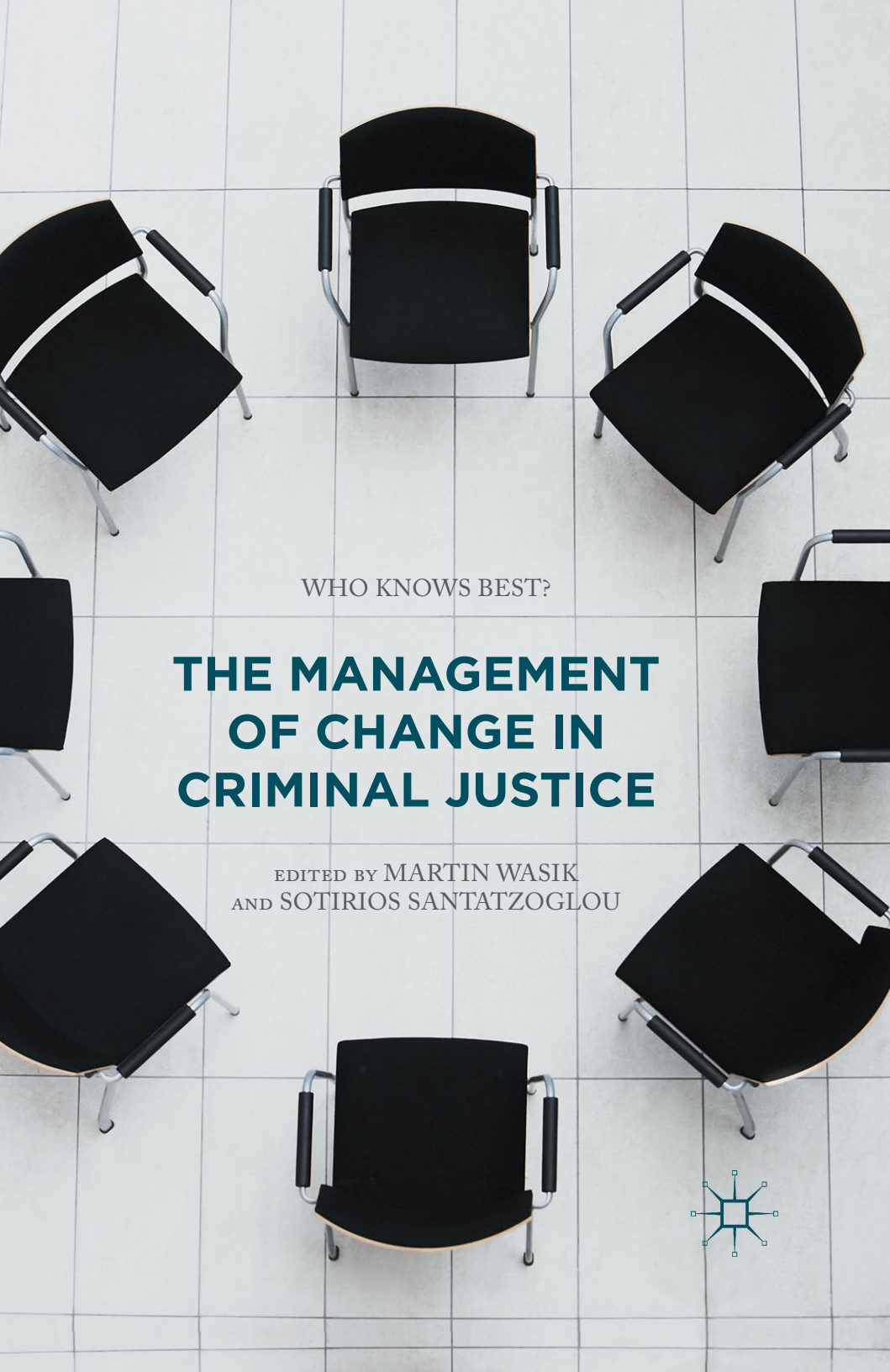

WHO KNOWS BEST?

THE MANAGEMENT OF CHANGE IN CRIMINAL JUSTICE

EDITED BY MARTIN WASIK
AND SOTIRIOS SANTATZOGLOU

The Management of Change in Criminal Justice

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Who Knows Best?

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Preface

The idea for this book emerged from various discussions between the two editors about the ways in which criminal justice policy emerges, takes shape and is implemented through the activities of practitioners on the ground. The purpose of the collection of essays is to explore a number of related themes within policy change in criminal justice. The subtitle 'Who Knows Best?' is meant to stimulate discussion about policy-making and its implementation (or not) through practice. How and why do particular criminal justice policies emerge from the political process and what are the contributions of politicians, civil servants, practitioners, researchers and others in the generation of those ideas? What is the relationship between the increasingly centralised formation of policy in Whitehall and its local implementation and delivery? To what extent is centralised policy interpreted and refined differently in local areas? Does diversity in implementation imply policy failure, or is it a sign of healthy activism among local practitioner groups? What importance does local justice have? When can the centre learn from local initiatives?

We invited contributors to write chapters on topics of particular interest to them, but to consider while doing so the aims, merits and limits of the 'top-down' approach to criminal justice policy-making and the involvement of policy-makers and practitioners in the management of change. The authors are well placed to offer a range of perspectives on these issues, whether through their own involvement as policy-makers, or practitioners, or campaigners or as academic researchers and writers. All approaches are represented here. Some of the essays reflect upon policy developments within particular historical periods (such as criminal justice policy under Thatcher, the implementation of community service orders in the 1970s and youth justice practitioner experiences in the 1980s), or in particular parts of the country (community justice in Scotland and youth justice in Wales) and some deal with contentious contemporary policy (such as 'transforming rehabilitation' and payment by results, multi-agency work on prolific offenders and proposed reforms to youth courts). Other essays reflect upon ongoing policy dilemmas, such as the impact of centralisation and managerialism on the magistrates' courts and the Crown Court, the continuing search for consistency and fairness in the administration of out-of-court disposals

and the use of anti-social behaviour orders against street sex workers. Yet others offer critiques of long-standing if not always consistent policies, such as those towards the 'troubled families' of young offenders and on 'community involvement' in the fight against crime. We are delighted to present a stimulating mix of chapters, some written by authors who are well-established experts in their field, and some who have the opportunity here to publish their doctoral research. Our thanks go to them all and to our publisher for their enthusiasm for the project and for their continuing support.

Finally, we must record our thanks to Max Rutherford, criminal justice programme manager at the Barrow Cadbury Trust, for kindly hosting a seminar for us in 2013 at which many of the contributors to this volume were able to discuss and exchange ideas and present early versions of their papers.

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Who Knows Best? A Question About How Criminal Policy Change Takes Place

Sotirios Santatzoglou and Martin Wasik

Introduction

In defining the tasks of criminology, Sutherland pointed to an examination of 'the processes of making laws, of breaking laws, and of reacting toward the breaking of laws' (Sutherland et al., 1992, p. 3). This 'still hard-to-beat definition of the field' (Loader and Sparks, 2011, p. 13) shows that the question of crime, and the responses to it, also encompasses the issue of how policy and practice decisions about crime are made. The examination of the how question is significant, because the way that policy and practice decisions are made shapes the content of those decisions and, in turn, the scope and limits of criminal justice. The how question becomes particularly important when policy and legislative initiatives are of a strategic nature; namely, when they attempt to bring change or significant development in the operation and scope of criminal justice, in order to increase its efficiency, effectiveness and public legitimacy. Examination of the how question, therefore, is central to the study of the procedural legitimacy of strategic policy initiatives. The suspended sentence in English law is a simple but useful example. The Criminal Justice Act 1991, consistent with the government's general policy objective at that time of securing proportionality and 'desert' in sentencing, restricted the power to pass a suspended sentence to 'exceptional circumstances' only. This had an immediate and dramatic impact on practice, rendering the sentence effectively a dead letter from 1991 to 2003, when the policy was reversed and the legislative restriction was removed.

Notwithstanding the centrality of procedural legitimacy, a further point is that, in a number of cases, those initiatives may not be successfully implemented, or they may fail their strategic intentions. In the language of organisational theory, they are unsuccessful because they 'fail to yield [the] intended results' (Kiliko et al., 2012, p. 81). When legislative policy initiatives fail to produce their intended results, there may be an issue about the process which underpinned the formulation of the intended criminal justice change – in particular, how the questions for change were framed and whose initiatives and ideas became part of that process. An examination of these decision-making issues in criminal justice does not suggest that '[policy] ideas have a life of their own' (John, 2012, p. 142). Instead, it reveals both the forms of knowledge and the processes of knowing, which underpin policy perceptions of crime and the responses to it at a given historical time. In this way, the question of change in criminal justice becomes a question of cognitive management of the policy process, of knowing both the need for and the scope of change. In particular, it becomes a question about the policy-makers whose perceptions and concerns dominate the formation of change. It is also a question about the power of practitioners to implement (or not) policy change on the ground, to give it a shape which will faithfully reflect (or not) the policy intentions. These processes are worked out within, and by reference to, particular historical moments or periods. The suspended sentence again is an example. That sentence, introduced into English law in 1967 and re-branded several times since, was always intended by policy-makers to drive down the use of immediate imprisonment, but the sentence has persistently failed to deliver that result. In many cases, judges and magistrates use the suspended sentence as an alternative to a community order, rather than as an alternative to custody (Ashworth, 2010, p. 303). This is not a case of deliberate subversion by practitioners of policy intentions. It has much more to do with a degree of ambivalence in the underlying rationale of the sentence, and the way in which practitioners (here judges, magistrates and probation officers preparing pre-sentence reports) tend to focus on the sentencing options available to best fit the needs of each particular defendant, rather than considering an overall policy objective.

During the period when the essays for this book were being written, a major restructuring of the probation service had been put in train, based upon the coalition government's 'transforming rehabilitation' agenda (Ministry of Justice, 2013). One of the problems addressed by the reform has been long-standing concern over the ineffectiveness

of short prison sentences, not least the fact that these offenders have been released at or before the half-way point of their sentences with no supervision or support from the probation service (Johnston and Godfrey, 2013). The influential Halliday report in 2001 described this problem as 'one of the most important deficiencies' in the sentencing system (Halliday, 2001, p. 22). A policy initiative in the Criminal Justice Act 2003, to enable the probation service to provide such support (so-called 'custody plus'), has since been abandoned as too expensive. The transforming rehabilitation agenda tackles this same problem in a different way – by contracting with firms in the private sector to provide supervision of those released from short sentences on a payment by results basis (results being measured by change in expected reconviction rates of offenders). On the back of this development, however, the policy has been taken much further, with the majority of the community sentence supervisory functions of the probation service also being transferred to private contractors (Neilson, 2012). Broad and Spencer (this volume) discuss the policy framework which has apparently led to this dramatic (and in the views of many, unnecessary and regrettable) change. They argue that 'the transforming rehabilitation agenda . . . is a policy devised around . . . a neoliberal ideology that can be seen to have failed across a number of [other] policy areas'. It is certainly possible that the transforming rehabilitation agenda may fail to deliver the measurable beneficial outcomes which it claims to be able to achieve. The policy may also have unintended consequences in practice. One rationale for legislating to ensure that short sentence prisoners (those serving sentences of up to two years) receive a total period of 12 months under supervision/on licence following release is a policy initiative to restrict the use of such sentences. Defence practitioners will no doubt argue, once supervision requirements are in place, that short sentences are more onerous than before, and hence should be imposed less frequently. Judges and magistrates may, however, take the view that a short sentence followed by supervision and support is a much more attractive option than a short sentence with no supervision and support, so that such sentences may turn out to be used more often. As with the suspended sentence, this would not be a case of judges and magistrates deliberately thwarting a policy aim. Judges and magistrates focus on the case before them, identifying the best approach to be taken for each individual, rather than considering the overall policy objective, even if that were entirely clear. Policy, in terms of actuarial justice and public management is predominantly concerned with collectives and associated costs, rather than individuals.

Variations in practice as a policy problem

In his 1961 book *In Search of Criminology,* especially in the closing chapter 'Conditions for Achievement', Radzinowicz reminded criminologists that 'probation, the Borstal system, the juvenile courts and several other innovations . . . have evolved, on the whole, under the influence of growing social consciousness, of religious movements, and philanthropic stimulus, some from temporary measures, or just from straightforward common sense, supported by experience' (1961, pp. 178–179). Radzinowicz's observation captures the historical and organisational complexity of change and development in criminal justice. It provides a warning to criminologists of the limits of theoretical criminological knowledge, and asserts the importance of understanding the practice of criminal justice. Radzinowicz said that 'one of the best ways for criminologists to maintain an empirical and realistic attitude is to remain in close concert with those engaged in the administration of criminal justice' (1961, pp. 178–179). In this way, Radzinowicz placed the practitioners who implement criminal justice in practice as central to criminal justice development and as crucial to the development of criminological understanding. A range of subsequent studies have taken up Radzinowicz's advice and have addressed the role of practice in criminal justice development. These accounts have, however, differed widely.

Several of the key early research studies regarded the dynamics of practice as part of the problem which needed to be addressed. In 1962, in his book *Sentencing in Magistrates' Courts – A Study in Variations of Policy,* probably the first study in the country which employed fieldwork methods, Hood examined the question of 'equality of consideration' before the law; in particular 'that similar general considerations should be taken into account when a [sentencing] decision is made' (1962, p. 14). The study pointed to a serious problem of inconsistency in the way that justice was dispensed. He observed that 'frequently [sentencing] decisions are reached with the aid of "experience" ', but that magistrates 'have, in most cases, very little information on which to base their decisions' (Hood, 1962, p. 92). Hood concluded that 'there is evidence to suggest that their actions are, to some extent, related to the type of community on whose behalf they are acting, and to their personal views on what is the best way to deal with offenders' (Hood, 1962, p. 78). Hood's distrust of the judicial function in relation to sentencing practice can also been seen in the equally famous 1977 study by Baldwin and McConville, *Negotiated Justice: Pressures on Defendants to Plead Guilty*, which examined the circumstances in which defendants who asserted

their innocence might come under pressure from their lawyer, and the judge, to save the court's time by pleading guilty. The authors began by noting that 'if plea bargaining exists in England, it has certainly been well hidden from researchers'. On the other hand, 'a casual visit to the Birmingham Crown Court would rapidly dispel the misconception that plea bargaining scarcely exists in English courts . . . barristers, police officers and others refer to the "deals" that have been struck' (Baldwin and McConville, 1977, pp. 18, 24).

So concerned were the legal authorities by this research that serious efforts were made to suppress its publication. Other accounts expressed distrust and pessimism about the administration of justice and its future. In 1983 Morris's paper 'Legal representation in providing criminal justice for children', written in the wake of non-implementation of the progressive aims of the Children and Young Persons Act 1969, the author found that '[r]esearch on the English juvenile justice system indicates a system in confusion. Certainly, one cannot talk about *the system*' (1983, p. 131). In 1985, in the same pessimistic tone, Burney's book *Sentencing Young People – What Went Wrong with the Criminal Justice Act 1982?* was an empirical study of the effect of implementation of that act upon juvenile justice practice. Burney pointed with regret to '[t]he sheer variety of custom and practice [as] such a strong feature of our criminal justice system' making it 'almost inevitable that the absorption of statutory change will equally vary in style and consequences' (1985, p. vi). Morris and Burney's pessimism may have been premature, since by the end of the 1980s local juvenile justice practice had been transformed and had become much more in tune with the spirit of the 1982 act (Windlesham, 1993 Telford and Santatzoglou, 2012). It seems the transformation was, however, achieved through strategic local inter-agency developments, rather than by additional policy drivers from the centre.

The research studies mentioned above, and of course many others, have provided a wealth of information about the world of criminal justice practice. In general, they have regarded it as a mechanism for implementation, which has delivered (or failed to deliver) the intended policy change, rather than as a world with its own characteristics, which can be innovative, and which should be explored and understood. Those studies in general portrayed the decision-making of lower practice levels of justice as part of the problem, to be rectified through further top-down policy interventions, rather than as part of the solution in criminal justice development. One example is sentencing guidelines, especially in the magistrates' courts. Sentencing guidelines were developed to address the issue of unjustified disparity in outcome from

one magistrates' court to another, but it is often forgotten that guidelines were first developed and implemented locally by magistrates and justices' clerks in the 1980s. They did not have binding force until 2003, when sentencing guidelines for all courts were placed on a statutory footing. Sentencing 'consistency' is a difficult thing to measure statistically, given that consistency of approach is not the same thing as uniformity of outcome. According to Tarling (2006), part of the solution to the problem of magistrates' sentencing variations was for the Sentencing Guidelines Council 'to monitor the use [of guidelines] to ensure that they are being properly applied' (Tarling, 2006, p. 40). While the Sentencing Guidelines Council regularly published statistics showing local sentencing outcomes, it is very difficult to identify local 'best practice' in sentencing. This is because English guidelines (unlike US ones) are inherently flexible, recognising that facts can vary considerably within any given offence category, and according proper respect to local decision-makers to weigh those particular facts within a nationally agreed framework. The issue of disparity has to be addressed locally, through training, as well as by clear guidance from the centre. The internal dynamics of the practice world is as important in this context as any other, and magistrates need to feel that they have ownership of, or at least influence over, the guidelines which they use: guidelines should be generated 'with' rather than 'for' the courts. Writing in the context of differential fine levels in the magistrates' courts, Raine and Dunstan (2009) describe a rich picture of practice factors which influence the ways in which financial penalties are implemented locally – widely varying economic conditions, a sense of local justice, the need to preserve discretion, complexity in applying key terms in sentencing such as 'serious' and 'proportionate' and a 'lack of confidence in some courts about the reliability and general quality of information available to them' (2009, pp. 29–30).

In the different context of youth justice in Wales, Field (this volume) says that 'the very nature of negotiated local practice means that there is significant variation in youth justice cultures in both Wales and England'. Practitioners naturally focus on local justice rather than national policy. Justice is seen as being delivered by a local team, or in a local centre, rather than as part of a national structure or pattern. As one circuit judge has put it (Compston, 1994):

> The justification for local justice surely lies in this – that only by breaking justice down into manageable units can it work effectively, for the defendant, the victim and the community. It implies closeness to the community and responsibility to the community. Only by

> dealing with matters locally will any sense of mutual responsibility be restored.

Overall, though, the last 20 years has been a story of increasing centralism in criminal justice, with a steady loss of autonomy amongst key local agencies (the police, the courts and the probation service). Raine (2014, p. 408) has said that:

> centralisation needs to be understood in the context of wider public sector developments. The advent of new public management (NPM) gave primacy to issues of efficiency and parsimony in resource usage and promoted competition and the disciplines and styles of management associated with the private sector. Under New Labour this widened to encompass stronger concern for the modernisation of public services as a whole through stronger 'customer-centricity' and more 'joined-up' approaches across the sector. The centre [had a] strongly held conviction that 'top down' direction and unitary organisational form would be the best way to achieve greater efficiency.

Many of the essays in this volume touch upon this issue of central-local relations. For example, Gibbs laments the erosion of local influence at magistrates' courts level, despite those courts having been regarded traditionally as the epitome of local justice. In the 1980s there were 600 local magistrates' courts, each serving a petty sessional division. A series of administrative reforms has taken place since then, driven in the name of 'modernisation', resulting in the closure of two-thirds of those courts by 2010. There have been many different strands here, including the abolition of local magistrates' courts committees and their replacement by a national administrative structure for all courts, and the employment of more professional judges in place of lay magistrates. There has also been a significant reduction in workload as a result of increasing use of diversionary cautioning schemes. In this volume, Wasik examines the extent to which local justice endures amongst Crown Court judges despite the degree of central control emanating from nationally formulated guideline rules on criminal procedure. Both issues touch upon the important constraint of judicial independence in the context of managerial change. Despite all this centralisation, and probably as a reaction to the pervasive power of Westminster, over the same period there has been an important push towards the devolution of political power to Scotland and to Wales, and perhaps in due course to some of the English regions. In the context of criminal justice policy development

post devolution, two contributions to this volume, Morrison's chapter on community justice in Scotland and Field's chapter on youth justice in Wales, are especially illuminating. According to Henry, 'institutional spaces do matter, and have mattered, in framing and underpinning the ways in which crime, justice, security and safety have been imagined' (2012, p. 416). One example of the critical importance of an institutional space is provided by Morrison (this volume) where she explains the importance of the delivery of community justice in a devolved Scotland being located within local authority social service departments and underpinned by a social work ethos, rather than within a national probation service, as in England and Wales, which has been much more exposed to the political change imposed by Westminster.

Practice as a policy driver

In her 2009 paper 'Historicising Criminalisation', Lacey argued that an understanding of 'institutional conditions' is a 'preliminary to building normative theories', as on these conditions the 'realisations' of the normative vision of criminal law 'would depend' (2009, pp. 941–2). Lacey's account sets practice conduct, what she calls substantive 'in action' criminalisation, at the centre of theoretical development. Her account sets practice conduct as the basis of the criminal law and criminal justice principles. By contrast Ashworth, in his 2002 article 'Responsibilities, rights and restorative justice', championed the importance of principle (as opposed to practice) in the development of criminal justice. Ashworth pointed out that '[r]estorative justice is practice-led in most of its manifestations' (2002, p. 578), while at the same time expressing serious doubts about a practice-led theory of restorative justice. While '[t]he theory of restorative justice has to a large extent developed through practice', '[o]ne consequence of this is that there is no single theory' (2002, p. 578) and, in Ashworth's view, no coherence. The article as a whole demonstrates that restorative justice has grown through practice, but that there are limitations to practice leading development and change in policy beyond the local context. While this is true, restorative justice has been the subject of much academic research, which has fed into policy change, especially in youth justice. There is something of a chicken and egg problem here. The development of a coherent general theory of restorative justice needs to be underpinned by what is known about its practical operation and effect. A better formulation of theory ought to help in the practical applications of restorative justice,

but it may be that restorative justice has its greatest value when operationalised in local contexts, and it almost certainly functions differently in different institutional and community environments. 'One size fits all' does not apply to restorative justice. The detailed working out of the forms of restorative justice may be better left in local control, such as the neighbourhood youth offender panels in England, albeit subject to guidelines and aims set centrally (see, for example, Daly, 2003).

Rutherford's important book, *Criminal Justice and the Pursuit of Decency*, dealt with the role and impact of the values of key professionals in the administration of criminal justice. He argued in the book that ground level practice is the driver of change. In the chapter 'The Way Forward', Rutherford claimed that criminal justice practitioners 'are often the principal agents of change, being able to encourage, facilitate, or impede the reforms efforts of others . . . to a very considerable extent practitioners comprise the linchpin that determines the success or failure of any reform endeavour' (1994, p. 120). Rutherford's account clearly regarded practice as being instrumental and cognitively singular in furthering change and reform on the ground. As Patterson and Whittaker explain, 'it is to practice which we must look to understand the way in which the [law] is being operated' (1995, p. 261). Another example is Rock's 2004 policy study *Constructing Victims' Rights: The Home Office, New Labour and Victims* which describes the development of 'official discourse' into an acceptance of some form of victims' rights for England and Wales during the New Labour government. Shapland (2006, pp. 135, 136) suggested in a review of that book that in fact it was 'very unclear that there [had] been such an acceptance' of the enhanced role for victims within the world of practice, which had slowed and obscured the implementation of reform.

From an operational perspective, the move from the local to national, transforming local initiative into national policy, may be seen as something falling outside the sphere of practitioners. As one interviewee, a retired chief probation officer said to the first-named author: 'Practice can't drive. I mean – ground floor level practice can't drive policy changes unless it gets a champion.' Such a champion might be a minister, or a senior civil servant. Another interviewee, a retired chief probation officer, said: ' "practice dictating policy" – to a degree that's right', but 'what you also have to bear in mind is that policy, in the first instance, emanated from government'. This statement reflects the interplay between policy development at the centre and criminal justice practice on the ground. If local initiatives are to be transformed into national trends, 'you've always got to have a matching pair of ears and

eyes within the government, within the policy of the civil servants that sometimes it's kicked further into development by enthusiasm of the young ministers'. A striking example is provided by Harding (this volume), when he explains the crucial roles played by Home Office assistant secretary Michael Moriarty in facilitating and encouraging probation service practitioners to develop on-the-ground strategies to ensure the successful introduction of community service orders in the 1970s.

The cultural complexity of the practice world

At one time it was fashionable to debate whether criminal justice was best understood as a 'system' or a 'process'. As Pullinger (1985, p. 19) has said, it is characteristic of a system that it 'will possess channels of communication and control. [Its] effectiveness . . . will depend on the system's monitoring capacity, the efficiency of its information channels and the degree of control which can be exercised.' This account points to the character of criminal justice as a process rather than as a system. Indeed, as Rutherford explained, '[a]lthough it is sometimes held that criminal justice is (or should be) a "system" [however] regarding criminal justice as a system may distort reality by obscuring the divergent and competing purposes between and within agencies, the informal working arrangements, and the unanticipated consequences that frequently ensue' (1994, pp. 125–126). Rutherford refers to a more or less loose world of agencies and individuals who interact (or fail to interact) and through their influences produce expected or, sometimes, unexpected patterns of practice including innovation. Little in the way of central planning went into the English criminal justice process, and those who work within it bring quite different perspectives to bear and have very different concerns and priorities (Wasik et al., 1999). As Rock puts it nicely, 'independent interdependence is the force that binds criminal justice together' (Rock, 1990). An interviewee, a retired Home Office civil servant, stressed to the first-named author the cultural multiplicity of practice as affecting policy implementation, such as the very different working cultures of the probation service and the police. His experience was that the former tended to be:

> more independent, more intellectual, more willing to stop and argue . . . . that's what the probation service always likes to do, and the police will go away and do it. [The police] may do it after their own fashion, and not exactly as you would hope, but at least it would happen, and it would happen quite quickly, and broadly

> speaking it would be consistent across the country and it would look well-organized – [it would be] much more haphazard in the probation service.

Neyroud and Slothower (this volume) address the crucial role of the police in managing out-of-court disposals in England and Wales. Cautioning, in simple or mere elaborate forms, has been an important form of diversion from the more formal criminal justice process for a very long time. Successive governments have addressed the policy conflicts which underlie cautioning – to achieve the undoubted benefits of diversion, but to do so within a robust and principled system of decision-making. The police are the main decision-makers here. Individual officers exercise their discretion at a local level far removed from central policy-making, so that it has proved difficult to create a system of cautioning which is both effective and consistent. The authors review the background and then evaluate Operation Turning Point – the most recent, and perhaps the most comprehensive, attempt to deliver such a system. Their provisional conclusion is that guidance and training of the police is crucial, but not enough by itself to ensure consistent decision-making. What they refer to as 'bounded discretion' can, they believe, be achieved through the additional use of a computer-based decision support tool.

It becomes clear that the degree of systemic independence/interdependence of the criminal justice world can ensure the success or failure of policy reform. Patterson and Whittaker, in their study of implementation of criminal justice legislation in Scotland, say that:

> An understanding of . . . decision making . . . requires a recognition of the criminal justice system's institutional structure, and the ways in which the parts of that structure (police, prosecutors and courts) interact. This sets the form, and helps to shape the content, of the professional relationships which criminal justice practitioners develop in individual localities. This interaction produces a localised criminal justice culture, which sets the assumptions within which practitioners work to interpret the law in particular cases.
>
> (Patterson and Whittaker, 1994)

Halliday et al. demonstrated the importance of professional status as an element in practice interactions (in the particular case of pre-sentence report writing for courts by social workers) affecting interdependency and its outcomes (Halliday et al., 2009). The study also

makes clear the importance of power relations between professionals having different backgrounds, training and working assumptions of criminal justice. Critical here is inter-agency working amongst professionals. As Field (this volume) points out, 'different agencies (Crown Prosecution Service, magistracy, police and probation) rarely have hierarchical powers of direction and command as between each other, [so] much depends on inter-professional dynamics (often played out at a local level)'. Since the mid-1980s, multi-disciplinary co-operation has been an attractive objective for policy intervention. As Faulkner (this volume) explains, under the Thatcher government in the 1980s and early 1990s the perception from the centre 'was a lack of communication and co-operation between services and government departments, and what were later called "silos" – functions which were carried out in isolation from one another and without regard for the other interests involved'. Management information systems, performance indicators and targets were introduced and escalated under New Labour. Perceived lack of co-operation was addressed in different ways according to the policy cultures of the time: an 'invitation' for 'joined up' services in the 1980s, and top-down 'micro-management' of practice relations during the New Labour years. According to Rutherford, '[d]uring the 1980s it became more commonplace for practitioners to think in terms of the interdependence of criminal justice agencies' (1994, p. 125).

Telford and Santatzoglou (2013) have discussed the 'bottom up' development of inter-professional communication in youth justice practice during the 1980s. Arguably, within that particular field, negotiations and exchange of professional experiences strengthened the trust between practitioners from different traditions, and created a fertile ground for practice policy development (see further, Santatzoglou, this volume). In a 2001 interview, as an interviewee, a retired chief probation officer said:

> There'd been a sense, I think, in the '70s that you had to wait for government, as there is now, you know, with New Labour and everybody's waiting for the Youth Justice Board to do this or to do that: the top-down model. In the '80s [...] something happened that gave practitioners a sense that this was for them, they could make a difference. And they began to see it happen.

The account suggests the importance of the interface between a particular government's style of policy management and the engagement (or not) with criminal justice practice. Other studies have shown that the

flourishing of inter-professional discussion and co-operation can have a very positive effect on policy implementation (Henry, 2012). Such a process allows for the exchange of experiences, and the development of new ones, allowing practitioners to feel more in control of policy implementation and innovation, acting not just as agents, but the owners, of change. Inter-professional co-operation can function to ease any difficulties of differential power, as policy ownership becomes a shared endeavour. Ownership of change appears to be a critical issue in the practice world.

Politics, populism and the market

During the 1980s a liberal basis of criminal justice policy was retained, described by Rutherford as 'principled pragmatism' (Rutherford, 1996). Home secretaries Whitelaw and Hurd both had the ability to keep criminal policy clear from 'interference from Number 10' with perhaps the only exception being the 'dodgy period during the miners' strike' (retired Home Office civil servant, quoted in Loader, 2006, p. 576). The structure and the features of criminal policy-making continued mostly as before. As Faulkner and Burnett have put it: 'New ideas and new methods were being proposed and tested, but there was a sense of continuity with the past . . . The "old" public administration was still in the ascendant' (Faulkner and Burnett, 2012). Within the Home Office, the system of policy-making was descended from what Loader and Sparks (2011) have called 'mid-century liberalism'. They refer to the ongoing respect for criminal justice expertise, which was 'understood as incorporating various forms of practical wisdom and generalist intellect as well as specialist academic knowledge as such' (2011, p. 68). This expertise was accommodated within institutional forums such as Royal Commissions and advisory bodies, and also drawn from centres such as the Institute of Criminology at Cambridge, and the Home Office Research and Planning Unit. In those years the structure of policy-making was insulated through the existence of what Loader has called the 'platonic guardians': 'a governing elite equipped with "confidence, arrogance, authority, credibility" . . . and committed to producing and deploying expert knowledge' (Loader, 2006, p. 563). The system of the 'platonic guardians' reflected the existence of civil service power within the policy structure arising from its continuity and policy experience. The Thatcher government, and especially New Labour, however, were suspicious of the vested interests of experts and their warnings about the limited impact which government could expect to have on 'the crime problem', so that over time Royal Commissions and advisory bodies largely

fell into disuse. The government had its own policy agenda and 'just wanted to get on with things' (retired Home Office civil servant, quoted in Loader, 2006, p. 575).

By 1995 Rock was writing about a transformation in the process of policy-making, with far less political reliance on the knowledge and experience of civil servants and other 'experts', which was rejected in favour of penal populism and a general appeal to 'common sense'. Rock said that:

> The newest modes of policy making are themselves the fruits of a new politics of populism, moralism, and the market. Attempting to reform such matters as the organization of the police and prisons, the incarceration of young offenders, and the 'right to silence', a number of Home Office ministers appear recently to have been impelled by a strong sense of the political, by personal volition, a doughty common sense, and appeals to what are thought to be popular sentiment.
>
> (Rock, 1995, p. 2)

In this statement Rock summed up the forces of politicisation, which were to influence and restructure the criminal policy-making process to date. The transformation constituted a significant departure from a long-term established system. Indeed, one could talk of the post mid-1990s policy period as opposed to the one before, and especially as opposed to the 1980s. The two periods encompassed a very different degree of politicisation with respect to the management of criminal justice change which critically affected the utilisation of experience of criminal justice professional at various levels.

