

Reducing the number of children and young people in custody



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Introduction

This briefing will examine issues surrounding the use of custody for children and young people, some of the key considerations that can influence custodial sentencing and what those working in the youth justice system can do to divert children and young people away from custody where appropriate.

Concern about the inappropriate use of custody for children and young people is not a recent phenomenon. The Youth Justice Board (YJB's) position, set out in its *Strategy for the Secure Estate*, remains that custody should be used sparingly for children and young people because of their vulnerable status. There is evidence that those serving custodial sentences are drawn from amongst the most disadvantaged families and communities and a high proportion of those that end up in custody are also '...vulnerable, emotionally and behaviourally disturbed children...' ¹ who may not feel safe in the custodial environment in which they have been placed. ² In addition, it is argued that certain groups are discriminated against (for reasons of ethnicity) from the point of entry into the criminal justice system through to being placed in custody and that certain other groups are over-represented in custodial populations, for example, looked-after children. This makes it even more important that the right diversionary measures are in place which take young people away from prosecution where appropriate, and that courts consider community alternatives wherever possible to ensure that custody is reserved for those young people who present a danger to the public and cannot be managed in any other way.

In addition to the problems of vulnerability and discrimination experienced by some young people, custody can have a detrimental impact on the young person's family and other support networks and make rehabilitation more difficult. There is particular disruption for young people from Wales. Youth offending team (YOT) managers in Wales have commented on barriers to resettlement brought about by the lack of synergy between England and Wales in respect of assessment processes and service provision in areas such as health and education. Moreover, Welsh speakers may not have the opportunity to converse in their first language.

All of this creates a real tension in striking the right balance between regard for the young person's welfare and developing approaches which: ensure an appropriate level of punishment for the offence committed; protect the public; enable the young person to make a positive contribution to their community; steer them away from crime; and gain the confidence of the public. The particular challenge for the criminal justice system when balancing welfare and justice considerations is to ensure that there is public confidence in the use of diversion and community sentences.

The current position

Over the last three decades custody levels have fluctuated and some efforts have proved successful in reducing custodial numbers. For example, between 1980 and 1991 the number of children and young people in custody fell significantly (from 7,700 to 1,700) amidst concerted efforts to divert young people from the youth justice system. At the start of the 1990s, this trend reversed and rates of custody rose until 2007.

Since then numbers have fallen, in line with a reduction in the number of first-time entrants to the youth justice system. As a result, fewer young people have appeared in court and in turn, there has been a reduction in the number of young people sentenced to custody. Different commentators ascribe different causes to the fall in the number of first-time entrants to the youth justice system. Some see the widespread availability of youth offending preventative activity as the reason, whilst others believe it is due to the development of targeted policing (notably target setting in relation to 'offences brought to justice' and sanction detections).³

Against this backdrop, custodial numbers for young people now appear to have reached a plateau. However, serious concerns remain about the disproportionate use of custody in some localities in England and Wales. The United Nations Commission on the Rights of the Child in the concluding observations of its reports on progress regarding the UK's compliance with the convention⁴ has criticised the continuing high use of custody in England and Wales, which remains significantly higher than in European nations.⁵

The UK government has signalled its intention to introduce payment by results and to devolve some of the costs associated with custody to local authorities as an incentive to reducing the custodial population and as a possible means of measuring the performance of YOTs. This will place greater emphasis on maintaining the recent trend of a decline in custodial numbers.

Lessons from research and practice

There have been a number of recent studies and investigations which have examined the overuse of custody and why there are such regional variations in custody levels.

Research commissioned by the YJB into the sentencing of young people found there was no single factor which could be identified as the reason for differential sentencing; rather there is a combination of factors at play. The rate of diversion, the distribution of sentencing, the availability of bail programmes, the nature of offences committed in the locality, the range and quality of services provided by the YOT, the quality and influence of pre-sentence reports and the degree of communication and confidence between the YOT and the court can all have a bearing on whether children and young people end up in custody.⁶ In addition, a study by Utting and Solanki of sentencing practice highlighted the fact that the nature and seriousness of the offence, the offender's criminal history, and

levels of stability and support in the young person's life have a large bearing on custodial outcomes and noted that sentencers sometimes saw the imposition of a custodial sentence as unavoidable because all other options had been exhausted.⁷ The onus is therefore on youth justice practitioners to find ever more innovative and effective ways to tackle youth crime in the community (albeit with limited resources).

Following research conducted by Nacro Cymru in Bridgend and Merthyr Tydfil for the Welsh Assembly Government,⁸ Her Majesty's Court Service set up a workshop in which magistrates from the respective youth benches and YOT staff met to develop an action plan for implementation in 2011. The proposals included:

- developing a more focused approach to information sharing between YOT and court personnel (in particular information about sentencing patterns and the work of the YOT)
- establishing informal review hearings of youth sentences post conviction
- ensuring that all bail applications involving young people would be heard by a youth court magistrate, even on non-youth court days.

