



Diversion, Discretion, and Sentencing Commissions

Reader's Note: This publication presents results of an online public opinion survey completed by a sample of Canadians who received an invitation through email, Facebook and Twitter (called "open link" sample; see Method for more details). This survey mirrored a survey conducted with a representative sample of Canadians, the results of which are available at: <http://www.justice.gc.ca/eng/rp-pr/jr/index.html>

Most respondents believe that diversion of accused people from the courts, should be the preferred response in some types of offences/situations. They also believe that increased use of diversion could make the criminal justice system (CJS) more efficient and effective.

The majority of respondents believe that judges should have at least some degree of discretion and flexibility when deciding a sentence. Many respondents believe sentencing guidelines to be the best way to ensure a fair sentence and consistency in sentencing and thought that a sentencing commission of which the most important function would be to give judges guidelines for sentencing decisions is important to consider.

Respondents to both the open link and nationally representative surveys support diversion to a similar degree. Compared to the representative sample of Canadians, respondents to the open link survey are more supportive of full judicial discretion and less supportive of sentencing guidelines.

What we also found¹

Diversion

- More than eight in ten (84%) respondents believe that diversion could make the CJS more efficient and 76% believe that diversion could make the system more effective.
- For this survey, three scenarios were presented, each depicting an offence for which a mandatory minimum penalty² would apply. Respondents were asked whether the case should be diverted or the accused should be prosecuted.
 - For all three scenarios, at least half of the respondents indicated that the accused should have been diverted out of the courts to be held accountable. Support for diversion ranged from 50% to 73% depending on the specific scenario.





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Discretion

- Almost all respondents (95%) felt that the best approach for determining fair and appropriate sentences involved giving judges at least some degree of discretion. Six in ten (61%) respondents thought it was best to give judges some sort of guideline or range of sentences to choose from, with the option of going outside those ranges if they deem it necessary. About one-third (34%) of respondents believed that the best way to determine a fair and appropriate sentence was to give judges full discretion (deciding on the sentence after looking at how the offence happened, why the offender did it and what sentences were given in other similar cases). Only 5% thought that there should be no judicial discretion for sentencing (i.e., everyone who commits the same offence should be given the same sentence).
- Almost all respondents (93%) thought it important that judges consider the seriousness of the specific offence (e.g., circumstances surrounding the crime, or if there was a victim). Just over three quarters (78%) thought that judges needed to consider how responsible or blameworthy the offender was (e.g., how responsible the offender was for his or her behaviour, whether there were relevant personal circumstances) when deciding on a sentence that is fair and appropriate.
- The majority of respondents (83%) also believed that judges should be allowed to consider personal circumstances such as brain damage and mental health problems. Many (74%) wanted judges to be able to consider whether the offender is the sole breadwinner or caregiver and the harm that restrictive sentences can cause young children who rely on the offender, when deciding on a sentence.

Sentencing guidelines and commissions

- Six in ten (61%) respondents indicated that the best approach to sentencing is to provide guidelines that still allow for a judge's discretion.
- Seventy percent thought that guidelines for sentencing would help make sentencing more consistent and 71% thought that Canada should consider having set sentencing guidelines.
- Just over two thirds (68%) of respondents believed that an independent organization such as sentencing commission would help make sentencing more consistent and 70% believed that a sentencing commission should be considered for Canada.
- When asked to choose which activities of a sentencing commission would be most important, the two most frequently chosen activities were "researching effective sentencing practices" (72%) and "recommending ideas for sentencing reform to the government and Parliament" (68%).

In more depth

Diversion

Diversion was described as a way of holding accused people accountable through means other than a trial. This approach can be used as long as society is still protected and when the accused accepts responsibility for his or her actions. Options for diversion could include community service, mediation, referrals to specialized programs for counselling, treatment or education (for example life skills, drug or alcohol treatment, and anger management), victim-offender reconciliation programs and similar measures aimed at restorative justice, or a letter of apology or essay.





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For the scenario depicting the offence of sexual assault against a minor (see methodology), half (50%) of respondents believed diversion would be the most appropriate response.

For the scenario depicting the offence of intentionally discharging a firearm while being reckless, 71% of respondents believed diversion would be the most appropriate response.

For the scenario depicting the offence of drug trafficking while carrying a concealed weapon, 73% of respondents believed diversion would be the most appropriate response.

Although the differences were not large, more open link respondents than nationally representative respondents believed that diversion could make the CJS more efficient (84% vs. 79%) and effective (76% vs. 69%). When asked about diversion in relation to the scenarios, the only notable difference was that more open link respondents thought that the single mother who had been selling her prescription opioids while carrying a knife in her backpack should be diverted than the nationally representative sample (73% vs. 65%, respectively).

Discretion and Sentencing guidelines and commissions

Sentencing guidelines were described as a prescribed range of sentences for each offence, which judges would use in deciding on an appropriate sentence. Judges would consider why and how each offence was committed. If a case were unusual in some way, the judge could go outside the prescribed range, but would be required to provide an explanation.

A sentencing commission was described as an independent organization comprised of judges, criminal justice professionals, advocates of victims of crime, and academics who undertake various activities related to research (e.g., effective sentencing practices) and communication (e.g., public education) about sentencing.