The appointment of Michael Howard as Conservative home secretary in 1993 was a significant turning point for criminal justice policy. In his 2009 book, *Punishment and Prisons: Power and the Carceral State,* which deals with the period 1990–1997, Sim devotes a particular sub-chapter to the heading 'The moment of Howard', thereby indicating the significance of that appointment with respect to the mid-1990s change of direction in criminal justice policy. In the wake of the murder of toddler James Bulger by two ten-year-old children Venables and Thompson, and in the context of the declining influence of the Major government, Howard's famous 'prison works' speech at the Conservative Party conference symbolised a sharp departure from the policy of limiting, and if possible reducing, the use of custody which had underpinned the Criminal Justice Act 1991 (Faulkner and Burnett, 2012). Howard rejected the long-standing policy of prison as a 'last resort' (Sim, 2009). His

appointment also marked a departure from the structure and values of an established process of criminal policy development.

Howard, who was the fifth home secretary in four years, regarded his appointment as *the* mechanism to overhaul the aims and function of a criminal justice system, which in 1993 was in a state of public and political turmoil. In 1993, under the title 'Public loses its faith in justice system', the *Times* reported that:

> A spokesman for Howard's department said yesterday that he was 'very concerned with any evidence that showed confidence in the criminal justice system may be declining'. Howard's priority was to implement measures that would 'most effectively restore full confidence in the system'.
>
> (Prescott and Kellner, 1993)

The message was that Howard's priority, as a reforming home secretary in touch with the common man and in tune with common sense, was radical policy change. In one way the message satisfied what Edelman has called the 'dramaturgical, illusionary dimension' of policy-making (Edelman, 1985). As Edelman has argued in his seminal book *The Symbolic Uses of Politics, '*[l]ike drama, [policy-making] is construed to be presented to a public' (1985, p. 210). Paraphrasing Edelman, the emergence of Howard as the active politician sold to the public his ability to manage what was portrayed in the media as a moment of crisis by promising immediate change, thereby answering the public's 'anxious search for direction' (1985, p. 190). However, Howard's 'moment' in criminal justice policy-making was much more than symbolic. His tenure as home secretary set in train a major shift in the structure and values of criminal policy-making. In his 1996 book, *Transforming Criminal Policy*, Rutherford voiced a prevalent concern of commentators at that time over the 'increasingly politicised nature of criminal policy', and the tendency of central government 'to seek greater influence, if not control, over the largely decentralised activities of criminal justice and crime prevention' (1996, p. 14).

Howard's politicisation of criminal policy was about greater control from the centre and it also concentrated power within a small group of ministers with similar ideological persuasions, keeping the civil service expert input at the periphery of this process. According to Crick, when Howard went to the Home Office, he 'felt he was entering a hostile territory' and Sim (2009) has written that, once in office, Howard 'surrounded himself with like-minded individuals', including

David Maclean, 'a vocal supporter of capital punishment who regarded criminals as "vermin" who should be driven from the streets'. Crick observed that during Howard's four-year term of office 'there were serious stirrings of revolt among Home Office civil servants' (2005). This rebalancing brought with it a marginalising of 'expert' opinion, including that of experienced civil servants, in favour of a more grass-roots penal populism. As Garland wrote in 2001:

> The old conventional wisdom was that elected officials ought best to avoid contentious pronouncements in an area where policy failure was highly probable. Until recently the details of corrections and crime control were frequently left to criminal justice professionals, and public opinion was viewed as an occasional brake on penal policy rather than a privileged source of policy-making initiatives. The relation between politicians, the public and professionals has been transformed, with major consequences for policy and practice.
>
> (2001, p. 145)

The following anecdotal story is concerned with the background to changes made to the practice of juvenile cautioning. An interviewee, a youth justice policy consultant with much experience of practice in the 1990s, said:

> There was a story that I was told when Michael Howard was Home Secretary, and cautioning was quite extensive. He saw it as a 'let off' really, 'nothing happened', so the fact that it *worked* was an irrelevancy. Howard went to some youngsters and said 'how many cautions have you had?' and they lied, basically, these two lads, and told him 'four' or something. 'What were they for?' 'Oh, one was for arson.' The Director of Social Services that was there, tried to intervene. [Howard] went straight on from there, this was a Friday afternoon, he went straight on to the Home Office on Monday morning, and we know this is right from the Home Office officials, and said 'we should tighten the whole caution thing'. The guidance that says you don't make more than two or three cautions was based on the evidence of those two lads, the arson, he set fire to a field of corn or something . . . He just wanted something to be able to say 'right!' So this is the problem when our legal system gets mixed up with politicians basically and public opinion.

Regardless of its accuracy, the story certainly reflects the new political taste for direct and immediate policy intervention, and it also probably

reflects the very negative feelings of contemporary policy participants (who disseminated the story). Howard's 'moment' was the start of a new era of political competition over which political party could claim greater 'toughness' on criminal justice issues. As Crick observes, 'those who were working in the Home Office in 1997 said that the best preparation for New Labour was working for Michael Howard' (2005, p. 284).

New Labour: Listening to 'ordinary people'

The impact of New Labour on the direction of criminal justice is usually condensed into Blair's 'tough on crime (and tough on the causes of crime)' slogan, which described New Labour's policy intention for an expansionist approach to criminal justice. The slogan was first heard in January 1993, during a radio interview and set the official stamp on New Labour's criminal policy agenda, pushing the party well into traditional Conservative 'law and order' territory. Blair made his political mark initially as shadow home secretary, and in that role was 'reluctant to attack' Howard for his pro-prison views, pointing out that 'a lot of Daily Mail readers would agree with him' (Crick, 2005). New Labour's highly interventionist approach was based on the political persuasion that the party must listen to 'ordinary people', in particular their preoccupation with persistent low-level anti-social behaviour and the public perception (accurate or not) that the criminal justice system was 'soft' and ineffective in dealing with offenders, especially juveniles. Once in government, Jack Straw confirmed that New Labour had broken 'with its past elitist inclinations, by listening to what ordinary people had to say about crime and anti-social behaviour' (Rutherford, 2000, p. 40). What now mattered in policy terms was the 'viewpoint of the man in the street, the man in the Clapham omnibus' who, back in the 1960s, was said by Lord Devlin to be the essential source of 'practical morality' and his 'viewpoint' the driving moral force in criminal justice (Devlin, 1965). Significantly, Devlin accepted that this ordinary man 'is not expected to reason about anything, and his judgment may be largely a matter of feeling' (1965, p. 15).

In 1995 Bottoms famously referred to politicians adopting a policy of 'populist punitiveness', by which he meant 'politicians tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance' on crime (Bottoms, 1995). Sophisticated public attitude research conducted at the time showed (and has continued to show) that much of the public's disenchantment with the criminal justice process stemmed from florid and inaccurate newspaper reportage

and from widespread public ignorance of how the criminal justice process actually operates. Within the academic world the growth and effect of politicisation on criminal law and criminal justice were addressed. Ashworth, in the opening of his 2000 seminal article 'Is the criminal law a lost cause?', castigated the way in which government (first under Howard, then under New Labour) seemed to regard the creation of new criminal laws as the solution to all social problems:

> Politicians, pressure groups, journalists and others often express themselves as if the creation of a new criminal offence is the natural, or the only appropriate, response to a particular event or series of events giving rise to social concern. At the same time, criminal offences are tacked on to diverse statutes by various government departments, and then enacted (or, often, re-enacted) by Parliament without demur. There is little sense that the decision to introduce a new offence should only be made after certain conditions have been satisfied, little sense that making conduct criminal is a step of considerable social significance.

Eight years later, in *The Prisoners' Dilemma*, Lacey (2008) examined the politicisation of criminal justice policy-making in the context of the growth of the prison population, which had continued to rise year on year, had actually doubled in size between 1993 and 2008 and which has continued to increase inexorably ever since. Lacey referred to politicians' willingness to accept at face value the 'punitive attitudes' of the public, despite the 'ambivalence of public opinion on issues of prison growth and punishment'. Lacey put this down to politicians' fears of the electoral costs of returning to a more moderate criminal justice policy, but lamented that 'the malleability of "public opinion" makes it an unsound basis for policy development.' Allen (this volume) reflects upon the series of crises and switches in policy which have impacted upon the prison system in England and Wales during these changing political times. Against the background of a steadily escalating custodial population, there has been a pattern of policy initiative and failure – 'prisons themselves are notoriously resistant to change [and] at the macro level this partly reflects a tendency on the part of governments to neglect prisons unless something goes wrong'. There are just the same local variations in the institutional context as there are in other aspects of the criminal justice process. As Allen remarks, despite government intervention the running of prisons is largely in the hands of governors and staff in the individual prisons. Her Majesty's Inspectorate of Prisons

reports have shown great variation in performance both between seemingly similar establishments and within the same establishments over time – much seems to depend on the individual Governor.

New Labour's attention to (some would say obsession with) what the media was saying on a day-to-day basis meant that criminal justice policy statements and initiatives would come and go quickly in response to newspaper stories and short-term issues – what Cohen (1972) famously dubbed 'moral panics'. Shapland has referred to the 'influences on policy, particularly the growing importance of ministers and political demands . . . and the media-accentuated impact of individual events'. She refers to a climate where 'civil servants [have] to act and think fast in the storm of e-mails within and without the Office, rather than produce carefully considered responses' (Shapland, 2006, p. 137). In an interview conducted by the first-named author in 2001, a retired chief probation officer spoke of the rise of new advisers on criminal justice policy at that time:

> The Home Secretary now, for instance, has two political advisers on criminal justice matters. One of them, I think, is 24 years old and the other one is 26. Neither of them has a criminal justice background. What they are is very sharp political operators, very in-tune with the media mood, very much, very bright people really, able to look at a large body of evidence and decide what might be the best thing to persuade the Minister on. But I think most of us in the business feel they've got quite disproportionate influence.

New Labour latched on to (and legislated upon) public concerns about low-level anti-social behaviour. In a 2000 essay Rutherford addressed the 'origins and implications of New Labour's endeavour . . . to bring "sub-criminal conduct" within the ambit of the criminal justice process' through the development of the anti-social behaviour order (ASBO) (Rutherford, 2000, p. 33). The idea of the ASBO attracted much academic debate and criticism, but very little political opposition. Again, the political reality was an unwillingness to appear 'weak' by opposing populist measures aimed at addressing electorate concerns. According to Rutherford, 'there were no divisions on clauses relating to the [ASBO] at the Committee Stage, where the detailed work takes place . . . none of the amendments aimed at tightening the definition of anti-social behaviour were pressed to a vote . . . at no stage did anyone urge abandonment of the ASBO' (2000, p. 53). The order was implemented as part of New Labour's flagship legislation, the Crime and Disorder Act 1998. In the

early days take-up of the new powers was very patchy, used enthusiastically in some local authority areas and not at all in others. This prompted the government to press publicly and privately for greater use of ASBOs across the board. There were all kinds of problems, relating to the insertion of broad, vague, over-inclusive or simply unenforceable conditions within ASBOs. The creation and enforcement of ASBOs were made the subject of guidelines from the Sentencing Guidelines Council to try to iron out some of the concerns and achieve more consistency in the use of ASBOs. The underlying issues could not be dealt with, however, since they were inherent to the measure itself – the disproportionate severity of the criminal penalty available for breach of a civil order, in relation to behaviour which (by definition) was low-level even if persistent and part of a wider local pattern. Lynch (this volume) considers the unhappy intersection of two very different criminal justice policies – the developing use of ASBOs and the unclear and fragmented policies dealing with street prostitution. It was perhaps inevitable that ASBOs would be utilised as a further option for tackling the anti-social behaviour associated with street sex work. An ASBO might be applied for by the police or by a local authority when a person has a history of prostitution and has perhaps received one or two cautions (which have the possibility of advice and referral to appropriate agencies where the person wishes to change their life-style). The limitation of the ASBO, however, as Lynch points out, is that as an order it can contain only 'prohibitions', rather than positive requirements. It offers only a threat of enforcement for future similar behaviour, but nothing constructive. ASBOs have recently been repealed by the coalition government and replaced with Criminal Behaviour Orders which are civil in form and broadly similar in scope, but which do permit positive requirements to be inserted.

New Labour: Not listening to professional experience

New Labour's 'political demand' for responses to the concerns of 'ordinary people' about crime, meant that policy generation and implementation became paramount. New Labour, even more than Howard, tried to micro-manage problems from the centre, which translated into limiting professionals to the role of implementers of policy ideas. The emphasis on 'top down' policy clearly limits, though it can never remove, the discretion and creative power of professionals on the ground. Faulkner and Burnett have said that the long list of New Labour's measures of criminal justice reform 'had the effect of increasing

central government's control of the operational services, and its influence on courts and sentencing, and reflected the Labour government's lack of confidence in the services concerned' (Faulkner and Burnett, 2012). An interviewee, a retired Home Office civil servant, speaking in 2001, said that:

> there's innovation and change going on, but much . . . more driven from the top than the bottom, and the ability for the people actually doing the work on the ground to have a sense of ownership . . . it is a pretty different kind of ownership from what they might have had fifteen years ago.

The same interviewee also regretted the marginalisation of civil servants in the development of criminal justice policy:

> [O]fficials aren't able – they're certainly not encouraged – to build up that kind of authority and expertise – they move about much more, their skills are judged in managerial terms, rather than having expertise in a particular field of policy – expertise in a particular field of policy is treated as a bit suspect rather than a qualification – people move around a lot more and policy-making nowadays is much more done between ministers, political advisers and 30 year old young men and women who might have brilliant minds and unlimited energy but don't have the years of wisdom that my generation was able to build up.

The influence of New Labour's ideological political vision was clearly to be seen in its policy on youth justice in the 1998 White Paper, *No More Excuses*. That White Paper addressed the 'political demands' to re-shape the policy on youth criminality and anti-social behaviour through a new generation of interventions. The White Paper was designed to reverse the earlier policies of diversion and lesser intervention and to claw back much of the discretion which had been vested in practitioners in the field. Those old ideas were clearly at odds with the New Labour enthusiasm for 'getting things done', directed from the centre (Telford and Santatzoglou, 2012, 2013). The White Paper itself was based on the findings of an Audit Commission report in 1996, called *Misspent Youth – Young People and Crime*. The Audit Commission had been created under the Thatcher government, but its series of efficiency scrutinies into different aspects of criminal justice fitted perfectly with New Labour's process of 'modernisation' through the new public management. Old,

inefficient and expensive criminal justice practices were to be swept aside and replaced by private sector values, especially greater efficiency and cost-cutting. Effectiveness was to be measured by way of a range of targets and all this was to be achieved by the injection of contestability and private sector principles of market competition. As Lacey (1994) has said:

> [T]he concern with efficiency has come increasingly to be approached on the assumption that the imposition of a market-type model can deliver improvement in the quality of public administration. Through full-scale privatisation, but also *via* partial contracting out and market testing, government has adopted what might be characterised as a managerial approach – one in which an idealised image of the private sector is constantly held up as a model. The figure of success becomes 'efficiency' or 'value for money' whilst the often complex and politically contested question of what constitutes 'value' in a particular area is moved away from the spotlight.

Significantly, the White Paper (as well as the Audit Commission Report) largely ignored the wealth of practice expertise in youth justice which had developed during the previous 15 years (Telford and Santatzoglou, 2013). The *No More Excuses* White Paper was an ideological policy document disguised as an expert report. It was designed to ensure that the government's 'tough on crime' political choice would be implemented at practice level. The resulting Crime and Disorder Act 1998 placed local authorities under a specific duty to consider the crime prevention implications of all their decisions, to conduct local crime audits, to have crime prevention strategies and to establish local multi-disciplinary youth offending teams (YOTs) accountable to the newly established Youth Justice Board.

The Act forced practitioners to restructure the voluntary practitioner-led co-operations through which they were used to working. They were now placed within a formal multi-disciplinary aegis, under a statutory duty and involving police, probation, social work, education and health. This re-setting of the practitioner agenda brought both benefits and costs. In her influential article, Souhami (2008) shows that, at its best, multi-agency work offers a holistic approach to problems, bringing with it not only efficiency, but also innovation and enhanced status for the service. On the other hand, it can be difficult for those involved to consolidate very different structural and ideological professional backgrounds into a shared form of service delivery. The more powerful

agencies are likely to dominate and set the agenda, conflicting agency cultures may undermine working relationships, and some partners may continue to owe principal allegiance to their 'home' agency. It would be a mistake to assume that multi-agency working ensures consistency of approach across the sites in which it takes place. There may well be important differences of approach both within and between them (Field, this volume). Multi-agency working is found not only in youth offending teams. Worrall and Corcoran (this volume) examine a specific model of inter-agency work known as integrated offender management projects. Integrated offender management is now the nationally recognised framework for local multi-agency collaboration in working with offenders. The authors refer to the key Home Office/Ministry of Justice guidance, as being 'all partners tackling offenders together' while at the same time 'delivering a local response to local problems'. The authors acknowledge the complexity of these projects in terms of their multi-agency nature and the needs of their clientele and also point to uncertainty over what counts as 'success'. While practitioners involved in the projects may 'know' that they are effective, this conviction is not enough to justify them in the 'harder edged, competitive world of commissioning'. As Nash has observed, practitioners 'need constantly to focus upon cutting costs, on ensuring that central policies and guidelines are adhered to and complied with, and their organisation is ever ready for the next inspection and that its customer focus is always ready to adapt to the next political directive' (Nash, 2008, p. 27).

The 1998 Act set the tone for a re-direction of youth justice towards a more austere, more interventionist and pro-institutionalisation future. The number of young offenders coming into the formal criminal justice system and the number of young offenders receiving custodial sentences both increased markedly as a result. Yet from 2008 onwards the clear punitive/interventionist reforms promised in the White Paper and legislated for in the Crime and Disorder Act 1998 have quietly been reversed and the number of offenders aged under 18 coming into the system and those locked up have scaled back year on year. By 2011 the numbers were back to the pre-reform level (Allen, 2011) and they have continued to decline ever since. There is no clear understanding of why this highly significant change has happened (Ashworth, 2014). In that context Wigzell and Stanley (this volume) note that the cohort of young offenders now coming before the youth courts have more complex problems than those who went before. They tend to have more prolific offending profiles and many present with greater and more complex needs. In consequence, the authors argue for significant reform

of youth courts. The authors express concern about the limited level of knowledge and experience of magistrates, and especially advocates, working in the youth courts, leading to poor communication in court with young offenders and erratic sentencing outcomes. They say that the old idea that the youth court is a place for young advocates to learn their trade must be changed and practitioners must be appropriately trained and certified before entering practice in the youth courts. Also in the context of young people, Smith (this volume) reflects on the enduring lack of criminal policy success in addressing 'troubled families'. He compares contemporary statements by the prime minister on what should be done about the responsibility of young offenders (and their families) to earlier political statements and policy initiatives into the sphere of social disadvantage and youth crime. The Ministry of Justice has referred to the need for a 'local, joined up approach to address the multiple disadvantages that many young offenders have, and the chaotic lifestyles that many lead .... [S]upporting parents to improve their parenting skills plays a significant part in improving life chances and reducing reoffending' (Ministry of Justice, 2010, p. 68). Smith goes on to consider the role that might be played here by the development of local restorative justice schemes.

Insulating policy from politics?

In 2014 the *Guardian* reflected upon the state of criminal justice policy in England and Wales, as compared with Sweden. The newspaper referred to the tendency of the Justice Secretary, Chris Grayling, in England and Wales to intervene directly in matters of operational practice, such as 'forcing prisoners to wear uniform, banning books being sent to prisoners, and turning off cell lights at 10.30 pm in young offender institutions' (Erwin, 2014). The newspaper contrasted this approach with the very different Swedish experience, as expressed by the director-general of Sweden's prison and probation service:

> A politician who tried something like that in Sweden would be thrown out of office. It would be a breach of our constitution – in our system that is the forbidden area. When we exercise authority over individuals, a politician cannot interfere with the administration process. In reality, there is a dialogue – politicians will tell me and my colleagues what they expect, and we will do our best to achieve those goals. We have a very clear division of labour between the government and public administration.

This lack of a 'very clear division of labour', along with the absence of meaningful dialogue between the political and professional participants in criminal policy-making, has characterised the politicised approach to criminal justice policy-making since the mid-1990s.

Lacey has argued for a re-development of the policy-making process, to address 'the relative lack of insulation of criminal policy development from popular electoral discipline in adversarial, majoritarian systems, and the lack of faith in an independent professional bureaucracy' (2008). She has proposed a restructuring of the public debate about penal reform, rooted in a Royal Commission, 'or something of yet wider scope . . . serviced by a substantial expert bureaucracy', and including a wide representation of expertise from the institutions which implement change (2008). Lacey's proposal was part of the 'strategy of insulation', which emerged in academic thought during the New Labour years. The strategy argued for 'the building of new "arm's length" bodies that can entrench professional expertise' as the policy driver (Loader and Sparks, 2011, p. 111), reflecting the widespread belief within academic and research thought that criminal justice policy has become far too politicised at the expense of professional expertise. The insulationists have argued for a reversal of that trend, calling for 'less politics, better outcomes', through 'respect for evidence and professional judgement' (Loader, 2010, p. 78). Their suggestions were based on initiatives in policy-making in other spheres, such as the Bank of England's independent Monetary Policy Committee (Pettit, 2001; Lacey, 2008), or the National Institute for Health and Clinical Excellence (NICE) (Loader, 2010; Loader and Sparks 2011) and were designed to empower expert knowledge (scientific and professional). As Loader and Sparks put it, the aim of the insulationists is:

> to build upon . . . the legal mechanisms and bureaucratic authorities (and their attendant forms of knowledge) that democratic societies erect to shield aspects of crime control and penal practice from democratic participation and direct political control.
>
> (2011, pp. 112–113)

While the insulationist movement during the New Labour years constituted an important moment in criminological academic thought, since that political period there has emerged something of a 'soft consensus' on criminal justice politics at Westminster. As Downes and Morgan put it, 'in the twenty-first century we may be witnessing . . . some underlying agreement in law and order' where 'political squabbles . . . are largely

about relative levels of expenditure on law and order services, police numbers, and the like' (2012, p. 183). While the 2010 Conservative Party manifesto had said that 'after thirteen years of Labour, we need *radical political reform'* (emphasis in the original) (Conservative Party, 2010, p. ix), in criminal justice the manifesto did not offer any great difference from what had gone before. It claimed that the Conservatives 'will give the people who work in our public services much greater responsibility' (Conservative Party, 2010, p. ix), but a close reading of the manifesto shows that the views of 'ordinary people' remained central to the policy process structure which the Conservatives had in mind. The manifesto emphasised that 'Our fundamental tenet is that power should be devolved from politicians to people, from the central to the local' (Conservative Party, 2010, p. vii); and Conservatives 'will give people much more say over the things that affect their daily lives' (Conservative Party, 2010, p. ix). In criminal policy in particular the manifesto indicated that the party would 'put the criminal justice system on the side of the public', because 'people want to know that the police are listening to them' (Conservative Party, 2010, pp. 56–58). Jacobson (this volume) considers the implications of the political reliance on 'community' within criminal justice policy. She says that the potential contribution of the concept of community to criminal justice has been variously understood in terms of informal social control exercised within cohesive neighbourhoods, community involvement in holding local criminal justice services to account and community involvement in service delivery. Research shows, however, that the public appetite for participation in these ways is rather limited and there seems to be little prospect of extending active community involvement in that sphere. During the tenure of the present coalition government the idea of the 'Big Society' was promoted, especially by the prime minister, but since 2012 this theme appears largely to have petered out.

The analysis of criminal justice policy change requires an understanding of the relational influence between policy and practice which is, of course, historically relative, as it reflects the decision-making modes of a particular policy- or practice-making period. The question of who knows best is a question about influences on the creative process at both policy and practice levels, set in an historical context. Faulkner and Burnett have rightly said that 'policy making in criminal justice is a precarious business,' but it is important that policies are 'informed by the evidence (that may be hard to find or equivocal) but also by the wisdom and confidence that come from experience' (Faulkner and Burnett, 2012).

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Part I
Making Policy Choices

2

The End or the Beginning of an Era? Politics and Punishment Under Margaret Thatcher's Government

David Faulkner

Introduction

This chapter considers the influences and processes which shaped the government's penal policies during the period from the beginning of Mrs Thatcher's Conservative government in 1979 to the early 1990s. It reviews the government's political agenda and the political context at the time, including its reforms of public services more generally; its sources of advice; its use of evidence and research; the constraints it faced; and the policies themselves, especially as they related to prisons, probation and sentencing. The government's penal policies were relatively mild compared with those that followed in later years, but there was a constant tension between the government's demand for economy and effectiveness and the political pressure for increased severity of punishment. Developments during that period also laid the foundation on which later governments could construct the more centralising and more punitive policies which followed.

The most memorable of the Conservative government's reforms of criminal justice in England and Wales during the 1980s and early 1990s are probably:

- The Police and Criminal Evidence Act, the formation of the Crown Prosecution Service.
- Rationalising the sentencing and custodial arrangements for young offenders, including the abolition of borstals and later detention centres as separate sentences and institutions; overhaul of parole.

- The first serious recognition of minorities and victims of crime and measures to improve their treatment in the criminal justice process.
- A better understanding of the limitations of the criminal process in preventing and reducing crime and of the scope for doing so by situational, physical and social measures.
- Continuing transformation of the probation service, principally to improve opportunities for offenders, make community sentences more credible and reduce the courts' use of imprisonment.
- Various efforts to 'manage the system' to make the services more efficient and to bring about a coordinated response to crime across government and the services as whole.
- Greater safety, security and better management in prisons, despite constant turbulence and pressure on capacity; establishment of the independent Prisons Inspectorate; first involvement of the private sector.

For more extended accounts, see Windlesham, 1994 and Faulkner, 2006, 2014.

Politics and the policy-making process

Unlike the government's economic policies, those for criminal justice did not conform to any over-arching vision or grand design. They can be portrayed as broadly 'liberal' in their intention and effect and contrasted with the policies pursued after 1992, but they were mostly pragmatic responses to situations and events. However, other more punitive and neo-liberal forces were already at work. Economics was having an increasing influence, especially the rational choice, free market version that has now become dominant and is reflected, for example, in the current coalition government's plans for transforming rehabilitation. It was becoming possible to discern the narrow, individualistic view of human behaviour and social values that is associated with economics, although that was not reflected in the attitudes of ministers such as William Whitelaw (Home Secretary, 1980–1992), Leon Brittan (1982–1984) or Douglas Hurd (1984–1989).

Crime had played a prominent part in the campaign for the 1979 election but the Conservative Party's manifesto contained few specific commitments other than to introduce short-lived 'tougher regimes' in detention centres and to allow courts to impose prison sentences of six months to three years on offenders aged 17–21[1]. The party's manifestos for the subsequent elections in 1983 and 1987 took credit

for the government's previous achievements and expressed the party's intention to support the police, protect the public, emphasise the responsibilities of parents and tackle issues such as the abuse of drugs, but they too contained few specific commitments. There was, however, an influential element in the Conservative Party which still regretted the abolition of the death penalty for murder and favoured a harsher treatment of offenders more generally. Crime was rising, more people were being affected by it and fear of crime and declining public confidence were coming to be seen as problems needing responses of their own.

In most respects, the processes of policy-making continued as before, with reports from advisory bodies or inquiries of various kinds; evidence from research and statistics; and contributions from voluntary organisations, the judiciary and the criminal justice services themselves. Civil servants coordinated the various contributions and ministers mostly looked first to civil servants for advice on any action that needed to be taken. There were few political advisers; those in the Home Office gave valuable support to ministers in their relations with their party but they did not seek to influence policy.

Neither the prime minister nor her office took much interest in criminal justice and Mrs Thatcher never intervened or spoke publicly about it. There was little disagreement on party lines and most of the criticism which the government had to face came from within the Conservative Party itself.

Commissions, inquiries and reviews

Advisory bodies had always been an important source of advice to government. They might be royal commissions, ad hoc inquiries or reviews, or standing advisory bodies such as the Advisory Council on the Penal System (ACPS, previously the Advisory Council on the Treatment of Offenders or ACTO) and the Criminal Law Revision Committee. They were composed of men and women who were sometimes referred to as 'the great and the good', at first with respect but then disparagingly when they came to be criticised as unelected and unrepresentative (Ryan, 2003). They did, however, have specialised knowledge and experience in their own fields, established professional reputations and no political positions to defend. Their reports were well considered and respected, not least by those who had to act upon them. Influential examples had included the ACTO report on prison after-care (addressing the same problems as the current coalition government's plans for transforming rehabilitation 50 years later) and the ACPS reports on

community service (Harding, this volume) and the arrangements for young offenders in custody and in the community.

The Conservative government came to regard such bodies as out of touch, self-interested or politically prejudiced. The ACPS was abolished and the Criminal Law Revision Committee ceased to function. The loss of the ACPS left a void in dispassionate, strategic policy-making which politically aligned 'think tanks' and voluntary organisations – such as JUSTICE, the Howard League, the Prison Reform Trust and Victim Support – later tried to fill through their own inquiries and commissions, but their reports never achieved the same impact.[2]

Even so, inquiries and reviews were still necessary and influential. Two inquiries were already in progress when the government took office in 1979. The May Committee had been set up primarily to resolve a long-running dispute over the pay of prison officers, but it also considered the administration of prisons more generally. Its lasting contribution was the creation of an independent inspectorate of prisons, arguably one of the most influential and enduring reforms of the period. The Royal Commission on Criminal Procedure, set up as a consequence of irregularities in the police, resulted in the Police and Criminal Evidence Act 1984 and the creation of the Crown Prosecution Service, both now established parts of the criminal justice landscape. Later inquiries included most notably the Scarman report on the Brixton riots in 1981 and the Woolf report on the disturbances in prisons in 1990, but other reviews covered, for example, children's evidence, fraud trials and parole.

Evidence from research and statistics

Over the previous 20 years, the Home Office had established its own Research Unit and Police Scientific Development Branch and had promoted research in universities. Several strands of research became especially relevant. Some of them produced negative results, in particular the lack of evidence that either severity in sentencing (Brody, 1975) or the number of police officers patrolling the streets (Clarke and Hough, 1984) had any significant effect on the general level of crime, although the visible presence of police officers was important for public confidence. Both of those findings seemed contrary to common sense and the findings were contested and widely disbelieved, as they still are today, but no new evidence has emerged which seriously challenges them. Few practitioners or penal reformers were ready to accept Robert Martinson's widely quoted, but sometimes misunderstood, conclusion that 'nothing works'.

Most believed and tried to show that at least some things can work, with some people, some of the time; but other studies seemed to show that prison regimes and probation programmes had only a marginal effect on the rate of reoffending. The British Crime Survey (now the Crime Survey for England and Wales), introduced in 1982, showed as expected that actual levels of crime as experienced by its victims were higher than those of crimes recorded by the police, but that only a very small proportion of the crimes committed is followed by a conviction and sentence. That seemed to confirm the view that the criminal justice process has only a limited impact on the general level of crime and it may have added to a decline in public confidence and to public impatience with the system as a whole.

There was, however, increasing and encouraging evidence from Great Britain and the United States that physical and 'situational' prevention measures can have a significant impact on levels of crime if they are well designed and targeted – not only improvements in physical security but also in the design and management of housing estates, keeping buildings and public spaces in good repair, the use of technology such as CCTV and engaging local communities (Clarke and Mayhew, 1980). Disturbing evidence was emerging of both direct and indirect racial discrimination at every stage of the criminal justice process and in the criminal justice services themselves and of the long-standing neglect of victims and witnesses. It was during that period that the issues first came to be recognised and taken seriously, not least by voluntary organisations such as NACRO and Victim Support, but they did not have a high political profile, and action, especially on race, was often frustrated by scepticism, indifference and sometimes by outright opposition.

The government was unable to withstand pressure from the media, the police and the United States for a 'war on drugs' for which there was no basis in evidence, and it did not seriously try. It was an instance where politically 'something [had] to be done', but it could already be seen – for example by Bing Spear the internationally respected Chief Inspector, Drugs Branch – that the action taken was likely to be ineffective and possibly disastrous.

Prisons

The turbulence in prisons which had led to the May inquiry continued throughout the 1980s, culminating in disturbances at Strangeways and other prisons in April 1990. Much of the Prison Service's energy was

necessarily directed towards issues of security and control and resolving its internal problems and the reforms of structure and staffing known as the 'Fresh Start'. There was little opportunity to take a wider view of its external relationships or its place in society. Its self-confidence had been affected by the lack of evidence that prisons could do much to affect a prisoner's character or behaviour after release and suggestions that it could achieve little more than 'humane containment', or 'positive custody'. The abolition of borstal training in the Criminal Justice Act 1982 caused some nostalgic regret among older members of the Prison Service, but the claims that were made for the efficacy of borstal had for some time been overstated and neither the sentence nor the regime were suited to the circumstances of young offenders as they had become by that time.[3] Improvements were made in matters such as prisoners' correspondence, arrangements for visits and the conduct of adjudications for offences against prison discipline, but regimes deteriorated when judged by tests such as the amount of time which prisoners could spend outside their cells or the opportunities for constructive activity.

Even so, the service, and especially the Prisons Board, tried to establish a stronger sense of identity, purpose, values and professional accountability. Those efforts led to the Prison Service's 'statement of purpose'[4] and in due course to the concepts of justice, decency, legitimacy and a 'healthy prison' which were later developed in the Woolf report (1991) and by successive directors general and HM chief inspectors (Sparks et al., 1996). For an account of the state of prisons in England and Wales during that period, see King and McDermott, 1995.