One lesson from this is that local evaluation can be a useful means of reviewing sentencing patterns, YOT and court processes, and of addressing practices which lead to regional variation in custody levels.⁹ The Prison Reform Trust, for example, has worked with a number of YOTs in areas where there is a high use of custody identifying the key local drivers and highlighting necessary changes in practice.

There have also been a number of initiatives in recent years aimed at keeping the size of the overall custodial population in check, notably the introduction of targets. The YJB set separate national targets for those on remand and those sentenced between 2001 and 2005. This was then replaced by a single target to reduce custodial numbers by 10% overall between 2002 and 2005 (a move which was linked to the extension of the availability of the intensive supervision and surveillance programme). The target was reset again in 2005/6 before being dropped completely. Although the process was useful in highlighting variances across localities, it did not in itself lead to significant and sustained reductions in custody overall.

In addition, a formal alternative to the custody sentence was introduced in 2001. The approach, initially set out in *Youth Justice – The Next Steps*, discussed the need to establish '... intensive supervision and surveillance... as the main response to serious and persistent offending'.¹⁰ An evaluation of its effectiveness described intensive supervision and surveillance as 'a useful option for the youth courts, bridging the divide between custody and conventional community penalties'.¹¹ The *Criminal Justice and Immigration Act 2008* subsequently introduced intensive supervision and surveillance as a requirement of the youth rehabilitation order and, as such, it now sits on a statutory footing as an alternative to custody.

The Centre for Crime and Justice Studies has argued that, whilst intensive supervision and surveillance may have led to a reduction in the use of custody in some instances, it may also have replaced less demanding community sentences, thereby leading to net widening.¹²

Research by Utting and Solanki indicates that not all sentencers accept there is a real community equivalent to a custodial sentence, in that no matter how restrictive a community sentence might be, it does not equate with the loss of liberty and the experience of incarceration. The debate about how to make community sentences sufficiently credible that they are seen as real alternatives to custody and how to match the restriction of liberty with the seriousness of an offence is an ongoing one.

Specific issues about the use of custody

The effect of custody on reoffending rates

Notwithstanding the fact that a secure placement prevents the continuation of offending whilst the young person is in custody, it is not effective at preventing future reoffending. Reoffending rates for the 2007 cohort of those aged 10-17 sentenced to custody, for example, are 75% overall and 77% for males.¹³ For those with previous custodial sentences, this increases to as much as 96%. There is no evidence that, on an individual level, custody reduces reoffending or that the factors which influence overall crime levels are causally related to rates of incarceration.

There has been sustained criticism in particular of the repeated use of short custodial sentences (especially four and six-month detention and training orders) on the grounds that they do not provide good value for money in terms of preventing reoffending¹⁴ and therefore do not protect the public. Utting and Solanki report that many sentencers question their value, particularly their ability to provide education and training, and suggest they may even perpetuate the offender's exclusion rather than reducing it, thus making rehabilitation more difficult.¹⁵

Costs

The average cost of incarceration across different sectors is £60,000 for placement in a young offender institution, £160,000 in a secure training centre and £215,000 in a local authority secure children's home.¹⁶ Analysis by the Foyer Federation found wide variations in the publicly stated costs of custody and that, in some cases, they have been understated because some cost elements (such as premises, insurance, pensions, depreciation, maintenance costs, capital costs and education and health services) are omitted from the figures given for young offender institutions.¹⁷ With around two thirds of the YJB budget spent on commissioning secure places, it is suggested a small reduction in the demand for places could release significant funding for community-based alternatives.

Currently, there is a strong focus on devolving the costs of placement in the secure estate to local authorities and introducing payment by results to the management of custody. The government's green paper, *Breaking the Cycle*, indicated that whilst the Ministry of Justice bears the cost of custodial placements, there is a lack of incentive on the part of local areas to develop effective community alternatives.¹⁸ The government has proposed a single remand order be introduced to replace the existing tariff, and that the costs of youth remands to secure accommodation be transferred to local authorities. The intention is also

to make existing arrangements more compliant with the United Nations Convention on the Rights of the Child.¹⁹

The second focal point of debate is the UK government's intention that local authorities share the financial risk of young people being sent to custody and the financial rewards brought about by a reduced custodial population – a mechanism which is being introduced through payment by results. In December 2010, the YJB invited all local authorities to submit proposals for a 'youth justice reinvestment pathfinder initiative' on a consortia or single area basis. This payment-by-results scheme will provide services targeted at reducing the use of custody by an agreed amount over a two-year period. If it fails, it will lead to a clawback of at least part of the funding. The government is also looking at whether payment by results can be built into the YOT grant funding formula.

