

Non-custodial sentences



Non-custodial sentences are those that do not include imprisonment. They can include discharges, fines and community orders. In England and Wales, the vast majority of sentences are non-custodial. This POSTnote presents trends in sentencing and describes the non-custodial sentences being used in England and Wales. It also reviews evidence on the effectiveness of non-custodial sentences and current policy considerations.

Background

When sentencing an individual, criminal courts judge whether an offence is serious enough to impose a custodial sentence (immediate imprisonment or a suspended sentence) or a non-custodial sentence. Criminal justice is devolved, so this POSTnote focuses on non-custodial sentences in England and Wales. The Criminal Justice Act 2003 reserves custodial sentences for the most serious offences.¹ Most sentences imposed in England and Wales are non-custodial (90% of all sentences in the year ending June 2019).²

In 2019, the Commons Justice Committee suggested that a rise in custodial sentences (in both length and as a proportion of all convictions) has contributed to the increasing prison population in England and Wales.³ This roughly doubled in size between 1990 and 2017 but has remained relatively stable since 2012.^{4,5} In 2019 there were 139 prisoners per 100,000 people in England and Wales, one of the highest rates in Europe.^{5,6}

There is general consensus that increasing the proportion of non-custodial sentences is unlikely to reduce the prison population due to other contributory factors (such as sentence length).⁷⁻⁹ But, non-custodial sentences may provide other benefits, especially compared with short custodial sentences (less than 12 months). These include reducing reoffending and causing less disruption to a sentenced person's life.^{7,10} In May

Overview

- Non-custodial sentences include discharges, fines and community orders.
- In the year ending June 2019, 90% of people sentenced in England and Wales were given non-custodial sentences.
- The types of sentence given to individuals from different demographics (such as young people or women) vary.
- Research shows that reoffending rates tend to be lower for non-custodial sentences than for custodial sentences.
- There is less evidence on the effectiveness of these sentences on other outcomes, such as making up for any harm caused.
- Policy considerations include public opinion, potential unintended effects on prison population, and cost.

2019, the Ministry of Justice (MoJ) announced more funding for voluntary and private sector organisations to deliver rehabilitation services.¹¹⁻¹³ These services will be delivered on behalf of the National Probation Service, which supervises both those receiving some types of non-custodial sentence and those released from prison into the community on probation.¹⁴

Non-custodial sentences include discharges, fines and community orders (Box 1). Evidence on their effectiveness varies, with most research focussing on the effect of community orders on reoffending.¹⁵ This POSTnote presents sentencing trends and describes the non-custodial sentences currently used for adults and young people in England and Wales. It also reviews evidence on the effectiveness of non-custodial sentences and discusses policy considerations.

Sentencing in England and Wales

When a person is convicted and sentenced by a criminal court in England and Wales, they either receive a custodial or non-custodial sentence. There have been changes in the use of sentences over time.² Also, the types of sentences received by those from different demographics can vary.¹⁶⁻¹⁸

Types of sentences

Custodial sentences

A custodial sentence can include immediate imprisonment or a suspended sentence order (SSO). An SSO defers immediate

imprisonment, giving the person a chance to avoid prison if they do not offend again. They may also have to follow other requirements (such as having a curfew or attending an alcohol treatment programme). If a person subject to an SSO breaches its conditions, they may serve the original custodial sentence plus the sentence for any new offence.¹⁹ SSOs are considered custodial sentences because there is the potential consequence of imprisonment if the individual does not comply.²⁰

Non-custodial sentences

Some academics prefer the term 'community sanctions and measures' to 'non-custodial sentences.' They argue that the term 'non-custodial sentences' gives the false impression that these sentences are alternatives to imprisonment and wrongly implies that custody is the main or default sentence type.^{21,22,23} This POSTnote uses the term 'non-custodial sentence' as it is used more frequently in the UK.²⁴

Non-custodial sentences are sentences that do not consist of immediate imprisonment or an SSO. They can include discharges, fines and community orders (Box 1). The Criminal Justice Act 2003 reserves use of custodial sentences for the most serious offences (such as violent crime).^{1,20} Non-custodial sentences are used for less serious offences (such as fraud or criminal damage). Other factors are also considered, such as any mitigating factors and offending history.²⁵ The line between offences eligible for non-custodial sentences and those receiving custodial sentences is called the custody threshold.²⁶

Sentencing trends

In the year ending June 2019, England and Wales criminal courts sentenced 1.18 million people.² Non-custodial sentences made up 90% of all sentences and custodial sentences 10%. Of the non-custodial sentences, 86% were fines and 9% were community orders. Of the custodial sentences, 66% were immediate custodial sentences and 34% were SSOs.

