did disclose that they were not entirely familiar with the breach policy in place. Those who provided comments were divided in their opinions. Many claimed that detection procedures for a breach and the subsequent response had improved in recent times. Others were less than satisfied because of the poor detection rates and failure to bring cases back to court for resentencing.

> *If orders are breached then they must be brought back before the court, so that people who do breach them know they are in trouble. Too often nothing much happens… when the person is sentenced to something else they then let the breach proceedings disappear into the ether and forget them altogether.*
>
> (Magistrate, Logan)

> *Let's face it; it brings the whole thing into disrepute if people are just allowed to get away with it.*
>
> (District judge, Littleton)

Equivalence of community and custodial penalties

Interviews with sentencers demonstrated a further divergence of opinion about the equivalence of community-based penalties and custody. Almost half of the sentencers indicated that – depending on the severity of the offence and the offender's situation – they regarded the ISSP as a demanding and credible alternative to custody. They took the view that the ISSP was equally if not more arduous for the young person and that it

struck an appropriate balance between punishment and welfare. Moreover, sentencers observed that the ISSP was not something that was 'done' to the offender but instead shifted the onus and responsibility of compliance over to the offender. This perhaps explains why some sentencers called for greater use of this disposal.

> *It's tougher than doing a six-month sentence – you try being indoors. But only as long as there's plenty of enforcement to back it up.*
>
> (District judge, Littleton)

> *I think the intensive supervision package is a significant disposal, very intensive, involves a lot of the young offender's time throughout the week and involves a lot of supervision and I think that is very very difficult for the offender to undertake and to come to terms with... If it is approached in the right way by the agencies and the offender, I think it can be very effective.*
>
> (Magistrate, Lindbergh)

The remaining half of sentencers argued that there was no real community equivalent to a custodial sentence. In the main, judges and a small number of magistrates asserted that if custody was used as intended (e.g. for the most serious offenders or as a last resort) then by definition nothing else could be regarded as a true substitute. Moreover, sentencers stressed that no matter how restrictive a community penalty might be, there was nothing quite comparable to being deprived of one's liberty.

> *However restrictive a community penalty may be, for example the intensive supervision and surveillance package with a curfew requirement – that is certainly very restrictive on liberty; but it is still nothing like as severe as a custodial sentence. For anybody to be taken away from their home – I don't think a community penalty can get anywhere near that.*
>
> (Crown Court judge, Hancock)

> *The test for sending someone to prison is: Is the offence so serious that only custody will do? If you answer this truthfully then there aren't alternatives.*
>
> (Crown Court judge, Midwich)

Although Crown Court judges expressed general confidence in the ISSP and Curfew Order, they were keen to stress that cases brought before them tended, by definition, to be more serious in nature than those heard before the youth court. The very fact that certain cases were committed to the Crown Court indicated that the magistrates' court considered the offence be one to which, if found guilty, could incur a custodial sentence of two years or more.[5]

Courts and youth offending teams

Pre-sentence reports and their role in sentencing

On the whole, the sentencers interviewed asserted that PSRs provided a useful and comprehensive insight into a young person's background and circumstances. They were also, in most respects, satisfied with the quality of the PSRs that they received and believed that considerable effort was made to ensure their utility. However, many

[5] Or approaching two years in the case of 12 to 14-year-olds who are not persistent offenders.

sentencers acknowledged that the quality of reports varied between the YOT workers compiling them and that some were more impressive than others.

> *Some are excellent and others are a bit wishy-washy.*
>
> (Magistrate, Midwich)

> *Depends on the author – you get to know writers from their reports and know which are realistic and which are not so. I tend to try and sift those out.*
>
> (Crown Court judge, Lakehurst)

The one issue where almost all sentencers' expressed considerable frustration was a strongly held view that YOT workers seldom included a custodial sentence among the disposal options they discussed and recommended. This led some sentencers to believe that YOT workers were unrealistic in their proposals.

> *We go absolutely ballistic when we've said we think this young man or woman should go to custody and they come back and say well we think this ought to be conditional discharge or something!*
>
> (Magistrate, Hyannis)

> *It's not always helpful to get unrealistic recommendations for community orders when it is clearly a case which warrants a lengthy section 91[6]. It can be irritating when it is so obviously such a serious offence that a lengthy custodial sentence is inevitable.*
>
> (Crown Court judge, Hartland)

In a similar vein, one district judge remarked that he felt most confidence in PSR recommendations when all options, including custody, had been considered as part of the assessment. The implication was that such 'realism' on the part of YOT workers added credibility to their current and future recommendations.

> *I sometimes feel that they [i.e. the YOT] are going to propose everything but custody because it is their job to do that… When I have had recommendations for custody in YOT reports… that is a realism which I hugely appreciate – when they recommend something they really mean it.*
>
> (District judge, Hubbardton)

The above points appear crucial to explaining why many sentencers, despite their positive view of the background aspects of PSRs, insisted they were of minimal influence when deciding between a custodial and community sentence. Moreover, this tendency to discount the sentencing recommendations of YOT workers in 'cusp' cases was most marked among sentencers in the localities that made the greatest use of custody. Sentencers who reported that PSRs exerted a moderate influence when choosing between community sentences and custody tended to be those sitting in areas that, in comparison, made relatively low use of custody. Moreover, it was in these 'low-custody' use areas that sentencers were generally more content with the quality of the reports – something that they mainly attributed to 'trust in the writer'.