Custody thresholds

One of the central concerns about custody is that it is not being used as a measure of last resort as indicated by the United Nations Convention on the Rights of the Child (article 37). It is argued that the threshold for the imposition of custody – which is not defined in statute but instead by interpretation of the Sentencing Guidelines²⁰ – is in practice lower than that of a measure of last resort. The Sentencing Guidelines also state that 'even where the threshold is crossed, a court is not required to impose a custodial sentence' as well as stipulating that three statutory tests must be satisfied before such a sentence can be made.²¹

In examining the use of custody thresholds for the 10 to 14-year-old age group, a report for Barnardo's by Glover and Hibbert questions whether the principle of last resort is sufficiently evident in sentencing practice.²² The study examined a group of 10-14 year olds (214 young people from 45 YOTs) who had received detention and training orders, and found evidence of high levels of breach and significant evidence of incarceration for non-serious and non-violent offences. It concluded that just over a third of those sampled had not met the custody threshold and should not have received a custodial sentence.

The Prison Reform Trust also examined the use of the custody threshold in *Punishing Disadvantage*.²³ The report drew attention to the importance of applying the principle of proportionality in sentencing, namely that custody should be used only when no other sentence can be justified. The study examined the extent to which serious and violent offences featured in the offending histories of 3,283 young people who had been sentenced to custody in the second half of 2008. The findings indicated that in three fifths of cases young people were convicted of offences 'which were not in themselves so serious that only custody could be justified' and where community penalties might have been applied. Half of those examined had received a custodial outcome for a non-violent offence, leading the report to conclude that most children and young people are repeat offenders whose continued offending leads sentencers to use custody as a last resort, simply because they have exhausted other disposals. In addition, Nacro Cymru's research found that there could be very short pathways to custody in some instances, with other non-custodial options appearing to diminish very quickly, as well as some evidence that providing young people with repeat opportunities to remedy their behaviour does not occur to any significant degree.²⁴

A systemic approach to reducing custody

Having discussed the current context and particular concerns about the use of custody, this briefing will now explore measures which should be adopted by those working in the youth justice system in order to help strike the correct balance between punishment and welfare and lower the chances of custody being used inappropriately.

It is well known that the way in which young people come to the attention of the police and the manner and speed with which they progress through the youth justice system has a strong bearing on the outcome. Reduced use of pre-court diversion increases the court population, and having previous convictions can accelerate young people through the sentencing framework which can result in escalation towards longer, more complex and intensive sentences. In addition, once any breach occurs, the options diminish further.

With the introduction of payment by results, YOTs will need to focus their efforts on taking steps at a local level to ensure that young people are remanded and sentenced to custody only where there are concerns about public protection and their offence is so serious as to warrant it. Key to a systemic approach is identifying the main points in the youth justice system at which custodial decisions are made and how they can be influenced.

Diversion can take place prior to entry into the system and also once in it:

- **Pre-court diversion.** This is activity which diverts young people from the formal youth justice system where appropriate. It may be achieved through the use of targeted prevention programmes, the use of summary pre-court measures (such as the youth restorative disposal) or various forms of penalty notices. It can also be achieved through the statutory pre-court diversionary provisions of reprimand, the final warning and (where available) the conditional caution.
- **Diversion within the court system.** This is activity which diverts young people, firstly, from entry to the secure estate through the use of the bail and remand tariff and, secondly, at the point of sentence. Diversion in court is based on the principle that the least restrictive option commensurate with the seriousness of the offence and the risk the individual poses to the community should be considered. Other relevant factors that must be taken into account are: the statutory aim of the youth justice system to prevent offending and thus increase public safety; the impact of the court's decision on the young person's welfare; the seriousness of the offence(s); and consistency with children's human rights (in particular, the United Nations Convention on the Rights of the Child).

Pre-court diversion

Maximising pre-court diversion

It is well documented that diverting more young people from the court process can reduce the number of people in custody. Currently, the police have the power to issue a reprimand, a final warning (if the relevant criteria are met) or charge the individual, in which case the matter goes to court. The decision taken will depend on the seriousness of the

offending, any previous offending history and any admissions of guilt or otherwise. A 2011 report by the joint inspectorate on youth offending court work and reports noted the main reason cases proceed to court where pre-court diversion should have been considered is the lack of early legal representation.²⁵

Focus on practice

Northamptonshire Police and YOT established a four-stage model of pre-court diversion which included the option of informal action in appropriate cases. Evaluation of the approach suggests that where cases did not proceed to an immediate prosecution, a reconviction for an offence at a later date was less likely than in those cases where there was immediate prosecution.²⁶