Although both the open link and the nationally representative respondents strongly supported at least some degree of judicial discretion in sentencing (95% for each group), the open link group was more strongly supportive of giving judges full discretion (34% vs. 24%). The nationally representative group more strongly supportive of providing guidelines that still allow for a judge's discretion (71% vs. 61%) as well as consideration of implementing guidelines for Canada (81% vs. 71%). Differences were less pronounced with respect to sentencing commissions – the only difference of note was that more respondents to the nationally representative survey than open link respondents believed that a sentencing commission would make sentencing more consistent (74% vs. 68%).

Method

As part of the larger 2017 National Justice Survey of a representative sample of Canadians,³ the Department of Justice undertook a parallel online survey with Canadians 18 years and over advertised on the Department of Justice Facebook and Twitter accounts. An email invitation was also sent to people/organizations on a mailing list held by Justice. This mailing list was held by a group in the Department responsible for overseeing consultations. Additional organizations working or interested in justice were included as well. The Twitter, Facebook and emails included a request that the survey be shared widely. The open link was completed by 3,486 respondents. The source of the invitation varied, with 40% hearing about the survey from Facebook (not necessarily Justice Facebook page), 2% from the Justice website, 27% by email invitation, 8% from Twitter and 20% from other sources (no response from 3%).





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The purpose of collecting data on this sample was to explore the reach of the Departments' networks and extent of Canadians' interest in providing opinions on the criminal justice system and how the views of a representative sample of Canadians might differ from a self-selected sample.

The questions in the open link survey were identical to those in the first survey completed by a representative sample of Canadians and focussed on discretion, sentencing and mandatory minimum penalties (MMPs). This survey included information (e.g., statistics and definitions of concepts such as sentencing guidelines) and three scenarios depicting offences that carry MMPs in order to provide context for responses.

For this survey, the same three scenarios were presented, each depicting an offence for which a mandatory minimum penalty⁴ would apply, and respondents were asked whether the MMP was a fair sentence in that case. Following these questions more general questions were asked about MMPs including fairness of these sentences in general, support for adding judicial discretion to go below or give a non-custodial sentence for MMPs, and the strength of various arguments for and against MMPs.

- Scenario 1: A 27 year old was convicted of sexual assault involving a minor. The incident occurred after a night of drinking when on a city bus. This behaviour was out of character, the accused has no previous criminal record, lives at home, has completed college, and is employed. He pled guilty and apologized to the victim in court.
- Scenario 2: A 21 year old was convicted of intentionally discharging a firearm while being reckless after shooting at a secluded farmhouse on a dare. He has no criminal record, has experienced physical and emotional abuse from a young age, and has brain damage (Fetal Alcohol Spectrum Disorder) as a result of his mother drinking alcohol during her pregnancy with him.
- Scenario 3: A woman was convicted of drug trafficking. The 36 year old mother of two who is the sole provider for her family was caught selling some of her prescription opioid pills and had a knife in her backpack when she was arrested. She has a legitimate prescription for opioids due to chronic pain, but has been selling some of her pills. She has struggled with prescription drug abuse for some time.

Sample Characteristics

The sample was not representative of the Canadian population and likely reflects a sample more invested in criminal justice system reform or interested in being consulted on reforms to the CJS. Forty-five percent either worked in the criminal justice system (CJS) or a related field and 15% volunteered in the CJS or another related area (these categories were not mutually exclusive). Only 18% had never been involved with the CJS before (compared to 45% of respondents for the representative sample).

Compared to the Canadian population, this group:

- was more highly educated - Six percent of the open link sample vs. 35% of Canadians had high school diploma or less and 62% of the open link sample vs. 29% of Canadians had a bachelor's degree or higher.
- had higher household incomes (11% of the open link sample vs. 35% of Canadians had annual incomes under \$40,000);
- were younger than the Canadian population overall; and
- were more likely to live in three provinces rather than across the country: Ontario (40%), and Alberta or British Columbia (18% each).





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For further information on the findings and/or surveys mentioned in this document please contact the Department of Justice Canada Research and Statistics Division (rsd.drs@justice.gc.ca)

¹ Unless otherwise noted, all findings are from the 2017 National Justice Survey, survey 1 (N= 2,019) and 2017 focus groups.

² A mandatory minimum penalty is a jail sentence where the minimum length of time for a conviction of a specific crime has been set by Parliament, and a judge may not go below the minimum sentence although they are able to give more than the minimum sentence when it is appropriate. MMPs can also include non-custodial penalties such as fines, but for this survey, MMPs were defined as custodial sentences.

³ The 2017 NJS included two surveys (surveys 1 and 2), twelve in-person focus groups and twenty one-on-one telephone interviews. Survey samples were drawn randomly and the surveys were completed online or via paper. The data were weighted for age, gender, geographic region and education to match the Canadian population.

⁴ A mandatory minimum penalty is a jail sentence where the minimum length of time for a conviction of a specific crime has been set by Parliament, and a judge may not go below the minimum sentence although they are able to **give more** than the minimum sentence when it is appropriate.