[6] Section 90 and 91 of the Powers of Criminal Courts (Sentencing) Act (2000) gives the Crown Court power to sentence children aged 10 to 17 years to prison for serious offences (for which an adult would receive a sentence of 14 years or more).

Views of youth offending team staff

Broadly speaking, sentencers expressed satisfaction with YOT staff. There was a general view that relationships between the courts and local YOTs had improved in recent years. Many sentencers singled out individual YOT officers, mainly court duty officers, for praise. One district judge had been especially surprised and impressed by the enthusiasm and commitment of YOT staff to delivering intensive supervision and surveillance programmes and suggested that this might have increased confidence in the programme's quality.

> *The chap who was running the ISSP program in this area came and gave an evangelical speech for the youth justices' and the district judges and he was so enthusiastic and positive about them that you know we were all quite struck by the effort that he and his colleagues were putting in and, I think it made a positive difference to the sentencers.*
>
> (District judge, Hartland)

However, not all views expressed were positive. The most commonly made complaint by those interviewed concerned what they regarded as unsatisfactory attendance levels of YOT officers in court. It was suggested by some that court duty YOT officers were seldom available to answer straightforward questions that required an immediate response or provide verbal 'stand down' reports to sentencers. Complaints were also voiced about occasions when it transpired that the YOT was being represented in court by staff who were not qualified to provide information about the young person. These unqualified YOT staff were said to include administrators and, on occasions, students.

> *I keep telling the YOT that sometimes people that sit in court are not the best advertisements for the excellent work that goes on back in the YOT. I didn't realise until last week but we often have administrative officers sit in court. And so we ask a question, this person stands up like a rabbit, terrified. Now we think that is the YOT worker who is actually going to be handling a community penalty. But in fact he's not at all.*
>
> (Magistrate, Hartland)

Sentencers who complained suggested that these problems, as well as some delays in receiving PSRs, were a result of YOTs experiencing financial and staffing problems. For example, some had noticed a high turnover of staff in their area which they considered had led to an over reliance on agency staff or those on short fixed term contracts. Staffing shortages were also blamed in the case of a few complaints of the start of community orders, specifically the Referral Order, being delayed.

> *The funding is so appalling, and the turnover of staff is so high that you're not getting this coherent approach really.*
>
> (Magistrate, Midston)

> *We are a little concerned as a bench that there isn't adequate funding going into the YOTs and it appears to be that some of the YOT officers appearing in front of us seem to be on short-term contracts and that sort of thing. Certainly when YOTs were first established, we had a particularly good relationship with proactive YOT officers and we have lost a few who don't appear to have been replaced.*
>
> (Magistrate, Midston)

I also think that there is a lack of staff really in the city YOT to deal with everything… and at various times they are unable to meet national guidelines, for instance with the start of Referral Orders.

(Magistrate, Midwich)

Feedback

Sentencers were asked whether they received feedback from their local YOT/s on the effectiveness of the community sentences they had passed. Of the 52 interviewees who expressed a firm view, only 17 reported that they did receive feedback. Moreover, this was not always specific to individual young offenders they had sentenced and might consist of more general information concerning the effectiveness of certain community penalties.

Yet the majority of sentencers said they would find it helpful to receive feedback from the YOT about the impact of the sentences imposed on young people in a wide range of cases. They pointed out that the cases they were most aware of were 'failures' consisting of young people who had been returned to court for breach of an order or licence. Sentencers were emphatic that they would welcome hearing more about young people who completed their sentences and managed to stay out of further trouble. Feedback for this group was reported to be non-existent and was much in demand, particularly for the cases where sentencers believed they had taken a real 'risk'.

It would be nice to know for the confidence of sentencing to have the positive ones because we only see the ones who have failed.

(Magistrate, Hyannis)

The one thing that we miss out on completely is feedback on the success that occurs and of course there is an element of success. We don't – we never hear anything about it, we only get the failures back and it would be rather nice sometimes to get a report at the end and say, well this has worked superbly and this is why we think it worked and these were the elements that seemed to do the trick and so on.

(District judge, Hunsford)

Just a few sentencers – invariably Crown Court and district judges – described occasions when they had specifically asked the YOT to monitor a young person's progress and feed back to the court on a regular basis. This was seen as having a dual purpose in that it enabled judges to assess whether a sentencing risk had been worth taking while making the young offender aware that his or her compliance was being monitored at the highest level.

If I think I'm taking a risk, I want to give the person a chance but I really think that they may not succeed – I say I'd like a report please in three months time. Just a progress report. And I'd like another one after another three months. So that I can say to the person concerned – I'm asking for these so I can see how you're getting on. And if you're not getting on, then I'll have you back and we'll have you breached. So it's a threat in a way. But it does also allow me to see how the thing's going.

(Crown Court judge, Midwich)

When it's somebody who I really wanted to lock up and I want to keep a close eye on, I will ask for feedback and I always get it.