The government did not at first promote the privatisation of prisons, or the contracting out of prison functions. Douglas Hurd said in the House of Commons on 16 July 1987[5] that he did not 'think the House would accept a case for . . . handing the business of keeping prisoners safe to anyone other than government servants'. Those ideas were, however, beginning to gather momentum in right-leaning think tanks and within the Conservative Party. For the Home Office and the Prison Service the most immediate and powerful argument was the restraining effect on industrial action by the Prison Officers Association and the strength it would give to management's bargaining position in the negations that were taking place over 'Fresh Start'. Another argument, more important in the longer term, was the incentive to improve the management of a prison through the prospect that it might be put out to competitive tender. A third argument, the political aim of 'shrinking the state', was still in the background.

A green paper published in 1988 canvassed the possibility of contracting out court and escort duties and involving the private sector in the management of remand prisons (Home Office, 1988b), where the objections of principle were somehow thought to be less important than they were for prisoners who had been convicted (Windlesham, 1993, pp. 255–307). In the event, following a visit to the United States by the prisons minister Lord Caithness but with little further consultation, David Waddington (who had become home secretary in 1989) agreed that the bill for the Criminal Justice Act 1991 should provide not only for the contracting out of court and escort duties but also for the management of any existing or future prisons. Critics argued that those competing for contracts would become powerful and politically influential companies which would press for new prisons to be built and more people to be sent to prison in order to increase their profits and benefit their shareholders. The latter did not happen, but the more subtle consequences of large-scale involvement by international corporations, the influences they can bring to bear, their long-term effect on relationships and dynamics, and the costs of operational or financial failure, are still the subject of debate.

Probation

The situation in probation was less immediately precarious, but more complicated.

Earlier developments in after-care, parole and community service had transformed the nature and volume of the work which the service had to do, and in many ways the character of the service itself. It was now poised awkwardly between two contrasting and often conflicting ideas of its identity and purpose. Many probation officers still wanted to see themselves more as individual practitioners, accountable to their 'clients', than as members of a national public service accountable to the public. Probation committees – composed mainly of magistrates but including a Crown Court judge and co-opted members – were the service's employers but behaved more as a forum for discussion than an effective mechanism of governance or accountability. The Probation Inspectorate had been more occupied with the selection and training of staff and the general well-being of the service than with standards of performance and quantifiable results. The service still had influential friends in the House of Lords and among judges and especially magistrates, but it did not have a strong public profile and some members of the Conservative Party saw it as being on the fringe of the criminal

justice system and often 'on the side of the offender'. The National Association of Probation Officers (NAPO) did little to correct that impression and made no secret of its dislike of Mrs Thatcher's government and all it represented.

The government for its part needed a strong, effective and credible probation service, both for its own sake but especially to moderate the use of imprisonment. It wanted the service to be more efficient, economical and more effectively managed; to develop 'punishment in the community', with 'tougher' programmes and methods of supervision to satisfy the public's demands for punishment; to provide sentencing options which the courts would find more attractive than imprisonment; and to be more closely integrated with the other criminal justice services. It introduced a series of reforms, such as national standards and cash limits, and a 'Statement of National Objectives and Priorities' which required that priority should be given to reports to the courts and the supervision of those offenders for whom it was compulsory. Probation staff had increasingly been required to concentrate on office-based activities that could more easily be measured – appointments made and kept, sessions provided and attended for drug or alcohol treatment, programmes completed. One casualty of all this was work with families and communities and another was the voluntary after-care of short sentence prisoners who were not subject to compulsory supervision. The need for the latter to receive compulsory supervision is now claimed as the chief justification for the coalition government's decision to transfer most probation work to the private sector under a system of 'payment by results'.

The resulting tension was played out, amicably for the most part, throughout the 1980s with the Association of Chief Officers of Probation becoming increasingly influential in providing the service's professional leadership and in its relations with central government. Creative innovations included day centres, courses to tackle offending behaviour, bail information schemes and also, to some extent, work with victims and restorative justice. Chief officers had good relations with ministers and enjoyed their confidence. By the early 1990s the service was developing a coherent vision for its future as a service with a social work base working at the heart of the criminal justice system (Shaw and Haines, 1989; Statham and Whitehead, 1992; Statham, 2014) but it had to abandon that vision in the later years of the Conservative administration and then under subsequent governments whose aim was to transform the service into an agency of public protection and punishment, closely linked with and overshadowed by the Prison Service.

Legislation and sentencing

The tradition was that sentencing was a matter for the judiciary and government and that Parliament should confine itself to the types of sentence that were available and the maximum penalty for particular offences. That could not easily be sustained in the situation where judicial decisions, especially on sentencing, could have a major impact on the resources of the state, or become a matter of political controversy. The precarious situation in prisons also meant that any change of policy or practice had to be considered from the point of view of its effect on prison capacity. One consequence was that any discussion of the limitations of imprisonment as a means of rehabilitating offenders or reducing crime, the scope for more promising alternatives, or the damage caused to prisoners' families and their communities, could be dismissed as a cynical attempt to save money.

The Criminal Justice Act 1982 began a process of rationalising the sentencing arrangements for young offenders, setting out for the first time restrictive criteria for the use of custodial sentences which were carried forward in the Criminal Justice Act 1988 and pointed towards the more comprehensive provisions in the Criminal Justice Act 1991. The 1982 act also removed the penalty of imprisonment for the offences of begging and soliciting for prostitution, although that was more symbolic than the start of any programme of de-penalisation. Ministers, especially Leon Brittan, were interested in schemes of day or weekend imprisonment as a means of reducing the pressure on prisons, but after much discussion they accepted that intermittent custody would not be practicable in this country. A section of the Criminal Justice Act 2003 providing for intermittent custody was not brought into effect and was repealed in 2012.

Relationships between the judiciary and the Home Office were delicate throughout the 1980s, partly because of what the judges saw as illegitimate attempts to influence sentencing to reduce pressure on prisons[6] and partly because of changes which Leon Brittan made to the administration of parole and life sentences (Windlesham, 1993, pp. 308–346). The difficulties with parole were resolved by the appointment and then the report of Lord Carlisle's committee (Home Office, 1988a) and then by legislation in the Criminal Justice Act 1991. On life sentences, there followed a series of judgments in the Divisional Court, a report from a House of Lords Select Committee chaired by Lord Nathan and then a judgment by the European Court of Human Rights, all of which asserted that release should be an independent judgment by a

court or the Parole Board and not an executive or political decision taken by a minister. An accommodation was eventually reached in section 34 of the Criminal Justice Act 1991, under which the Secretary of State would release a prisoner serving a discretionary life sentence in accordance with the judgment of the Parole Board, but ministers insisted on keeping control of the release of those serving mandatory life sentences for murder (Windlesham, ibid.). Further judgments in London and Strasbourg followed and the home secretary's power was removed by the Criminal Justice Act 2003. The dispute was revived in 2014 over the Parole Board's decision to release Harry Roberts, who had been convicted of the murder of three police officers in 1966.

Criminal Justice Act 1991

In 1986 there was a dramatic escape by helicopter from Gartree prison and widespread disturbances by prisoners in which Northeye prison was burnt to the ground. In the following year the prison population reached what was then its extreme limit of 50,000 and further increases were projected. Ministers took an immediate decision to increase the rate of remission on prison sentences from one-third to one-half. That provided some short-term relief, but exacerbated the problem of 'truth in sentencing' – the gap between the sentence pronounced in court and the period which the offender actually spends in prison, which has been a source of criticism since that time. For the longer term, ministers decided that the situation was too precarious for them carry on and 'hope for the best' and more decisive action was needed. They rejected the option of a major programme of prison building on the grounds of cost and chose to adopt a deliberate policy of trying to reduce the use of imprisonment for offenders not regarded as a threat to society.

The usual devices – more non-custodial penalties, reducing maximum penalties, greater use of fines – could be useful, but were unlikely to be sufficient. A principled case could, however, be made for a more general overhaul of sentencing legislation and practice to promote consistency, clarify principles and remove acknowledged ambiguities, for example over deterrent or exemplary sentencing, the significance of local prevalence and the treatment of previous convictions or related offences. Ministers were attracted by a proposal from Andrew Ashworth (1983) for a sentencing council but did not pursue it, partly for fear of judicial opposition but perhaps also because its necessary independence from the government might enable it to become politically troublesome.[7]

The method adopted was to build on the restrictions on imprisonment which had been introduced for young offenders in the criminal justice acts of 1982 and 1988 and to try to establish proportionality, or 'just deserts', as the guiding principle for sentencing. The bill which became the Criminal Justice Act 1991 was framed accordingly. As an exercise in legislative drafting it was not successful and it suffered from the general difficulty in English law of giving statutory expression to general principles. Magistrates and judges, including Lord Chief Justice Lord Taylor, criticised its lack of flexibility. Its intentions were undermined by judgments in the Court of Appeal[8]; and its provisions on means-related fines and on previous and related offences were repealed by the Criminal Justice Act 1993. The framework as amended might have survived, but the policy was, in effect, abandoned following Michael Howard's appointment as home secretary in 1993.

Management reforms

A different set of influences came from the government's Financial Management Initiative, with its emphasis on economy, efficiency and effectiveness across government and public services as a whole, including prisons, probation and the magistrates' courts services, some of which have already been described. They also included the management information systems, performance indicators and targets which were later characterised as the 'new public management'. Inspection and audit became more rigorous and systematic, with the creation of the Audit Commission and greater involvement on the part of the National Audit Office. 'Efficiency scrutinies' focused on particular services, such as magistrates' courts. There was not, however, the criticism of 'self-interested providers' that was made of some other public services and there was, as yet, no general lack of confidence in the services themselves. Reforms were, for the most part, brought about within existing structures and by existing staff.

The government was keen that criminal justice should be 'managed as a system', although the pressure came more from Treasury and Home Office officials than from ministers. Critics said that the approach was unrealistic and argued that the principles of judicial independence and the operational independence of chief constables meant that criminal justice could not constitutionally be treated and, still less, managed in such a mechanical way. There were, however, genuine issues to be resolved, including the lack of communication and co-operation between services and government departments and

what were later called 'silos' – functions which were carried out in isolation from one another and without regard for the other interests involved. There was growing concern about the apparent waste of resources resulting from the services' failure to co-operate or to understand one another's difficulties or points of view. Various procedures were introduced to improve both coordination with government and communication between services, and more structured arrangements followed, including the Criminal Justice Consultative Council and area committees set up following the Woolf report in 1991. Ideas developed at that time were also reflected in the subsequent Labour government's 'Public Service Agreements'. Progress was made, but it was difficult to achieve co-operation and a sense of common purpose between different services and especially so in a competitive culture of targets and penalties.

The changes in retrospect

The measures taken during that period were for the most part necessary and had a salutary effect, but they brought a new bureaucracy of risk assessment and performance measurement, much of it founded on dubious assumptions or evidence. They also implied an instrumental view of justice, with an emphasis on 'what works' and its effectiveness in protecting the public, which prepared the way for the 'micro-management' that became a feature of the Labour government's administration in later years and developed into the coalition government's intention to commission most probation services from private contractors on the basis of 'payment by results'.

Many of the changes could be seen as 'liberalising' measures, but there was already a growing insistence on punishment early in the life of the Conservative government that expressed itself in a series of unsuccessful attempts to restore the death penalty for murder. The Conservative Party and the then Labour Party's continuing pre-occupation with life imprisonment and the administration of life sentences has already been described. Provisions in the Criminal Justice acts 1987 and 1988 increased maximum sentences for firearms offences, cruelty to children, corruption and insider dealing, as well as giving the Attorney General power to refer apparently over-lenient sentences to the Court of Appeal and allowing majority verdicts in jury trials.

There was a more general expectation among ministers and in Parliament that any criminal wrongdoing had to be punished in some way that was painful or humiliating and for that purpose probation or

community service orders did not count. Community sentences became characterised as 'punishment in the community' – with curfews and electronic monitoring as additional requirements – and the Criminal Justice Act 1991 made probation a sentence of the court instead of an alternative to it. The process of making community sentences more 'demanding', or simply punitive, began and still continues.

Legislation in the 1980s established precedents for legislative interference in sentencing, at first to reduce the use of imprisonment but later for broader political and declaratory purposes – to 'send a message'. As a gesture to public opinion but against its own principles of proportionality, the Criminal Justice Act 1991 included a provision (in section 2(2)(b)) which allowed for disproportionately long sentences for serious sexual or violent offences, a measure which gathered momentum in the Criminal Justice Act 2003, with the sentence of imprisonment for public protection. In the 2003 act the Labour government went further by legislating for 'progression' in sentencing (every previous conviction should be treated as an aggravating factor) and for offenders to be treated, as Tony Blair put it, 'for who they are and not for what they have done'.

The principle of proportionality remains in section 143 of the Criminal Justice Act 2003, which requires the court to 'consider the offender's culpability in committing the offence and any harm which the offence caused', but it has become progressively diluted as other considerations have been introduced as aggravating factors (for example previous convictions) or as relevant considerations (such as deterrence or prevalence) and by the introduction of presumptive minimum sentences and imprisonment for public protection (the last of these abolished in 2012). Section 142 of the 2003 act set out statutory purposes for sentencing, although these were incoherent and have had little practical effect. The Sentencing Council and its predecessors have developed sentencing guidelines, but the 'muddles' which the Criminal Justice Act 1991 was intended to resolve still, for the most part, remain (Ashworth, 2010).

An unanswered question is whether the 1991 act was really needed at all if the aim was to reduce and then to limit the prison population. The courts' use of imprisonment was in fact falling between 1989 and 1992, before the act had been passed and even before the bill had been published. Perhaps the fall was because the courts were anticipating the act and would have reverted to more punitive practices if the act had not been in prospect. Or perhaps they were responding to a temporary climate of political and possibly public opinion in which community sentences had become more acceptable for cases where imprisonment would previously have been imposed. However that may

be, the history of legislative attempts to structure sentencing for instrumental or declaratory purposes has not been encouraging. No one can doubt Parliament's right to make them, but its wisdom when it has done so has been more open to question.

Conclusion

Penal policy has to operate in situations which are complex and beset with uncertainty and ambiguity. To find a 'best' solution, or to decide 'who knows best', would be difficult enough in any circumstances, but it is made harder when there is a fault line between two contrasting approaches to what is 'best', reflecting different views of society and citizenship. One is a response to crime which favours social and situational solutions based on humanity, respect and individual and social responsibility, and which values experience and expertise. The other emphasises public protection, law enforcement and punishment and relies on public confidence and 'common sense'. It sees 'criminals' as a class different from, and of less value than, 'honest' people who need to be protected. The division was present in the 1980s but it has deepened since then.

The question 'Who knows best?' invites several possible answers – ministers, experienced practitioners, experts in systems and management, judges, the public, victims of crime or offenders. None of them is the right or the only answer, but none of them should be excluded either. Eric Hobsbawm (2013) described the tension between informed and popular opinion as 'the challenge of the twenty-first century'. The task, as government and service managers mostly tried to see it during the 1980s, is to identify and acknowledge the contribution that each of them can make and to bring them together in a decision-making process conducted in accordance with what became the Nolan principles of public life – honesty, integrity, selflessness, objectivity, leadership, accountability and openness.

Notes

1. Tougher regimes were soon abandoned after an evaluation which found that they made little difference to reoffending and the trainees rather enjoyed them. The change in sentencing powers (which the ACPS had recommended in 1974) was implemented in the Criminal Justice Act 1982.
2. Examples include the Prison Reform Trust's Commissions on the Penalty for Homicide and on Women's Imprisonment and the Howard League's Commission on English Prisons Today.

3. Borstal training was an indeterminate sentence of three – and later two – years of which at least nine (and later six) months had to be spent in custody and the remainder in the community under supervision. It was originally an alternative to a prison sentence for offenders thought to have good prospects of reform. In the 1960s it had become the only medium-term sentence available for young adult offenders, effectively preventing the courts from marking the relative seriousness of the offence, for example between co-defendants, where a sentence of between six months and three years would otherwise have been appropriate. Some members of the Prison Service resented what they saw as the privileged treatment that borstal trainees supposedly enjoyed.
4. It reads 'Her Majesty's Prison Service serves the public by keeping in custody those committed by the courts. Our duty is to look after them with humanity and help them lead law-abiding and useful lives in custody and after release.'
5. Official Report, HC 16 July 1987, col 1299.
6. Although Lord Lane as Lord Chief Justice was not entirely unsympathetic, arguing in the cases of *Upton* (1980, 2 Cr App R (S)132) and *Bibi* (1980, 2 Cr App R (S)177) that prisons were a scarce resource to be used sparingly at a time of severe overcrowding.
7. The Labour government set up a Sentencing Advisory Panel when it came into office in 1997 and that has evolved into the Sentencing Council which exists today.
8. Especially in *Cunningham* (1993) 14 Cr App R (S) 444.

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3

Troubled, Troubling or Troublesome? Troubled Families and the Changing Shape of Youth Justice

Roger Smith

Repackaging the problem? The context

Negotiating the terrain between 'welfare' and 'justice' has been a perennial problem for those concerned with the issue of youth offending, whether as theorists, policy-makers or practitioners. Whilst these two concepts have been caricatured almost to the extent of losing any substantive meaning, the underlying tensions are still discernible in continuing debates about what to do about the crimes of the young; and they still appear to underpin many of the assumptions which inform initiatives for change, even in the contemporary era. Of course, bound up with this controversy are the questions of the extent to which young people (and their families) should be held accountable for their behaviour ('responsibilised') and how far, by contrast, we should view and treat their actions as the understandable (and excusable) consequence of the adverse circumstances of their upbringing. In both cases, importantly, it seems that families and their influence are to be problematised.

The historical nature of the problem is easily illustrated by the recurrent emergence of certain key motifs, revolving round the nature of the response to young people deemed to have broken the law and the ways in which their families, too, should be viewed and, indeed, implicated in the process. Amongst other bleak observations, the 1816 Report of the Committee into Juvenile Delinquency observed that 'the main causes of delinquency were the "improper conduct of parents", "the want of education", the "want of suitable employment", "violation of

the Sabbath" and habits of "gambling in the public streets" ' (Committee for Investigating the Causes of the Alarming Increase of Juvenile Delinquency in the Metropolis, 1816, p. 10). Indeed, the committee believed that 'the number of boys is very small, whose original tendencies to do wrong have not sprung from the improper conduct of their parents' (p. 11) and that the moral decay associated with this could be attributed to a number of causal factors, including: the 'want of employment', 'improvident marriages' and the increased availability 'of spirituous liquors' (p. 12).

So, what are we to make of the fact that similar imagery (and causal assumptions) remains topical and politically attractive, nearly 200 years on?

> Whatever you call them, we've known for years that a relatively small number of families are the source of a large proportion of the problems in society.
>
> Drug addiction. Alcohol abuse. Crime. A culture of disruption and irresponsibility that cascades through generations.
>
> When you look through all the problems these families have . . .
>
> . . . the kids leaving sink schools without qualifications . . .
>
> . . . the parents never getting a job and choosing to live on the dole . . .
>
> . . . the teenagers rampaging around the neighbourhood before turning to crime . . .
>
> . . . you see a clear thread running through.
>
> (Cameron, 2011)

Although there are some differences of emphasis, these two explanatory accounts, centuries apart, share enough in common to suggest that there is a recurrent problem, framed in a particular way by conventional understandings of disadvantage, youth crime and the (almost inevitable) connections between them. On the other hand, these conventional narratives are themselves shaped by a number of internal and external dynamics, notably those associated with the challenge of accounting for policy failure. In other words, the analyses and actions of policy-makers have had to take account of and respond to the sheer persistence of the identified problem, as repeatedly government-sponsored initiatives have, apparently, failed to make any impact. Thus, for example, the copious investment by the New Labour government

in measures to tackle the challenge of 'social exclusion', itself identified as the product of 'linked problems such as unemployment, poor skills, low incomes, poor housing, high crime environments, bad health and family breakdown' (Social Exclusion Unit, 1997), was dismissed by the incoming prime minister as 'an excess of unthinking, impersonal welfare. Put simply: tens of thousands of troubled families have been subjected to a sort of compassionate cruelty . . . swamped with bureaucracy, smothered in welfare yet never able to escape' (Cameron, 2011).

In a sense, this analysis of the 'problem' appeared little different from that of the preceding government. The failure, it seemed, was in the inappropriate nature of the policy response, which in its 'top-down and patronising' approach maintained people in a form of captive welfare dependency, as opposed to supporting and 'empowering' them 'to take control of their own lives'. So, although the end goal was very much one of responsibilisation, the starting point did not appear to be one of imposing blame on those families experiencing multiple challenges in their lives. Indeed, even the need to take responsibility was acknowledged as a shared obligation: 'We will not fix these problems without a revolution in responsibility . . . a recognition that we need in our country a massive step change in accepting personal responsibility, parental responsibility, and social and civic responsibility too' (Cameron, 2011).

This approach towards 'troubled families' espoused by the coalition government appeared to have much in common with its attempt to set out its distinctive position on dealing with crime and the commitment to a 'rehabilitation revolution'. Criticising the previous government's apparent over-readiness to intervene, the coalition stated that: 'We need a local, joined up approach to address the multiple disadvantages that many young offenders have and the chaotic lifestyles that many lead . . . . Supporting parents to improve their parenting skills plays a significant part in improving life chances and reducing reoffending' (Ministry of Justice, 2010, p. 68). And the theme of disadvantage and its cumulative impact was sustained in subsequent policy announcements:

> Offenders often lead chaotic lives: Broken homes, drug and alcohol misuse, generational worklessness, abusive relationships, childhoods spent in care, mental illness, and educational failure are all elements so very common in the backgrounds of so many of our offenders.
>
> (Grayling, 2013, p. 5)

It seems, therefore, that the coalition government is attempting to construct a distinctive account of its approach and rationale for

intervention (or non-intervention) with young people who offend and with the overlapping population of 'troubled families', in ways which distinguish it from its predecessor and at the same time square a number of circles – that is, to say, resolve a number of apparent tensions and contradictions.

These contradictions are several. First, in both instances, the coalition government approach is contrasted with its predecessor to the extent that it aspires to intervene to a lesser extent and certainly in a more 'targeted' and efficient manner. Nonetheless, it is suggested that it will take the investment of considerable time and resources with those qualifying for intervention to achieve positive change and this is all the more apparent with the later expansion of the remit of the Troubled Families Programme to 500,000 families (approximately 7% of families with dependent children in England) in August 2014. Thus, while resources which may be provided to the population as a whole are withdrawn, there is to be at least an element of reinvestment in those who are identified as particularly problematic. Dramatic high-profile announcements of 'new' spending are offset by the continuing erosion of existing (often 'targeted') services as local authority and voluntary sector budgets are progressively and substantially reduced.

Second, whilst ostensibly attempting to avoid blaming families for their situation or attributes, policy is certainly geared towards achieving behaviour change and in a fairly 'assertive' manner, with key workers taking the lead role in 'getting a plan of action together' (Cameron, 2011) and taking practical steps to initiate change – hinting at a rather conventional behaviourist model, perhaps; or possibly aspiring to the solution mapped out by Donzelot (1979), whereby the family becomes the vehicle for policing itself. Of course, this line of reasoning also begs the question of who exactly is 'to blame' if not government and not families themselves – are they just the unfortunate victims of social accidents?

And third, the way in which indicators of 'success' are constructed creates a degree of uncertainty about who the real beneficiaries of the programme are intended to be. Much is made of the expected saving to the public purse of 'turning round' families whose problems apparently generate very significant costs to state agencies and the welfare system, whilst specific targets revolve around improvements in those agencies' performance (reducing levels of anti-social behaviour, improved employment figures, better school attendance levels, for example). But on the other hand, improvements in the quality of life and well-being of the families concerned is portrayed more as a by-product of all

these socially valued outcomes – to be welcomed, for sure, but not the principal aim of the programme.

From these observations a number of key questions emerge, particularly to do with the implications of this 'refocusing' of government action to deal with the persistent issue of families whose individual and collective lives present difficulties for them and for the wider community. In specific terms, we are interested in the process by which a contemporary approach to a perennial problem has emerged; and where the continuities and disjunctures might lie in terms of previous attempts to define the problem and the underlying ideological and operational assumptions which have informed these.

Criminalising the family – Rodger and 'de-civilisation'

> The family has always been an object of interest to policymakers. Indeed, the central policy issue for governments since the nineteenth century has been how to influence in the public interest the many private decisions that people make about relationships, sexuality and parenting without violating the sanctity of the private sphere and undermining liberal democratic sensibilities.
>
> (Rodger, 2008, p. 97)

In capturing the continuing state interest in regulating family life so eloquently, Rodger also draws attention to the defining line that must be trodden between interfering in the lives of 'normal' people (outside the bounds of legitimacy) and taking (legitimate) action to monitor and change the behaviour and attitudes of those who stray too far from what is conventional and acceptable. The family fulfils too many other normalising social functions for it to be completely open to scrutiny and intervention – there must be an agreed and formal basis for determining who qualifies for special attention and treatment.

At the time of writing, Rodger's immediate focus was the New Labour government under Blair and he noted that part of the rationale that government offered for taking the approach to families that it did, was to distance itself from a Conservative preoccupation simply with supporting conventional families. He observed however that: 'The ease with which the debate about family life rubbed shoulders with the debate about how to control incivility illustrated clearly the way in which this key [policy domain] had been criminalised' (Rodger, 2008, p. 97). As he also pointed out, it was by then a standard feature of criminological inquiry to find an association (and an implied causal relationship)

between various types of family problems (conflict, separation and poor 'domestic management', for example) and the delinquencies of children. These conclusions were, in turn, associated with three theoretical approaches which sought to elaborate the causal connections assumed to be in play: selection theories, linking particular family characteristics with delinquency; life-course theories, making connections between damaging experiences of family life and negative behavioural outcomes; and trauma theories, which sought to associate criminality with the kind of coping strategies adopted by children and young people to deal with significant adverse events. Of course, these are not mutually exclusive and share in common the capacity to create the basis for differentiating between the normal and the abnormal in the family lives of the young. They are, for example, quite clearly seen to be interlinked in the factors Rodger (2008, p. 102) identifies as being linked empirically to deviant behaviour by a series of studies, including 'marital disruption', 'poor domestic care of the child', 'overcrowding in the home' and 'poor parental supervision'. The more such factors are found in combination, the greater the likelihood 'of a child's developing anti-social tendencies', it seems.

As Rodger goes on to illustrate, such attempts to articulate the family-related factors associated with delinquency are, in turn, often supplemented by psychological studies which seek to elaborate the mechanisms by which what is viewed as deficient parenting might impact on children's social and behavioural adjustment and self-control. Some authors are therefore reported to have developed ways of classifying 'parenting styles' which can be 'correlated with delinquency' (p. 105). Importantly, in these accounts, bad parenting 'is presented in such theories as something that is exhausted by reference to the relationships internal to the isolated family' (p. 109); and in this context, it becomes possible to test 'rival theories' to suggest why particular parenting styles are criminogenic, as if they are decisive. Indeed, the fact that 'good' and 'bad' parents are found to share socio-economic characteristics may be utilised as a justification for theoretical and empirical attempts to distinguish between them and assert causal links with their children's behaviour and outcomes. This differentiation is also analytically helpful in that it establishes the basis for the argument that 'poor parenting' is not inevitable, nor even a predictable consequence of certain adverse social factors, but it is rather a consequence of poor judgement or errant choice-making on the part of thoughtless or reckless parental figures who should know or are at least capable of knowing better. This emerging sense of a 'democratised' and therefore responsibilised family is consistent with Giddens's

(1991) arguments about the changing nature of interpersonal relationships and the greater sense of 'negotiated' expectations between adults and children (Giddens, 1999). The more that family members are 'freed' from historically based social structures and behavioural conventions, the more the onus is upon them to make careful and considered choices about all aspects of their domain of responsibility, especially their children's upbringing. As Rodger observes, this understanding played nicely into the 'respect' agenda launched by the Blair government in 2005 and setting out an explicit form of social contract, marrying rights (to child-related benefits, child care, health care and education) with responsibilities, to make appropriate use of the services on offer and to act in a socially desirable manner in the realm of providing moral guidance and discipline for their children.

Where this outcome was not achieved, then, in those situations where the implicit bargain had not been kept, the legitimacy of state-enforcement action could not be called into question. Failure to comply could simply be attributed to irresponsibility in most cases and, as a result, action to ensure compliance would be fully justified – according to the inexorable logic of disciplinary control. As Garrett (2007) has observed, this rationale can be seen to have underpinned the 'respect' initiative, first outlined in 2003, with its 'velvet glove' approach, according to which intensive support would be offered to acutely problematic families with the 'hope' that they would accept this help 'voluntarily' (Home Office, 2003, p. 28); an approach which was closely supplemented with a much more directive model of intervention, underpinned by legal provisions such as parenting orders, ASBOs and Acceptable Behaviour Contracts. Indeed, it was soon to be the case that the government spelt out plan to 'roll out' a model of intervention in which a 'lead person' would 'grip' the family and services around them and thereby ensure compliance and reform (Respect Task Force, 2006, p. 22). Even at this point, then, a close connection was being made in government circles between problem families' inherent and intransigent lack of responsibility and the need for forceful intervention, which could, if necessary, be supplemented by the imposition of legal requirements. Garrett (2007, p. 208) notes that the 'problem family' was by no means a recent discovery at this point, having at least a 60 year history; nor, as we know, was the link between such families and youth crime a newly discovered association. However, Rodger (2008, p. 115) does argue that the rhetoric associated with the 'respect' initiative did represent a changing emphasis in terms of the ways in which the problems of the family were conceived. In place of both 'welfare' (family support, welfare-based citizenship) and 'legal' (interests of

the child, right to protection) discourses, a third formulation was gaining strength, based on ideas of 'discipline' (conditionality of support, productive use of sanctions):

> Since the late 1990s, the anti-social behaviours and 'respect' agendas have come to constitute a third policy field that is primarily aimed at subordinating issues of child welfare to those of a 'tougher' youth justice system.
>
> (Rodger, 2008, p. 115)

Of course, this trajectory could be traced further back to New Labour's conversion to the idea of being 'tough on crime' as well as on its causes (Blair, 1993), but looking forward, it also sits quite comfortably with an incoming coalition government which also claims to have a radical (and responsibilising) agenda. The focal point of concern and the rationale for intervention have shifted from a desire to ensure 'good lives' for all to a wish to safeguard communities and protect the public interest.

And when times are hard and it is incumbent on everyone to pull together and 'do their bit' of course it is only reasonable to expect those who are not doing so to be brought into line, as effectively and efficiently as possible. It is perhaps unsurprising that much of the agenda-setting work of the coalition government has focused on the alleged social and economic costs of 'failing families' and so this introduces another subtle twist to the disciplinary discourse. It remains helpful to be able to problematise families and associate them with unacceptable forms of behaviour by their members, especially their children and young people, but in some ways this becomes less important, once the imperative of cost saving becomes an overriding consideration. And, of course, local authority budgets have suffered savage cuts and, indeed, family support services have often been subject to draconian reductions themselves (for example with the loss or drastic curtailment of many children's centres; 4children, 2013); but coincidentally, the social/financial costs argument allows for the reinsertion of a degree of sympathy for those whose circumstances have impacted adversely on their capacity to contribute to the general well-being of the economy.

Against 'compassionate cruelty' – a fourth way?

And so we encounter yet another set of paradoxes – the language used to characterise 'problem families' is rife with continuities (having a well-established heritage), but the demands of political expediency require

governments to distance themselves from their competitors, so the coalition had to find a distinctive voice on the subject. This, in itself, would not have required a distinctive intervention strategy (just 'repackaging'), but for the impact of the economic crisis and the need to live up to the claim that 'we're all in it together'. The politics of blame became quite tricky to negotiate at this point and thus a rather softer line at least made tactical sense in relation to those families who were deemed to be 'troubled'. And, alongside this, the financial crisis also imposed a practical constraint in the sense that however extensive they may appear, interventions to address the difficulties of these families had to be low cost and minimalist.

Whilst families were still problematised in the same way – in terms of their many reported deficiencies – the language and techniques of intervention were adjusted, to create political distance from the previous administration, to adapt to a need for economical solutions and, it would seem, to align government objectives with its more generic slogans ('broken Britain', 'Big Society', 'in it together'); that is, to present a more 'inclusive' model of practice than had been in evidence previously. Interventions would be authoritative and directive, but not 'cruel'. This orientation therefore framed the practice model set out for the Troubled Families Programme (Department for Communities and Local Government, 2012). Family intervention workers are thus 'dedicated to families', showing persistence in building relationships with those with whom they work, addressing the problems faced 'as a whole', maintaining an assertive approach but seeking a 'common purpose' and 'agreed action' to achieve change (Department for Communities and Local Government, 2012, pp. 15–17). Tough messages are delivered 'with empathy' (p. 24) and the tacit threat of a range of 'sanctions' (criminal, pre-criminal or non-criminal) are aimed at the family as a whole. Its problems are accordingly seen as being interlinked:

> To be targeted for help under the Troubled Families Programme, families have to meet three of the four following criteria:
>
> - are involved in youth crime or anti-social behaviour;
> - have children who are regularly truanting or not in school;
> - have an adult on out of work benefits;
> - cause high costs to the taxpayer.
>
> (Department for Communities and Local Government, 2014, p. 7)

But in fact, it seems, the problems these families face are much more diverse; and of those families that have been involved in Troubled Families projects, 'Families had on average nine problems related to employment, education, crime, housing, child protection, parenting or health on entry to the programme' (Department for Communities and Local Government, 2014, p. 10).