Swansea Youth Offending Service and South Wales Police have developed a 'bureau' designed to divert young people out of the youth justice system, tackle the causes of their offending behaviour and promote positive social behaviour. If young people meet the criteria to enter the bureau, they are bailed to appear at a clinic 14 to 21 days later.²⁷ Within this period, an assessment is undertaken to explore the circumstances of the offence, to identify underlying problems and to provide the young person with the opportunity to think about their behaviour and what can be done to address it. A recommendation is then made about whether they should receive a formal sanction or a non-criminal disposal and whether any services should be offered to them. The views of victims are also taken into account. Preliminary findings indicate accelerated reductions in the number of first-time entrants to the youth justice system and a decrease in the proportion of first-time entrants as a proportion of all young offenders in Swansea.²⁸ There has also been an increase in the use of informal actions (as opposed to formal sanctions) and more detailed analysis is currently underway to examine the impact on reoffending. One of the strengths of the approach is considered to be the opportunity it provides young people with to explore and express their views about decisions that concern them.

Triage schemes also seek to divert young people from the youth justice system. There are a variety of models that operate within different localities – for example, those that focus on providing preventative interventions to low-level or first-time offenders, those that aim to divert young people who have committed minor offences into restorative justice processes, and those that seek to influence not only decision making in the police station but also in the court. Where YOT staff are present in the custody suite, there is also the added benefit of being able to access services and to develop support packages which are targeted at the objections to the granting of bail, as well as to complement representations made by legal advisers and appropriate adults and thereby influence what happens at the first court appearance.²⁹

Refusal of police bail

One of the areas that tends to be neglected in the discussion of what impacts on custodial levels amongst children and young people is what happens when a young person is charged with an offence and the police decide not to grant bail prior to the young person's appearance at the next court hearing. The young person will appear in court from the

status of custody and there is evidence that this can impact on subsequent bail decisions as there is a greater likelihood of this status being maintained throughout subsequent hearings unless representations are made.³⁰

When bail is denied, a transfer to local authority accommodation should be sought under the provisions of the *Police and Criminal Evidence Act 1984*.³¹ This is commonly referred to as a PACE transfer. Anecdotally, it appears that the use of PACE transfers has declined and, although they have never been centrally monitored, it seems that this has resulted in more young people remaining in police cells. Gibbs and Hickson, in a report on the overuse of remand for children and young people, suggest that local authorities rarely provide such accommodation and police officers rarely ask for it.³²

Gibbs and Hickson suggest the need for improvements in risk assessments for police bail and that legal representation should be made available so that the young person is made fully aware of their rights. They also highlight the need for appropriate adults to be better informed about the PACE provisions so they can operate more effectively (ie, so they know when the need for overnight detention should be questioned). The YOT also has a role to play in monitoring cases eligible for transfer to local authority accommodation but where a transfer did not take place and in ensuring the legal requirement to produce the certificate giving the reasons why it did not occur is available when the young person first appears in court.³³ This certificate is to make clear that detention only occurred because there was no suitable open placement available for the young person.

Diversion within the court system

There are various points within the justice process prior to sentence and at the point of sentence where there are opportunities to ensure that custody is used only when absolutely necessary. Effective diversion relies on the YOT providing a good quality service to the court, proactive remand management and presenting alternatives to custody in pre-sentence reports, as discussed in the sections below.

The court duty role

The court's perception of what a YOT does and of the quality of its service derives, in the main, from its experience of how its staff operate in court when advocating on behalf of young people, assisting with enquiries and presenting court reports. This requires time spent developing a constructive and helpful relationship with magistrates which relies on the provision of timely and relevant information and knowing when (and how) to be assertive and challenging.

For the court duty function to operate well, good support is crucial. This will include the following:

- Access to information, particularly about young people, from the YOT electronic case management database.
- Ready and immediate access to services for bail support programmes.

- Up-to-date reference material consisting of, for example, current guidance, legislation and case law.

Thorough pre-court preparation is necessary to ensure that, firstly, all the information the court is likely to require is ready and, secondly, to anticipate instances where the YOT might be required to provide information (for example in cases where bail is likely to be denied, where a pre-sentence report might be requested or a referral order might be under consideration and where any breaches are being presented). For more information, see Nacro's good practice guide, *Working in the Courts*, which provides detailed guidance on the pre-court preparation process and the court duty function.³⁴

Remand management

When considering the use of custody, debate has tended to focus in recent years on the sentenced population and it has been suggested the remand population has not received the scrutiny it should have.³⁵ The government's green paper, *Breaking the Cycle*, highlighted that whilst custodial sentences have been reducing in number, the remand population has not been falling at the same rate, noting that remands account for 28% of the juvenile secure population. The Prison Reform Trust estimates that three quarters of young people who are remanded in custody do not go on to receive a custodial sentence, thereby calling into question whether their loss of liberty was necessary in the first place.³⁶

Remand management services should target young people at risk of being denied bail and liaise with the young person's legal representative to put forward the most appropriate option to facilitate the granting of bail. Courts need to have a clear and thorough understanding of the bail and remand framework, and YOTs should provide comprehensive bail information to encourage sentencers to make use of the most appropriate option in a given case. For example, accommodation problems may need to be investigated and resolved to facilitate the granting of bail.