(District judge, Littleton)

It became apparent that when sentencers spoke about receiving feedback it was deemed to have many advantages in addition to ensuring compliance. One Crown Court judge said he took particular pleasure in revoking a community order when it was evident that a young person no longer needed to be subjected to it given the improvement in their behaviour.

I have brought orders back early on the recommendation of the supervising team… you know they have done so well that all the signs are that they really have turned the corner, and seen there is another way and that does happen and you bring them back and you congratulate them.

(Crown Court judge, Hinesburg)

As noted, this approach of asking for regular feedback on 'risk' cases was exclusively adopted by judges. Magistrates stressed that they, too, wanted feedback. But they also voiced widespread concern about the burden that this additional request might place on YOT staff.

As the chair of the youth panel I go to more meetings than my colleagues so I hear more about the results. But I think the ordinary magistrate would feel that it is just a black hole, you pass your sentence and then that's it. I have discussed this with the head of the youth offending service, it is difficult – without adding lots of work, which I don't want to do, because you want to use their time supporting young people. I haven't got the answer but it would be nice to have more feedback.

(Magistrate, Hyannis)

The YOT could do so much more if it had the resources. But there's no chance of getting all this extra feedback.

(Magistrate, Meridianna)

Specific issues concerning Referral Orders

As previously noted (see above) sentencers discussing the range between community disposals and custody expressed particular concern about their limited discretion in relation to the use of Referral Orders. The Youth Justice and Criminal Evidence Act 1999 (consolidated in the Powers of Criminal Courts (Sentencing) Act 2000) introduced the Referral Order for young offenders who had pleaded guilty and been convicted for the first time. This change in legislation limited the range of disposals applicable to the first time offender to one of the following:

- Referral Order
- fixed sentence
- Absolute Discharge
- Hospital Order
- custody

A large proportion of the sentencers interviewed commented on how much they disliked having to make a 'stark choice' between a Referral Order and custodial sentence in more serious cases where a community sentence was not their automatic choice.

> *My only problem is the big gap between the Referral Order and custody… I think there should be something in between.*
>
> (Magistrate, Hancock)

Some sentencers were of the opinion that the Referral Order lacked rigour when compared alongside other community-based sentences which they believed placed greater demands on the offender (notably ISSPs or Supervision Orders).

> *There is a significant problem with really serious offences that are at or above the custody threshold. No matter how they are presented, Referral Orders are not as tough as an ISSP program or a supervision order and I think that needs to be revisited.*
>
> (District judge, Hartland)

Some sentencers went as far as to say that their use of custody was exacerbated by the fact that the Referral Order, in their view, lacked 'teeth'. They were also clear that if the full range of community-based options had been made available to them then there were possibly cases where a non-custodial disposal would have sufficed.

> *[The Referral Order]… is not enough of an alternative; it hasn't got the teeth it needs… If you were able to pick out a number of first-time offenders who have been given a detention and training order and speak to the sentencer and say, "If an ISSP would have been available would you have done it?" I am sure some of them would say, "Yes, I would".*
>
> (District judge, Hunsford)

> *Once or twice I have sent somebody to custody because an ISSP was not available, because I know a Referral Order would not be good enough – which is crazy. To send somebody away that shouldn't be sent away because you have no discretion.*
>
> (District judge, Logan)

Aside from frustration about knowing that their 'hands were tied' in such cases, there was a suggestion from a few magistrates that a lack of sentencing discretion meant their competence was in question when dealing with first-time young offenders.

> *First-time offender pleading guilty, "that is a rubber stamp job".*
>
> (Magistrate, Littleton)

> *Why on earth they think we are so competent to deal with them [young offenders] in every other case but, we are not competent to make decisions for the first-time offenders, I simply don't understand it.*
>
> (Magistrate, Leydon)

The Referral Order was also regarded as an unsatisfactory option in part because of the time taken to implement and commence the order. In addition, there was an element of uncertainty about its content and the ability of the youth offender panel members to effectively address the offender's criminal behaviour.

For a first-time offender, it's either a Referral Order or custody, and that you might get a really serious offence that didn't warrant custody, but we weren't sure that a referral panel would have the skills, the training or whatever, to be able to actually deal with that level of offending.

(Magistrate, Logan)

I recently heard of somebody who'd waited quite a long time for the Referral Order to kick in. Now, to my mind, with youngsters – it should all be straight away, while it's fresh in their mind. Two or three weeks are too long.

(Magistrate, Leydon)

It was not within the remit of this study to explore in greater detail sentencers' choices between Referral Orders and custodial placements. However, the data gathered suggest a real possibility that some first-time young offenders may have been sentenced to custody after pleading guilty simply because the options available to the court did not include respected, rigorous community alternatives to the Referral Order.

