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The prison population in England and Wales has been rising steeply. Prisons are overcrowded, budgets are stretched to the limit. Despite this, there has been remarkably little debate about the reasons for this increase, and about ways of putting a stop to it. We have just finished a study designed to go some way to filling the gap.

Whether to contain the prison population is a contentious and thus a political decision. Though there is a strong case for reducing prison numbers, our study did not focus on the pros and cons of doing so. Rather, our starting point was that politicians who want to curb the use of imprisonment need to know the best ways of doing so. We set out to look at what might discourage the use of custody, and what might encourage the use of non-custodial alternatives.

We mounted 48 face-to-face interviews with Crown Court judges, recorders and district judges; and we organised 11 focus groups with 80 magistrates. We asked everyone to provide details of four cases that lay on the ‘cusp’ between custody and community penalties. (Magistrates provided this information in a self-completion questionnaire.) We also interviewed five members of the senior judiciary.

Explaining the rise in the prison population

As a preliminary, we trawled through Home Office statistics to identify the factors driving up the prison population. We focused on the adult prison population of England and Wales. This has grown from 36,000 in 1991 to 62,000 in 2003 – an increase of 71%. The rise cannot be explained simply by greater use of remand. Nor is it the result of more offenders appearing before the court. Numbers have fallen, as have crime rates.

There are two main reasons why the prison population has grown. Sentencers are now imposing longer prison sentences for serious crimes, and they are more likely to imprison offenders who ten years ago would have received a community penalty or even a fine.



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The decision to imprison

What factors influence sentencers when choosing between custody or community sentences? **Mike Hough, Jessica Jacobson and Andrew Millie** report the findings of the study they conducted with the Criminal Policy Research Unit and the Prison Reform Trust.

Tougher sentences

Why has sentencing become tougher? In part it is because legislation, guideline judgments and sentence guidelines have all had an inflationary effect on sentences passed. At the same time, the climate of political and media debate about crime and sentencing has become more punitive, and has influenced sentencing practice. All of the five senior judges who took part in the study thought this, as did many Crown Court judges and recorders. District judges and magistrates were less inclined to talk in terms of tougher sentences, and more likely to say that more serious cases and more persistent offenders were coming before them.

In fact, the statistics show little change in the ‘offence mix’ in courts’ workloads, and if anything, there appear

to be a greater proportion of first offenders now than ten years ago. However, the statistics could be masking *some* changes in offending behaviour that have an impact on sentencing, such as increased drug dependence.

Certainly, sentencers’ *perceptions* of changing patterns of crime are a factor in sentencing practice, regardless of their accuracy. If they regard offending behaviour as more serious than hitherto, they are likely to pass heavier sentences than hitherto.

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

Sentencing decisions

We asked how sentencers had made decisions in cases on the 'cusp' between custodial and non-custodial sentences. The decision to imprison was generally based on considerations of the seriousness of the offence, the criminal history of the offender or both. It was universally described as a decision of 'last resort'.

A wider range of factors were of significance in cusp cases resulting in non-custodial sentences. Sentencers attached greater weight to the present circumstances and condition of the offender in such cases. A positive response to prosecution (for example, in terms of a show of remorse or willingness to co-operate with the courts) was often a significant factor, as was the offender's 'previous good character'. This emphasis on personal mitigation makes the sentencing process a highly subjective one, in which the sentencer has to make assessments about the attitudes, intentions and capabilities of the offender; assessments which feed judgements about responsibility and culpability.

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

Sentencers did not identify a lack of satisfactory community options as a factor ...

Community penalties

There was general satisfaction with the range and content of community sentences. There was strong support for the DTTO, and the review provisions they included. Some sentencers were equally enthusiastic about curfew orders, while others had mixed feelings and many were poorly informed about them. Some were poorly informed about community penalties more generally, and their benefits. Most recognised that the general public were ill-informed about most community penalties. This suggests a need to improve awareness of community penalties both among sentencers and among the wider public.

Sentencers appeared largely satisfied with the work of the probation service: many said that pre-sentence reports had improved, and that the enforcement of community orders had become much more rigorous. However, there were widespread concerns about under-funding and under-staffing.

Conclusions

If there is political will to contain the prison population, then success in doing so will depend on changes both to sentencing practice and to the context in which sentencing is carried out.

An approach tried by successive governments is to provide the courts with a wider and more attractive range of community penalties. This may go some way to reducing prison numbers. However, those we interviewed did not say that they were using prison for want of adequate non-custodial options. The enhancement of community penalties could simply result in 'net-widening' – where the new sentences are used with offenders who would previously have been fined, or served a conventional community penalty.

Encouraging the use of fines could prove a sensible option. This would relieve pressure on the probation service; in terms of outcomes it could at best deflect some offenders entirely from further offending without resort to imprisonment or community penalties; and at worst it could defer the point in their criminal career where prison becomes inevitable.

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

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

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

We would like to express our gratitude to the Esmée Fairbairn Foundation, who funded this study as part of its Rethinking Crime and Punishment programme, and all those magistrates and judges who took part in the research. The full report is available from the Prison Reform Trust: *The Decision to Imprison: Sentencing & The Prison Population*, by Mike Hough, Jessica Jacobson and Andrew Millie. £10 plus £1 p&p Tel: 020 7251 5070 Fax: 020 7251 5076 e-mail: prt@prisonreformtrust.org.uk

The study's conclusions at a glance

1. The best way of bringing down the prison population is to issue guidance to sentencers to use imprisonment less often, and where it is used, to pass shorter sentences.
2. Providing a wider range of tougher and more demanding community penalties will probably result in 'net-widening' – where the new sentences are used with offenders who would previously have been fined, or served a conventional community penalty.
3. There is a need to improve sentencers' and the public's awareness of community penalties and their benefits.
4. The use of the fine has declined sharply. If the courts were to make more use of fines it would free up probation resources and defer the time when the 'last resort' of imprisonment has to be used.
5. Above all, there needs to be consistent and visible political leadership in stressing the need to end the uncontrolled rise in the prison population.