It is important that the bail and remand framework is used appropriately. For example, there is a clear distinction between bail supervision and support and bail intensive supervision and surveillance, and this distinction should be upheld to avoid the latter becoming the default option when support programmes are being considered. There has also been a decline in the number of remands to local authority non-secure accommodation. This may mean they are not being considered in cases where they should be – particularly where a court ordered a secure remand or where a remand to custody is made. If this route is underused, specialist accommodation may cease to be available.³⁷ The government's response to the *Breaking the Cycle* consultation indicates that all those under 18 will be treated the same for remand purposes (at present 17 year olds are treated as adults). When viewed in conjunction with proposals to transfer costs to local authorities, this may mean there is a resurgence in demand for local authority non-secure accommodation.

A young person's response to a bail programme can give an important indication of how that young person may respond to a community sentence. Pre-sentence reports should address and comment on the bail period (whether the YOT was involved or not). However,

the 2011 report by the joint inspectorate on youth offending court work and reports found this information was frequently omitted, and therefore information relevant to the sentencing process was excluded from court deliberations.³⁸ A final comment worthy of note from this report is that, although YOTs tend to have well documented remand processes in place, a remand management strategy is frequently lacking. This suggests an opportunity is being missed to think more strategically about what can be done to ensure that young people only lose their liberty when there are public protection concerns, and that there is much to be gained by more collaborative working between HMCS staff and sentencers.

Sentencing

Research by Bateman and Stanley has shown that areas which have high rates of custody tend to make less use of first tier sentences and of less intensive community penalties.³⁹ Since the publication of their report, the sentencing landscape has changed with the introduction of the youth rehabilitation order. This change (from a range of orders to a single community order albeit with a range of requirements) has made it even more important that pre-sentence report authors do the following:

- Propose sentences below the community sentence threshold (where appropriate) to minimise the number of low-risk young people becoming subject to orders which require supervisory input.
- Propose first tier sentences in cases where the young person may have previously been sentenced to a community penalty in order to prevent accelerated progression through the menu options of the youth rehabilitation order.
- Encourage sentencers to use and repeat shorter sentences, rather than seeking longer and more intricate orders (particularly with the demise of the action plan order, which was specifically designed to be a short sentence).
- Include full details of the requirements and the expectations of the order (for example the frequency of contact, the content of any intervention programmes, how they will address the behaviour which led to the offending, what behavioural change is expected, what risk factors will be addressed and the young person's and parents' view of the order).
- Include details of contracts in instances where a referral order may be made in cases on the cusp of custody in order to overcome reservations magistrates may have about using the order.⁴⁰

The quality and content of pre-sentence reports is influential in decision-making on sentencing. Bateman and Stanley suggest the credibility of pre-sentence reports lies, firstly, in their ability to provide a clear picture of sentencing options and secondly, in the extent to which they enable the court to feel confident about the quality of service the YOT can provide in terms of appropriate interventions and enforcement.

The main criticisms of pre-sentence reports tend to focus on the quality of their proposals. Nacro Cymru's research in Wales found this can become acute when courts request 'all options' reports where custody is one of the decisions under consideration.⁴¹ Magistrates

indicated it was unhelpful when the author highlighted a number of sentencing options but did not indicate which would be most suitable or where there was obvious conflict between what was discussed and what was proposed. The 2011 report by the joint inspectorate on youth offending court work and reports noted that such reports are sometimes incorrectly requested (and suggested this practice should cease) and that discussion of 'every possible sentencing option' including those that would not be 'applicable, possible or appropriate' was not helpful in providing the court with a clear, rational, evidence-based proposal.⁴² Nacro Cymru research found that in such instances a lack of clarity may lead courts to err on the side of caution and consider custody, and that YOTs may effectively be passively advocating custody by not being clear or firm enough in their proposals. Indeed, Nacro has previously commented that practitioner commitment to the avoidance of custody is less evident than it was, and that there has even been a shift towards the active recommendation of custody.⁴³

How YOTs assure the quality of their reports and whether there are effective processes for identifying ambiguities and conflicts and ensuring that reports are analytical, relevant and contain logical proposals magistrates can be confident of is extremely important. The report by the joint inspectorate on youth offending court work and reports suggests there should be better quality assurance of reports and training for practitioners. Nacro's good practice guide on pre-sentence report writing provides detailed information on how to construct a well argued pre-sentence report.⁴⁴ In addition, the YJB's *Making it Count in Court* toolkit has examples of forms to give to sentencers to request feedback on the quality of bail supervision reports and pre-sentence reports which are submitted to the court, which should feed into quality assurance reviews.⁴⁵