Key findings from Section 7

- Sentencers interviewed as part of this study were mainly satisfied with the range of non-custodial disposals available for young people. In addition, it was believed that the content and delivery of such disposals had improved in recent years.
- A notable exception to this was in relation to first-time offenders who pleaded guilty, where sentencers choice of disposals was limited to a 'stark choice' between a Referral Order (referring them to a youth offender panel in the community) and custody.
- Sentencers believed the Referral Order lacked rigour as a response to serious offences compared to other community disposals, notably Supervision Orders and ISSP. A few indicated that some first-time young offenders guilty of serious offences might not have been incarcerated if a more demanding, community-based sentence had been available.
- Some sentencers also suggested that the Referral Order was an unsatisfactory option because of the time taken to implement and commence the order.
- An ISSP was the community alternative to custody singled out for the most praise by sentencers. Nearly half took the view that an ISSP was equally, if not more, arduous for the young person and struck an appropriate balance between punishment and welfare. Only a few sentencers expressed scepticism based on recent research into the reconviction figures for this disposal.
- A similarly large group insisted there was no real community alternative to custody if it was used, as intended, for the most serious offenders or as a last resort.
- Although sentencers were mostly content with the quality of the background information in PSR prepared by YOTs there was a strongly held view that YOT workers seldom included custody among the disposal options they discussed and recommended. This caused frustration and led some to believe that YOT sentencing proposals were unrealistic.
- A lack of confidence in YOT sentencing proposals appeared to be crucial to explaining why many sentencers insisted that PSRs were of minimal use when deciding between custody and a community sentence in 'cusp' cases.
- Those sentencers who reported that PSRs exerted a moderate influence when choosing between community sentences and custody tended to be those sitting in areas that made relatively low custody use in comparison to the high custody use areas.
- There was general satisfaction expressed with the quality and commitment of YOT staff. However, some sentencers complained that the level of attendance by YOT officers in their courts was unsatisfactory. This was attributed to financial and staffing shortages.
- The majority of sentencers said they would find it helpful to receive feedback from the YOT about the impact of community and custodial sentences. They especially regretted a lack of feedback in cases where they felt they had taken a sentencing risk. Judges appeared more likely to ask for – and receive – feedback than magistrates.

8 Other influences on custody

Introduction

In this section of the report we explore a range of factors that are not directly related to the offence or offender, but nevertheless are reported to have the potential to influence sentencers' decision-making. Magistrates and judges who were interviewed as part of this study were asked to comment on the extent to which the media and public opinion influenced their decision-making. In addition, magistrates were asked to describe the role of the legal adviser in the court process and provide examples of the sorts of questions that they usually posed to the legal adviser.

The legal adviser

The *Youth Court Bench Book* (Judicial Studies Board, 2005) describes the role of the legal adviser in magistrates' courts as follows:

> It is the responsibility of the legal adviser to provide the Bench with any advice they need to perform their functions, whether or not the magistrates have requested that advice.
>
> The Practice Direction on the functions and responsibilities of the legal adviser makes it clear that their responsibility extends to:
>
> - giving advice on the appropriate decision-making structure to be applied in any given case
> - reminding the Bench of evidence
> - assisting the court, where appropriate, with the formulation of reasons and the recording of those reasons.
>
> Generally the advice of your legal adviser should be in open court. However, you are able to request that your legal adviser joins you in the retiring room. If your legal adviser provides additional advice in the retiring room this should be subsequently repeated in open court to give the parties an opportunity to make representations, so ensuring that the proceedings are open and transparent.

There is a considerable literature that suggests that while sentencers enjoy wide discretion, the informal agenda of cases may be shaped by others, for example, legal advisers (previously referred to as clerks) and defence solicitors. Parker et al (1989) reported that although the power relationship between magistrates and legal advisers could vary between courts, and between individuals, most of the magistrates they interviewed did not mention the legal adviser as a major influence on their sentencing decision. However, Parker et al (1989) argued that magistrates may be unaware of the indirect general influence exerted through advisers' responsibility for training at a local level. Their possible limited experience and knowledge of other courts could mean that they have little basis for comparison. In addition to legal advisers, research has suggested that defence solicitors often and increasingly base their pleas in mitigation around the pre-sentence reports (see Jacobson and Hough, 2007; Tata, 2007; Brown, 1991; Shapland, 1987).

The magistrates interviewed for this study were asked to describe the sorts of questions they posed to legal advisers and what guidance was sought and offered.

Broadly speaking, the questions asked of advisers fell into two categories:

- The first sought clarification regarding case law and sentencing guidelines. For example, there were occasions when magistrates were presented with two opposing interpretations of the law, provided by the prosecution and defence, and were unsure of whose account was the most accurate. In such cases the legal adviser would be asked to clarify the position.

  We had heard all the summing up from the defence solicitor and the prosecutor came back on a point of law, it was a robbery of a mobile phone case and he gave us the benefit of his advice as he understood the law. Then the defence solicitor didn't agree with that and they were up and down like a yoyo. So I said, "look, this is very difficult for us because we are not legally qualified and you are giving us one set of advice and you are giving us another." And so the legal adviser was asked to advise us.

  (Magistrate, Midwich)

- The second most common area was in relation to disposals and length of sentence. Magistrates sought clarity about the range of disposals available in any given case and to which age groups these options applied. Many magistrates said that they would usually inform the legal adviser of their choice of disposal and tariff (i.e. length of sentence) prior to announcing it in court to ensure that both were 'lawful'. One magistrate regarded it as particularly important to seek advice about remanding young people into custody:

  We seek guidance for instance about remands for young people, there is a real process of what you can do with remand and so we always make sure that we do that.