> Having so many different problems within a household unit is very likely to make each individual problem more difficult to tackle. Individuals within families do not operate in isolation and the problems of one will affect another, reinforcing each other and therefore likely to build up and lead to a family becoming dysfunctional.
>
> Yet services have traditionally dealt with individuals – not families – and worked on a 'presenting' or dominating problem, not the interconnected and layered problems and dynamics which means the unit as a whole, and the individuals within it, are sinking. With many services circling families, working with individuals within the family or individual problems it can mean families are only contained in their difficulties, often lurching from crisis to crisis.
>
> (Casey, 2014, p. 5)

For those who have been involved in the public policy sphere for any length of time, this observation is strikingly familiar to the terms in which 'social exclusion' was portrayed by the New Labour administration, despite the naïve claim from those at the heart of the initiative that this is 'the first time that we have been able to evidence the extent of the problems' (Louise Casey, quoted in the *Guardian*, 18 August 2014). But its effect in terms of shaping the prevailing discourse and orientation to practice is significant – problems should not be addressed in isolation and it is their very combination which seems to lie at the root of these challenging outcomes, for the families themselves and for others.

Emerging from this is an implied rationale for a 'new' and distinctive practice model, which has a strong moralising and disciplinary basis, but does not – and indeed cannot – adopt a strategy of direct criminalisation. Problems are linked, they affect the entire family, they have distinctive 'welfare' dimensions, and the family is the ultimate site of the 'solution' in contrast to the interfering state, with its many ineffective

services 'circling families', merely 'containing them in their difficulties' (Casey, 2014, p. 5). They need to be 'supported to change' rather than having partial, wasteful and ineffective solutions imposed on an 'individual' basis (Department for Communities and Local Government, 2014, p. 16).

All this suggests two things: a refocusing of the 'disciplinary state', along the lines envisaged by Donzelot (1979); and, a re-positioning of those agencies specifically concerned with the provision of criminal justice services so that they become part of a coherent, seamless web of interventions, supporting and supplementing the 'whole family' approach, arguably consistent with the rapidly emerging consensus around the use of diversionary and restorative measures in youth justice in particular.

Although clearly he was taking a historical view, Donzelot's argument was that a distinctive feature of the emergent modern state was its approach to inculcating a spirit of conformity amongst working-class families, when direct coercion was no longer a practicable or effective option. In order to achieve this objective, the essential aim would be to create a 'disciplinary' framework within which families would be educated to 'police' themselves, in other words, to internalise the behavioural and attitudinal norms essential to achieving compliance with the requirements of dominant (market) interests. The processes for achieving this would be based on the achievement of a legitimised form of engagement by welfare professionals, whose task would be to utilise techniques of persuasion and direction to gain families' consent and active commitment to the prescribed forms of behavioural change. According to this sort of approach, overt mechanisms of control are less useful than methods based in negotiation and persuasion – with 'sanctions' only operating as a reserve power. Interestingly, it is noted that in the Troubled Families Programme, the key worker 'rarely controls' the available sanctions themselves and 'there is some evidence that shows that intervention can be more readily accepted if it is delivered by an agency which is not the agency that will implement the ultimate sanction or take legal action' (Department for Communities and Local Government, 2012, p. 28). The key worker therefore acts as a kind of buffer or mediator, being more acceptable to the family when not responsible for the coercive measure, whilst also therefore retaining more credibility when trying to persuade them towards desirable change.

It might reasonably be assumed therefore that an approach to practice such as this, with less overt use of coercive sanctions, coupled with a less

individualised approach to problematic behaviour, might also imply a realignment of service delivery – quite apart from the contemporaneous changes imposed on local agencies by the need to achieve massive budget savings and service 'efficiency'. So, in Hartlepool, for example, the Safer Hartlepool Partnership received a report in August 2013, detailing the progress of the Troubled Families initiative for the area. The basis for implementation was a collaborative approach by which services would 'work together to offer families a coherent response based on their needs which will be built around individual and family/household aspirations and the support required to achieve these' (Report to Safer Hartlepool Partnership, 16 August 2013, para 2.2). Families would be put at the centre of the service planning process and a 'whole family' approach to intervention would be adopted. Interestingly:

> The delivery model is underpinned by Restorative Practice, a way of working with families that promotes partnership with families, ownership of issues and a solution oriented approach to tackling issues. Restorative Practice is based on the social discipline window which involves working WITH families/households, rather than doing it FOR families/households, or doing it TO them, thereby creating a culture of empowerment rather than dependency.
>
> (para 2.4)

Clearly, here, the agenda revolves around inculcating a spirit of self-discipline and compliance within families, of their own volition.

Equally significantly, the delivery model outlined for the programme in Hartlepool assigned team leadership to a member of the local Youth Offending Service, with other members being drawn from family support, housing, probation and anti-social behaviour teams. Intervention itself was to be based on a process of determining family 'needs' and working with them to develop a 'Family Contract and Family Plan' which would be encapsulated in one 'user friendly document'.

In Kent, too, in a very different area, the Troubled Families Programme shares similar characteristics: it is based on a multi-agency approach and utilises dedicated workers to 'design' and 'agree' action plans and objectives with 'Kent's most disadvantaged families' (Kent County Council, nd, p. 6). Underpinning the county's approach is the belief that 'evidence shows that the biggest change to the behaviour of a troubled family is generated by the relationship developed by the dedicated worker, who stands alongside the family, committed to

achieving change' (p. 12). And, similarly to Hartlepool, the service delivery model in Kent is 'integrated', incorporating a range of children's and other services, including the 'Integrated Youth Service' which is responsible for delivering youth justice as well as other youth-based interventions (p. 25). Again, there is reference here to working 'with the family to an agreed action plan' and 'providing practical hands-on support and coordinating a wider multi-agency team around the family' (p. 32). Families will be helped (empowered) to 'take control of their lives and be less reliant on public services' (p. 13). Coercive approaches to intervention are conspicuous by their absence within this framework, although family intervention workers will provide 'a persistent, assertive and challenging approach' (p. 8).

Assuming that these documents represent the direct experience of implementation, it seems that there is emerging a common intervention model, which is organised around notions of interlinked problems, family-centredness, integrated intervention strategies, 'tough love' and 'common sense' solutions and negotiated consent. To the extent that youth justice services are subsumed under this overarching strategy, this also suggests a reframing of practice in relation to the anti-social or criminal behaviour of young people, which can no longer be readily de-linked from the wider array of connected and interacting problems experienced by families in difficulty.

Making connections – depenalising (and decontextualising) families?

By implication, these developments in family intervention policy might also be assumed to imply a parallel process of adaptation in those spheres of practice directly concerned with young people's wrongdoing, partly because these services have been aligned with and in some cases integrated with more generic children and family services; and, partly because the change in practice orientation represented by the Troubled Families initiative would be inconsistent with the continuation of a highly individualised and punitive approach to young people who infringe the law. As we already know, there has indeed been a persistent trend towards the decriminalisation of young people who offend – stemming from 2008 at least – and by now becoming almost institutionalised as the preferred approach in youth justice. At the same time, much has been made of the emergence of restorative disposals as routinised forms of intervention. In this context, too, the family is often the focal point for intervention.

In keeping with Hartlepool's endorsement of 'Restorative Practice' it is interesting to note Hull's even more whole-hearted embrace of this approach to meeting its civic responsibilities:

> The aim in Hull (UK) is to become the world's first Restorative City . . .
>
> [W]e believe that this aim is the best and most effective way for us to work together with the children, families and communities in the city . . . .
>
> The restorative framework requires us to work with children, families and the community and provides the 'glue' that binds together agencies in a common approach and language. Aiming to create consistency across all services.
>
> (Hull Centre for Restorative Practice, nd)

The ethos of restorative practice as described here is about building relationships, empowering families and others to take responsibility for their own well-being and promoting the 'pro-social skills of those who have harmed others'. This aspiration is acknowledged in the city's youth justice planning documents (Hull Youth Justice Service, 2012), whilst at the same time the service identifies its 'considerable contribution' to make in achieving the desired objectives of the Troubled Families initiative (p. 15) by creating a 'platform to support' the development of the programme (p. 17).

Thus, we are able to identify the emergence of signs of a twin-track process, whereby an (enforced) realignment – merging – of service delivery systems and providers is accompanied by a reframing of the nature of the task of addressing the difficulties encountered by families, including the criminality of their younger members. Whatever the initial and somewhat fantastical claims of service transformation and dramatic improvements in the lives of families themselves (Department for Communities and Local Government, 2013), a proper empirical assessment of these strategic and ideological shifts has still to be undertaken. Nonetheless, this process has clearly underpinned the de facto de-emphasis of young people's reported criminal behaviour, which is now a matter to be resolved through 'assertive' intervention by the new cadre of family support workers brought into action by the Troubled Families initiative; and this can be achieved effectively through a 'restorative' model of intervention, it seems, drawing on experience in youth justice. By these means, families will be 'empowered' to develop the strengths and responsibilities they need to turn their own lives

around – an achievement which is to be measured, in turn, purely and simply by their capacity to become conforming (attend school, don't offend) and productive (find work, don't impose undue costs on the public purse). If after all this, they still have any remaining 'troubles' (such as poverty, stress or ill health), perhaps they'll be expected to keep these to themselves.

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4

Understanding the Marketisation of the Probation Service Through an Interpretative Policy Framework

Rose Broad and Jon Spencer

Introduction

The government's plan for the management of offenders, Transforming Rehabilitation (TR) (Ministry of Justice, 2013a) outlines a structure where only those assessed as high risk are managed in the public sector and sets out a process for bidding to provide criminal justice services within a market environment. This agenda builds on the intentions set out in Breaking the Cycle (Ministry of Justice, 2010) to extend the principles of payment by results (PbR) to all providers of services for offenders. In the TR agenda, the government is moving from a position of relative stability in an area not recently attracting significant public concern towards a policy that has little evidence base. It is a policy decision fraught with pitfalls that could expose the government to a high-profile policy failure especially if previously effective systems are dismantled and reoffending increases.

This chapter is focused on the fundamental question: how has policy-making moved in the direction of the TR agenda? This discussion uses an interpretative policy framework developed by Turnbull (2006) to consider the themes relevant to the development of the TR policy and the actions of the policy-makers. Rational problem solving is determined as inadequate in explaining the policy process (Turnbull, 2006, p. 8; Kingdon, 1984, pp. 82–83) and therefore to understand policy-making within the TR agenda. An interpretative policy framework views the way in which a problem is structured and the consequent response to that problem as having equal relevance and importance in the policy-making process. The primary justification for a policy overhaul was that

offenders sentenced to short periods of imprisonment did not receive any post-release supervision. A simple response to this would have been to make it a statutory obligation on the Probation Service to provide such supervision. However, the response was one that was very different. The claim was that there was a fundamental problem within the community supervision of offenders rather than a problem with short-term incarceration: an interpretation that can be seen to have longevity.

The discourse of the policy requirement to change the structure of offender supervision in one relatively small and low-risk area of the Probation Service's supervision of offenders is presented as heralding a fundamental transformation to the management of offenders in the community. However, by using an interpretative framework, it is possible to see continuity of themes across this area of policy-making including the ongoing reduction of public sector services. In addition, areas that have been consistently neglected – for example, the supervision of female offenders – can also be seen to persist within the framework as policy 'silences' (Yanow, 2007). These themes (and neglected themes) have been amplified by the socio-economic conditions created by the climate of austerity and the political ideology underpinning the spread of marketisation within the criminal justice and wider spheres. In this context, the question is not who knows best but whose knowledge is perceived as best.

An interpretative policy framework

This section sets out the interpretative policy framework and the underpinning theories which provide a means to understand the apparently illogical policy direction of the TR agenda. The concept of policy problematisation (Turnbull, 2006) is far more complex, uncertain and varied than the rational problem-solving model, the latter can result in an over-simplistic view of political interaction. A linear model of policy-making relies on there being a series of stages, each stage dependent on the previous one. The problem with this approach is that there is no process of feedback and adjustment (Turnbull, 2006). The primary criticism of the rational problem-solving model made by Turnbull (2013; 2006) is that it does not permit an understanding of how the initial issue becomes defined as policy. The TR agenda cannot be understood as a rational response to the policy problem. To simply understand criminal justice policy-making as a process of rational problem solving fails to recognise the political context and processes by which such policy issues are problematised. It is the process of policy-making that is integral to

the outcome rather than the policy issues, which are continually dealt with through policy-makers:

> professional, organisational, institutional, social and political experiences . . . [and] has little to do with rational, problem solving logic.
>
> (Turnbull, 2013, p. 117)

Problems and solutions are not progressively and logically linked in policy-making but rather the problems are constructed through power and interpretative framed schemes and through the practice of policy-making activity (Turnbull, 2013, p. 115).

Focusing on the processes of problem setting and problem answers allows a more detailed understanding of the policy process. It is the 'problem setting' aspect of policy-making that has been neglected which therefore fails to acknowledge the political nature of policy and both the persistence and absence of themes. The process by which an item is classed as a problem which then becomes an agenda item is not a logical process but a contingent one where a choice is made between possible formulations of a problem. This choice is made by 'claims-makers' (Spector and Kitsuse, 1987) whose interpretation and knowledge regarding the situation are afforded legitimacy. 'Policy solutions are often partial, small advances upon the previous solutions,' (Turnbull, 2006, p. 5), rather than scientific, research-based solutions to specific problems. This means that policy-making is not based on rational problem solving and new approaches but is a process of incremental change within the interpretative frames of policy-makers and claims-makers (Turnbull, 2006, p. 5; Radaelli, 1995, p. 164). Problem setting is crucial to policy-making since the shape of the questions asked regarding a problem will determine the shape of the answer;

> policymaking is inquiry in two senses; it sets the problem by giving it form and seeks the best solution to *that* problem.
>
> (Turnbull, 2006, p. 7, emphasis added)

Therefore, the way in which the problem is initially defined is key to subsequent policy development.

By focusing on the questions and answers presented throughout the policy-making process, the scope of problem orientation is widened which allows inaction and any other relevant responses into the frame and begins to account for various facets of policy-making including

partial answers and repetition of themes. This approach also allows 'contaminated' forms of discourse – argumentation, contingency, interests and negotiation – into the interpretative framework which can then be regarded as a legitimate part of the process. 'As the basis for policy theory, this enables us to express the problematicity of political reasoning in rational terms,' (Turnbull, 2006, p. 18).

An interpretative policy framework differs from interpretative policy analysis: it considers the context within which the policy is made rather than analysis of the policy content. The approach aims to 'take into account what is meaningful to actors in those situations' (Yanow, 2007, p. 111). The interpretative policy framework builds on some of the principles from Kingdon's (1984) analysis of policy-making and concepts of social constructionism which provide an illuminating foundation for understanding policy-making in the TR agenda. Kingdon (1984) emphasises the operation of agenda funnelling, problem setting and incremental change and rejects a rational, comprehensive model of the policy process (Kingdon, 1984, pp. 82–83). Turnbull (2006) developed this by adding an epistemology of questioning and expanding the problem concept in policy theory, as outlined above.

Kingdon concludes that those inside government are afforded the primary influence during agenda setting and interest groups and academics are only able to engage in the process of change once the agenda has been set[1]. This explains the inability of academics to significantly impact on the policy direction in some areas, despite repeated research evidence of ineffective or deficient practice. Kingdon (1984) also suggests that the origin of an idea may not be as important as the context within which the idea becomes relevant; 'the critical thing to understand is not where the seed comes from, but what makes the soil fertile' (Kingdon, 1984, p. 81). In terms of the TR agenda the 'march of the market' (Neilson, 2012) and an underpinning neoliberalist political ideology operate within a setting of austerity to contextualise the policy base for the management of offenders.

The premise that the reality created by policy is socially constructed is generally accepted (Schmidt and Radaelli, 2004, p. 194). It is not necessary to detail the theory of social problems for the purposes of this discussion. However, it is useful to draw on social constructionist concepts related to policy-making in order to examine the development of TR and the actions of the policy-makers in this area. Analysing the TR policy agenda through an interpretative policy framework explores the way in which the issues have been problematised and the activity of the policy-makers in their use of the identified social conditions.

An examination of the social conditions chosen by the policy-makers in order to develop problem answers can illustrate the way in which the policy problem has been interpreted. So, policy-makers' use of the reoffending rates of those receiving short custodial sentences is crucial in understanding how they have developed the TR agenda and subsequent policy solutions. It is not necessary or useful to determine the objectivity of these conditions. The aims of the policy-makers in presenting 'objective' social conditions are usually related to the relevance of their own policy-making. Analysis of this is termed 'contextual constructionism' (Weinberg, 2009; Best, 2002) which uses social conditions to comment on claims-making activities such as those involved in policy-making. Weinberg (2009) argues that researchers and policy-makers differ in their use of objective conditions, the former are guided by a specific research question, whereas the latter are led by the relevance of the objective conditions to their own policy-making activity (Weinberg, 2009, p. 73).

Problematisation in the Transforming Rehabilitation agenda

The way in which the problem is defined in the TR discourse is interesting and illustrates the operation of the policy-makers in problematising this issue. Using the concept of problematology (Turnbull, 2013; 2006), the issue of inadequate offender supervision can be seen to focus on a specific group of offenders which are presented by the policy-makers as the rational basis for the overhaul of offender supervision as a problem solution. TR (Ministry of Justice, 2013a) specifically cites issues with the post-release supervision of offenders in the community who have served less than 12 months in prison as a justification for the agenda direction. The figure of a 58% reconviction rate for this group cited in the TR (Ministry of Justice, 2013a) document is taken from the *Proven Re-offending Statistics Quarterly Bulletin* (Ministry of Justice, 2013b). However, the document neglects to include research regarding the efficacy of short prison sentences compared to the viability (both in terms of rehabilitation and economically) of the use of community supervision as an alternative to short custodial sentences (Johnston and Godfrey, 2013). Commenting in response to the curtailment to prisoners' reading material, Lord Chancellor Christopher Grayling repeats the links to the problematic reoffending rates of short-sentenced prisoners highlighted in the TR documents further cementing this group as the 'problem' within this policy problematisation

(Grayling, 2014). The policy discourse has effectively created a problem which, the Probation Service not being tasked or equipped to deal with, is being solved by a policy solution that dismantles the Probation Service.

The problematisation is interesting in relation to the public perception of this issue as a critical problem. There is no evidence of significant public concern in recent years regarding the performance of the Probation Service either in terms of official perspectives or from the public. Media and public concerns are frequently associated with serious case reviews where an individual under probation supervision commits a serious further offence. The most recent of these was the Omand Review into the conviction of Jon Venables (Omand, 2013) which highlighted procedural issues, difficulties associated with Venables age at the time of conviction and the unique situation regarding identification as underlying the failings which led to reconviction, rather than issues with the probation supervision of Jon Venables under licence. The most recent media-driven concern regarding offender supervision occurred during the mid-2000s following a series of serious further offences committed by offenders under probation supervision[2] which led to calls for an overhaul of the system (for example, *Guardian*, 2009). The current shifting agenda cannot be justified on the basis of any rising public concern or institutional crisis. Public concern is not a necessary ingredient in setting the agenda in the public policy domain. Indeed, the official perspective of a problem has a certain degree of legitimacy which often results in public acceptance of the policy agenda: 'the acts of producing and using information in organisational decision-making have the symbolic value of expressing the perceived rational foundations of choice' (Radaelli, 1995, p. 162). By virtue of their official status, the policy-makers' assertions are attributed legitimacy.

The lack of both an evidence base other than reconviction statistics and an assessment of the effectiveness of short sentences cohere with Kingdon's (1984) conclusion that the perspectives of academics and action-focused groups are not part of the agenda-setting process. The focus of the claims-makers has begged the question: why is Grayling 'not championing the extension of existing probation arrangements and calling for low-level offenders to be given sentences to serve within the community, as opposed to custody'? (Harper, 2013, p. 38). Within an interpretative policy framework the failure to consider community sentences as an alternative to prison, instead focusing on the structure of community sentences following prison, can be seen as a feature of policy with historical longevity, despite the negative impact

of short prison sentences being highlighted for well over a century (Johnston and Godfrey, 2013). This further illuminates the tendency for policy themes to persist and can be understood as a change to the delivery of offender management within parameters defined by the policy-makers.

This is not to suggest that the services and support available to this group of offenders is currently adequate: an opportunity for the government to consider the academic research in this area and to consider alternatives to custody for this group has been neglected. Focusing on the post-release community supervision of these offenders is framed as the problem answer. However, an increased period of supervision when prisoners re-enter society following a short prison sentence will not easily re-establish the connections lost through incarceration: employment, housing and family relationships (Johnston and Godfrey, 2013, p. 436). Despite the emphasis on the transformative and revolutionary nature of this policy agenda, the policy answer to the defined problem group focuses on widened support and increasing resettlement packages on release from a short sentence rather than addressing the efficacy and appropriateness of the short sentence itself. However, to have focused on the inefficacy of short prison sentences and the benefits of community supervision would have changed the policy axis by calling into question the centrality of prison as the core of punishment and this would have been a significant departure from the interpretative policy framework in which this policy was developed. The failure to re-think policy that significantly questions the efficacy of prison is explicable on the basis that policy choices are made through routine practice on the basis of ingrained responses which serve as answers (Turnbull, 2013, p. 118) and as a result of the reinforcement of the political ideology through the increased marketisation of the public sector.

The contexts within which policy is made 'repress problematisation in favour of existing interpretations. But they also involve potential sources for change,' (Turnbull, 2013, p. 118). The promotion of the ideology underpinning marketisation both within criminal justice and more widely represses problematisation of alternative issues within criminal justice in favour of that which allows the extension of these ideological principles. Turnbull (2013) lists 'weak repressions of problems that act to explicate questions and make them the seed of change' (Turnbull, 2013, p. 125) which includes socio-economic change and party strategy as key factors in the process of policy change. A key element of the interpretative frame therefore is the socio-economic context of austerity and the way in which this has been interpreted by the coalition

government in accordance with an ideology of neoliberal capitalism that utilises the market as a central problem-solving strategy.

Since the Conservative Party victory of 1979, where law and order was a decisive factor (Downes, 1998), successive governments have viewed law and order policy-making as an area of political vulnerability. Consequently successive governments have approached criminal justice with a 'tough' stance moving from a due process model of criminal justice towards one of crime control (Jones and Newburn, 2002; Packer, 1964). The legislative frameworks have seen changes to the right to silence, the development of registration systems for sex offenders and increased restrictions on the provision of legal aid. These changes, amongst others, have eroded the responsibility of the state in the statutory provision of checks and balances which has brought opportunities for involvement of private organisation in the delivery of criminal justice. The use of the voluntary sector and development of a competitive market in criminal justice is not a new and 'transformative' idea but one that has been within the interpretative framework 'since the 1980s . . . not only aimed at transforming civil society and criminal justice, but altering public services from state monopolies to mixed service economies' (Corcoran, 2011, p. 33). The encroachment of the market on criminal justice has long been a theme within this area of policy-making, the pace increasing on the basis of austerity providing a 'fertile soil' for the principle.

Austerity, marketisation and the loss of added value

The climate of austerity has led to an emphasis on value and the process of both questioning and promising value. In this context, policy is increasingly discussed within an economic framework. This can be most clearly seen in the prominence of PbR which superficially coheres with the concept of value, thus seemingly legitimising the policy direction. Paying for services only when results are delivered is clearly attractive, particularly within the context of austerity (Hedderman, 2013, p. 44). However, the Payment Mechanism Straw Man outline (Ministry of Justice, 2013c) defines only reoffending in terms of contract incentive: the reduction of reoffending is defined as the only outcome of value despite continuing research identifying the complex and non-linear nature of desistance (for example, McNeill et al., 2013; Sampson and Laub, 1995). In addition, the market principles of PbR fail to acknowledge the relevance of morality or political ideology (Neilson, 2012, p. 421). PbR schemes largely lack evidence (Calder and Goodman,

2013; Hedderman, 2013; Audit Commission, 2012; Burke, 2011). This underlines the political vulnerability of this policy and the potential for policy failure.

It can be argued that the structure of offender management led by a public sector probation organisation was relatively successful, or as successful as any such system is likely to be, given the issues with measuring the impact of interventions and the pathways both into criminality and towards desistence (Farrell and Maruna, 2004; LeBel et al., 2008). The operation of this system also met a 'hidden agenda'. The mainline policy discourse of reducing reoffending and public protection effectively supported a system of multi-agency partnership work and safeguarding which satisfied parallel policy rhetoric. The increasing importance of domestic abuse and violence on policy agendas has been well served by this dual functionality with systems simultaneously working towards risk management, child safeguarding and victim-focused systems such as Multi-Agency Risk Assessment Conferences (MARACs). These methods of affording protection to vulnerable individuals in a domestic violence offender's family and kinship networks appear to be significantly jeopardised because the developments outlined in the TR documents place the importance of value (profit) within a market environment.

The management of medium-risk domestic violence offenders (which will comprise the majority of domestic abuse offenders) is an area of concern and vulnerability under the TR agenda (Gilbert, 2013). Interventions with perpetrators of domestic abuse are commonly delivered through multi-agency programme interventions. These models have risk-management strategies based on the evidence of the efficacy of multi-agency and co-ordinated community approaches (CCRM, 2010; Donovan et al., 2010, p. 69; Robinson, 2009, p. 5). Involvement in multi-agency fora that are a critical element of these risk-management strategies have been a key function of the role of offender supervisors specialising in this area. However, the time and expertise required to work with perpetrators, partners and children in cases involving domestic abuse are some of the most expensive cases to manage (Gilbert, 2013, p. 129). Reducing the time allocated to the supervision of these cases on the basis of cost will erode the added value contributed by probation staff to public protection and safeguarding. Decision-making on the basis of responsibility, accountability and shared strategic interventions may be superseded by justification in terms of value and market return. The notion of shared working and shared responsibility does not easily sit with ideas of a competitive market where results determine

the element of profitability of an intervention, particularly where the responsibility for that intervention may be shared across a number of agencies. Simply, the actions of other agents over which one of the contractors has no control can determine the level of profitability.

The concept of economies of scale must apply to services for offenders: interventions and services for smaller groups are significantly more expensive than those for 'high volume offenders', for example, female offenders. However, the context of these issues shifts within the TR agenda to one where it will be difficult to attract organisations to provide services for these groups in the face of meeting PbR targets (Gelsthorpe and Hedderman, 2012, p. 385). TR documents state that Probation Trusts will be required to demonstrate how they will provide appropriate services for female offenders, recognising that responses must be tailored to their complex needs (Ministry of Justice, 2013a, pp. 15–16). However, criminal justice policy relating to female offenders has seen repeated recommendations for reform unimplemented (Gelsthorpe and Hedderman, 2012; Women in Prison, 2012; Hedderman, 2010; Corston, 2007). For women, a sole focus on reduction in reoffending as an indicator of success fails to recognise the alternative ways in which success may be viewed by female offenders and those who work with them (Gomm, 2013, pp. 155–156). Existing service providers of interventions for female offenders operate 'from a sense of moral purpose, not financial reward' (Gelsthorpe and Hedderman, 2012, p. 387). Indeed, the sole focus on reoffending as a measure of success for PbR raises concerns regarding the ability to measure reoffending effectively for any group, particularly in addition to the error rates and poor data quality in PbR models in NHS Trusts (Hedderman, 2013, p. 47). As such, these services will fail to fulfil the market requirements, and provisions for female offenders will again be side-lined. The absence of women from criminal justice narratives has been a theme, or 'silence' (Yanow, 2007, p. 116), identifiable within the interpretative policy frame for decades and one that continues apace in the current agenda.

The enhanced contribution of an increased involvement of the third sector is closely associated with the theme of austerity, used as a mechanism for persuading government and public sector agencies to work together and use their resources more effectively (Maguire, 2012, pp. 483–484). Specific links between potential financial savings and the role of the private sector have become more prominent in the context of austerity (Maguire, 2012, p. 485). In addition, concern has been raised by the Third Sector that staff working in the context of PbR became conscious of meeting targets and felt time-pressured in meetings, reducing

the amount of time spent with offenders (Third Sector, 2012). Involving specialist charitable organisations that have provided effective support to offenders in conjunction with probation services in the past would have provided a robust structure for offender intervention and has proven to effectively support offenders. However, the bidding capabilities of large private organisations such as Serco and Sodexo mean that smaller organisations will struggle to compete to deliver these services (Calder and Goodman, 2013, p. 180). In this context, the added value that smaller, specialist organisations are able to offer may be lost.

The interpretative frame for this overhaul of offender management is situated within a wider policy frame in which marketisation features as a primary theme, underpinned by the political ideology of the coalition government focused on redefining responsibility and changing social relationships. Again this policy theme is not new; the marketisation in the TR agenda builds on the direction of previous Conservative governments and the Labour commitment to competition and commissioning within the public sector. The concepts of marketisation have been developed across a number of areas including higher education (for example, see Brown, 2013) and health services (for example, see Heins, 2013). Bowen and Donoghue (2013) view the marketisation of justice as a continuation of a specific operating model which has eroded local and community justice through 'competing desires to drive performance improvement either from the centre or through "open" market-incentivised public services' (Bowen and Donoghue, 2013, p. 16).

Conclusions

The Transforming Rehabilitation agenda reflects a neoliberal political ideology where the market is seen as a solution to social problems and issues. Consequently, reductions in crime can be achieved by private-sector organisations being commissioned to address what are defined as the root causes of crime: housing, education and employment; anti-social behaviour and attitudes; and mental health and substance misuse issues. The market, it is believed, provides the most efficient, effective and economic solution to remedying such problems. The management of offenders is now defined as a problem that the market can resolve more effectively and economically than the existing Probation Service. This approach removes offender management of low- and medium-risk offenders from the public sector and relocates the responsibility in the private sector. The appeal for government is not only ideological but

also provides a distance between the government and the responsibility for crime reduction. As Neilson (2012) highlights, the criminal justice system has unique characteristics resulting in the mechanisms of marketisation applying in a less straightforward way: it is not possible to place a value on some aspects of offender management. This is especially so in relation to sustaining the motivations for change, the management of offenders with multiple problems that require sensitive and strategic management. As McNeill (2013) has argued, pecuniary contracts are not congruent with the development of trust and engagement in worker–client relationships (McNeill, 2013, p. 84).

The potential consequences of this policy move to marketisation are profound in terms of the demise of criminal justice structures supporting the 'added value approaches' that have a critical role in effective offender management. The concern is that whilst the added-value approach is a critical element in offender management it will fail to meet the demands of a market-based system. A reading of many of the further offence reviews highlights that failures in communication between professionals charged with managing the case are a common reason for things 'going wrong' (see for example HMIP, 2006). These complex cases are located in increasingly complex risk-management systems that involve multiple agencies working effectively together. The management approach demands the ability to understand the different facets of risk and how the dynamics of risk can result in an increased probability of harm. Knowing how to effectively manage these dynamics and to intervene appropriately requires professional skill at a high level of competence. Managing domestic violence, for example, requires effective communication between a range of professional players: social workers, probation officers, health visitors, school pastoral care workers and professionals from the voluntary sector working in a range of provisions such as addiction services. This example is multi-layered, requiring managerial direction through effective professional supervision and liaison. This is complex enough and there has been much work over the past decade to streamline the systems of communication and accountability, for example the introduction of MARAC. There is no evidence that such complex systems fail to work, the last serious case review was that into Jon Venables which was not one of failure but rather of how a case of such complexity was managed sensitively and with respect. Whilst the argument will be that high-profile cases – such as that involving Jon Venables – will always be managed by the Probation Service, there has to be concern about the lower risk cases where the levels of vulnerability of individuals and potential victims are not simply removed

because such offenders are seen to be more effectively supervised by market conditions. However, the idea that the market is more effective in the supervision and management of offenders is highly questionable.