There is undoubtedly a strong correlation between levels of custodial sentencing and magistrates' views of the quality of youth justice services.⁴⁶ These perceptions depend on the degree of trust and confidence established between YOTs and the court. However, Nacro Cymru's research in Wales indicates it may also be more complex than this: it found that even where magistrates have high levels of confidence in their local YOT, they still make high use of custody.⁴⁷ Ivankovic suggests that in order to help overcome this, YOTs need to be clear about their role and purpose in court and not be tempted to moderate what they believe to be right in anticipation of what they consider magistrates will find acceptable.⁴⁸ Maintaining independent working relationships, along with high levels of confidence, is the most effective way of ensuring appropriate outcomes for young people.

YOTs also need to give serious consideration to the proposals they put before the court to ensure that the demands contained within the proposals are of a nature the young person can understand – breach can be a significant driver of custodial levels. Research in this area has identified that from a young person's perspective, some orders can feel overwhelming (in terms of length and intensity) and impossible to achieve, and they reported having little opportunity to comment on how they would approach what was being put forward.⁴⁹ This suggests a more participatory approach is needed in the process of formulating pre-sentence proposals, which would then lead to more effective engagement with the individual concerned and minimise the prospect of breach.

Reviewing court outcomes and working in partnership

The YJB in its guidance on effective court work, *Making it Count in Court*, emphasises the importance of YOTs developing professional relationships with others in the court setting which inspire confidence: such relationships can influence the use of community sentences and opinions on the effectiveness of available programmes.⁵⁰ However, the YJB guidance also suggests YOTs and other court users should meet to review sentences and sentencing patterns. Nacro Cymru found in its own research that magistrates were not necessarily familiar with the youth court's sentencing patterns and how they use the options at their disposal, even when they had served on the youth bench for a considerable period of time.⁵¹ Additionally, there may be limited awareness of how a YOT delivers different elements of orders and the work it undertakes with young people.⁵² Such gaps in knowledge could impact on sentencing decisions, on how sentencers form a view about the quality of local youth justice services, and highlight the importance of YOTs and courts finding an effective way of sharing and reviewing this information.

With this in mind, there should be varied mechanisms in place to ensure the exchange of information between magistrates and YOTs: for example, meetings, open days, the provision of information in magistrates' retirement rooms and the circulation of a periodic newsletter. Northumberland Youth Offending Service holds engagement events which use a format akin to 'speed dating' enabling magistrates to get round and talk briefly and informally to all youth offending service staff. Similar events have been held between magistrates and referral panel volunteers and magistrates and parents.⁵³ The YJB's *Making it Count in Court* toolkit contains useful resources for reviewing court performance, as well as other resources which can assist in the exchange of information.

The YJB's guidance also recommends that there should be better exchanges of information on the progress of young people on community orders, and that the focus should be on positive outcomes, successful completions and the effectiveness of community-based interventions as well as on orders that have been unsuccessful and breached. Magistrates have indicated the need for a more rounded picture of progress and activity and for more information on the impact of community and custodial sentences, in particular where they felt they had taken a risk with sentencing.⁵⁴

In addition, YOTs should review all cases with custodial remands and sentences (particularly those where the outcome was unexpected or there was a first-time entrant to custody) to identify if there is anything they could have done differently and whether any further action is required. The YJB's guidance advocates this information be shared with magistrates. The 2011 report by the joint inspectorate on youth offending court work and reports noted that custodial matters do not command a high enough priority on the agenda of YOT management boards and that YOTs, sentencers and all other relevant agencies must work together to achieve a non-custodial outcome where possible.

Suffolk Youth Offending Service, for example, holds quarterly meetings to look at all bail refusals involving a secure placement and all detention and training orders of up to six months' duration. Information is fed back to court staff, magistrates and other agencies, including

information on unsuitable accommodation which may have affected custodial outcomes.⁵⁵ In addition, the Howard League has reported on the effectiveness of a custody panel in Wessex responsible for reviewing all cases sentenced to custody and analysing them in order to identify any problems or gaps in service which might have prevented custody.⁵⁶ It found that the panel's work had led to a significant drop in the custodial population in 2007.