  (Magistrate, Hyannis)

It was noticeable that most magistrates interviewed did not mention the legal adviser as a major influence on their sentencing decisions. Many acknowledged the legal adviser's involvement as 'imperative', but were keen to emphasise that the actual decision-making was a matter for them as magistrates.

However, the responses of some magistrates suggested that there had been occasions when a few legal advisers might have attempted to influence the Bench's sentencing decision, either deliberately or inadvertently. One described how, when informing an adviser of the Bench's decision 'you get the raised eyebrows', but maintained that this body language was simply 'ignored'. A magistrate in a different area, meanwhile, reported that the legal adviser had, on one occasion, discouraged a particular disposal as over-lenient. Another maintained that if the Bench's decision was 'wildly different' to that of the adviser then it was not uncommon for the panel to re-examine its proposed decision.

Because they [i.e. legal advisers] are in court all day and they are seeing other cases they have a better idea relative to other offences and offenders for similar things. We would certainly listen and we would consider it [legal adviser's advice] and then we would have to decide whether we were going to act on it or not, because [although] at the end of the day it is down to us, their advice is valuable and might change our minds. If the clerk's advice

then was wildly different we would probably send him out or her out again and we would discuss it further.

(Magistrate, Hunsford)

The above interviewee was not alone in accepting that legal advisers considered themselves well placed to 'advise' magistrates on disposals and tariff because, unlike most magistrates, they were in court on a daily basis.

Legal advisers can often influence the decision making process – rightly or wrongly. When I've been influenced it's actually pushed it the wrong way. In other words the legal adviser will push them into custody rather than out. One or two of our legal advisers have been here quite a long time and they've seen it all, they've heard all the excuses and they tend to be quite hard-nosed and it's certainly not unknown for them to come and have a word with you. I think a strong legal adviser and a weak Bench leaves a legal adviser running the court.

(Magistrate, Lawndale)

The media

Magistrates and judges who took part in this study were asked how far the media directly or indirectly influenced their decision-making. Using a scale ranging from one to five, where one equalled 'not at all' and five 'a very great deal', only four of the 54 sentencers rated themselves at three or higher.

But while the majority of sentencers maintained that their decisions were not influenced by the media, a large proportion expressed concern about how their decisions were reported in the local, and sometimes national, media. With this in mind, both judges and magistrates tended to be cautious about preparing carefully worded pronouncements if they suspected that the case was at all 'newsworthy'. Many sentencers mentioned their frustration with being misquoted or over the inaccuracy of certain court reporting. Furthermore, a few sentencers remarked upon how some cases that they presided over had been sensationalised.

I think it would inhibit me enormously if I knew the press were there. [I] would be far more subdued and circumspect if I knew everything I was saying was going in the press.

(District judge, Littleton)

If you are going to do something which is going to produce a nasty headline, you make sure that you have got jolly good reasons for doing what you are doing. So I mean you are always slightly looking over your shoulder.

(Crown Court judge, Lindbergh)

If you suddenly read in the local paper that Bloggs, that you've just sentenced, [has received] this ridiculous sentence, I mean the frustration! There is some sort of subliminal message which they [i.e. the media] try to put across.

(Magistrate, Lawndale)

[The] thing that is targeted by the media and obviously by the family, and then the public at large, is the fact that I have announced the tariff period,

which is their first opportunity, their first eligibility for parole. It doesn't mean to say they will get it, but in the public's mind and in the press's mind you know the judge has passed a sentence he will be out in five years and it is not the case.

(Crown Court judge, Hinesburg)

Public opinion

Sentencers were also asked to rate how important it was for them to take account of public opinion when sentencing. Again, they were asked to answer the question using a rating method of one to five, where one was 'not at all' and five was 'absolutely essential'. Here, as many as half of the 44 sentencers who responded in a conclusive manner gave a rating of three or higher. However, responses were not always completely clear-cut. Several sentencers maintained it was necessary to take public opinion into account when making decisions, while at the same time insisting that it should not be a dominant or invariable influence.

The majority of sentencers who gave a rating of three or higher stated that it was crucial to take account of public opinion, not least to determine which offences caused the community most concern, but also to gauge how best to deal with the perpetrators. A couple of judges and magistrates emphasised the need to be seen to be administering local justice to ensure that that the public 'were on board' and had confidence in the courts and the wider criminal justice system.

You have got to take the public into consideration from the point of view of whether they need protection from that particular person and from that sort of offending.

(District judge, Hartland)

If it is something that is particularly prevalent in our area, that is where knowing your community is helpful then it does weigh, it comes into the equation when you are deciding on the sentence.

(Magistrate, Hunsford)

I think it is important to a degree because there has to be confidence in the criminal justice system by the public. And to that extent, it is important.

(Crown Court judge, Middleton)

Although it was not within the scope of this research, it is worth noting the potential effect of the media on public opinion. Although sentencers may state that they are not affected by the media in their sentencing decisions, it may be possible that they are being indirectly influenced in their consideration of public opinion.