The systems of communication, managerial supervision, lines of accountability and strategic decision-making in terms of risk assessment under this new policy agenda become even more complex and multi-layered. For not only are there questions of linkages between professional actors but the element of profitability is introduced into the new supervision arrangements. Lessons from Serious Further Offence Reviews and Child Abuse Enquiries suggest that there should be effective lines of communication, clear management responsibilities and structures, transparency between actors and accountability between the different professionals. However, it is questionable whether such criteria can be maintained when there is always the argument of 'commercial confidentiality'. So, it would seem that this policy is likely to increase the potential for serious failings that may result in tragic consequences. To maintain profitability it is probable that those low- and medium-risk 'difficult cases' and those requiring a high intensity of input will become re-defined as 'high risk' allowing the transfer of the non-profitable cases back to the public sector. This can be seen as a focus on efficiency that will lead to an increase in defensive practice and swift enforcement for those 'too difficult' (Clarke, 2013, p. 111) or too expensive to work with.

The Transforming Rehabilitation agenda is not an agenda that has been devised to address a serious set of problems in relation to offender supervision, or even the re-settlement of prisoners serving short sentences. It is a policy devised around an ideological position that has defined the overall policy approach and legitimised the claims that the system is failing. The evidence is not of a failing system but of a policy driven by a neoliberal ideology that can be seen to have failed across a number of policy areas. The problem with such an approach is that once undone, the Probation Service cannot easily be stitched back together.

Notes

1. For a detailed explanation of this process see Kingdon (1984), chapters 2 and 3.
2. Cases involving Peter Williams (HMIP, 2005), Damien Hanson and Eliot White (HMIP, 2006a), Anthony Rice (HMIP, 2006b) and Dano Sonnex (Cluley, 2010).

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5

‘Community’ Knows Best? Community Involvement in Criminal Justice

Jessica Jacobson

Community justice has been a prominent goal within criminal justice policy since the late 1990s and can be broadly defined as the aspiration that local communities should play an active part in addressing the crime and disorder problems affecting them. The potential contribution of ‘the community’ to crime control has been variously understood in terms of the informal social control exercised within social cohesive neighbourhoods; community involvement in designing and holding to account local criminal justice services; and community involvement in service delivery. Research suggests that the public appetite for active participation in design and delivery of services is limited, but that, nevertheless, community justice is a worthwhile policy goal if conceived as a matter of helping to nurture community spirit and informal social control.

Background

The promotion of ‘community engagement’ has been a significant theme within government policy in the United Kingdom since the late 1990s. It is a theme that, under both the Labour administration of 1997–2010 and the subsequent coalition government, has cross-cut many spheres of public policy. The phrase ‘community engagement’ is broad and subject to differing definitions and overlaps with various other policy concepts – among which are community empowerment, community involvement, social action, civic or civil renewal, co-production and active citizenship. Another closely associated term – albeit one that has largely fallen into disuse since 2012 – is ‘the Big Society’, which

encompassed Prime Minister David Cameron's vision of an active civil society against a backdrop of sweeping public sector spending cuts. The common thread running through all these policy concepts is the aim of:

> fostering within communities more mutual trust, a greater sense of collective self-interest and a greater preparedness to act in this self-interest.

The subject of this chapter is one aspect of the broader community engagement agenda: namely, 'community justice'. Community justice lies at the intersection of community engagement with criminal justice policies and can thus be defined as the ideal that:

> communities which are bound by mutual trust and a sense of collective self-interest can and should play an active part in addressing the problems of crime and disorder which affect them.

In this chapter, I will address three main points relating to the policy ideal of community justice. First, I will outline the ways in which community justice has been articulated and promoted in government criminal justice policy since the early years of the last Labour administration. I will then consider whether the concept of community justice has resonance for the general public. I will then conclude by discussing the extent to which community justice is a valid goal of criminal justice policy.[1]

First, I will add a short note on the use of the slippery and problematic term 'community'. Many different kinds of social entities are referred to as 'communities' – including local, national and transnational groupings, of all sizes, based on religious, ethnic, cultural, political and other affiliations. In this chapter, the focus is on communities comprising individuals from all backgrounds living and working within a given local area: in other words, 'local communities'. However, it is generally assumed that a defining aspect of any kind of community is that there should be amongst its members a degree of social cohesion or a sense of solidarity.[2] Accordingly, a grouping of people who are bound together only because they can objectively be said to share certain characteristics (such as their place of residence or work) and who do not have any positive feelings towards each other based on their common characteristics, cannot be said to be a community. In practice, the extent to which there exists a sense of solidarity which transcends internal differentiation is

likely to be contested within any so-called community. The question of whether and how a sense of solidarity can be fostered within what are (in public policy discourse) simplistically ascribed as 'local communities' is central to the issues addressed in this chapter.

The articulation and promotion of community justice in public policy

The definition of community justice set out above – that is, the goal that communities, building on a sense of mutual trust and collective self-interest, should help to address problems of crime and disorder – leaves open to interpretation exactly what kind of part communities should play in tackling crime and disorder. Analysis of criminal justice policy since the early years of the last Labour administration reveals that relevant policy initiatives have tended to coalesce around three main aspirations, reflecting three differing ways in which communities can take action:

- community-building: fostering a sense of community within local areas which enables communities to exercise informal social control;
- encouraging communities to design and hold to account local criminal justice services;
- encouraging communities to become (formally or informally) involved in the delivery of local criminal justice services.

Community-building and informal social control

Social cohesion, as a defining element of community, has been of particular interest to politicians and policy-makers seeking to promote community engagement in its many different forms. Under the Labour administration, the civil renewal agenda – taken forward most emphatically by David Blunkett as home secretary from 2001 to 2004 – sought 'to strengthen community ties and to foster values such as mutuality, solidarity and altruism' while also facilitating more active political participation (Jochum et al., 2005, p. 37). This was expressed, for example, in Blunkett's Scarman lecture, delivered in 2003, in which he spoke of the need for communities which are self-determining and embody the values of solidarity and mutuality:

> Solidarity is founded on the commitment to regard the well-being of others as an integral part of our own collective well-being. Mutuality

> stems from the readiness to embrace our interdependence as a positive motivation to co-operate in the search for solutions to our problems.

An emphasis on community-building was no less evident in the current government's Big Society agenda and related policy developments. The Big Society was promoted by Conservative Party leader David Cameron in the lead-up to the 2010 election. In a speech delivered in November 2009, Cameron set out his vision of the Big Society as an antidote to the 'trend of continuous central state expansion' that the previous 12 years had seen – while describing the Big Society in words which echoed much of what had previously been said about the agenda for civil renewal: 'The big society demands mass engagement: a broad culture of responsibility, mutuality and obligation.'

The Labour and coalition government efforts at community-building since the late 1990s have had clear implications for criminal justice policy. Both governments have placed an emphasis on the informal role that communities can play in tackling crime and disorder. The importance of this informal role has long been recognised in criminological research, which has produced 'a sizeable body of evidence which links strong communities characterised by high levels of social capital, and "collective efficacy", to lower crime rates' and 'suggests that one of the most effective ways of reducing crime will be to encourage associational life' (Rogers, 2005, p. 8).

Under Labour, policy documents made frequent appeals to communities – sometimes described as 'decent communities' – to play their part in criminal justice. Implicit and occasionally explicit in these appeals is the assumption that, through their very 'decency' and sense of togetherness, communities can and should exercise informal social control over the perpetrators or would-be perpetrators of criminal and anti-social behaviour (ASB). Community cohesion was thus, in itself, presented as a valid and critically important aim of criminal justice policy: community participation was seen as a means of 'creating sustainable, cohesive and "safe" neighbourhoods' (Bowen and Donoghue, 2013, p. 11). These were communities within which 'active citizens' were expected to be directly involved in the 'co-production of security', by doing their duty as witnesses, looking out for their own and others' conduct (Gilling, 2010, p. 1146). It is notable, for example, that the Home Office Strategic Plan 2004–2008 was entitled *Confident Communities in a Secure Britain*; and referred to the importance of people 'contributing to building a community that upholds basic standards of

decency and is strong enough to prevent and deter offending' (Home Office, 2004, p. 38).

Community-building has likewise been a recurring theme in coalition government statements on criminal justice; as in a speech given by Home Secretary Theresa May in May 2010, in which she stated that the Big Society was about saying 'enough is enough and we come together to reclaim our communities for the law-abiding majority . . . Our communities will stand tall – because we're all in this together' (May, 2010a). Two months later, in another speech, the home secretary vigorously criticised her predecessors' approach to tackling ASB ('top-down, bureaucratic, gimmick-laden') while echoing their rhetorical appeals to community:

> We need to make anti-social behaviour what it once was – unusual, abnormal and something to stand up to . . . We need to give communities the power to bring about their own change; to build the town, the village, the city – the community – that you want.
>
> (May, 2010b)

Designing and holding to account local criminal justice services

A theme common to many of the public policy initiatives launched by government over the past 15–20 years is the conviction that public services of all kinds must become more 'responsive' to the needs, priorities and expectations of local people and that this must be ensured through mechanisms by which local people hold the services 'to account'. This is a theme that has been particularly prominent within criminal justice policy.

In the early years of the last Labour administration, this conception of community justice emerged alongside growing concerns with what became known as the 'reassurance gap': that is, the paradox that while crime rates were falling, public fear of crime and mistrust in the criminal justice system were rising. One cause of this was perceived to be the narrowing focus of policing – over the course of the 1990s – on crime-fighting targets (Fitzgerald et al., 2002; Hough, 2007). In response, a 'reassurance policing' pilot was launched in 2002: a neighbourhood-based approach which entailed identifying and responding to local concerns about crime and disorder – however seemingly minor these may have been – with an explicit aim, among others, of improving public confidence in the work of police.[3] The pilot was subsequently developed into the national Neighbourhood Policing Programme, which placed a heavy emphasis on the role of the public in identifying their local

policing priorities and the role of the police – particularly through their newly established, ward-based 'safer neighbourhood teams' – in visibly responding to these priorities.[4] The subsequent Policing and Crime Act 2009 was largely focused on methods of making the police more accountable to their local communities.

Developments in policing policy under the coalition government have followed a similar trajectory, at least in theory. Although cuts to police budgets, implemented as part of wider austerity measures, have impacted the staffing and activities of police safer neighbourhood teams, a commitment to building on the principles underlying neighbourhood policing was repeatedly expressed in the 2010 policing White Paper *Policing in the 21st Century: Reconnecting Police and the People*. As also occurred under the preceding government, crime mapping has been presented as a means of enhancing the local accountability of the police. In February 2011 a new mapping website was launched, to enable members of the public to 'explore and compare crime and outcomes of crime in your neighbourhood'.[5] Most significantly, 2012 saw the introduction of elected police and crime commissioners (PCCs) (under the Police Reform and Social Responsibility Act, 2011) to 'work with their local communities to establish the crime and ASB priorities that matter most locally, and for the public to hold them to account for the performance of their force' (Home Office, 2010). The first PCC elections were held in November 2012, but produced a turn-out of just 15%.

Not only in policing, but also in other areas of criminal justice policy there has been a continuing emphasis on the importance of community involvement in shaping and holding to account local services. An example is the coalition government's White Paper on ASB, *Putting Victims First* (Home Office, 2012), which stated the government's intention to develop more effective responses to ASB and to 'support people and communities in establishing what is and isn't acceptable locally and in holding agencies to account'. The Anti-Social Behaviour, Crime and Policing Act 2014 has since introduced the 'community trigger' (with the purpose of giving 'victims and communities the right to request a review of their [ASB] case and bring agencies together to take a joined up, problem-solving approach to find a solution') and the 'community remedy' (which 'gives victims a say in the out-of-court punishment of perpetrators for low-level crime and anti-social behaviour') (Home Office, 2014). These initiatives clearly echo some introduced by the preceding administration, such as the 'community impact statement'[6] and the 'Community Call for Action'.[7]

Delivery of services

Opening up the delivery of public services to non-statutory providers – that is, both private sector providers and voluntary and community sector (or 'Third Sector') providers – has been 'seen across government as . . . the means through which public services might deliver innovative, effective, efficient and quality outcomes for service users and populations' (Bovaird et al., 2012, p. 8). The commissioning of public services was a core policy commitment of the Labour administration since the early 2000s; thereafter, the coalition government has been committed to extending much further the role of non-statutory bodies in the delivery of public services and to transforming commissioning structures in order to make this happen. These ambitions apply to the criminal justice sector as to other types of public services. The contracting out of criminal justice services is not new (the first privately run prison was opened in 1992), but has been undertaken with increasing vigour over the past few years. Key developments include: the creation of the National Offender Management Service (NOMS) in 2004, one of the aims of which was the introduction of greater 'contestability' within prison and probation services; and, most radically, the opening up of the majority of community-based probation services to competition under the Transforming Rehabilitation programme, from 2014.

The topic of commissioning is a vast one, but its relevance to this discussion of community justice is that we now have a policy environment within which the delivery of criminal justice services is open to an ever-widening array of providers, including those which style themselves as community-based.[8] However, while an increasing proportion of criminal justice work – across prisons, policing and probation services – is being contracted out to non-statutory bodies, it is rare for genuinely grass-roots community associations to take on these roles. Rather, the private sector and, to a lesser extent, professionalised voluntary organisations (which may or may not be locally based) are taking greater responsibility for service delivery.[9] These developments thus cannot be said to contribute in a significant way to 'community justice' as defined above – notwithstanding the liberal use of the term 'community' in much of the policy rhetoric on commissioning.

Beyond commissioning, another type of (more genuinely) 'community' involvement in the delivery of community justice services is work undertaken by individuals and groups on a voluntary basis. Voluntary involvement in the delivery of local criminal justice services can take a wide variety of forms, many of which have been actively supported

or promoted by government. The spectrum of voluntary action encompasses local people who are involved in largely informal associations and networks which undertake 'delivery' in the loosest sense; the activities of more formalised community-based groups and associations (such as Neighbourhood Watch, or local residents' associations with an implicit or explicit focus on tackling crime and disorder), some of which may have access to some local or central funding[10]; and the participation of volunteers in the statutory provision of criminal justice services – such as magistrates and special constables.

Some policy initiatives have sought to enhance the role of volunteers in statutory criminal justice provision – with volunteers being seen not only as contributing to the services in which they participate, but also as having the capacity to build links between the formal justice system and their local communities. This perspective is evident, for example, in a 2005 Department for Constitutional Affairs document, *Supporting Magistrates' Courts to Provide Justice*, which looks at how magistrates' courts can be better connected to their communities. This is a process in which magistrates themselves (described by Morgan [2012, p. 476], as 'arguably the epitome of the Big Society') are said to be central: 'The magistracy, drawn from local communities, is the lynch pin in delivering justice locally.'[11]

Does community justice appeal to the general public?

National survey data and the findings of my own qualitative study of community activism (conducted with colleagues from the Institute for Criminal Policy Research) provide some tentative answers to the question of whether the policy aspirations for community justice have resonance for the general public.

The civic core

National surveys have established that substantial minorities of the population of England and Wales engage in civic action of various kinds and/or formal volunteering. The most recent *Community Life Survey* (Cabinet Office, 2014)[12] found that over the preceding year:

- 9% of the population had been involved in civic activism (direct involvement in decision-making about local services or delivery of services) at least once;
- 16% had been involved in some form of civic consultation (active involvement in local consultation such as completing questionnaires or attending public meetings) at least once;

- 27% of the population had been involved in formal volunteering (providing unpaid help to other people or the environment, through groups or organisations) at least monthly.

Involvement in civic action and volunteering is associated with certain demographic and socio-economic characteristics. The *Helping Out* survey of volunteering commissioned by the Cabinet Office (2007) found volunteering to be most common among those in 34–44 and 55–64 age groups, women, working people, actively religious people and people not at risk of social exclusion. Secondary analysis of *Citizenship Survey* data (Mohan, 2011) identifies the 'civic core' of the population: 'In total, this 31% of the population provides 87% of volunteer hours, 79% of charitable giving, and 72% of civic participation.' The people who make up this 'civic core' are described as disproportionately middle aged, relatively highly educated, owner-occupiers, religious and settled in their neighbourhoods. Indeed, over 60% of middle-aged women with higher education qualifications would be counted as part of the 'civic core' (Mohan, 2011, p. 9).

Our study of community activism was undertaken in four contrasting (but all relatively economically deprived) neighbourhoods in 2011–2012 and entailed a series of interviews with activists.[13] All respondents were unarguably members of the civic core: most were devoting very considerable amounts of time and effort to community activities; usually for no pay and often over periods of years and even decades. Some respondents were involved in local activities that had an explicit criminal justice dimension, but most were playing other kinds of roles in the community – for example, as active members of residents' associations, or through involvement in minority ethnic associations or gardening or environmental groups. When asked what motivated them to get involved in these activities, most frequently they referred to a desire to help improve the local area and the lives of local people; whether this was expressed in a very general sense or with reference to more specific concerns (which included, but were not limited to, local crime problems). Some evidently felt they had a sense of duty to contribute to the community: a duty that was variously defined in religious, moral or civic terms. Many of the activists also referred to the personal satisfaction that they derived from their community engagement.

A limited appetite for community justice?

The existence of a highly active and engaged civic core does not necessarily offer the promise of widespread engagement in community justice

along the lines of the policy aspirations described above. Notwithstanding government efforts to promote community engagement in the criminal justice sphere and beyond, there is little evidence of significant expansion of civic involvement. Survey data (including from the *Community Life* and earlier *Citizenship Survey*) show that levels of participation and volunteering have fluctuated in recent years, but there have been no major shifts.

Surveys focused specifically on engagement and volunteering within criminal justice have found that people frequently express an interest in crime and justice matters and in taking action to tackle local crime problems. However, the relatively high levels of stated interest in community justice do not seem to translate into action. In a 2008 Ipsos-MORI poll on participation (reported in Ipsos-MORI, 2010a), 13% of respondents reported wanting more of a say in policing, compared to 53% who said that they like to know what the police do but are happy to let them get on with their job and 30% who said that they are not interested in what the police do. Similarly, a 2009 Ipsos-MORI poll (Ipsos-MORI, 2010b) looked at levels of involvement in local crime/ASB issues and found that while 9% were already involved or wanted active involvement, 24% wanted more of a say and 63% just wanted information or did not care. In the 2011/2012 *Crime Survey for England and Wales* (ONS, 2012), 3% of adults said they had attended a police beat meeting in the past year; 11% had looked at or used crime maps in the past year; and 14% of households were currently members of a neighbourhood watch scheme, with membership more common in wealthier households than poorer ones. The low turn-out of 15% in the first PCC elections in November 2012 may also reflect a general lack of appetite for community justice – at least in terms of the aim of helping local communities to 'hold local criminal justice services to account', with which the establishment of the PCC role was associated. However, limited awareness of the elections and the PCC role has been widely cited as the main cause of the poor turn-out (see, for example, Electoral Commission, 2013).

The community activists who participated in our qualitative study voiced profound scepticism about the prospects of extending levels of community engagement (in community activities generally and those related to criminal justice more specifically) within their respective neighbourhoods. This reluctance of others to engage was attributed to various causes. In an economic recession, some said, time and financial constraints inevitably discourage people from committing to voluntary activities and associations. Respondents frequently commented on the reticence or nervousness of many local people when it came to mixing

voluntarily with their neighbours; and this, they said, impedes efforts to get community activities of any kind off the ground. Ethnic or cultural divisions within the local population were sometimes said to exacerbate this problem; a problem also said to be greater in areas where a significant proportion of the population was transient. Some suggested that a certain mutual mistrust between local people who were working and benefit claimants reduced the potential for social solidarity. A general apathy on the part of local residents was perhaps seen as the greatest barrier to wider participation in community activities. Another factor inhibiting engagement in community activities with an explicit criminal justice dimension – which some activists said also impacted their own willingness to engage in action of this kind – was the fear of intimidation or retaliation from local offenders.

When asked specifically about what they thought the role of the community should be in tackling crime and disorder, many of the activists talked largely about the responsibility of the community to provide information to the police about any criminality that is witnessed or suspected. This is, of course, a more traditional conception of the relationship between the police and the policed, whereby the more compliant elements of the latter take steps to help the former, but do not see themselves as active partners in the policing endeavour. It was also clear that what many of the activists wanted (and often felt they did not get) from the police was not that they should 'engage' with the community over local concerns and priorities, but that they should be present and visible and, above all, respond when called in an emergency.

However, the activists also tended to perceive another way in which the community could contribute to tackling crime and disorder: and that is by helping to impose and sustain social order through its entirely informal, internal mechanisms of control. This perspective on community justice – which is aligned with the 'community-building' policy aspiration outlined above – reflects the activists' wider conceptions of community as something that feeds into both individual and social well-being. The activists did not explicitly use the term 'informal social control', but articulated this general theme in a variety of ways. Most notably, some respondents spoke about a passive kind of social control arising from shared values and a sense of unity which serve to discourage criminal and anti-social behaviour; while others were interested in the ways in which a more active social control is exercised by the community, whereby misbehaviour of certain local people is deliberately challenged by others.

The enduring appeal of 'community'

What is most evident in the activists' conceptions of informal social control (whatever terms were used to describe this) is a deep attachment to 'community' as an ideal. Most of the activists saw the community as something that was, or had the potential to be, very meaningful to them – at the same time as it acts as a bulwark against crime and disorder. For many, the meaning offered by community was primarily social: being active in the community provided opportunities for getting to know people and socialising; it enabled individuals to feel part of something bigger than themselves; at the most informal level, it encouraged friendly day-to-day interactions between neighbours. All this, it seemed, could play a significant part in making people feel better about themselves and their lives. Many of the activists had a nostalgia for a time when, they said, local communities were more cohesive than they are today. This was described as a time when everyone knew each other, people would leave their doors unlocked and parents would let their children play on the streets, fully confident that other adults would keep an eye on them and reprimand them if they caused trouble. These recollections of a happy past tended to be imbued with a certain degree of optimism for the future: they were inclined to believe that at least some of the old community spirit survives today, or that it is possible, with a certain amount of effort, to rekindle that spirit (even if, as noted above, they saw little prospect of a big increase in levels of active community engagement).

The activists' attachment to the ideal of community does not seem far removed from wider public attitudes, according to national survey data. For example, the latest *Community Life Survey* found that 85% of people felt their community is cohesive (agreeing that people from different backgrounds in the local area get along well together); the same proportion were very or fairly satisfied with their local area as a place to live; and 70% felt they very or fairly strongly belong to their neighbourhood (Cabinet Office, 2014). The survey also found that 75% of the public chat to their neighbours (involving more than just saying 'hello') at least once a month and 60% agreed that local people pull together to improve the neighbourhood. A specific 'community spirit' topic report on *Citizenship Survey* data (DCLG, 2011) observes that ethnicity, class, age and levels of deprivation have a significant bearing on attitudes towards one's local area and its people. For example, individuals from south Asian backgrounds reported higher levels of satisfaction with and belonging to the local area than others; and older people and those from

the least deprived areas were very much more likely than others to report that 'local people pull together to improve the area'.

Is community justice a worthwhile policy goal?

Much as government would like it, there would seem to be little immediate prospect of extending active community engagement well beyond the 'civic core' of the population. Barriers to participation may include apathy, time and financial constraints, general shyness or reticence and community divisions. But the limitations of community engagement policies do not only stem from the reluctance of communities to engage. Arguably, there is a logical flaw in the very notion of community engagement – at least to the extent that it concerns active participation in public services. As noted by Chanan and Miller:

> Government is promising through the Big Society theme to 'give power to people and communities'. This generous offer overlooks the fact that government only has power in the first place because people have invested power in government itself to do things which people want done collectively. The things we want done collectively are mostly those that need to be done *systematically and fairly across society*. These are the things that cannot be done by spasmodic citizen action.
>
> (2011, p. 32)

Similarly, Power points to the interconnectedness of 'the complementary functions of state and civil society' which means that while 'widespread citizen participation' is required to tackle many social, political, environmental and economic problems, 'the state has a key role in amassing and redistributing both resources and power on behalf of all citizens' (2012, pp. 58–59). And if this applies to public services in general, it applies most of all to criminal justice services. Criminal justice provision – particularly provision by the police, the prosecution authorities and the courts – by definition entails managing and resolving conflict between individuals and sectors within society; and the authorities have the means and legal right to exercise coercive power in undertaking this necessarily contested work. In a modern democratic and pluralistic society, 'the community' – however defined – cannot have the responsibility for dealing with its own conflicts through the use of coercive power. Of course, no official policies on community justice urge local communities to take it upon themselves to carry

out front-line policing or to prosecute criminals: the role and remit of the community are always much more modestly defined. But it remains a fundamental flaw in many notions of community justice that the essential limitations of community involvement are simply not recognised.

And yet, if the scope for community justice is limited by the public's general reluctance to 'engage' and by the intrinsically problematic nature of community involvement in criminal justice services, it does not necessarily follow from this that the concept of community justice should be jettisoned. Rather, the enduring appeal and relevance of the ideal of 'community' suggests that community justice is a worthwhile goal for government, to the extent that this is conceived as a matter of helping to nurture community spirit and informal social control, rather than promoting local communities' engagement in the design and delivery of criminal justice.

However, the argument in favour of community-building policies, from a community justice perspective, should be tempered by a recognition of the inherent tensions within this task. While government funding and infrastructure support for grass-roots groups and activities can help to nurture communities, few would claim that a sense of community can be socially engineered from above. Noting that government attempts to 'create or control community activity . . . would be a contradiction in terms', Chanan and Miller argue that the job of government is 'to create the right conditions for people to strengthen themselves as communities' (2011, p. 34). But even conceived in these more limited terms, this task is fraught with difficulty. As commentators within what can be broadly described as the 'community development movement' have observed, the very rationale for community development has often been opposition to government and the public authorities – and a major strength of informal and semi-formal voluntary action has been its capacity 'to operate independently from the state, and to maintain a radical ethos' (Buckingham, 2012). Hence government efforts at community-building run the risk of undermining the very processes they are seeking to support.

There is another tension within public policy on community development, particularly as it relates to community justice. The aim of helping communities to be partially self-policing through informal mechanisms of social control brings to the fore what Roberts refers to as the 'inherent conflict between the drive for civil renewal (which is based on cohesion, inclusivity and trust), and community safety (which is founded on the generation of suspicion, and is essentially exclusionary)'

(2006). These are issues seemingly overlooked by many policy appeals to 'community' – such as those that call on 'decent communities' or 'the law-abiding majority' to stand up to crime and anti-social behaviour. Such appeals fail to recognise that definitions of what is and is not 'decent' (and, for that matter, what is and is not anti-social) vary from person to person and from group to group; and that within any community it is not possible to draw a clear line between the 'law-abiding' and the lawless. At the outset of this chapter, I defined community justice with reference to the mutual trust and collective self-interest that makes it possible for local communities to play an active part in tackling crime and disorder. Perhaps, then, the greatest challenge in putting community justice into practice is the building and nurturing of mutual trust and a sense of collective self-interest that are narrow enough to be meaningful but broad enough to embrace difference. As with community-building more generally, this is not something that government can impose from the top down, but it is something that government can support.

This may mean reconfiguring notions of community engagement and the related (and by now largely cast aside) concept of the Big Society in the manner advocated by a Royal Society of Arts report appropriately titled *Beyond the Big Society*:

> The idea of the Big Society is at its weakest when it is presented as a partisan technical solution to acute socio-economic problems, and at its strongest when viewed as a non-partisan long-term adaptive challenge to enrich our social and human capital. From this perspective, the Big Society should be viewed as a process of long-term cultural change, driven by social participation for social productivity and social solidarity. The big idea in the Big Society that has cross-party agreement and public support, is the need to make more of our 'hidden wealth' – the human relationships that drive and sustain the forms of participation needed to make society more productive and at ease with itself.
>
> (Rowson et al., 2012, p. 7)

Notes

1. This chapter is based on the findings of research funded by the Esmee Fairbairn Foundation (see Jacobson et al., 2014, for full study results).
2. By this broad understanding of community, members do not need to have face-to-face contact; note, for example, Anderson's definition of the 'nation' as an 'imagined community' most of whose members will never

meet or know each other and yet have in their minds 'the image of their communion' (1991, p. 6).
3. See Tuffin et al., 2006, for an evaluation of the reassurance pilot.
4. See, for example, the Policing Green Paper *From the Neighbourhood to the National: Policing Our Communities Together* (Home Office, 2008).
5. http://www.police.uk/, accessed 4 November 2014.
6. Introduced to provide information for law enforcement officers about local crime and ASB, http://www.cps.gov.uk/legal/a_to_c/community_impact_statement_-_adult/#introduction, accessed 28 October 2014.
7. Initially legislated for in the Police and Justice Act 2006.
8. See Maguire (2012) for discussion of the implications of the increasing role of the Third Sector in criminal justice delivery.
9. For discussion of barriers to government commissioning of the voluntary sector to deliver public services see, for example, McGill (2011) and Centre for Social Justice (2013).
10. The coalition government and its predecessor have launched various funding initiatives aimed at fostering and supporting community associations of all kinds, including the £130 million 'Grassroots Grants' fund from 2008–2011 and the £80 million 'Community First' fund (2011–2015).
11. The years 2003–2007 saw concerted efforts (with limited success) to increase the diversity of magistrates to make them more representative of the communities they serve (Gibbs, 2014).
12. This government survey started in 2012 as a replacement of the *Citizenship Survey* which had been undertaken annually since 2001.
13. See Jacobson et al. (2014) for more details.

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6
Continuity and Change in Prisons

Rob Allen

Introduction

Judges and other practitioners in the criminal justice system frequently bemoan the amount of change in the criminal justice system (*Daily Telegraph*, 2009). While complaints about torrents of legislation creating thousands of new offences and myriad new sentencing powers are sometimes overblown, it is certainly true that criminal policy can seem to be in a state of perpetual revolution, increasingly under the sway of political and media pressures to address perceived shortcomings of one sort or another. As a result of legislative hyperactivity the number of people in prison in England and Wales has doubled since the early 1990s, partly because offenders are more likely to receive a prison sentence and partly because they will spend a longer part of that sentence locked up (British Academy, 2014).

But what about the places in which those sentences are served? How much change have they seen in recent years and what has brought it about? The aim of this chapter is to consider the extent and nature of changes in the practice of imprisonment and to identify the key drivers of and obstacles to reform. As with many areas of public service, developments in prison policy and practice reflect an interplay between, on the one hand, external political, economic and technological dynamics and on the other, the internal demands of managing a complex set of institutions. There are, however, three elements which distinguish prison from most other policy areas and colour developments in how it is managed.

The first is that the politicians and civil servants responsible for introducing change have seldom any direct experience of imprisonment. As Denis MacShane – a former MP who served a short sentence at

Belmarsh and Brixton prisons – has written 'unlike other parts of the public realm – the NHS, schools, councils, transport, benefits, police services, the army and so on – where MPs and policymakers have direct personal experience, no one in the Commons, Whitehall or the media will have been a prisoner' (MacShane, 2014). Indeed relatively few members of the public have been in a prison in any capacity and while there is a strong civil society sector which campaigns for prison reform, it too is relatively uninformed by a service user perspective, which is well established in the fields of mental health and drug treatment. One result of this is that to a greater degree than in other areas of policy, there may be a substantial gap between what is thought to be happening and what in fact happens. It is not only that 'the rhetoric of imprisonment and the reality of the cage are often in stark contrast' (Morris and Rothman, p. xi), but that the interior dynamics of prisons – what have been termed the depth, weight and emotional tone of imprisonment – are all too often neglected (Liebling, 2006).

A second feature particular to prison is that the question of appropriate conditions is complicated not only by the requirement of economy (which has been particularly salient since the 2007 economic downturn) but also by the notion of less eligibility; that life in prison should in no way be preferable to life outside in case people are incentivised to return. While this has been described as a daft idea (Morris and Rothman, 1995), it has served to shape political, media and public attitudes to imprisonment and some specific initiatives within prisons. Ensuring that prisons are not holiday camps is a recurring theme of prison policy discourse.

The third distinctive feature of change in prison is perhaps the most relevant to the concerns of this chapter. It is that to an unusually high degree, change occurs not as a carefully planned programme of reform but rather as a consequence of pressures, events and incidents. Much of the change that prisons have seen throughout their history has been imposed upon them from outside, often as a result of population flux arising from changes in criminal law or after catastrophes of one sort or another, whether escapes, disturbances or deaths. Lord Ramsbotham has said that when he started as chief inspector of prisons he was also told that 'improvements were only made by implementing recommendations made by outsiders following disasters' (HL, 2008).

Given that prison itself sits at the end of the chain of decision-makers, prisoner numbers are outside of its control and are notoriously difficult to predict. Surges in prison numbers have from time to time required prisoners to be held in police cells or to be freed before their due date. Most recently, between 2007 and 2010, prisoners serving sentences of up

to four years were made eligible for release 18 days early – about 80,000 prisoners benefitted from the scheme at considerable political cost to the then Labour government. While the prison population stabilised after 2010, an unexpected rise in the number of historic sex offences leading to imprisonment has put unanticipated pressure on prison capacity since 2012.

Projection of prison numbers has never been a particularly accurate science, but more important than any technical shortcomings has been the failure of successive governments to make available the number of prison places required to implement their increasingly harsh sentencing policies. Attempts to stem demand by creating more attractive alternatives to prison and producing guidelines for judges have had limited success. Legislative attempts to reduce prison numbers have also run into difficulties. The 2010 coalition government for example initially planned to introduce measures which would have reduced the prison population by some 5000, basing their plans and budget for the management of the prison estate on such a fall. A toughening of policy eroded the putative falls, but additional resources were not restored, leaving the Prison Service coping as best it could.