Engaging young people in court

In recent years, there has been growing interest in the extent to which those passing through the youth justice system have learning difficulties or problems with speech, language and communication. Often these conditions are not formally diagnosed and can be interpreted as 'boredom, evasion, resistance or lack of co-operation'.⁵⁷ Talbot, in a study of children and young people in the youth justice system with complex needs, recommends that pre-sentence reports should highlight how any concerns about impairments could impact on a young person's behaviour in court, given that there is evidence that these young people are more likely to receive a custodial sentence because courts sometimes interpret these difficulties in a negative light.⁵⁸

The joint inspectorate report on youth offending court work and reports indicated that YOTs could do more to help young people and their families to understand court processes.⁵⁹ One of its suggestions was that greater use should be made of the Communication Trust's booklet *Sentence Trouble* to help improve communication with young people.⁶⁰

Reducing reoffending

The current sentencing framework provides opportunities for young people to be diverted from custody through the use of the referral order, the menu-based options that exist within the youth rehabilitation order (including the use of more intensive supervision and surveillance) and the use of other sentencing options such as curfew orders in appropriate instances.

Traditional responses to crime have tended to focus on what practitioners, agencies and services should do to encourage desistance from offending. The approach has been to work within a model that identifies risk factors and then seeks to manage them in supervisory arrangements. In the present challenging economic climate and with the advent of payment by results, the pressure is on to develop community-based approaches that deliver large-scale sustainable reductions in reoffending. Despite the National Audit Office's suggestion in 2010 that still not enough is known about what does actually work and which activities are likely to be the most effective⁶¹ there is a growing body of evidence from the UK, Europe and North America of what does work: aiming targeted interventions at those most at risk of offending, getting young people back into education, addressing substance misuse and changing antisocial attitudes into pro-social attitudes.

Successful outcomes are influenced by the young person's relationship with YOT staff and

volunteers, pro-social modelling, motivational approaches, positive reinforcement and help with problem-solving skills. These have to be reinforced by proactive work aimed at maximising compliance and reducing attrition from programmes. Additionally, work with young people should include the family and examine their role in finding a means of resolving the difficulties that may have arisen and, where possible, building family members' capacity to act as capable guardians for the young person in trouble.

In light of the UK government's introduction of the concept of the Big Society, growing consideration is being given to how the extent of crime and reoffending, and the fear of crime can be reduced by enhancing the involvement of ordinary people in the youth and criminal justice system. In his study of collective efficacy and community safety, Sampson argues that a whole gamut of problems which run deep in neighbourhoods can be addressed, at least in part, by the maintenance of inter-generational ties, the reciprocal exchange of information and services, and the shared willingness of people to intervene to find shared solutions to common concerns.⁶²

Restorative approaches and processes are now very much a feature of the youth justice landscape, whether being used to divert young people from the justice system or for those under sentence. Such approaches have the potential to create conditions in which young people can understand the consequences of their actions and play a part in determining how to redress what they have done, thus making it less likely they will repeat their behaviour. In the process of making amends, the views of victims and the wider community are also taken into account. Restorative approaches have the potential to work well for young people as they strike the balance between the need for justice to be seen to be done and for young people to learn from their wrongdoing.

A review by Sherman and Strang of the evidence relating to restorative justice practice suggests that it works well as a general policy, but that careful consideration needs to be given to how best to use restorative approaches.⁶³ They suggest the best results regarding recidivism occur in relation to more serious criminal offences, particularly when personal victims have been identified and involved in restorative processes. These findings indicate that, to be effective, restorative justice needs to be genuinely restorative and, whilst there is a place for reparative activities, such activities need to be meaningful and assessed as likely to be of value in reducing reoffending if they are to have any impact. It is also worth noting that, in many cases, the victims of crimes committed by young people are likely to be other young people and addressing this cause and effect can be an important factor in the prevention of reoffending.

A further dimension to community involvement is the role that members of the public can play in the justice process. The referral order has provided scope for members of the public with particular knowledge of their communities to become volunteer panel members who help to determine the content of referral order contracts – namely, the reparative elements and those organised or delivered by the YOT. However, securing victim engagement, being able to organise sufficiently high quality reparation, and having a broad enough choice and range of reparation projects for young people all remain a challenge for

referral order panels. Volunteering and mentoring activities provide further scope for involvement and can provide support in post-custody resettlement, particularly if family support is lacking.

Promoting compliance

Breach of bail and orders (whether criminal or civil, for reasons of non compliance and/or further offending) have contributed to significant increases in custodial sentencing. This is largely due to the relatively high rates of breach associated with the intensive supervision and surveillance, the failure of some to comply with (or to engage with) such an intensive programme, and is also due to the *National Standards for Youth Justice Services* becoming more prescriptive and less discretionary. Whilst breach action can be taken for non-attendance and unacceptable behaviour, committing an offence on an order does not automatically constitute a breach in itself (although the behaviour involved might).