Since the reintroduction of SSOs in 2005, evidence suggests they have increasingly been used in place of community orders.^{27–29} Overuse of SSOs can be viewed as a form of up-tariffing, where a harsher sentence is given instead of the appropriate sentence.³⁰ Concerns about up-tariffing led to the Chair of the Sentencing Council (which produces sentencing guidelines) to clarify that SSOs should not be used as a more severe form of community order for offences that may not cross the custody threshold.^{31,32} Since this recommendation in 2018, there has been a decrease in the use of SSOs in England and Wales.²

Over the last decade, there has been a reduction in the number of short custodial sentences passed, but not in their proportion of all sentences.² However, in the year ending June 2019, half of all immediate custodial sentences were under six months long and over a third were three months or under.² The Revolving Doors Agency, a criminal justice reform charity, argues that short sentences make it more challenging to support prisoner needs and cause undue disruption to the convicted person without providing meaningful rehabilitation.⁹ Scotland has legislation limiting the use of short custodial sentences (Box 2).³⁶ England and Wales have considered a similar approach.^{7,8,37,38}

Box 1: Types of non-custodial sentence in England and Wales

Discharges³³

Discharges do not impose a punishment beyond having a criminal record. They are given for the least serious types of offence, such as low-level drug offences. Courts can give an absolute discharge (no further punishment) or a conditional discharge (no further punishment but if the person commits another offence, they can be sentenced for both the first and new offence).

Fines³⁴

Fines are given for low-level types of offence, such as some motoring offences. The court can determine how much to fine the person once they have considered the seriousness of the offence and the ability of the person to pay.¹

Community orders³⁵

These can be given for serious offences that do not pass the custody threshold, such as theft. Community orders are intended to address the cause of the person's behaviour to reduce the likelihood of reoffending. A court can decide how many, and what combination, of the following requirements (listed by the Sentencing Council) need to be completed by the person for their community order:

- A rehabilitation activity requirement
- Unpaid work (up to 300 hours)
- A curfew (enforced with an electronic tag)
- A programme to help change offending behaviour
- Drug treatment (with the person's consent)
- Alcohol treatment (with the person's consent)
- Alcohol abstinence and monitoring (with the person's consent)
- Exclusion from particular places
- Mental health treatment (with the person's consent)
- Prohibition from certain activities (such as attending sports matches)
- Prohibition from international travel
- Having to reside at a particular address
- When a person is under 25, they may have to report to an attendance centre at specific times during their sentence

Courts can also impose certain orders alongside any sentence, such as requiring the convicted person to pay compensation, prosecution costs or a victim surcharge (used to fund victim services).

Demographic differences

Young people

Young people aged 10–17 years are not treated the same as adults, with sentencing usually occurring in youth courts.³⁹ For young people, there are two sentencing principles: to prevent further offending and to support their welfare.^{40–44} Non-custodial sentences used for young people include discharges and fines, like adults (Box 1), alongside two unique non-custodial options:⁴⁵

- **Referral orders** last 3–12 months and are often given for first-time offences for those who plead guilty. They involve a youth offender panel made up of the young person, their parents/guardians, a youth offending worker and, often, the victim of the offence. The panel agrees a contract setting out requirements that focus on rehabilitation and reparation.⁴⁶
- **Youth rehabilitation orders** are similar to community orders but can include requirements particular to young people (such as obliging them to attend appointments with a youth offending worker).⁴⁵

Young people can only be given custodial sentences for the most serious offences. When they are given, they aim to educate and rehabilitate.⁴⁷

Women

Women are a minority at every stage of the criminal justice system, often having committed less serious offences than men.⁴⁸ Many have complex needs (such as histories of abuse, mental health conditions and addictions) and are often primary carers.⁴⁹ In recognition of this, in June 2018 the MoJ launched the Female Offender Strategy.⁵⁰ It recommends that fewer women should be given custodial sentences and more should receive community orders.⁵¹

Black, Asian and Minority Ethnic (BAME) people

MoJ data from 2015 highlighted that the chances of imprisonment for BAME people were higher than for white people under similar criminal circumstances.⁵² Sentences for those found guilty after making a 'not guilty' plea tend to be more severe as there is a discount on sentences for early 'guilty' pleas.⁵³ A 2017 independent review (the Lammy review) stated that differences in sentencing for BAME people was partly due to them being less likely to plead 'guilty' and receive a sentencing discount, often due to lack of trust in the criminal justice system.^{52,54–56}