Population pressures are of course not only a matter of numbers but of the type and nature of prisoners. The Prison Service today faces challenges that were not so prominent in the early 1990s. A more heavily convicted population, more of whom are serving long and indeterminate sentences, and more foreign nationals in prison have added tensions. Dealing with increased gang activity and the threat, real or perceived, that imprisonment can be a hothouse for violent extremism are among those challenges. Preventing corruption among staff is another.

Just as population pressures have often dominated the day-to-day running of prisons, so too do the risk and reality of untoward events. Indeed as an institution of punishment (as opposed to a place of detention for those awaiting trial), imprisonment was invented or at least gained its central place, as an urgent response to a specific set of events, namely the ending of transportation. While the early years of the penitentiary were characterised by a proactive desire, sometimes zeal, to perfect a system of punishment, developments at the end of the 20th century and into the 21st century have reverted to being more reactive in nature, whether responding to escapes, disturbances, staff problems or budget cuts. While it would be wrong to see change in prison as entirely one of crisis management, it is perhaps true that the nature of the institution means that it is always vulnerable to short-term pressures, whether in

terms of a fluctuating population or firestorms of public and political concern.

These environmental features provide a perhaps unique context to the management of change in prisons. After a brief introductory overview of that context, this chapter seeks to identify the key drivers of change in prison before looking at three key events which took place in prisons and at the investigations and reviews which came in their wake: Lord Woolf's inquiry into the Strangeways disturbances of 1990 (Woolf and Tumim, 1991); Lord Keith's inquiry into the murder of Zahid Mubarek in 2000 (Home Office, 2006); and Baroness Corston's review of vulnerable women in the criminal justice system following the tragic deaths of six women at Styal prison in 2005 (Corston, 2007). The chapter concludes by assessing whether any lessons can be learned about how change might take place in prisons in the coming period.

Overview: Prisons a low innovation sector?

In many ways, prisons themselves are notoriously resistant to change. The prison estate still includes buildings constructed in the 19th century. Among current establishments, Dartmoor was constructed to hold prisoners from the Napoleonic War, and Portland to enable a supply of convict labourers to work on major local projects. While the coalition government has closed a number of smaller, older prisons on the grounds of cost (NAO, 2014), the continuing use of infrastructure from another era does not suggest a service driven by innovation or adapting to the changing requirements of society.

Indeed prisons have been identified as a low innovation sector by the leading organisation established to promote fresh thinking and ideas in public policy (NESTA, 2007). At the macro level this partly reflects a tendency on the part of governments to neglect prisons unless something goes wrong; one home secretary in the 1980s has said that 'too many people in positions of authority have turned their backs on the prison problems and prefer to look the other way' (Whitelaw, 1989) and another that 'managing the prisons was the most exasperating and arguably most important of all the tasks in the Home Office' (Hurd, 2004). Their views would almost certainly be echoed by more recent ministers.

Hurd's frustration arose in part from the conservative culture within what is a uniformed, disciplinary organisation according significant weight to procedure and security. In the public sector it is highly unionised. While there have been some good examples of individual

projects being introduced into prisons in recent years – including work, vocational training and resettlement activities – it is still a fair assessment that prisons have a strong default culture which can act both as a block to innovation and a barrier to the diffusion of innovations across the system. As the Social Exclusion Unit put it: 'the system is inevitably risk-adverse and as a result is unwilling to adopt new practices. Too much of the system is driven by process, inputs and outputs, rather than outcomes. The result is that rules and regulations tend to dictate practice rather than imagination and initiative' (SEU, 2002, p. 124).

Basic legislation governing prisons in England and Wales was passed in 1952 and while it has been amended and its subsidiary instructions and orders have been through many revisions, it has seldom if ever been thought necessary to come up with a new overarching law. The system of security categorisation which gives basic shape to the prison estate dates back to the 1960s as does the arrangement by which those prisoners requiring the highest levels of security are dispersed among a small number of establishments.

One area in which there has been more change is in the governance arrangements for the prison system in England and Wales. After 86 years, the abolition of the Prison Commission in 1963 led to direct control by the Home Office. After a review in 1991, the Prison Service became an agency with ministers distanced from its day-to-day operations. New Labour considered and at first rejected merging prison with probation, only to create as an executive agency the unified National Offender Management Service – first in 2004 and in a revised version in 2008. Departmental responsibility for prisons moved to the newly created Ministry of Justice in 2007. Earlier in the 2000s, responsibility for prison health had been moved to the NHS and prison education to the education department. From 2000, the Youth Justice Board (YJB) assumed responsibility for commissioning prison places for young people under 18.

How much these management changes at the top of the system have impacted on the fundamental purposes, function and practice of locking people up is open to question. While NHS responsibility for prison health has brought about improvements, the scale of mental health problems, in particular, among prisoners has presented a major challenge. Prison education has continued to struggle. Ofsted reported in 2013 that two-thirds of prison education was not good enough (Ofsted, 2013). Despite the efforts of the YJB, the Prison Service has remained resistant to change in the way it accommodates young people. Only after prolonged negotiations was it agreed that staff in under-18 Youth

Offender Institutions (YOIs) would give up the normal prison 'black and whites' in favour of less militaristic uniform (Allen forthcoming).

If organisational reform has not guaranteed change, perhaps more surprisingly nor has the introduction of private prisons. 1992 saw the United Kingdom's first privately managed prison contract at The Wolds and by 2014 the United Kingdom had the most privatised prison system in Europe, with about 13% of the prisoner population held in 14 private prisons. The National Audit Office found in 2003 that there had been a small amount of innovation from the private sector mainly in the recruitment and deployment of staff and use of technology but there appeared 'little difference in terms of the daily routines of prisons' (NAO, 2003). More recent research has found that private sector prisons are not necessarily better or worse than public sector prisons.

> When they get it right, they can provide decent and positive environments. But when they get it wrong, which seems to be more likely (but not inevitable) if they are run cheaply, they can be chaotic and dangerous places, which are no good for either the staff who work in them or the prisoners who live in and will be released from them.
>
> (Liebling et al., 2011)

Drivers of change: Inside and out

There are many ways in which new programmes, policies or practices can be introduced into prisons. Some are the result of initiatives from those politically or administratively responsible for the service, others arise from outside government.

Proactive programmes of reform to imprisonment are relatively rare – manifestos of the main political parties over the last 30 years show little mention of the practice of imprisonment (in contrast to plenty of promises about its use). The issue of privatisation initially had a party political dimension, although the home secretary who paved the way for it has written that it was a pragmatic desire to be free from the burden of the Prison Officers Association rather than an ideological commitment to free-market competition which was the advantage huge enough to overcome his earlier doubts (Hurd, 2004). While in opposition in the 1990s, the Labour Party described private prisons as morally repugnant and promised to end the experiment and restore privatised prisons to the public service as soon as contractually possible. Once in government, however, Labour embraced and extended private sector financing and management of prisons. When the current Conservative

Party justice secretary announced the award of a contract for a 1600-place prison to the private security company G4S in 2011, he was able to agree with the Labour shadow secretary in Parliament to leave aside 'stale ideology and dogma, and instead look at what works and what produces the right solutions for the public' (HC Debs, 2011).

When grand plans have been put forward to modernise prisons, they tend to have been watered down for reasons of cost or workability. While in office, Labour Home Secretary David Blunkett complained that 'we have got a 19th century system and are just adding to it, trying to improve the same system rather than thinking radically' (Blunkett, 2006, p. 343). But his ambitious 'prison without bars' satellite tracking scheme launched in 2004 has, ten years on, delivered considerably less than it promised. So too has the system of end-to-end offender management which was to provide a seamless supervision of people in prison and on probation. Jack Straw's plans to resolve once and for all the shortfall of prison places through the creation of three 2500-place Titan prisons met considerable opposition from inside and outside the prison system and were abandoned.

Conservative plans outlined for a massive prison-building programme which would end overcrowding by 2016 were scaled back before the 2010 election and while the coalition government has implemented proposals to sell off costly old prisons, plans to replace them with small local ones soon gave way to a policy of creating larger establishments not dissimilar to Labour's Titan prisons, which both coalition parties had opposed when in opposition (Allen, 2013).

Conservative proposals for public sector prisons to be run as independent fee-earning trusts did not get off the ground, although a government wide emphasis on Payment by Results (PbR) is being piloted in prisons. While the philosophy behind such approaches is that prison should be left to adopt whatever measures produce successful outcomes in terms of reduced reoffending on release, even politicians who espouse that view cannot resist the opportunity to intervene in aspects of the detailed running of prisons. In the wake of media coverage of a party at Holloway prison in 2008, the Labour government introduced an instruction restricting activities in prisons to those which are publicly acceptable. The coalition government has amended the system of incentives so that prisoners must start on a new 'Entry' level, actively work towards their own rehabilitation to earn privileges and are prohibited from viewing certificate 18 DVD's. These changes were introduced without the benefit of research or piloting. In at least one prison, the governor had taken the decision to slowly phase in the new incentives

and earned privileges scheme so as not to create tensions as she did not have the staff to manage this safely (HMIP, 2014a).

Such is an example of how, despite the interventions of ministers, almost all of the day to day running of prisons is in the hands of Prison Service governors and staff in the establishments and the officials in the headquarters. Standard operating procedures govern most areas of prison life but research has found substantial variation in the perceived legitimacy of prisons; relationships between prisoners and staff are crucial. Inspection reports too have shown great variation in performance both between seemingly similar establishments and within the same establishments over time. The Prison Service has been responsible for implementing a number of reorganisations over the years including changes to staff pay and conditions and a recent benchmarking exercise designed to increase efficiency. As far as the introduction of innovations at the level of individual establishments is concerned, much seems to depend on the governor.

Findings from research and academic study have also played a role in the development of a number of important innovations within the prison system. Such innovations include the Offender Assessment System (OASys), the main instrument for assessing the needs of and risks posed by prisoners; the rehabilitation programmes developed as part of the so-called 'What Works' developed on the back of a range of evaluations prison and the community; and a system for monitoring the quality of prison life developed at the Cambridge Institute of Criminology (Liebling 2004).

As for external influences, there are four elements outside the Prison Service whose work can and does make a substantial impact on developments within it. First are the three independent bodies responsible for monitoring what happens inside prisons: Her Majesty's Inspectorate of Prisons (HMIP), the Independent Monitoring Boards (IMB) and the Prisons and Probation Ombudsman. Each of these makes recommendations for change within individual establishments. These are generally accepted and usually but not always implemented. There is some evidence that resource constraints may be making it harder for prisons to implement suggested reforms. When he visited Brinsford in 2013, the chief inspector found that hardly any of the concerns raised in the previous year's inspection had been addressed effectively and that in almost all respects the prison had deteriorated markedly (HMIP, 2014b).

The second source of innovation is Parliament. Prison matters are regularly debated, with the House of Lords, in particular, containing a number of active members with an expertise and interest in the subject.

The House of Commons Justice Select Committee is at the time of writing conducting an inquiry into prison planning and policies; it reported on Older Prisoners and Women Offenders in 2013 and on the Role of the Prison Officer in 2009. While recommendations are not always accepted and/or implemented, such reports can have a long-term impact on policy-making. The Public Accounts Committee scrutinises spending on prisons although criticism has been made of their failure fully to assess the impact of cost cutting on effectiveness (Allen, 2014).

The third influence on the running of prisons comes from domestic and international jurisprudence. The Human Rights Act 1998 requires ministers to state that any legislative provisions are in their view compatible with rights under the European Convention on Human Rights. While it is debatable how far human rights considerations have acted as a constraint on penal policy-making, historically they have played an important part in shaping particular practices within prisons, such as adjudication procedures and the opening of prisoners' correspondence, as well as procedures for dealing with indeterminate sentences. Much of the current disaffection with the European Court of Human Rights has arisen from two prison related cases – one of which has deemed the blanket ban on prisoners voting to be unlawful (ECHR, 2005) the other requiring mandatory life sentences to be amenable to review (ECHR, 2013).

The final type of influence that needs to be mentioned is the civil society sector – the charities and other non-governmental organisations which take an interest in penal reform. These include large national organisations, such as the Howard League for Penal Reform and Prison Reform Trust, and smaller local bodies, many of which provide practical services for prisoners in the fields of education, training and resettlement. The Probation Service, half-way houses and hostels and visitors centres all have their origins in the charitable and voluntary sector. So too do more recent innovations, such as first night in custody and listener schemes designed to reduce the risk of self-harm or suicide, and a range of initiatives to improve the quality of life in prisons and prepare prisoners for release.

Disasters and directions

While the political, administrative, legal and social institutions listed above may make up the static context in which prisons operate, it has been dynamic events and inquiries into them which have brought about some of the most significant changes in recent years. This analysis

might have looked at the high-profile escapes in the 1960s and the Mountbatten inquiry whose recommendation for a system of categorisation was accepted but whose proposal for one maximum-security prison on the Isle of Wight was not; or the identifications of failings in the juvenile custodial estate in the 1990s which led Lord Ramsbotham to recommend that under 18s be removed from the Prison Service altogether, a step too far for the incoming Labour government but which shaped the commissioning role of the YJB; or the population crisis in the mid-2000s and the Carter report whose proposal for Titan prisons was accepted and then rejected only to be revived in part some years later. However, the three inquiries considered below help to show the various ways in which the need for change in prisons has been identified and its implementation facilitated or frustrated.

Strangeways and the Woolf inquiry

In April 1990 a 25-day riot and rooftop protest took place at Manchester's Strangeways prison in which one prisoner was killed and almost 200 staff and prisoners were injured. With much of the prison badly damaged, the cost of repairs amounted to £55 million. A series of less serious disturbances took place at 30 other prisons. Lord Woolf was asked to chair the inquiry which was to look at not only the specifics of what happened at Strangeways but also the broader state of the prison system. For the second of these tasks Lord Woolf was assisted by Chief Inspector of Prisons Judge Stephen Tumim. A five-month public inquiry began in Manchester in June 1990. Every prisoner and prison officer in the country was invited to give evidence.

Woolf's report was published in February 1991. It made 12 main recommendations and 204 proposals. His overarching conclusion was that prisons required a balance between security, control and justice and that the third of these had been neglected. Conditions inside the prison were intolerable in the months leading up to the riot and successive governments had failed to provide the resources for the Prison Service which were needed to provide for an increased prison population in a humane manner.

Of the 12 key recommendations all bar one were accepted by the government in a White Paper published in September 1991. There is no doubt that the inquiry led to important changes. Slopping out was ended, telephones were introduced into all prisons and an ombudsman appointed. The recommendation which was not accepted was for a new prison rule that no establishment should hold more prisoners than is provided for in its certified normal level of accommodation, with

provisions for parliament to be informed if exceptionally there is to be a material departure from that rule. Woolf later came to see overcrowding as a cancer of the system which limited implementation of his agenda for reform. Progress on government plans for keeping prisoners close to home by creating clusters of community prisons were stymied by the demands of managing a population which began to grow sharply from 1993 onwards; improvements to conditions were also limited by overcrowding.

A second factor which frustrated the Woolf agenda was heightened concern about security. The period between the publication of Woolf's report and the White Paper saw the escape of two IRA prisoners from Brixton. But priorities really changed following the escapes of six prisoners from the high-security Whitemoor prison in September 1994 and of three prisoners from Parkhurst four months later. Two inquiries were commissioned (Woodcock, 1994; Learmont, 1995) which as well as being highly critical of the 'yawning gap between the prison service's ideals and actual practice' noted the early 1990s as a time of very mixed ideologies within the Prison Service, intent on increasing physical security to prevent escapes but wishing to provide the greater element of care and positive inmate relationships which the Woolf report had encouraged.

Learmont's comprehensive review of security recommended nationally agreed building standards, together with the installation of up-to-date electronic devices such as CCTV, electronic movement detectors and electronic locks. These have been widely implemented, at enormous cost, so that increased levels of security are in evidence across the estate. The priority given to security swallowed high levels of resources during a period of rising imprisonment.

Zahid Mubarek and the Keith Inquiry

On 21 March 2000, 19-year-old Zahid Mubarek was attacked by his racist cellmate Robert Stewart at Feltham YOI. Mubarek, a first-time prisoner, five hours from the end of a 90-day sentence for stealing razor blades worth £6, died in hospital seven days later. Both the Prison Service and the Campaign for Racial Equality held inquiries which found institutional racism in the prisons but Zahid's family demanded an independent public inquiry. The home secretary was finally ordered to establish such an inquiry in 2003 and Lord Justice Keith started work the following year. He was assisted by three advisers, one a former prisoner. His report, published in June 2006, found over 186 failings across the prison system and made 88 recommendations designed to

'reduce the risk of something like this ever happening again'. Some of the recommendations related to failures in information and risk assessment – Stewart was or should have been well known to the Prison Service – some to core issues of overcrowding and understaffing.

Six years after its publication, HMIP reviewed the implementation of the inquiry recommendations (HMIP, 2014c). HMIP found positive change had taken place with electronic case records making sharing and using information easier and cell-sharing risk assessments carried out before prisoners are placed together. Yet HMIP found that in practice there were delays and weaknesses in such processes, too many incompatible prisoners placed together and worse experiences for black and minority ethnic prisoners. HMIP concluded that such an incident could happen again.

One underlying reason for this pessimistic conclusion is that despite accepting almost all of its recommendations, governments have been unwilling or unable to act on the fundamental question of enforced cell sharing. Keith recommended that its elimination should remain a high priority, with a date set for its realisation and funds provided to enable more prisoners to be accommodated in cells on their own.

Nor had any progress been made in one of the other core questions raised by Keith; that is researching whether it is desirable for young adults to be held separately from adults or if, in certain circumstances, mixing may be desirable.

Suicides of women and the Corston Review

In the 12 months from August 2002, six women killed themselves at HMP Styal in Cheshire. Reports by the coroner and OMBUDSMAN argued for a broader inquiry than they could provide into how women end up at risk of harming themselves in custody and whether prison was a justifiable and appropriate response for women with vulnerabilities. The Ombudsman made it known that 'the current use of imprisonment as reflected in Styal, Holloway and the other women's prisons, is disproportionate, ineffective and unkind' (PPO, 2003). A number of urgent initiatives were undertaken at Styal and at other prisons but it was decided to take stock of the work and see what more needed to be done. A review was announced in March 2006, conducted by Baroness Corston, with a report published in March 2007. It contains 43 recommendations aimed at improving the approaches, services and interventions for women offenders and women at risk of offending. Thirty-nine of the recommendations were accepted in full, in part or in principle. The government deferred a view on the most radical proposal

about prisons; that they should announce within six months a clear strategy to replace existing women's prisons with suitable, geographically dispersed, small, multi-functional custodial centres within ten years.

As with the Woolf and Keith reports, considerable progress was made on many of the detailed practical recommendations. In 2010 Baroness Corston herself listed 'the good work done by the government in supporting women in the penal system' highlighting in particular the scrapping of automatic strip searching of women on arrival at prison (APPGWPS, 2010). Funding had also been made available for a number of local projects designed to keep women out of prison.

Yet on two of the central recommendations progress has been limited. Recommendation 18, accepted in principle by the government, was that custodial sentences for women be reserved for serious and violent offenders who pose a threat to the public. Yet the numbers of women convicted of non-violent offences who receive custodial sentences remains stubbornly high. Of the 6803 women received into prison under sentence between 1 April 2013 and 31 March 2014, 2743 had been convicted of theft and handling stolen goods, 391 for drug offences and 348 for fraud and forgery. While some of these may be serious offences, many are not. In the year up to June 2011, just 3.2% of women in prison were assessed as high or very high risk of harm to others.

Little has changed in respect to the prison estate for women. Two specific reviews have been conducted by the Prison Service, both of them arguing that small units of 20–30 women are neither feasible nor desirable, being unable to deliver the range of services required to meet the full range of women's specific needs. The kind of radical transformation envisaged by Corston looks unlikely to come to pass.

Conclusions

At the time of writing there are, as there have been all too frequently in its recent history, claims that the Prison Service is in crisis. There are reports of increasing numbers of small-scale disturbances and statistics show increases in serious assaults and deaths in custody. Reports from monitoring bodies suggest that conditions in many prisons have deteriorated and some have expressed fears that larger scale disorders may take place. What this brief analysis suggests is that some form of external review or scrutiny may be required to trigger the kind of changes that are needed – before the kind of disaster that triggered the work of

Woolf, Keith and Corston. To have a serious long-term effect, the lessons of previous inquiries suggest that it will need to address two fundamental problems: how to constrain the numbers in prison, control of which was recommended by Woolf; and addressing the size and adequacy of prison infrastructure about which Woolf, Keith and Corston made proposals. Unlike previous inquiries, recommendations in these key areas will need to be accepted and given priority by the government and the Prison Service. To provide the best chance for such recommendations to be accepted, it may be necessary for a Royal Commission to be established. This has been proposed periodically but thus far rejected, but it is perhaps only a body with the gravitas of a Royal Commission that can ensure that the Prison Service is placed on a sounder footing than it has been in recent years.

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Part II

Developing Policy Through Practice

7

'We Were the System': Practitioners' Experiences and the Juvenile Justice Mosaic in the 1980s

Sotirios Santatzoglou

'Practice leading policy'

The 1980s custodial decrease

During the 1980s, the significant use of institutionalisation for juveniles common in the 1970s was radically reversed. Between 1980 and 1990, the number of both male and female juveniles sentenced to custody fell dramatically, from 7000 to 1400. In the same period, the proportionate use of non-custodial options increased and also the overall number of juveniles dealt with by the youth justice system was reduced by 37%. A strategy of 'diversion' (from custody, from prosecution and from the youth justice system altogether) was evident (Telford and Santatzoglou, 2012). A significant policy event of the time was the Conservative government's 1983 Intermediate Treatment (IT) Initiative, which offered significant resources to voluntary organisations, working in partnership with local authorities, in return for providing alternative-to-custody, community-based projects for juvenile offenders. Notably, youth justice practitioners were seen as instrumental in the occurrence of the diversionary transition. As one practitioner has put it: 'what happened [during the 1980s] was very special; the input from practitioners' (Lorna Whyte in Rutherford, 1992, p. 26). Indeed, accounts written in the early 1990s strongly associate the custodial decline with practice activity in shaping innovative community programmes (Allen, 1991, p. 49; Ball, 1992, p. 280; Pitts, 1992, p. 136; Gelsthorpe and Morris, 1994, p. 983). Importantly, further sources show that the innovative spirit was extended, to the transformation of both their wider practice and to the juvenile justice process more generally.

This was a significant change, as during the 1970s juvenile justice practice had been in a state of disrepute, reflecting the poor performance of practitioners and their perceived discomfort with and irrelevance to juvenile justice process (Anderson, 1978; Parker et al., 1981; McCabe and Treitel, 1983; Telford and Santatzoglou, 2013). When Parker et al. evaluated the state of juvenile justice practice of the 1970s they found that social workers were 'not court specialists', which was the source of their 'sense of discomfort, anxiety and reluctance to assert themselves in the criminal court'. They also criticised 'their [infrequent] attendance at court'. They indicated that social workers felt 'on the defensive in the juvenile court' with respect to the other participants and wanted to 'see their own position strengthened'. However, as Parker et al. stressed:

> [they] seemed to have little idea about how the system could be restructured, and so tended to perceive change in terms of minor tinkering with the present system.

The focus of this paper is on the 1980s activity of practitioners, mostly with a social work background, who involved themselves directly with juvenile offenders in the context of local alternative-to-custody projects, or within larger local Juvenile Justice Units (JJUs), which were mostly but not always associated with the IT Initiative. The term 'practitioners' in this chapter refers to these practitioners only.

The mosaic of local practice and process development

During the 1980s the practitioners developed existing or created new tasks, by introducing dynamic new patterns of conduct in several areas of the local processes. Over that time practitioners increased the quality of social inquiry reports (SIRs) to the juvenile courts by increasing consultations with young offenders and their parents and by developing a 'disciplined', quality-driven process of scrutinisation of SIR content and recommendations (Jones, 1985, p. 1; Burgin, 1988, pp. 21–22 and Table 6; Allen, 1989, pp. 20–22; NACRO, 1990, pp. 32–33; Lyon, 1991, p. 191; NACRO, 1991, p. 41; Wade, 1996, p. 50). Further, at least one-third of local youth justice community projects initiated the use of systems to monitor youth justice sentencing and identify local custodial and non-custodial trends (McPhillips, 1984, p. 2; NACRO, 1985, pp. 18–21; Dixon and Gosling, 1985, p. 3; Lyon, 1991, p. 191). This monitoring practice engaged practitioners closely with local sentencing trends and by the end of the 1980s was seen as 'an absolute necessity' (*AJJUST*,

May 1989, p. 18). The tailoring of structured supervision programmes was a further significant development, set against the unfocused practice of the previous decade (Telford and Santatzoglou, 2013). These programmes employed innovative methods and tools of intervention and facilitated the practitioners' constructive engagement with young offenders (Blackmore, 1987; Telford and Santatzoglou, 2013). At the same time, those programmes incorporated principles of proportionality, so that more intensive interventions were reserved for serious, custody-risk cases (Blackmore, 1987; Telford and Santatzoglou, 2013). The 1980s development of co-operation within local justice settings was a further significant trend. The structural and social 'conditions' of inter-professional communication greatly improved and the emergence of professional 'trust' relations was evident (Telford and Santatzoglou, 2012). Importantly, the trend was credited to practitioners' efforts, as they actively and consistently developed their participation in local juvenile justice interagency 'Management Committees', magistrates' courts and also with the police in the context of juvenile cautioning settings (NACRO, 1985; Wade, 1996; Telford and Santatzoglou, 2012). Finally, during the 1980s, practitioners championed the value of diversionary strategies and the use of lower tariff options and cautioning; the importance of proportionality in assessing the seriousness of the cases; and retaining proportionality when fixing the degree of onerousness in supervision interventions (Blackmore, 1987; Telford and Santatzoglou, 2013). Overall, the sources show the occurrence of juvenile justice practice and process development with the re-organisation or emergence of new local policies and practices which occurred during the 1980s. Certainly the changes were not consistent countrywide. They have been described by Harding as patchy, 'a patchwork quilt', meaning an important development, but with inconsistencies (Harding, 1989). The change is perhaps best seen as a rich mosaic of practice and process development, a description which mostly indicates the positive character of the developments.

'Practice leading policy' and the inner practice dynamics

In the late 1980s, this transition led to some reflection on the significance of practitioners' activity over the period. Jones famously concluded that there had been a practice-driven 'successful revolution' (Jones, 1989) and Rutherford described a 'practice leading policy' phenomenon (1987, 1989). These accounts, which pointed to a powerful practice input in the occurrence of the transitions, require us to consider the essence of the practice activity and empowerment, its nature and

what enabled it. The discussion will not address the policy-level impact (although that was significant), but only the inner practice dynamics; 'nothing less than the quiet power' of the 1980s practice-level activity (paraphrasing Ben-Dor, 2007, p. 121).

Our discussion about the inner forces, which may enable practice empowerment, is historically limited to these events in the 1980s. However, it is also relevant to a wider question about practice-driven policy development and not only in the criminal justice field. Indeed, Strauss et al. (1964) argued that the construction of psychiatric ideologies within a hospital ward, namely the ideologies of doctors, psychologists and nursing staff, were a product of the participants. Therefore, Strauss et al. discerned an inner practice level of policy creation. As they stated, 'it seems clear that [their] ideology and operational philosophy emerged from common experience and discussion' (1964, p. 149). Discussion, negotiations and inter-professional communication all are significant in the emergence or shaping of policies and strategies at the practice level. In the 1980s, the development of inter-professional communication was critical for the local emergence of diversionary strategies (Telford and Santatzoglou, 2012). In this chapter the focus is on practice experiences.

Our discussion here is supported by contemporary documentary sources, as well as by anonymous interviews. Four leading practitioners of the 1980s were interviewed by the writer and they offered memories and accounts regarding the local and countrywide practice development of the time. A number of useful sources are associated with the IT Initiative projects and were published in *Initiatives* – the newsletter of the Juvenile Offenders Team, the IT projects' coordinating body – and in the journal of the campaigning Association for Juvenile Justice (called *AJJUST*). The author has also drawn upon Sue Wade's unpublished MPhil on local practice development in Hampshire. The whole discussion is informed theoretically by Mintzberg's Crafting Strategy organisational theory.

Mintzberg's crafting strategy

'Neat dichotomy' and 'emergent strategies'

In organisational theory, Mintzberg emphasised the significance of the 'actions and experiences' of the people 'way down the hierarchy' who are 'in touch with the situation at hand'; 'a grass-roots approach to strategic management' (1987). Mintzberg criticised traditional planning theory's division between high-level 'formulators', responsible for

conceiving plans for strategic or policy change, and the 'way down the hierarchy implementers' of the planned changes (1978, 1987). According to Mintzberg this 'neat dichotomy' is based on the 'often false assumptions' that the 'formulator is fully informed' and knows of the contextual issues, which may hinder the implementation of the intended strategy (1978, p. 946). Instead, Mintzberg claims that the understanding of environmental conditions, which may affect the implementation of a planned policy, lies beyond the sphere of the high-level formulators and is in fact part of the implementers' domain. The implementers, through the 'learning process' of strategy formation, become aware of arising problems and they re-modify the intended aims of a strategic or policy development plan (1978, 1987). Therefore, the conventional 'neat dichotomy' between policy formulators and policy implementers critically 'ignores the learning that must often follow the conception of an intended' policy development (Mintzberg, 1978, p. 948) and, as a result, overlooks the significance of the 'emergent' strategies and policies, which are formed by the implementers and may well vary from the intended plan. The emergent strategies and policy developments 'form gradually, perhaps unintentionally' during a practice process of 'one by one decisions'; a 'complex organizational process' taking place within a 'confusing reality' (Mintzberg, 1978).

The values of the crafting strategy model and the potential for change in the potter's metaphor

In order to explore the significance of practice activity and experience in organisational development and change, Mintzberg introduced the 'crafting process' model, 'a fluid process of learning through which creative strategies evolve' (1987, pp. 66, 7). According to Mintzberg, the crafting model encompasses a system of significant working values, such as 'dedication, mastery of detail … involvement with the material … long experience and commitment' (1987, pp. 67, 73). Involvement, which represents a form of intensive action (otherwise engagement) is central to Mintzberg's crafting strategy model (Kiliko et al., 2012, p. 81). Involvement triggers the occurrence of 'the intimate connection between thought and action', which in turn becomes the 'key' and 'most basic' value of the crafting strategy process (1987, p. 68); the power-base of ideas as 'action drives thinking' and so effective strategies or policies emerge. In order to demonstrate the significance of both involvement and the intimacy between thought and action, Mintzberg employed the metaphor of a potter, a craftsman.

The engagement of the potter with the creative process and its arising challenges and opportunities, constitutes the central theme of the metaphor. The potter craftsman 'tries to make a freestanding sculptural form' but is confronted with problems:

> It doesn't work, so she rounds it a bit here, flattens it a bit there. The result looks better, but still isn't quite right. She makes another and another and another. Eventually, after days or months or years, she finally has what she wants.
>
> (Mintzberg, 1987, pp. 69–70)

Therefore, through continuing experimentation, namely through involvement, the craftsman achieves the desired shape; in Mintzberg's words, 'is off on a new strategy' as 'action has driven thinking [and] a strategy has emerged' (1987, pp. 68, 70).

With this metaphor, Mintzberg described and analysed the potential of a creative strategic process. Engagement with both challenges and opportunities increased the generation of ideas, the thinking process and facilitated the emergence of not only incremental solutions but also of new patterns of conduct. Indeed, as Mintzberg further indicated, during this creative process, practitioners 'may' see an opportunity to 'break away' from an old pattern of conduct and 'embark on a new direction' (1987, p. 67). Hence there can be an unexpected strategic change, a policy development which breaks away from past incremental changes and practices. This is an issue which Mintzberg particularly emphasised, in order to demonstrate the strong potential of a creative process which can provide new experiences and therefore new options. On the one hand, according to Mintzberg, the potter is a craftsman with past experience and therefore 'the product that emerges on the wheel is likely to be in the tradition of her past work' (1987, p. 67). So, past experiences may limit strategic and policy change. On the other hand, embarking on a new pattern of action is always possible in the creative process, because of fresh challenges and opportunities, or new experiences which will pose new questions and provide the potential for new options. As Mintzberg indicated, during the creative process, the options for the potter are open:

> The form for a cat collapses on the wheel, and our potter sees a bull taking shape . . . Wafers come into being because of a shortage of clay and limited kiln space . . . Thus errors become opportunities, and limitations stimulate creativity.
>
> (Mintzberg, 1987, p. 70)

The metaphor indicates the fluidity, and thus the potential, of the creative process. The engagement of practitioners with arising problems can stimulate creativity and they become able to 'see' 'opportunities' in 'errors' and develop new practices, policies or strategies. Indeed, in Mintzberg's words 'strategy creation is essentially a process of synthesis' (1987, p. 74).