Crown Court judges, in particular, emphasised that they had been appointed to administer justice in an impartial manner and not simply to 'pander' to the public's demands. Magistrates took this further by stressing the need to consider the young offender's needs – something which they did not think the public could be expected to do, since they were not privy to all the evidence and background information relevant to the case and the young offender.

Some also suggested that taking account of public opinion was a low priority for the youth court, where the emphasis was more to do with the welfare of the child.

We sentence with the young person in mind, with the place in society second in a way; we don't do things to be popular.

(Magistrate, Hyannis)

I hope it doesn't have too much influence… we have to send the right messages out to the general public, but the general public is far more, "bang up all the little bastards". The public don't have a real concept of what's behind the problems in the first place.

(Magistrate Lawndale)

Another perceived danger associated with too great a concern with public opinion was a widely-held view that members of the public were generally harsher in their views of crime and appropriate punishment. Sentencers supported this view by recalling discussions with friends and other members of the public about cases that had been covered by the local media

Most – a lot of public would say,"lock them up". We don't do that, what I am trying to say is that we don't do what they say all the time. We do it when it is appropriate.

(Magistrate, Hyannis)

I used to think it was very important and I now consider it to be less important because the criminal justice system has become so politicised that one can't really gauge what public opinion is and in any event public opinion is 50/50. Given any reasonably serious offender, half the community will want to see him locked up and the other half would be appalled if he were locked up. So really when you do my job you have to make your decisions and do your best.

(District judge, Meridianna)

Issues around young people are much more complex and not as immediately apparent as they are in the adult court and therefore I said before they are closed courts, so if we responded to public opinion everybody would be in jail.

(Magistrate, Meridianna)

Lastly, it is worth noting that a few magistrates took the view that it was unnecessary to seek public opinion because they themselves were members of society. They strongly believed that the underlying purpose for having a lay magistracy was to ensure that peers from a cross-section of the local community were entrusted with representing and administering the views of the wider community.

Key findings from Section 8

- The magistrates who were interviewed described obtaining authoritative information from their court's legal adviser on case law, sentencing guidelines and tariffs. However, it was noticeable that most did not mention the legal adviser as a major influence on their sentencing decisions.
- Few sentencers thought the media exerted any significant influence over their sentencing decisions, but concern about the way that individual decisions might be reported in the local and, sometimes national, media was widespread.

- Half of the sentencers who expressed a view said they took significant account of public opinion, especially when dealing with offences that caused most concern in the community. However, there was also a widespread acceptance that caution was required to ensure that justice was administered impartially. There was a widely held belief that many members of the public took a harsh view of crime and punishment without having access to the full facts revealed in court.

9 Conclusions and recommendations

Introduction

This study of sentencing decisions in the youth justice system has examined borderline or 'cusp' cases where courts are required to make a decision between a community-based sentence and placing a young offender in custody. The research highlights a wide range of different factors that were reported by sentencers to encourage or discourage the use of custody in borderline or 'cusp' cases. This concluding section draws on the main findings of the research and considers some of the implications for research, policy and practice regarding sentencers' decision-making in respect of young people.

Limitations of the study

The study was based on in-depth, qualitative interviews conducted with a purposive sample of 62 sentencers from a total of 16 'high custody', 'medium custody' and 'low custody' areas. In addition, 66 case studies were examined involving young people reported to have been on the borderline between a community-based disposal and custody.

It cannot be assumed that the case studies or the decisions, approaches and attitudes of those who were interviewed are necessarily typical of all youth and Crown courts in all parts of England and Wales. In addition, while sentencers in the sample were asked for their views about the role of YOTs and other parts of the youth justice system, it was not our brief to seek their corresponding views and response. For those main reasons, we have deliberately refrained from translating the findings into firm proposals for practice and policy. However, we believe the research indicates a number of areas where further research could be undertaken, and where the YJB, MoJ and other policy-making bodies could consult across the youth justice system with regard to cases on the cusp of custody.

Conclusions and recommendations for future research, policy and practice

The context for the research is the YJB's commitment to meet its national target to reduce the population of young offenders in custody. The YJB is firmly committed to a policy of restricting custody to only those young people who cannot be dealt with by other means. Although the fieldwork and analysis of this study proceeded Lord Carter's review of the prison system in England and Wales, it would appear that the need to better understand the mechanisms and influences that drive decision-making, particularly where it relates to custody, is all the more relevant.

Lord Carter's review (2007) highlighted that demand for prison places will continue to outstrip the supply of prison places in the short, medium and long terms unless measures to increase the capacity of the secure estate and improve the way custody is used are taken to address this imbalance. Although the review includes only YOIs as far as young people are concerned (it excludes the remainder of the secure estate for young people, for example, secure children's homes and STCs), it could be argued that some of the recommendations may also benefit the secure estate generally.

Lord Carter's review acknowledges the complexity and uncertain effect that external factors have on the sentencing framework. Moreover, he notes that predicting the factors that determine and influence sentencing is difficult and this can have implications for government decision-making and planning on the use of resources. He makes a recommendation that a working group be establishned to consider the advantages, disadvantages and feasibility of a structured sentencing framework and a permanent Sentencing Commission to bring greater transparency, predictability and consistency to sentencing and the criminal justice system.