Effectiveness of non-custodial sentences

The Criminal Justice Act 2003 states that all courts must have regard to the following purposes of sentencing:¹

- Punishment of offenders
- Reduction of crime
- Reform and rehabilitation
- Protection of the public
- Reparation to victim(s)

This section reviews the effectiveness of non-custodial sentences in achieving these purposes. It mainly focuses on community orders as these sentences are often given for offences near to the custody threshold.²⁰

Punishment of offenders

Research suggests that public support for sentences focussing on punishment has increased in the UK since the early 1990s.^{57–59} Studies indicate that the public consider non-custodial sentences to be 'soft' options that do not effectively punish offending.^{64–66} In response to these concerns, in 2012 the MoJ introduced an obligation for all community orders to include at least one requirement that was a form of punishment (such as unpaid work, curfews and/or exclusion from certain areas).^{67,20}

The charity Prison Reform Trust suggests that a focus on punishment can undermine how well community orders can deliver other outcomes, such as reducing reoffending.⁶⁸ It argues that some requirements create extra burdens for individuals that may increase the likelihood that they breach the order's conditions. This can result in a custodial sentence, contributing to prison population growth.^{69,70} Researchers also note that community orders already represent a form of punishment as they all deprive people of certain liberties.^{71–75}

Box 2: Presumption against short sentences in Scotland

Since 2011, legislation has required Scottish courts to avoid using a custodial sentence of three months or less, unless they consider that no other sentence is appropriate.⁶⁰ Following a consultation, in 2019 the legislation was applied to sentences of 12 months or less.⁶¹ During the consultation, academics and charities (such as the Howard League Scotland) raised concerns about this change.³⁶ These focused on the possibility of up-tariffing and a lack of evidence about the effectiveness of the 2011 legislation.^{62,63} In England and Wales, it has been argued that the custody threshold acts in a similar way to a presumption against short custodial sentences.²⁶

Reduction of crime

Sentencing can seek to reduce crime in various ways, such as deterring others from offending. However, research typically focusses on whether sentences reduce reoffending. Data from 2017 (latest available data) indicate that between 29–32% of convicted adults and 36–44% of convicted young people are proven to have reoffended within one year of completing their sentence.²⁴ Four international reviews comparing reoffending rates for custodial and non-custodial sentences report mixed findings.^{76–79} In most (but not all) cases reoffending rates were lower for non-custodial sentences. A 2007 review of over 100 studies globally also indicates that non-custodial sentences are associated with lower reoffending.⁸⁰ Probation and community orders (including rehabilitation treatments) showed lower reoffending rates than custodial sentences. However, even when an intervention reduced reoffending in one location, it did not always result in a reduction when implemented elsewhere.

When looking at reoffending data, there is a lack of clear evidence on which interventions are effective at reducing reoffending, how these should be implemented, and for which offender groups the interventions should be used.⁸⁰ There are also issues with comparing people receiving custodial and non-custodial sentences. This is because the characteristics of the two populations (such as sex, age and offending history) are different. There are also differences in how studies measure reoffending. For example, some look at charge or conviction rates while others survey people with past convictions on subsequent offences.⁸¹ Therefore, researchers encourage consistency and transparency in how reoffending data are collected and reported.^{79,82}

In 2019, the MoJ compared the reoffending rates for people given short custodial sentences, SSOs and community orders.¹⁰ They matched various characteristics associated with reoffending across the three groups to ensure that the groups were not vastly different. The analysis found that short custodial sentences were associated with higher reoffending rates by similar individuals when compared with SSOs and community orders. Analysis by the MoJ in 2014 also highlighted that community orders reduced reoffending more than other types of non-custodial sentences.⁸³

Reform and rehabilitation

Both custodial and non-custodial sentences can seek to reform and rehabilitate people to prepare them for life beyond the criminal justice system. Researchers identify four forms of rehabilitation that they argue are necessary for an individual's successful reintegration into society:^{84–86}

- **Personal rehabilitation** involves developing a person's skillset for life outside the criminal justice system. It aims to increase their motivation and develop a positive personal identity.
- **Judicial rehabilitation** is the restoration of full civil liberties to a person after the end of their sentence.
- **Moral rehabilitation** is the acknowledgement (by the person who has offended, civil society and the state) that harm was caused. It can also involve the person seeking forgiveness as part of social reintegration.⁸⁷
- **Social rehabilitation** is the restoration of a person's social position and social identity.⁸⁸