The cognitive element of the crafting process

Creativity, involvement, experimentation, errors, limitations, opportunities, learning-experiences, intimacy of action and thinking, action-driving-thinking and the emergence of new patterns of action, all constitute the concepts which comprise Mintzberg's analytical framework of the practice crafting process of strategy and policy development, 'a process of synthesis'; a process of knowing. It is crucial for Mintzberg that strategy and policy development are formatted by people 'who [know] their industry intimately', '[k]now the business' (Mintzberg, 1978, p. 946; 1987, p. 74). Within the crafting process, the occurrence of the intimate connection of thought and action through involvement with the issues surrounding daily practice, can generate new learning experiences; namely knowing. Therefore, Mintzberg's theory of crafting effective strategy and policy development is a theory of knowing, of what the strategy or policy should be and how and when it should occur; and this knowing results from the closeness of the person to the issues surrounding daily practice. It is this type of knowing which high-level strategic and policy planning lacks, and hinders the ability to provide successful strategies (Mintzberg, 1987, pp. 73–74); namely, plans which can 'yield [the] intended results' (Kiliko et al., 2012, p. 81). This form of knowing, which grows through involvement and the consequent generated learning experience, can be evidenced in emergent practice strategies which 'like weeds . . . appear unexpectedly in a garden' (Mintzberg, 1987, p. 75). The development of both the crafting learning experiential process and knowing can be evidenced in juvenile justice practitioners' activity in the 1980s.

'We run from 6 o'clock to 9 o'clock, . . . all day long': Commitment and involvement in the 1980s

In 1982, a significant NACRO report *Community Alternatives for Young Offenders*, which considered the future youth justice landscape and was the product of collaborative work between different agencies and researchers, stated that 'the successful implementation of [changes] [ultimately] depended . . . on the commitment and backing of those staff

working directly with young people' (NACRO, 1982). In the mid-1980s, in a practice conference entitled 'Developing the Initiative', Jones argued that '[t]here is little point in doing something in which one has little faith', calling for youth justice practitioners 'to communicate and meet without worrying about being late home or missing a train' in order to 'provide an effective and efficient service' (1985, p. 2). His remarks pointed to the need for a working culture of commitment and engagement. As we have seen, set against the 1970s pessimism on practitioners' relevance to juvenile justice, in the 1980s practitioners demonstrated a strong commitment to participating in the local development of juvenile justice.

The 1980s practice working credo was best summarised in a practitioner's statement in a letter published in *AJJUST* in 1987: '[we] constantly look at pushing the system further on to achieve better results and even more imaginative responses' (*AJJUST*, January 1987). The aims were captured in a practitioner-interviewee's remark: '[we] tried to solve problems by communicating a working philosophy of problem solving, delivering the goods, [...] giving information.' These statements demonstrate the commitment of practitioners to become involved in the development of the local processes. Therefore, as the practitioner-interviewee indicated, in youth arrests, 'getting to the police station quickly, and know[ing] our stuff' was important, as was 'trying to find out why some parents couldn't come to court and to try to get them in'. In an account of an early 1980s successful local alternative to custody scheme, a practitioner-interviewee stressed the commitment and engagement of the staff: 'we run from 6 o'clock to 9 o'clock, four days a week, ... all day long ... that's what we did ... because we were obviously enjoying it as well.' Also, in Wade's account, which covered 'the detail of how practitioners achieved their [local JJU] objectives' during 1987–1990 (Wade, 1996, p. 7), she stresses the 'committed' conduct of the practitioners, who were fully engaged with their tasks and involved in the local process (Wade, 1996, pp. 43, 45). Overall, the memories from this period indicate a working culture of commitment and involvement, evolved within a creative process of crafting practice development and local policy; mostly an experiential learning process.

'We had to do everything from scratch': The emergence of the experiential crafting process in the 1980s

By the late 1980s, it was evident that innovative projects had been 'tried and tested' throughout the country and that their development

had been the outcome of evaluative practice experiences (Blackmore, 1987; Telford and Santatzoglou, 2013, pp. 427–428). In 1985, Feeny and Wiggin's short practice paper discussed the 'ingredients for a successful partnership' between their local authority project and voluntary agencies and highlighted the need to be 'adventurous' and to 'break new ground' (1985, p. 1). They used the word 'experience' ten times within a two-page paper to underline the importance of gaining experience, as well as learning from the experience of other agencies so as to build a successful partnership. They also emphasised the importance of 'independence' which 'allows for experimentation and risk taking' (1985, p. 1). Similarly, Jones, the director of a local project, said in his paper that his project 'had no external pressures to work in any specific way, or to use any particular methods, and thus had the freedom to generate its aims and objectives from first principles' (Jones, 1985, p. 1). This 'freedom' and 'independence' in building from scratch was also stressed by a practitioner-interviewee regarding the development of a local JJU:

> it was completely green field, we were allowed to do exactly what we wanted, there were no administration systems, there were no records and there was no way of actually doing things, we had to do everything from scratch, it was the most delightful first management job you could ever have.

These accounts indicate the value of generating experience and facilitating practice development through a ground-based creating process of self-learning. Indeed, the wording in Jones's paper clearly demonstrates the existence of an independent practice process, which experienced, learned and created local policy: 'the Project decided that', 'It thus became clear' 'This led', 'Our experiences', 'We wished', 'We decided that', 'This led to', 'It also led to', 'It was also considered necessary' (1985, p. 1).

Local practice development in the 1980s was mostly the outcome of a 'delightful', 'independent' experiential learning practice process, but which was also lengthy and 'time-consuming'. Characteristically, in 1985, the first NACRO survey on the implementation of community projects funded by the IT Initiative showed that the schemes had to 'invest considerable time and energy' in increasing their local credibility as 'courts were not accepting their recommendations'; and 'they felt that there was a lack of credibility in relation to alternatives for the most serious offenders' (NACRO, 1985, p. 29). In 1989, in a conference evaluating

the IT Initiative, Gosling and Locke, commenting on the NACRO survey, said that 'it uncovered many problems in the early stages of the projects [...] and the creation of such projects was a complex and time consuming process' (1990, p. 21). These accounts demonstrate that this 'delightful' and 'independent' process was also 'complex', marred with several contextual issues, which arose as the practitioners tried to create and establish local alternative projects. As a practitioner-interviewee said, with respect to the construction of their cautioning monitoring system: 'It was a hell of a job to do.' However, it was this time-consuming engagement and involvement with the problems that generated challenging experiences and paved the way for the proliferation of new ideas. It was what Mintzberg called the 'intimacy between thought and action', an idea which describes the very meaning of the experiential learning process as the powerhouse of effective strategic and policy development.

Blackmore, in his short but very informative practice paper, indicates how 'experience' had 'shown' that persistent offenders needed programmes which 'were more than a straightforward "offence only" approach' (Blackmore, 1987, p. 4). Similarly, a practitioner-interviewee told this writer that: 'As we gained some experience – firstly we'd run groups of working with young people – we said 'we really need to work individually with kids' ... [and] we designed individually-tailored plans for each of the young people that we worked with.' Referring to the early 1980s Woodlands centre's successful community programmes, Rutherford (1992) indicated that their shape continued 'to evolve and develop', since the complete repertoire of the programmes had not been designed in advance. The programme for the least serious offenders, for example, was a 'spill-over from the early months of the centre's existence and was not originally anticipated' (1992). As Rutherford said 'It was thought' that for these type of offenders, a 'voluntary attendance' rather than a 'confrontational focus' constituted a better response (1992), demonstrating how the thinking process of the practitioners was informed by their experience from the application of the programmes. Indeed, Wade later commented that 'the impact of Woodlands ... was significant ... It produced ... the experienced staff ... for the rest of the county,' (1996, p. 28).

The accounts given above are representative of many more from and about this era, which frequently pointed to the acquisition of practice experience as the mechanism which drove local development. The 'freedom and independence' based experiential learning process, which was 'complex' or even 'time consuming' and certainly 'creative' (all

reflections of the practitioners' commitment in becoming involved), constituted the crafting process, which underpinned local juvenile justice development in the 1980s. The development or emergence of practice policies, which composed the juvenile justice mosaic of that time is directly relevant to the evolvement of what Mintzberg has called the 'crafting strategy process', a process which allowed experience to flourish and in this way facilitated the construction of innovative community options, the improvement of SIRs, the wide use of monitoring, the development of inter-professional communication and the establishment of legal and policy concepts within practice, such as proportionality and diversion.

The crafting process, namely, the flourishing of experience, led to the flourishing of practical knowledge and, in turn, to the cognitive empowerment of the 1980s practitioners. This was the critical inner practice event, which supported the emergence and construction of the practice policies mosaic.

'Great kicks . . . We knew we were achieving some things': The emergence of cognitive empowerment in the 1980s

In 1989 Thomas declared that practitioners had 'undoubtedly built up their own wealth of experience' (Thomas, 1989). The statement acknowledges the occurrence of the practice-based learning process of experience acquisition; but also the accumulation of experience-based knowledge, practical knowledge, which formed the 1980s juvenile justice specialism, the practitioners' very 'own wealth'. Indeed, by the late 1980s, practitioners were widely acknowledged as the specialists of the local juvenile settings (Telford and Santatzoglou, 2012, 2013) and were the owners of a specialist knowledge, which was practical and derived from their engagement with the experiential crafting process of local juvenile justice development.

The practical dimension of their specialism is clear from 1980s practice discourse. An practitioner-interviewee stressed the 'practical' character of the conference 'conversations' of that time:

> [When] we went into conferences [. . .] most of our conversations were about practice; 'how are your police working?'; 'how are your courts working?'; and 'have you started to have to do appeals?'; 'how do we influence the Court Duty Officers to be less conservative and less collusive than they are?'

As the interviewee emphasised:

> It was that sort of conversation, rather than whether they had heard the latest [theoretical] thing from such and such. So it was a much more practical conversation.

The evolvement of practice discourse towards 'practical conversations' shows that the 1980s juvenile justice specialism was highly informed by the proliferated practice experiences of that era.

This was a significant trend, which increased the professional confidence of practitioners. They knew from their own learning experience what was probably the right decision, the right direction, the right practice; a successful cognitive trend. In the words of a practitioner-interviewee: 'Great kicks . . . We knew we were achieving some things', or as another practitioner-interviewee said: 'We were now specialising in juveniles, we were attracting people into the specialism that we thought was working in the right way, so we were now setting the agenda.' Authentic accounts of the 1980s demonstrate this empowering ring of experience acquisition, development of practical knowledge/specialism and cognitive confidence about what the choices should be.

'Cash Flow and Toilet Rolls': The empowering experience of becoming involved with the detail of a project budget

In his 1984 practice conference paper 'Starting new projects takes time', one member of the Community Alternatives for Young Offenders (CAYO) in Sandwell, indicated the need for a culture of engagement with the 'detail' of the budget of the entire spectrum of an alternative-project (Johnson, 1984). Under the sub-heading 'Cash Flow and Toilet Rolls', Johnson stated that:

> To be a tool, rather than just an irritating constraint, a budget needs to be set out in some detail; from planning major expenditure to suit grant income dates down to calculating the consumption of toilet rolls and cleaning materials.
>
> (1984, p. 3)

Having explained his involvement with practical budget issues, Johnson concluded that:

> If you can afford the time, no exercise is more worthwhile. The resulting 'x-ray' gives you something to hang important features of the project on.
>
> (1984, p. 3)

Perhaps the use of the striking subtitle 'Cash Flow and Toilet Rolls' demonstrates Johnson's appreciation of the value of engagement with every single project detail, even the 'toilet rolls'. It gave him confidence to make decisions, something also demonstrated in the following account of the familiarity of a practitioner with juvenile justice process.

'It was a complex case' – the empowering effect of experiential knowledge

In 1987, a long letter from a practitioner published in *AJJUST* demonstrates his perception of a link between experience and professional knowledge and hence ability to deal effectively with the complexity of an appeal against custody (*AJJUST*, December 1987, p. 20). The appeal had been lost and the letter criticised the 'inordinate power vested in the barrister, and the dependence upon him, as an avenue to the ear of the court'; despite the fact that barristers may know 'nothing' about the 'complex' cases in front of them; as had arguably happened in the appeal. In contrast to the barrister's poor level of skill, the practitioner asserted his own wealth of experience, his long acquired practical knowledge: that he had 'worked in an I.T. Centre', was 'familiar with the critical role of solicitors within the court process', was 'intimately involved in the case', was 'familiar with the case' and knew that 'it was a complex case'. The letter claimed that the appeal was 'a travesty of a fair hearing, leaving the youngster embittered and cynical, of us, other professionals, furious and frustrated at being ignored and dismissed'. Finally, the letter stressed the need for the involvement of experienced youth justice practitioners during the appeal process through 'professional planning' and the 'close liaison of all speaking of the defendant'. The letter concluded with the cry 'change must be instituted', demonstrating the practitioner's confidence in his practical knowledge, empowering him to argue against established patterns. Similar themes emerge in the following letter in the issue, which casts doubt on the value of top-down solutions.

'Confronted with a number of situations in court': The power of practice-based decision-making

In 1989, Hodges and Miller's article 'Alternatives to Custody – Establishing Service Access Criteria & Minimum Professional Standards' argued for 'the development of national standards governing "service access criteria" and "minimum service standards" ' which would 'define the minimum service that will be offered to those in receipt of it' (Hodges and Miller, 1989, p. 13). The authors believed that such a top-down intervention would 'consolidate the achievements of the last ten

years' (1989, p. 13). The article was published in *AJJUST* and a practitioner responded with a letter published in the following issue (*AJJUST*, October 1989, p. 25). The practitioner stated his general agreement, but then outlined some concerns about the proposal:

> However, as a practitioner I have found myself confronted with a number of situations in court which a standardised Supervision Order on its own would have done little to help. In short, I feel that even if Supervision Orders do become standardised, magistrates need to be aware of our basic philosophies for practice.

The practitioner's letter indicated that the real power of influencing decision-making should lie with practitioners on the ground, who by experience know the complexity of court decision-making and therefore they were the irreplaceable mechanisms of change.

All three accounts were loud as they conveyed the messages of confident practitioners who had experienced the hard work of organising an alternative programme, or the challenges surrounding the sentencing of serious juvenile offenders, or the complexity of dealing with magisterial decision-making. As a result, they felt that they knew the depth of the issues and were able to recognise potential practice options and therefore craft or suggest effective responses. Therefore the 1980s specialism emerged in the form of practical knowledge which empowered individual and collective practice and in this way opened the way to innovation and change within the local processes. Indeed, in her account of developments in the 1980s, Wade indicated that the practitioners' 'very strong and growing demand for change' was based on the emergent 'new consciousness' that 'their views were important' (Wade, 1996, p. 33). The emergence of this 'new consciousness' was directly relevant to the fact that the practitioners, who drove local change, 'knew their local criminal justice scene very well' (Wade, 1996, p. 37). In the same vein Jones, in his famous 'Successful Revolution' paper, indicated a process of local policy development in the 1980s, which was driven by the practitioners' learning curve and their increase in 'confidence': 'as these workers gained confidence, and learnt to use a range of social skills and behavioural change exercises, they began to address other areas of the system' (1989, p. ii). These accounts all describe an intimate professional evolutionary process, which brought together experience, learning and knowledge acquisition during a process of engagement with the shaping of formal or informal tasks and processes. This intimate process, which Mintzberg described as an 'action driven

thinking' process, empowered practitioners' cognitive skills and became responsible for developing and changing the 1980s juvenile justice landscape.

'More time for workshops': The 1980s self-recognition of the empowering effect of practical knowledge

The empowering effect of experience acquisition certainly had become apparent among practitioners. The feedback report of the 1987 successful practice conference, Towards a Custody Free Community-Next Steps in Policy and Practice, which was organised by the practitioners' campaigning organisation Association for Juvenile Justice indicated that: '[d]elegates wanted more time for workshops, and less on speakers' (*AJJUST* September 1987, p. 12). This was because the speakers addressed policy issues only, whilst the workshops dealt with practice issues such as community programmes (Strategies for Practice: How to Individualise Court Recommendations, and Alternative to Custody Programmes) or how to research and monitor criminal careers within the youth justice system (Monitoring Matters!) – or inter-professional co-operation (Changing A Local System, The Policies, Practice and Obstacles) (*AJJUST*, June 1987, pp. 21–26). Significantly, these workshops were run by practitioners, which gave the chance for learning from the experiences of others on a range of practical problems, but also demonstrated the keen practice interest in spelling out their experiences as an organised body of practical knowledge. Indeed, in 1987 Blackmore stated that 'most information' on the development of the Intermediate Treatment projects 'was written by, and for, professionals and published in professional journals' (1987, p. 3). The same also applies to all the other aspects of the 1980s practice and process development.

Towards the end of the 1980s, the concepts of experience, practical knowledge, or practice knowledge were particularly celebrated within the youth justice microcosm. A paper by McLaughlin, published in *AJJUST* in 1990, clearly reflected this climate. McLaughlin indicated that his research examined 'how [juvenile justice] was experienced by those who service its [local] operation'; and emphasised that the 'experiences' of all these actors contained 'information and data that is worth both recording and assessing' (1990, p. 17). Interestingly, McLaughlin referred to all those who participated within the juvenile justice process, the total of the practice microcosm, a focus which is both historically and conceptually related to the advancement of the 1980s juvenile justice practitioners.

'We were the system' – a concluding discussion

'. . . a very exciting time': Experiences, cognition, change

In 1991 Allen identified the 'enthusiasm . . . of practitioners and managers "on the ground" ' as one of the key ingredients which defined the 'success' of the IT Initiative funded projects (1991, p. 49), a point echoed by Rutherford in several of his accounts on the 1980s (1987, 1989). Indeed, feelings of practice self-satisfaction, enjoyment and enthusiasm, all are evident in the various sources on the 1980s practice activity, as reflected in the accounts presented in this chapter. Recall the practitioners interviewees' statements that: 'We had to do everything from scratch: it was the most delightful first management job you could ever have,' or 'we run from 6 o'clock to 9 o'clock, . . . all day long . . . that's what we did . . . because we were obviously enjoying it as well.' Perhaps the most striking expression of enthusiasm can be found in the following practitioner-interviewee's statement: 'They were my happiest working days . . . I am really, really privileged . . . I know it sounds . . . here I am, a senior manager . . . but I was REALLY privileged to have been part of all of that.' This enthusiasm encapsulates the memory of a creative, innovative and efficient practice, a trend which occurred in the 1980s through the emergence of a juvenile justice specialism, which drew upon and developed experience-driven practical knowledge. It was indeed a period of self-empowerment for practitioners, as a practitioner-interviewee explained to the present writer:

> [the 1980s] was a very exciting time . . . If you describe that period as a pyramid, it was exactly right. It was a pyramid then and we were in control at the bottom of it. We were the system. Now it is very much the other way around. The Youth Justice Board and the Government dictate what goes on, which has de-skilled practitioners, it's left them without motivation, they don't have motive to affect change, they don't feel part of it.

That practitioner was interviewed in 2001, when the New Labour top-down policy change in youth justice, so markedly different from the 1980s (Telford and Santatzoglou, 2013), was still in ascendance. The account contrasted two very different eras of youth justice and reasserted the importance of an ongoing experiential learning process within youth justice practice. It was within this process in the 1980s that practitioners increased their cognitive abilities and felt able to shape new patterns of practice conduct. As with Mintzberg's potter, the

practitioners were able to 'see opportunities in errors' during the crafting process and therefore were able to develop 'new shapes'; namely new practices, policies or strategies. Mintzberg concludes that 'strategy creation is essentially a process of synthesis' (1987, p. 74). Equally, the 1980s practice development in juvenile justice was a creative process, featured by practitioners' ability to address problems and synthesise options. Naturally 'it was a very exciting time' as 'they were the system'. This was an inner practice development.

However, within the inner practice microcosm of the 1980s, the essence of the inner development was the proliferation of practice experience, which enabled practice cognition and, in turn, local change. So, if the question is whether practitioners 'know best', the example of the 1980s episode of crafting local change is yes, providing that they are given the space and opportunity to engage themselves in the exciting course of experience proliferation. In the 1970s juvenile justice practice was characterised by a lack of specialism, a lack of ideas, a lack of practice involvement and a lack of innovation, along with feelings of weakness and anxiety. In the 1980s the transition to an experience-based practice process of change corrected the 1970s mischief, increased practical knowledge and left a mosaic of practice and process development as an important part of the history of youth justice.

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8

From Planning to Practice: Pioneering Community Service Orders in England and Wales, 1972–1974

John Harding

Introduction

Over 40 years ago, on 2 January 1973, the first community service order in the world was made in Nottingham Crown Court by Mr Justice James. The order was for 120 hours and was given to Peter, a cannabis supplier and a university student. As the senior probation officer responsible for initiating the Home Office pilot scheme in Nottinghamshire, I was summoned to the judge's retiring room at lunchtime before the sentencing decision was announced. The judge wanted to know what the new measure involved, where Peter would be placed and how accountable the service would be if he failed to respond to the terms of the order.

The judge made the order that afternoon, not quite realising the national and international repercussions of his decision-making. Within hours, Peter had become a minor celebrity, filmed by television crews not just from the United Kingdom but also from the United States and many parts of Europe. It proved impossible to place Peter as a worker in an old people's home for the first ten days of his order because of the sheer number of reporters wanting to doorstep his lodgings and gate-crash the home to film him at work.

However, the introduction of community service was far from unplanned. The concept of community service was created by a think tank of academics, lawyers and criminologists as part of the Advisory Council of the Penal System (ACPS). Their proposals for the introduction of community service were prepared for legislation by a Home

Office working party composed of senior civil servants and carefully selected principal probation officers. Their findings were incorporated in the Criminal Justice Bill 1972 and, with minor amendments, became part of the Criminal Justice Act 1973.

Rather than making the new measure available to magistrates' courts and the Crown Court throughout England and Wales, the home secretary on advice from the working party decided to pilot the new measure in six probation areas: Nottinghamshire, Inner London, Durham, Kent, South West Lancashire and Shropshire. At the end of the pilot period of two years, a decision would be made by the home secretary as to whether the scheme was viable enough to be made available to the remaining jurisdictions in England and Wales. From the outset the outcomes of the six pilot areas would be evaluated by a small team from the Home Office research unit (HORU) led by Dr Ken Pease.

Looking back, the gestation of community service from concept to operational implementation in the pilot areas represented one of the best planned criminal justice legislative initiatives in post-war years. The contrast in the careful planning of the early 1970s to the headlong rush by the Ministry of Justice's transforming rehabilitation policy of 2014 could not be greater. The new policy transfers 70% of probation work with low- and medium-risk offenders by the beginning of 2015 to community rehabilitation companies from the private sector with little or no record of assessing and supervising offenders. Unlike the introduction of the community service order, Minister of Justice Chris Grayling's 'rehabilitation revolution' is unevidenced, untested in terms of piloting and ideologically speculative.

Community service orders: Rationale and purpose

The ACPS was asked by the home secretary of the day, Roy Jenkins, in 1970 to provide independent advice on a number of selective criminal justice issues, which might, in turn, lead to criminal justice legislation. He identified four themes. They included detention centres, reparation, the future of secure prisons following the Mountbatten report and non-custodial and semi-custodial penalties. He chose Barbara Wootton, a life peer, a juvenile court magistrate and a criminologist to chair the non-custodial penalties working group for the ACPS.

How did the ACPS subcommittee come up with the idea of community service in the first place? In answer, I asked the only surviving member of the ACPS (which lasted from 1966 to 1978), Sir Louis Blom Cooper QC – a much celebrated barrister – to fill in the background

(Blom-Cooper, 2012). At the outset of the committee's deliberations, Sir Louis admitted that the Home Office did not expect anything penologically significant to emerge from the committee's recommendations except, possibly, a further condition to an existing probation order. In an exchange of ideas, the committee latched onto the idea of community service. By chance, the committee's attention was drawn to a newspaper article of an experiment conducted by a criminal court judge, Karl Holtzschuh, in Darmstadt, West Germany in the 1950s. Sir Louis reported that the German judge exercised judicial discretion in ordering an offender, convicted of dangerous driving, leading to the wounding of a victim, to work as an assistant to nursing staff in the local accident and emergency department of the general hospital in Darmstadt for certain periods of time (Oakley, 2011, p. 342). The knowledge that the judge under German criminal law could impose a legal requirement of a convicted offender to carry out such work, provided the spur the committee needed to develop their thinking of community service as a court sanction in its own right.

In England, too, the committee was aware of a non-legally binding experiment in community service. Alex Dickson, the pioneer founder of Voluntary Service Overseas and its UK equivalent, Community Service Volunteers (CSV), initiated, in 1971, the helping potential of young offenders by asking prison governors in five participating Borstals to supply trainees for local Cheshire homes. The governors selected trainees to work on a daily basis with residential staff catering for the needs of the severely disabled. The initiative involved 100 offenders a year with CSV acting as an intermediary agency between the governors and Cheshire homes. The measure was not court sanctioned (Dickson, 1973).

Although Wootton has been historically credited with the idea of community service, Sir Louis said all the committee members shared responsibility for developing the legal parameters and practicality of the future order. However, without Wootton's inspired chairmanship and forcefulness with the Home Office, community service would not have emerged as a penal sanction in its own right. It might just have survived as an aspect of a probation order. The subcommittee believed that although community service was a sentence of the court, it should be a constructive penalty whereby the offender took on the burden of social responsibility towards others. They saw great merit in merging the majority of offenders with non-offender volunteers so that the former could be inspired by the latter. They did not rule out the possibility of community service tasks being undertaken solely by offenders, but

favoured the 'wholesome results of the association of offenders with volunteers' (Wootton, 1978, p. 127).

They envisaged the scheme as being dependent upon voluntary agencies and local authorities in terms of supplying tasks. They expressed the view that community service would be inappropriate for trivial offences but should not be restricted to offences punishable by imprisonment. Besides being seen as an alternative to a short custodial sentence, it should be considered as an alternative to a fine or fine default. The committee recommended the Probation Service as the appropriate agency to administer the scheme on the basis that they served the courts and were locally based with an extensive network of area offices. They further recognised that new legislation was essential for the implementation of his proposals and added that there should be pilot schemes to test the feasibility of the whole idea of community service.

The Home Office working party on community service by offenders

The initial Home Office response to the Wootton recommendations was enthusiastic. Michael Moriarty, the then assistant secretary of the main policy division of the Home Office, recalled in a letter to the author that Sir Philip Allen, the permanent secretary at the Home Office, displayed top-down enthusiasm for measures to arrest and decline the rise in the prison population, then around 40,000 prisoners. There was however, some resistance to adding more burdens to the Probation Service, on the grounds that it was still absorbing new responsibilities for prison after-care and parole. The committee was even attracted to the idea of using existing voluntary service organisations as the administrators of the scheme.

Moriarty, as the prime legal mover behind the proposals, was convinced that community service would have the best chance of success if the Probation Service played a prominent role in it, certainly, in the interface with the courts but also in providing and managing directly or indirectly the community tasks to be undertaken (Moriarty, 2013). He reasoned that the service was best placed to gain the enthusiasm and confidence of the courts and to develop as a central non-custodial resource of the criminal justice system. Commenting on the terms of reference set by the working group, Moriarty said that the Home Office wanted the new measure as a credible alternative to some prison sentences:

> Some of the Wootton committee members including Wootton herself felt that this was too restrictive. But in the circumstances of the time, I think we will write to hold the line, in both the legislation and the supporting rhetoric that this was to be an alternative to imprisonment.
>
> (Ibid.)

In passing, Moriarty ventured:

> I stayed in post long enough to see the legislation passed, the pilot schemes started and the research, on which the committee put much emphasis, in place. Its regular reinventing by successive governments has had its vexing side, but it can be seen as evidence of the durability of the concept.

Legal implementation

Between the publication of the Wootton report in 1970 and the Royal Assent for the Criminal Justice Act in October 1972 a number of significant changes took place. Offenders would only be eligible for community service if they were convicted of an offence punishable by imprisonment. The maximum number of hours to be completed in a 12-month period was raised from 120 to 240 hours. The act also empowered community service for fine defaulters (this provision has never been activated). Significantly, too, the six pilot areas in England and Wales would be 100% funded by the Home Office.

As the Criminal Justice Bill 1971 passed through Parliament, the debate over community service provision was marked by enthusiasm and goodwill from both sides of the House. Both government and opposition saw community service as a legal means of giving self-respect to the offender for carrying out socially responsible tasks. In the Lords, Baroness Wootton introduced an amendment to the bill which stated that sentencers should explain the purpose of community service to the offender, outlining what was expected of him/her and what would be the consequences of the breach of a community service order.

Robert Carr, the home secretary, endorsed community service by saying.

> I was attracted from the start to the idea that people had committed minor offences would be better occupied doing a service to their fellow citizens than sitting alongside others in a crowded jail.
>
> (HC. Deb. Vol. 826 col. 972)

Preparations for the pilot areas

Probation committees in all six pilot areas appointed a skeleton staff of senior community service organisers and others to plan the introduction of community service in their areas within a tight time constraint of less than three months. The organisers' principal tasks included the following: locating community service placements from a host of potential providers from the public and voluntary sector, persuading judges and magistrates that community service was a credible and viable sentence of the court, making arrangements for assessing and matching offenders for a work placement, persuading probation colleagues to recommend the new measure in social inquiry reports for the courts, satisfying trade unions that community service would not undermine employment opportunities and using the press, media and TV to inform the public of the purpose of community service.

Prior to my appointment as the senior community service organiser in Nottinghamshire I was seconded by the Probation Committee for a period of ten months to the National Institute of Social Work in London to study community development and organisation. The programme focused on forms and ways of mobilising resources in the community, both formal and informal. The insights and lessons from community work shaped the way community service was introduced in Nottinghamshire. At the outset of the pilot I was joined by Alan Simpson (later MP for Nottingham South) the Assistant Secretary of the Council of Voluntary Service in Nottingham, who was seconded part-time to the Probation Service. Together, we drew up a list of objectives for community service. The objectives were as follows:

- community service should be a worthwhile experience for the offender;
- community service should offer tangible benefits to the community – (the notion of enhancing the social capital of an area);
- community service should take place in or near a person's locality; unless the subject is capable of pursuing an activity outside his own area such as nature preservation, archaeological digs and so on;
- community service should offer the participants an opportunity to continue service after the expiration of the order.

In respect of the last objective, both Alan and I were keen to draw on the lessons of anti-poverty programmes in the United States, developed in the late 1960s under President Johnson's administration. Community workers within these projects began by hiring local residents from

disadvantaged areas as organisers and aides, often with great effect. The employment and use of local people with a background of unemployment and sometimes criminal records became known as the New Careers movement. These examples, and the CSV experience of using Borstal trainees in homes for the handicapped, held out a challenge to us in contemplating first moves in Nottinghamshire. Was it possible to reverse an old social work model? Instead of making people recipients of help could they be asked to be dispensers of service and thereby gain status and approval for their actions. Before taking these steps, much depended on the way those responsible for introducing community service by offenders planned projects and selected tasks.

Locating tasks

One of the first jobs of the organiser was to take a sounding from different sectors of opinion in the community, from local councillors to serving prisoners. We talked to tenant associations, neighbourhood groups, voluntary organisations, local authority chief officers, Rotary clubs, the police, hospital nursing staff, youth club leaders and social services staff in day centres and residential homes. The initial contact work with agencies was divided up, with a probation officer covering county towns and Alan Simpson and I focusing on Greater Nottingham. We shared our findings from the site visits on an almost daily basis over a period of three months, interviewing 20–30 agencies a week. Alongside the task finding, we carried out a range of radio, television and newspaper interviews on the introduction of community service. One of us visited the local prison in Nottingham, where we asked 14 serving prisoners if they thought community service might be a useful measure and if any of them had a recent experience of volunteering. A minority had, and, not surprisingly, most would have preferred doing community service rather than a six-month stint in prison.

The voluntary organisations were initially more accessible in providing tasks than their local authority counterparts, since decision-making lay in the hands of a few people rather than the layered bureaucracies of the public sector. Hand-outs were given to the voluntary sector explaining what might be expected of them in terms of supervision, timekeeping and disclosure of the offender's criminal record. It was noticeable that some groups presented stereotypical views of offenders, whilst others were prepared to offer a high threshold of acceptance to those who might be involved. Within months, the following types of organisations agreed to participate, some taking single placements,

others prepared to take a group of six or more in, for example, placing offenders in a designated workshop or restoring furniture for homeless families about to be resettled. The list included committee care groups, tenants associations, the Salvation Army, housing groups, youth clubs, day centres, nature preservation societies, canal restoration groups, the Womens Royal Voluntary Service (WRVS), organisations for the physically and mentally handicapped, preschool playgroups and the local university community action group. Outright refusals were very few.