By examining the sentencing activities and perceptions of magistrates, district and Crown Court judges from selected areas, this study has been able to shed new light on the influences and reasoning that lead sentencers to choose between custody and a community alternative. It adds to existing evidence that there are interlinked factors influencing sentencing outcomes that go beyond merely considering the seriousness of a particular offence. The chosen interview sample and methods did not yield all the insights we would have wished; a smaller than expected response to the request for sentencers to identify two cusp cases each made it impossible to analyse the resulting data by sentencer type and area, as hoped. Nevertheless, the decision to focus on borderline cases yielded a wealth of data that indicates a number of areas where changes in policy and practice might lead to greater consistency in sentencing.

- While magistrates reported making extensive use of the *Youth Court Bench Book* in their sentencing decisions, judges highlighted a lack of specific guidelines for sentencing young people. Although judges often favoured a more intuitive 'fine art' approach to sentencing, a decision by the Sentencing Guidelines Council to prioritise the production of new guidance could help to reduce the current variations between courts (Section 3).

- It is acknowledged that the proportion of cases where sentencing is deferred pending reports may be small and that sentencers will typically hear a great deal of evidence. Nevertheless, some magistrates expressed concern that a decision to defer sentencing made it unlikely that they would determine sentence when the young offender returned to court. While rota arrangements may make it difficult for magistrates to 'reserve' such cases (as judges may do), it may be worthwhile exploring the possibility of ensuring that at least one member of the original bench is sitting at the time of sentence to help bring about consistency (Section 3).

- Sentencers were generally sceptical regarding the effectiveness of custody beyond its ability to take a young offender out of circulation for a time. Even so, there was a widespread view that custody became 'unavoidable' in certain cases due to the seriousness of the offence or in regard to repeat offenders, that community alternatives had been exhausted. Views of what defined this 'endpoint', where sentencers feel 'enough is enough', often appeared vague and subjective. Further research around this 'endpoint' is recommended to determine whether or not there are differences between sentencers in reaching this decision. In addition, once this is known, there could be scope for producing guidelines to ensure greater consistency in determining when the endpoint is reached (Section 4).

- A few sentencers considered there were circumstances where custody could benefit young offenders, by making rehabilitative treatments available that could not be accessed while serving a community sentence. At the same time, it was apparent that not all magistrates and judges were familiar with the availability or effectiveness of drug treatment facilities and other relevant interventions in the community. This may

suggest gaps in the availability of community treatments as well as a lack of awareness among some sentencers of what is available in their area. Improved community rehabilitation services and better information for sentencers both appear to be indicated (Section 4).

- A number of sentencers maintained that custody could set boundaries and offer structure to some young people who lead chaotic lives and that, for susceptible individuals, a 'short, sharp shock' period of imprisonment could act as a deterrent. Primary research may be justified to further examine the outcomes of short-term custody (periods of less than four months' DTO) in relation to young offenders (Section 4).
- A larger group of sentencers expressed doubts about DTOs of between four and six months on grounds that the secure estate was unable to provide sufficient education and training for this group of young people. Rather than justifying longer, standard sentences, this may suggest a need to re-examine and intensify the education and training components of short, 'entry-level' DTOs (Section 4).
- Some sentencers took a view that harsh penalties were justified to 'make an example' of young people who committed offences that had become especially problematic and prevalent in their area. These localised problems (for example, a spate of car crime) may help to explain some sentencing discrepancies within and between areas. National policy makers may wish to explore the reasons why (a) particular offences are dealt with by means of a custodial sentence in one area when they would receive a less severe, community disposal elsewhere and (b) investigate if there is disparity between sentencers in the same local court and jurisdiction (Section 5).
- Greater equity remains a consideration in the treatment of young offenders whose lack of a permanent address was seen to place them at greater risk of custody than those whose accommodation or family arrangements were more secure. Sentencers were generally clear that in cusp cases, a young person's lack of permanent accommodation often made them unsuitable for ISSP as a demanding alternative to custody. Action to tackle the reported shortage of age-appropriate accommodation for young people without a permanent home, including those formerly in public care, could play a significant part in reducing the current resort to custody (Sections 5 and 6).
- Sentencers said they tended to look more favourably on young people who were constructively engaged in education, training or work and who came from 'a good home'. Having a parent present in court was identified as one of a number of mitigating factors when sentencing in cusp cases. This could place the most excluded and vulnerable offenders at added risk of custody. One potential solution may lie in the wider use of promising community alternatives for young offenders that include intensive family-based support (Utting et al, 2007), for example, multidimensional treatment foster care (Chamberlain, 1998) and multisystemic therapy (Henggeler, 1998) (Sections 5 and 6).
- An offender's remorse, provided it was taken by sentencers to be sincere, was another factor cited as discouraging the use of custody. Given the value they placed on evidence of genuine contrition, it is possible that there may be scope for enhancing the attraction of intensive community sentences by adding to the existing components for achieving reparation to victims and 'restorative justice' (Section 5).