Bateman indicates the way in which a young person experiences an intervention will have a significant bearing on their compliance, and suggests engagement is an essential strand in reducing custody as it reduces the likelihood of breach (and thus breach action) and increases the potential for community-based interventions to have an impact on future offending behaviour.⁶⁴ Lack of understanding of the expectations and the requirements of a court order can lead to a lack of motivation on the part of the young person, particularly if what is included is not perceived as being worthwhile or delivering a tangible benefit. Hart's research into breach and enforcement highlighted the need for particular attention to be given to younger children under 14 because, in many cases, those that are returned to court for non-compliance find themselves within the secure estate as a consequence of breach.⁶⁵

It is important that court orders are properly enforced to promote confidence in the YOT's administration of community orders. However, as Rod Morgan, the former chair of the Youth Justice Board, has pointed out, 'robotic, bureaucratic, unthinking enforcement is likely to be counterproductive'.⁶⁶ Canton and Eadie view the discretion of the practitioner as a necessary component of good practice, provided practitioners are accountable for their decisions.⁶⁷ Their study suggests that a worker's immediate priority should be to motivate young people to comply '...at least to the extent of securing attendance reliably for appointments' and that the uncritical application of *National Standards for Youth Justice Services* has the potential to undermine this. They suggest the disorganised lifestyles and the considerable support needs of many of those who enter the youth justice system point to an even greater need for a motivational approach in formulating the YOT's understanding of, and response to, a breach. Hart even suggests that the road to breach action should be lengthened and greater allowance made for use of discretion and professional judgment when making decisions about breach⁶⁸ but this should also be tempered with the need to secure the confidence of the court and the public at large. The YJB has indicated they will be running a small number of pilots with YOTs over the next six to 12 months to test out a more discretionary approach to the use of *National Standards for Youth Justice Services*.

Nacro has long recommended that YOTs develop a common understanding of what constitutes acceptable and unacceptable instances of non-attendance, how contact is defined and what flexibility there is in determining whether the contact requirement has been met or not. Any assessment of the reason for non-attendance and whether it is acceptable should focus on whether it is indicative of an intent to comply with the order, the young person's ability to do so, and whether their non-attendance itself poses an increased risk. Hart's research indicates that YOTs find it difficult to articulate to young people what is and is not acceptable, there is variation in the way in which breach is handled across different localities and it raises the question of whether 'technical' breaches are always within the young person's or the justice system's best interests, particularly if there has been good engagement and progress is being made and there has been no indicative increase in the risk of reoffending.⁶⁹ 'Paying back' missed appointments, issuing reminders to get back on track, holding meetings to review progress and formulating alternative supervision plans are good ways in which to promote compliance.

Hart's report also discusses magistrates' perspectives on breach, noting that they sometimes struggle to find a suitable disposal, especially when young people have particularly challenging problems. Some magistrates also questioned the need for cases to be returned to court when the YOT has indicated the young person is starting to respond. Providing progress reviews and discussing difficulties may be more helpful than always being in a position of having to take action, irrespective of the context. The 2011 joint inspectorate report on youth offending court work and reports recommended that breach reports be strengthened by providing comprehensive information about previous responses to supervision, progress and achievements during the order, and providing unambiguous conclusions which state whether the order should continue or not and what should happen next.⁷⁰

Conclusion

The factors which can impact on custody levels and the action that can be taken to address them are well established. What seems to be important in the management of custody is that that which is known is systematically and proactively applied by youth justice practitioners, since action or inaction can have a profound effect on the outcome for a young person.

A high custody rate has, to some extent, become established as a proxy variable reflecting the ability of YOT services to prevent offending, manage risks and ensure public protection if the child or young person remains in the community. This notion will perhaps be reinforced when the payment-by-results initiatives proposed in *Breaking the Cycle* are introduced, particularly as available resources will potentially be dependent on how successful YOTs are at reducing the use of custody.

The perspective of sentencers on how they feel offending should be dealt with in their area, what their norms and thresholds are, and the court's culture are also all hugely

significant. The evidence suggests that different areas have different perceptions and measurements of risk and seriousness which result in different regional interpretations and outcomes in sentencing. YOTs and sentencers should both be committed to ensuring that young people are not escalated through the system purely on the basis of repeat (rather than persistent) serious or violent offending. In a framework of diminishing options, the ability to repeat orders and interventions of similar lengths and with similar conditions should be part of the process of helping young people to remedy their behaviour, to mature and develop and to become law-abiding members of their communities.

It is also important that in those localities which have high levels of custody, a collaborative enquiry is instigated and there is a system in place to evaluate how processes are working and the decisions which come out of them. Strategies that involve joint training, joint discussion, greater awareness of the impact of sentencing practice, jointly shared monitoring processes and good communication can all help to instil knowledge and confidence between parties in and outside the court setting. Sentencers need to be fully acquainted with, and have confidence in, community-based options and YOTs should appropriately advocate on behalf of young people and produce informative, analytical and well argued reports for court that can usefully inform sentencing deliberations and decisions. Finally, young people need to feel part of these processes, to understand what is happening to them, to be able to make a contribution and to be provided with interventions they can effectively engage with in order to maximise the chances of a positive impact on their future behaviour.

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