Research indicates that some community orders (such as alcohol treatment) may provide the majority of these forms.^{89–91} While research shows that rehabilitation is possible through non-custodial sentences, assessing forms of rehabilitation, such as to what extent a person acknowledges the harm caused, can be difficult.^{80,92} Successful rehabilitation also relies on programmes being adapted for individuals. However, there is little evidence on how to do this for different groups. For example, a 2018 report for the Prison and Probation Service reviewed 11 studies of rehabilitation programmes for BAME people and found a lack of evidence on what was effective.⁹³ It also noted that participants were less likely to engage in programmes that lacked cultural awareness.

Protection of the public

When sentencing an individual, one aspect that a criminal court considers is protecting the public from future harm. Custody removes people from society, preventing them from carrying out any other offences in the community while they are in prison. Although not providing the same level of protection, some community order requirements help to protect the public in a similar way, such as an electronically monitored curfew.⁹⁴

Protection of the public also involves successful deterrence and prevention of reoffending.⁹⁵ If this is achieved, then levels of crime should reduce following convictions. Data from police force areas in England and Wales between 2002 and 2013 indicate that the relationship between sentences and local levels of crime vary by offence type.⁹⁶ Community orders appeared more effective than custodial sentences at lowering the volume of property crime and robbery. Custodial sentences (but not community orders) were associated with reductions in sexual and violent offences.

Reparation

Reparation is the process of making up for the harm caused to victim(s).⁹⁷ Convicted individuals may pay back their community through some types of sentence, such as unpaid work.³⁵ The income generated from fines is treated as government revenue, meaning that it may be directed to court funding but is not passed on to victims.⁹⁸ However, both custodial and non-

custodial sentences may require convicted individuals to pay victim surcharges and/or victim compensation (Box 1).^{99–101}

Reparation can also include restorative justice, which brings together the person who offended and their victim(s) in an attempt to repair harm.^{102,103} A 2013 review of 10 restorative justice interventions reported that they reduced reoffending and increased victim satisfaction.¹⁰⁴ A 2016 Commons Justice Committee report made similar conclusions.¹⁰⁵

Policy considerations

Prison population

Increasing the use of non-custodial sentences is unlikely to significantly reduce the size of the prison population due to other contributory factors (such as sentence length).^{7–9} Some stakeholders note, though, that using community orders instead of short custodial sentences could reduce the high turnover of people in the prison system (referred to as 'churn') and reduce the associated costs.^{8,9} Research also suggests that community orders are often used for less serious crimes over time. If community orders were used for more serious crimes and/or for less serious crimes, their number would increase. This could result in unintended outcomes.^{15,32} For example, more people receiving community orders may result in more breaches of these orders. As a breach can result in a custodial sentence, this could lead to an increase in the prison population.⁷⁰

Public opinion

In an online survey of 2,000 people in England and Wales, around 70% of the respondents felt that sentences are too lenient.¹⁰⁶ This belief is often reinforced by policies that put greater emphasis on imprisonment.⁵⁷ This is despite evidence suggesting that more severe sentences do not act as a better deterrent against crime.¹⁰⁷ Research suggests that there is a lack of public understanding surrounding non-custodial sentences.²² When the public is presented with real-life scenarios, their feeling that sentences are too lenient tends to lessen.¹⁰⁶

There are also public concerns about the effectiveness of community orders in maintaining safety.^{21,108} Changes and advancements in the use of technology may reduce these concerns. For example, improved application of electronic monitoring together with community order requirements may monitor behaviour more effectively.^{109–111} Advances in algorithms may also increase the accuracy of predicting the risk of individuals reoffending in the community.¹¹²

Cost and resources

Non-custodial sentences cost less than custodial sentences.^{7,113} For example, in 2017/18, the average cost of custody was £37,543 per prisoner (not including costs after release, such as probation).¹¹⁴ The cost for a community order in 2016/17 (the latest available data) was between £2,500–£4,000 per person.¹¹⁵ Costs and resources vary by sentence type, with some using fewer resources (such as curfews) and some requiring greater use of trained staff time (such as restorative justice). There are likely to be limits to how many community orders can be administered by the National Probation Service because delivering them would require more trained staff and increased funding.^{116,12}

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