- The value of a guilty plea in borderline cases involving adult offenders has been found to be exceptionally important in deciding whether or not to impose a custodial sentence. Previous research (see Hood, 1992) suggests that a significant amount of the differential in sentencing between Black and White adult offenders is due to the greater reluctance of Black defendants to plead guilty. Further research to explore whether credit for the guilty plea has a discriminatory effect on young offenders who 'prefer to have their day in court and take their chances before a jury' (Wasik, 2004) may be justified (Section 5).
- Although sentencers were largely satisfied with the range of non-custodial disposals available to them, the use of Referral Orders for first-time offenders pleading guilty was a notable exception. Many complained of a 'stark choice' in serious cases between immediate custody and referring the young person to a youth offender panel, which they considered insufficiently rigorous. Some said the lack of a demanding alternative had, on occasions, persuaded them to impose a DTO. A more 'demanding' alternative to the Referral Order might be considered for use as an alternative to custody in serious cases (although there would be a risk of courts moving 'up tariff' and reducing their use of Referral Orders rather than their use of custody). However, it might be preferable as a first step to ensure that sentencers are properly familiar with the work of youth offender panels and their capacity, through a demanding restorative approach, to repair the harm caused by an offence and tackle the causes of offending behaviour (Section 7).
- Another complaint about Referral Orders concerned the time taken to implement them. Action to reduce time-lags in bringing young people before youth offender panels and implementing the order could help to strengthen confidence among sentencers (Section 7).
- Despite some doubts about reconviction rates, the sentencers interviewed took a generally positive view of the ISSP imposed alongside Supervision Orders or Community Rehabilitation Orders. Almost half considered the ISSP to be at least as demanding on young offenders as custody and approved of the balance struck between punishment and welfare provision. Although reconviction rates of 90% have been recorded, ISSPs have been associated with reductions in the frequency and seriousness of reoffending compared with the DTO (Gray et al, 2005). The views of sentencers underline the value of finding ways to make the ISSP more effective in reducing reoffending so their benefits and cost effectiveness are made clear when compared with custody (Section 7).
- One of the most intriguing findings from the study concerns the opinions that sentencers gave concerning PSRs prepared by YOTs. Although mostly content with the quality of the background information provided on young offenders, many sentencers expressed disappointment that custody seldom figured in the options and recommendations for sentencing. Seemingly as a consequence, it was commonly maintained that PSRs exerted little influence when deciding cusp cases. Further research should be undertaken to explore if greater willingness to discuss custodial options might lead to YOT proposals being given more credence (Section 7).
- Other research contemporaneous with this study, (e.g. Tata et al, 2007) has found that sentencers and lawyers have often made comments about PSRs not being 'realistic'. It could be argued that realism is subjective and therefore poses some difficulties for the report writer. This issue may merit further research that focuses on inter-sentencer disparity.

- Despite the general satisfaction expressed with the quality and commitment of YOT staff, some sentencers complained that attendance by YOT court officers was unsatisfactory and that the local YOT had – on occasions – been represented in court by staff who were not familiar with the individual cases being determined. Assuming these complaints are justified, there is a case for remedial action to restore confidence and prevent court time being wasted (Section 7).

- The majority of sentencers interviewed were keen to receive feedback from YOTs about the impact of sentencing – especially in cases where they felt they had taken a risk by deciding on a non-custodial alternative. Moreover, judges reported making use of progress reports on young people by way of congratulating those who demonstrated compliance with the community penalty. On this basis, it is worth considering the utility of providing feedback to sentencers on a routine basis. It could prove a valuable tool to inform sentencers of the outcomes (both positive and negative) of those young people who are serving community-based sentences (Section 7).

- Most of the magistrates interviewed did not mention the legal adviser as a major influence in their sentencing decisions. There is considerable literature that suggests that while sentencers enjoy wide discretion, the informal agenda of cases may be shaped by others, for example, legal advisers (previously referred to as clerks) and defence solicitors. It was not within the remit of this study to include legal advisers and defence solicitors in the interview sample. However, it would be useful to undertake future research that includes these stakeholders to explore the extent to which they play a part in the sentencing decision process (Section 8).

- While sentencers reported that local and national media exerted very little influence over their decisions, around half said they did take public opinion into account, especially when dealing with offences believed to cause particular concern among the community. Sentencers also felt that the public, without access to the full facts of a case, tended to take a harsher view of crime and punishment than the courts. Given the indications that concern for public opinion can translate into tougher penalties for locally prevalent offences, it may be worthwhile considering the efficacy of local campaigns to make the public more aware of the demanding nature of ISSPs and other community-based alternatives to custody (Section 8).

- There was one main element to the empirical research conducted for this study and that was one-to-one interviews with sentencers. It is important to note that the interviews provided sentencers' accounts of what they do rather than observing sentencing in-situ. With this in mind, we advocate that future studies of this kind employ a variety of different methods (e.g. pre- and post-sentencing interviews; observations of sentencing hearings; focus groups; simulated sentencing hearings; a follow-through of the trajectory of borderline cases, etc.) that may help to better focus on exploring the interpretation of borderline 'cusp' cases. Particualar consideration should be given to creating an exercise based on fictitious case papers. This could enable consideration of 'typical' borderline cases without the need to discuss real cases (if this poses an issue). Moreover, the use of either real or mocked-up case papers would be especially helpful in understanding how sentencers interpret case material.

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