The public sector response was slower. The whole process of gaining committee approval up to councillor level took time. For example, it took a full six months to obtain the approval of social services departments. Ultimately, safeguards were agreed on the lines of contact between Probation and Social services. Interestingly, the more rewarding placements for offenders in social services tasks arose where a particular social worker or residential staff member had expressed a strong interest in community because the philosophy behind the scheme mirrored his or her own thinking about user involvement. Perhaps the most receptive welcome came from the youth section of the city and county education departments. They welcomed the confidence shown in youth leaders and looked forward to challenging situations whereby an offender might be placed in a youth club as an assistant responsible for some part of an evening activity. The shared work between youth workers and probation officers broke down some of the professional distance and suspicion which each may have felt about the other.

Although probation areas felt a sense of indebtedness to community organisations willing to take a placed offender, some benefits accrued to the agencies themselves. Stephens, a Home Office inspector at the time of the pilots, carried out a survey of agencies outlining positives from community service in a number of categories (Stephens, 1976). First, there were leadership factors. Stephens noted that leading figures in agencies had the courage to overcome the deep-seated reservations of some staff in placing offenders in sensitive situations. These leaders had the vision to see that carefully selected offenders, often with a background of disadvantage themselves, could relate to handicapped children or the elderly in meaningful terms. Second, agency volunteers acquired new skills of supervising offenders and making constructive relationships with those for whom they were responsible. Third, they were able to further the objectives of the organisation. In Nottingham, a small community care group on a council estate transformed the range of its services to the elderly, disabled or housebound by the inclusion of ten offenders who helped in the daytime, evenings and weekends. The

offenders were mainly involved in bus trips, organising shopping services and a programme of household repairs for the housebound. Most of the offenders came from the locality and some were able to bring friends and relatives to help with tasks. Finally, many of the agencies which participated in community service pilots acquired publicity in a positive sense. Local press highlighted the significance of their work and their achievement in working with offenders.

Obviously, the agencies' experience of working with offenders was not always satisfactory. The usual cause for the removal of an offender from a particular task was unreliability of attendance rather than unacceptable work or behaviour. As far as the offender was concerned, unreliability could usually be attributed to deficiencies in the matching process or the original assessment of the offender. Instances of unacceptable behaviour by offenders were rare and traceable, possibly to a history of mental instability or evidence of general unsuitability for community service. Some thefts occurred, but on isolated occasions. Ironically, most of the messages from the agencies to community service organisers were concerned with their valuation and appreciation of the work carried out by offenders on community service. We asked the beneficiaries to extend this appreciation to the participants themselves. Invariably, this was of more lasting value than any endorsement by the community service staff. Within the first year of the pilot we had many instances of community service workers who stayed on with an agency as a volunteer after their sentence of hours was completed.

The selection, assessment and matching of offenders to tasks

Before the pilots commenced in 1973, magistrates contemplating the making of a community service order were asked to consider requesting a social inquiry report from a probation officer to ascertain the suitability of the new measure for an offender charged with an imprisonable offence. The issue of suitability became a key feature of discussions between the probation officer and community service organisers during the lead-in time to the introduction. In the early 1970s, probation officers had not developed risk-assessment models based on static and dynamic factors in relation to an offender's history of offending and anti-social behaviour.

In striving to develop suitability criteria, the initial focus was on excluding the unsuitable. Early exclusions included drug or alcohol users with a history of prolonged abuse, offenders with repeated acts

of violence on their record, sex offenders, including paedophiles and rapists and those offenders whose personal and social circumstances were so disordered that a probation order was seen as more appropriate. As project staff developed confidence, they became less bound by some of these early exclusions. Indeed, some voluntary organisations showed remarkable resilience in coping with a more demanding person, to the extent that earlier reservations were later modified. In hindsight, over the two-year pilot period, none of the six probation areas had a high-profile crime such as a murder committed by a community service offender. Had such an incident occurred in the pilot area, community service could have been derailed as a pioneering legal measure by the force of public opinion, led by the tabloid press.

The probation officer, when examining the suitability of community service for an offender, discussed key issues such as the nature of his/her offence, work patterns, availability during leisure hours and attitudes of family and friends. The community service organiser offered some advice about recommendations in the social inquiry report and informed the probation officer which suitable tasks were available. After the making of an order in court, following the offender's consent (which was a legal requirement at that time), the community service team interviewed the subject within days. The organiser was concerned not only to draw out a person's coping capacity, but also what they had to offer community service. Questions were asked about their ambitions, often revealing a wide gap between their present reality and future aspirations for themselves. One young man replied 'I just want to be someone.' A woman in her 30s, with five children in care, said 'I'd like to feel I was of some use, I've lost my self-respect' (Harding, 1974, p. 11).

Part of the matching process involved questions of previous helping experiences. We avoided the use of the word 'volunteer'. Almost all those who were interviewed in the pilot period had some experience to draw on. One young man, a miner's son, had changed and bathed his disabled father every night for the past three years. An ex-Borstal boy recalled the happiest time of his life as a ward orderly on the sick bay of a large Borstal hospital wing. Offenders during the interviews were shown lists of task available in the local area. Some showed indifference, favouring a practical assignment where the hours could be completed as soon as possible. Others showed a commitment to personalised tasks. The final choice of placement rested on the availability of work, the nature of the offence, the public risk involved, the motivation of the offender and the attitude of the placement agency. Some inspired matching did take place. For example Andrew, disabled in his left leg as a result of

polio, was placed with the sports club for the physically handicapped as a volunteer leader. Andrew had come to terms with his disability and with his experience was able to offer considerable help to youngsters with similar problems.

Offenders were usually placed with an agency within a week of their assessment. There followed a first meeting with an agency supervisor in which he/she had an opportunity to withdraw a placement if too many doubts were raised. Most of the organisations accepted the offender as an ordinary volunteer, not to be differentiated in any way from other members of the group. If an offender wished to tell his/her story they were free to do so. Many did, possibly to test out the initial overtures of acceptance within a group. Such a sharing often created a more realistic dialogue between the offender and the group.

Creating a dialogue with the courts

Initial meetings between the probation staff, the magistracy and the justices' clerks focused on two major questions. If the scheme was designed as an alternative to custody, what was the limit in terms of an equivalent prison sentence? Second, what guidelines could be offered to courts in terms of the number of hours an offender might receive on community service? The Home Office memorandum to courts in December 1972 was inconsistent. It suggested that community service should be an alternative to a short custodial sentence. No attempt was made to define 'short'. The act itself stated that community service was to be imposed for an offence punishable by imprisonment. But many instances of offences which are punishable by imprisonment can be described as minor. Thus, if not carefully monitored, community service orders could be made for offences which might properly be dealt with by a lighter court sentence, such as a probation order, fine or conditional discharge. An agreement was struck with the magistrates, later ratified by the liaison Crown Court judge, that community service would be a waste of potential if allowed to lapse into an alternative to a fine or conditional discharge. We jointly introduced an unofficial tariff system, whereby a person who might have received a 12-month sentence might be given an order of up to 240 hours. In the same way, a 120-hour order might be the equivalent of six months in prison. Shortly after the pilot period finished, Ken Pease, the Home Office researcher, suggested more elaborate guidelines on penal proportionality for the new measure. He recommended that an order of less than 100 hours be considered as an alternative to a non-penal option, 100–135 hours as

being the equivalent of a three-month prison sentence, 135–170 hours the equivalent of a six-month sentence, 170–205 hours the equivalent of a nine-month sentence and 206 hours upwards the equivalent of a 12-month sentence (Pease, 1978).

In practice, the policy became a flexible instrument with a good deal of variation depending on the attitude and the approach of particular magistrates. Judges tended to be clearer about their decision-making. Reports from HORU indicated that Nottinghamshire magistrates maintained a fairly consistent view of the use of community service as an alternative to custody, rather than a watered-down alternative to a lesser sentence. Not surprisingly, there was some dispute in the magistracy about the overall aims of community service. Some saw community service as a punishment, whereby the offender could pay his debt to society. Others saw the measure as a method of rehabilitation, by which the offender could gain respect and approval. If anything, the notion of community service gained a certain unifying strength among magistrates with its appeal to conflicting philosophies about crime and punishment. Other questions were directed at the type of task an offender might undertake. Some saw redemption for the offender in terms of hard, physical graft. Indeed, some magistrates saw working with the handicapped as a soft option, as opposed to digging gardens for the elderly. Many magistrates took a longer-term view, however, maintaining that working with the handicapped made mental and emotional demands on an offender which were far from easy.

Overall, magistrates were supportive, provided they were supplied with a flow of information about the progress of the scheme. Within the pilot areas, legislation enabled us to set up a community service committee made up of sentencers and clerks to the justices, who received a quarterly report on community service progress from the senior community service organiser. Through this process magistrates and judges were encouraged to ask a probation officer at the time of the court proceedings for a follow-up report on a quarterly basis on anyone who was made subject to a community service order. Judges, in particular, welcomed the feedback, usually provided in the form of a couple of short paragraphs from a probation officer. The engagement served two purposes – to inform sentencers of the value of what they were doing and to let the probation officer and the offender know that the sentencing judge was keeping an eye on the outcome of the sentence. The informal reciprocity of sentencer/offender information sharing was embraced, decades later, when legislation provided for courts to hold regular reviews on the progress of offenders undertaking a drug rehabilitation requirement as

part of a community order or suspended prison sentence (Rex, 2002). Some magistrates' contact with offenders could turn out to be even closer. A number of magistrates were actively involved with voluntary organisations. Some even worked alongside offenders on shared tasks in a day centre, or a club for the handicapped. None revealed their other responsibilities to the offender and they were able to mix freely, sharing experiences as ordinary volunteers.

Local Crown Court judges were all consulted about community service, as were visiting High Court Judges. All concerned expressed an interest in community service. Indeed, the first order in the world was made in Nottingham Crown Court. In the first year of the Nottinghamshire pilot, judges made approximately one-third of the 270 orders. Word-of-mouth exchanges in judges' retiring rooms, information leaflets written by community service organisers, feedback reports from probation officers, all gave rise to an increased level of confidence in community service as managed by the Probation Service. Dialogue with sentencers about failures in community service was realistic, too. Sentencers began to understand that placing an alcoholic or a prolific drug abuser on community service invited breakdown and non-compliance with the order. Within the second year of the pilot, courts, in particular the Crown Courts, were prepared to take greater risks in placing offenders on community service, risk-taking being measured by the seriousness of the presenting offence and the number of previous convictions held by the offender.

The Probation Service

There was some scepticism in the Probation Service, both locally and nationally, when the legislative details of the scheme were first announced. The essence of voluntary work in the community is that it is freely given without any element of compulsion. Was not community service, therefore, a contradiction in terms? In addition, probation officers were quick to point out that, although an offender had to give consent to an order, it was 'Hobson's choice', when the alternative option was most likely a prison sentence. There were doubts, too, about the type of task. Would community service be run on 'chain gang' lines, with offenders in work parties open to public view? These questions and fears were thoroughly explored in early meetings, leading to the creation of a country-wide working party on community service, at which probation officer representatives could explore issues with local organisers on a regular basis. For the probation officer, one of the

most constructive elements in the process of integrating offenders with community groups was the recognition of the potential value of the community itself. In linking with other social networks, the community service organisers, in one sense, helped to reduce the isolation of the criminal justice system from other social systems. De Smit, among others, has suggested that community service forged a new role for probation officers in becoming the brokers of resources, opening up opportunities for offenders whose social networks had been closed off (de Smit, 1976, p. 174).

One of the most pressing difficulties to emerge in the pilot period was typified by a minority of offenders who were unable to cope with the demands of the order through family breakdown, financial difficulties, sudden unemployment or the illness of a loved one. Community service staff had no space to offer supervisory help to poorly coping offenders under the terms of the order. The situation was never properly resolved in the pilot period. Later criminal justice legislation, in 1991, introduced the combination order, whereby an offender could be made the subject of a probation order as well as community service.

More recently, of course, the community service order has ceased to exist in its own right and has, since 2003, become an unpaid work requirement as part of a generic community sentence. The title of 'unpaid work' is perhaps misleading and confusing, as non-offenders also carry out such work on internships or as part of benefit eligibility. Community service, as conceived by Wootton, was readily understood by sentencers over decades as a unique reparative measure which made sense to them and the public as a way of paying back harmed communities through useful work. The change of name, as part of a generic order, risks losing the identity of the community service order with its backcloth of community work.

Some early outcomes

During the pilot period the majority of orders were made on offenders between 17 and 25 years of age. Research conducted by HORU showed that a high proportion of offenders had previous convictions – on average, five. Some 42% of offenders in the pilot period had a previous custodial sentence. In Nottinghamshire, most offenders placed on community service were locals. A few lived in bedsits or flats, but the majority lived with families or relatives. Less than 10% of the orders were made on women, reminding us of a celebrated Wootton quote

'If men behaved like women, then the courts would be idle and the prisons would be empty' (Wootton, 1959, p. 30). The average length of order was between 100–240 hours. The proportion of orders completed in the pilot period and in subsequent years averaged over 74%. Most of the remainder were breached for failure to comply with the requirements of the order or the commission of a further offence. Importantly, too, HORU reported that, taking all the data available from the pilot areas over an 18-month period, courts acted on probation officer recommendations for community service in 74% of cases. Only 18% of orders were made by courts against the recommendations of probation officers.

Between 1973 and 1976, Deirdre Flegg, a Nottinghamshire senior probation officer, conducted with others a survey of 100 offenders who had completed their community service orders. The interviews were semi-structured, using a questionnaire as a guideline. Of those interviewed, 67% thought community service was a fair sentence while 73% had expected to receive a custodial sentence. To many, community service offered a fixed time commitment, a measure of purpose and a sense of satisfaction and achievement. Tasks were important, giving offenders the opportunity to identify skills and work interests which they themselves had not previously regarded as useful. The interviewees were asked whether community service had been a useful experience. Only four replied negatively. Some took a very personal view and commented on their learning skills, gaining self-confidence, being valued by others and on the extent to which the helping was worthwhile. Twenty-nine of those interviewed wanted to carry on as volunteers after the completion of their orders. Forty-six were content to complete their hours. A few had forged opportunities for themselves as 'new careerists' in paid employment with social work programmes, youth clubs and ancillary posts within the Probation Service (Flegg, 1976). Richard, for example, was given a lengthy community service order for grievous bodily harm in an offence of alcohol-fuelled violence. He was placed with a Nottingham youth club where he worked three nights a week with marginalised youth. After six months work, he said.

> I have found in me something which I didn't know existed. The ability to do something constructive.
>
> (Marshall, 1974, p. 46)

Richard later became an assistant warden in a New Careers probation hostel in Bristol. He then took a politics degree, followed by a master's

degree in social work. He joined the Probation Service in Hampshire in the late 80s and died in 2011.

Beyond the pilot period

Baroness Wootton noted that the HORU's final report on the pilot experiments was a superb illustration of official caution, but punctured by irresistible enthusiasm (Wootton, 1978, p. 128). The researchers said that the scheme was viable and despite their doubts about its overall impact on the prison population, revealed that, at best, community service was an exciting departure from traditional penal treatment (Pease et al., 1975). The endorsement was enough for the Home Office minister to extend community service orders to be rolled out by other probation areas in England and Wales by the end of 1977.

The operational success of the pilot experiments spawned the growth of community service legislation over the next 20 years throughout Europe, Australasia, parts of Asia and the United States. In the United Kingdom alone, millions of hours of community service have been performed by thousands of offenders in programmes which amplified the social capital of towns and cities at a fraction of the cost of imprisonment. Even Ken Loach's recent film *The Angels Share* (Loach, 2012) has a Scottish offender on community service as the hero of the action. The actor, Paul Brannigan, who plays the lead role is, himself, an ex-offender who served four years in a Young Offenders Institution.

However, in a retributive age, we have seen the image of community service ratcheted up to match penal populist opinion. Thus, the demand for tougher community penalties has been paralleled by the rebranding of community service. We have moved from community service, to community punishment, to community payback and now to unpaid work. Offenders now wear fluorescent tabards over their own clothes to indicate that they are offenders, easily recognisable by discerning members of the public. In reality, I suspect, despite the hardening rhetoric, nothing much has changed in terms of the nature of tasks undertaken, though the rigid enforcement orders leaves little room for supervisors' discretion. But now, over 40 years on since the birth of community service, the Probation Service has been instructed to hand over responsibility for unpaid work to private security companies like Serco. The justification for such a measure is said to be to ensure a more efficient and cost-effective service. There are no evidential grounds for this degree of optimism. Serco, like other private companies, promises to cut costs and the danger is that they will do this by changing the employment

conditions of existing supervisory staff and cutting salaries, particularly those of front-line staff. That a private company could make a profit on the back of offenders repaying their debt to society is a far cry from the Wootton committee's founding principles. The new contract also specifies that unemployed offenders should work for four full days a week on unpaid work, rather than spend a more proportionate part of that time looking for permanent work, which would take them off benefits.

Alan Bennett, the playwright, echoing perhaps the Wootton line, said recently in a comment about the demise of the Probation Service:

> Profit is thought (by government) to be the only trustworthy motive and thus probation can be farmed out to whatever agency thinks it can make it pay.
>
> (Bennett, 2014, p. 7)

Last word

I began this account of the birth of community service orders with the first order made on Peter in 1973. He wrote an email to me out of the blue in 2013, shortly after I had published an article in the *Guardian* celebrating 40 years of community service. He reminded me that he was grateful not to be sent to prison and had spent the rest of his occupational life working in residential homes with troubled adolescents (Harding, 2013). Peter's story is not untypical of thousands of offenders who have taken part in community service over four decades. This chapter has attempted to set out the building blocks of the sentence, from a think tank idea to a legislative development in the act, to the assignment of tasks for offenders in the public and voluntary sector, to the perspectives of sentencers, probation staff and offenders. The pilots were carefully monitored and researched to the point of providing an endorsement for national implementation in probation areas. Despite governmental rebranding and tinkering with the measure at the behest of penal populists, the measure still survives as a credible option in the sentencing arena. It remains an excellent casebook example of the management of change in the legal process.

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9

The Management of Community Justice Services in Scotland: Policy-Making and the Dynamics of Central and Local Control

Katrina Morrison

Introduction

For observers of, and those involved with, the Probation Service in England and Wales, this is a bleak time. As the Ministry of Justice pushes through reforms which will see 70% of Probation Trusts' work outsourced to voluntary and private bidders on a system of payment by results (PbR) and morale in the Probation Service is at an all-time low (see for example Hedderman, 2013; Phillips, 2014; Robinson, 2013; Senior, 2013), a time when probation in England and Wales was underpinned by social work values and principles seems a distant memory.

It is interesting to note the contrast with the service responsible for community justice in Scotland, Criminal Justice Social Work (CJSW), which, despite repeated efforts at reform over the past 50 years, continues to be located within social work departments and underpinned by a social work ethos. This chapter argues that one reason for this is the service's location within Scottish local authorities, which has protected it from radical central reorganisation. There have been repeated attempts over the past 40 years to exert greater central control over the service due to ongoing concerns about inefficiency, isolation from other services, lack of status and legitimacy, geographical variability and local politicised decision-making environments. The nature and successes of these reforms has depended on the political context in which they emerge and are implemented. This chapter will outline the different phases of reform of CJSW in Scotland, arguing that it represents an

opportunity to observe the tensions between, and implications of, local and central control and concludes by reflecting upon what this story can tell us about the wider criminal justice policy-making environment in Scotland.

This chapter draws on PhD research conducted in 2009/2010 which included interviews with those involved with community justice policy-making prior to and post devolution, including ministers and their advisors, civil servants and practitioners (Morrison, 2011). Unless otherwise stated, this is the source material for the arguments made in this chapter.

Reform and Scottish community justice: A story in four acts

The story of Scottish community justice reform is one of repeated attempts to improve the legitimacy of the service in order to reduce reoffending and the prison population and to improve consistency and efficiency. As with all policy decisions, the political context is as important as the 'problem' to be addressed (Kingdon, 1995) and this has influenced the shape of the various efforts of reform over the past 50 years or so. This will be illustrated by an examination of four key reforms over this time.

The creation of a generic social work service for offenders

The story of community justice reform begins in the late 1960s. The Social Work (Scotland) Act 1968 disbanded the old Scottish Probation Service and placed it within the organisation and control of a generic social work service. The overall rationale of this service was to 'promote social welfare', with the idea that offenders should be viewed as requiring care and attention in the same way as any other group who received services from social work departments (Robinson and McNeill, 2004). These reforms took place due to ideological motivations in the wake of the Kilbrandon Report in 1964, which promoted the ideal that offending should be seen as a symptom of wider social need (although there were pragmatic reasons for the move as well (McNeill and Whyte, 2007)). However, the reforms would also have long-lasting implications for the service because they put its control and organisation into the hands of local government, responsible for administering key social services in Scotland.

It is interesting to note that a similar move was mooted for the Probation Service in England and Wales at the end of the 1960s, but was

heavily resisted by the service, backed up by the powerful magistrates who were involved in it (Nellis and Goodwin, 2009). Although this was regarded as a victory for the Probation Service of England and Wales at the time, the Scottish experience tells us that such a move may have in fact insulated the beleaguered service in England and Wales from future reforms.

The creation of Criminal Justice Social Work

Generic social work with offenders proceeded until concerns began to emerge during the 1970s which precipitated reforms in the early 1990s. There were concerns about the funding arrangements for community service (McAra, 1998) and the skill set of generic social workers to deal with offenders (McAra, 2005) which resulted in a fear that sentencers' confidence in community sentences was being undermined (McIvor, 1999). There were also concerns about prison riots (Coyle, 1991) and suicides and an increase in the prison population which had shown a rapid rise over the 1980s. This resulted in an explicit policy of penal reductionism being expounded in Scotland in the late 80s by the Scottish minister at the time (McNeill and Whyte, 2007). Finally, it was also felt that the service was losing out in a highly politicised local government environment. Many within CJSW believed that in a generic social work service, criminal justice would always come at the bottom of the priorities, below services for children and the elderly. A convenor of social work at the time described it as 'the orphan' of social services, that did not attract the best staff or public sympathy and in this context, local authority councillors did not prioritise it in resource allocation decisions.

There were therefore multiple reasons why central government might intervene in the governance of the service. However, instead of removing CJSW from social work services completely, it was decided that it would remain within social work (and under the control of local authorities), but would become a distinct branch within it, working towards its own nationally set standards and objectives. Furthermore, the funding for this newly specialised service would come from central government and would be ring-fenced to be spent on CJSW alone. In return for this, local authorities would have to draw up three-year strategic plans and be subject to a national inspection regime (McNeill and Whyte, 2007).

These changes were introduced in 1990 and 1991 and represented a significant increase in the funding and attention given to the service, whilst simultaneously opening the door to a much greater degree of central control. From now on, CJSW was to have a key role in

bringing down the prison population: the first objective as laid out in the National Standards was 'to enable a reduction in the incidents of custody . . . where it is used for lack of a suitable, available community based social work disposal' (SWSG, 1991). This was making explicit for the first time that probation and community service was viewed as an alternative to custody and was therefore providing a standard against which its success would ultimately be measured.

The introduction of ring-fenced funding together with National Standards meant that greater efforts were now made to professionalise the service by having specific criminal justice training for personnel. This move increased the status of work carried out and CJSW was no longer regarded within local authorities as the 'runt of the service'. These reforms helped to temporarily silence those who were calling for the whole service to be centralised into a national agency (McIvor, 1999).

Several years later, an unrelated political development was to have major consequences for the future of the delivery of CJSW. Where previously there had been nine regional authorities forming local government, the Local Government etc. (Scotland) Act 1994 created 32 unitary authorities, or councils, over the relatively small size of Scotland, each one with its own administrative structure and service delivery unit. This change would lead to ongoing concerns in future years about the consistency and efficiency of provision throughout Scotland.

The 'Tough Option' reforms

In August 1998, one year after New Labour came to power in Westminster, the Scottish Office published a consultation paper 'Community Sentencing: The Tough Option' (Scottish Office, 1998), which bore remarkable similarity to calls for reform from the Labour-led coalition in Scotland a number of years later. This review took place one year after a similar review in England and Wales which also sought to join the Prison and the Probation services together (Whitehead, 2009).

The Tough Option review was redolent of New Labour managerial reforms of increasing efficiency, 'joining-up' and restructuring (Newman, 2001). One of the major themes was the need for improved communication and partnership between key players in the criminal justice system and the inefficiency and inconsistency of running a service over 32 unitary authorities. Now that central government was involved in the administration of ring-fenced funding, the perceived fragmentation and inefficiency of CJSW was no longer tenable. The review included the possibility of restructuring provision into a single

national service, in order to 'maximise effectiveness, efficiency and quality' (Scottish Office, 1998, p. 23).

Shortly after the publication of the Tough Option, devolution occurred and the Scottish Executive was composed of a coalition between Scottish Labour and the Scottish Liberal Democrats. In 2000, new Liberal Democrat Justice Minister Jim Wallace took the decision on the review. He was persuaded that CJSW should retain its place within individual local authorities and the Executive would instead opt for a mid-way position of 12 national groupings of CJSW teams, who would each be obliged to create strategic plans to monitor the performance of services across the constituent authorities. There was also an expectation that resources would be moved between authorities if there were areas with differing levels of need and that each grouping would appoint a single responsible person as a 'point of entry' for other agencies to deal with.

However, these groupings had a number of flaws, as even key members of the service would admit a number of years later. The governance arrangements were informal, meaning that as long as the participating local authorities agreed on issues such as sharing resources, then there were no difficulties, but as soon as there was disagreement, each council reverted back to its old way of working and there was no mechanism to enforce co-operation. Because they were so informal, some councils even opted out of them altogether without any repercussions. Groupings were supposed to move resources from authorities depending on demand, but in practice it was very difficult to get agreement from any council to release any of its funds to another and money tended to be allocated on an unchanged historic basis. While there were examples of good practice, the real 'thorny issue' lay around the redistribution of resources between authorities and the groupings were not equipped to deal with this problem.

Those who worked in CJSW at the time felt proud that it remained within local authorities and part of the social work department. However, the service was also subject to a great deal of involvement from central government due to the ring-fencing arrangements and National Standards, which other parts of local authority services were not subject to. The service therefore sat (and arguably continues to sit) in an awkward place between central and local control.

In the early 2000s, there was a perception within the criminal justice fraternity (shared by even senior people within the service at the time) that CJSW was still not delivering. This was against the backdrop of increased spending on CJSW over the past 15 years, a perceived

failure to 'deliver' on bringing down the prison population and levels of reoffending and a related concern that community sentences lacked credibility and legitimacy in the eyes of the public and sentencers. As concern about reoffending and the 'revolving door' grew, a growing focus emerged on enabling more successful partnership working between CJSW and the Scottish Prison Service, which, given their radically different administrative structures and working cultures, was not always easy or successful (see Homer (2002) for an examination of an example of fraught co-operation between these two services).

A 'Correctional Service for Scotland' and the national strategy for reducing reoffending

In the run up to the 2003 Scottish Election the Scottish Labour party published its manifesto which included the following pledge:

> we will set up a single agency – the Correctional Service for Scotland – staffed by professionals and covering prison and community based sentences to maximise the impact of punishment, rehabilitation and protection offered by our justice system.
>
> (Scottish Labour, 2003)

This came out of the blue to the Justice Department, senior personnel in CJSW and indeed the grass-roots Scottish Labour party which had strong connections with local government. The 'policy entrepreneur' (Kingdon, 1995) pushing these proposals forward was the first minister's political advisor, who had also advised the minister for Home Affairs who published the Tough Option review a number of years earlier. The proposals would see the new service staffed by personnel who no longer required social work training. The primary role of these staff would be redefined as supervising the court order, monitoring potential breaches, though they would also signpost offenders to other social services if and when necessary. This was a clear attempt to 'de-social work' the service, a trend which had occurred in England and Wales and which had so far been successfully resisted in Scotland (Robinson and McNeil, 2004).

The centralising of the new service was motivated by a New Labour modernising agenda which favoured centralisation; the desire to have a national unified model of delivery; reluctance to tether it to social work departments and hence local authorities; a mistrust of local authorities to deliver real public service change; and the perceived benefit of joining the service with the SPS in order to facilitate better co-operation between the two services.

It is important to note that although this announcement was felt to many in Scotland as a 'particularly English development', this proposal in fact preceded the publication of the Carter Report in England and Wales, which precipitated the creation of the National Offender Management Service (NOMS), by a number of months. The reason why many at the time felt as though the proposals were an English 'imposition' was a context, both in community justice and wider criminal justice, of similarity between the two jurisdictions under the New Labour reform agenda (Croall, 2006; McAra, 2007; Mooney et al., 2014). However, the Correctional Service for Scotland was actually a very Scottish development which had emerged out of specific concerns to do with CJSW and in particular, its place within local authorities. Nonetheless, it is undeniable that it shared many similarities with the New Labour policies emanating from Westminster and this is undoubtedly due to the very close links between the two parties during this time (see also Mooney et al., 2014).

Following the 2003 election, Scottish Labour formed another coalition with the Scottish Liberal Democrats and the justice portfolio was given to a Labour minister who took the single agency proposals forward. Shortly after the election, the minister and her team realised that it would be impossible to win cross-party support for the proposals in Parliament, with opposition even from within the coalition. This was combined with fierce opposition from within CJSW, which felt as though the ethos of its service was under threat, and a fear within local government that the correctional agency represented a central government expansion.

While local government opposition need not be an absolute impediment to pushing through reforms, there was a reluctance within the executive to take on Labour-dominated local government when its support would be crucial for the next election and it was already pushing through a number of other unpopular (to Labour councillors) reforms introducing PR into local government elections (McConnell, 2006, p. 81).

The emphasis on structural reform, punishment and protection which had dominated the original manifesto pledge now gave way to a focus on reoffending (Scottish Executive, 2004a; 2004b). In the context of a still rising prison population and continued concerns about the legitimacy of community sentences in the eyes of the public and sentencers, reducing reoffending would now become the indicator upon which the success of CJSW would be judged.

The resulting reforms were born out of compromise at every step: compromise with Labour's coalition partners and compromise with local government. They were implemented in 2006 after consultation and a Parliamentary process.

The Management of Offenders etc. (Scotland) Act 2005 created eight regional bodies called Community Justice Authorities (CJAs), which would leave CJSW in the control of local authorities but with a far greater degree of central control. These proposals were heavily redolent of the New Labour public sector reforms taking place in England and Wales at the time, relating particularly to increased central control, structural change, new pressures on local authorities to prove their performance and the threat of sanctions and further centralising should partners not meet their required standard (Newman, 2001). The language of 'seamless sentences' was also used to justify reforms (Scottish Executive, 2003) which bore heavy similarity to language in community justice reform in England and Wales at the time (Nellis and Goodman, 2009). Although not included in the act because it did not require primary legislation, the reforms also created a National Advisory Board (NAB), which would provide the minister with advice on specific issues, including an ongoing review of a national strategy, and monitor the performance of the CJAs by scrutinising and approving their area plans and annual reports (Scottish Executive, 2006).

CJAs' key functions are to ensure the co-operation and coordination between the different organisations involved in offender management, primarily between CJSW and the SPS. The other key function of CJAs is to distribute the ring-fenced CJSW funds between the different constituent local authorities, which was a function that the previous Tough Option groupings were supposed to have performed, but as there was no penalty if they did not, tended not to happen. Each CJA is led by a chief officer who is not part of the local authority and whose job is to oversee the area plans, get agreement from partners and to report on failings to the minister.

The climate in which CJAs operated changed considerably in 2007 when there was a change of administration and the SNP formed a minority government. This marked a significant shift in the tone and content of penal policy in Scotland (McNeill, 2011; Mooney et al., 2014) and had notable bearing on the nature and function of CJAs and the governance of CJSW in Scotland. Alongside a more moderate approach to justice reform which tended not to favour structural change (with the important and notable exception of the centralisation of the police force

(see Fyfe and Scott, 2013; Henry and Fyfe, 2012; Scott, 2013)), there was also a new relationship between central and local government which was based on 'mutual respect' (Scottish Government, 2007) rather than the micro managed approach of the Lib/Lab coalition in which a great deal of local authority funding was ring-fenced. Central government promised a more 'hands off' approach in return for helping to deliver a number of the SNP's key policies (McGarvey, 2012). In this context, the potential hard edge of CJAs was gone and replaced with a softer governance approach which meant that the ability of CJAs to hold local authorities to account and move resources between them was reliant in large part on the skill and personality of the chief officer, which varied considerably between the eight CJAs.

It is worth noting that within this context of much diminished central government control, one ring-fencing policy area remained and that is the grant that pays for CJSW. This is significant as it reveals that even in the context of a far lesser degree of central control, significant concern about the ability of local authorities to prioritise CJSW and deliver high-quality community justice services remained.

The success of CJAs has been mixed. Their governance structure is weak, meaning that the ability of the chief officer to push through radical change is hampered and dependent to a large extent on personality and pre-existing relationships between authorities. CJAs also introduced a political element to the governance of CJSW because the decision to vote on resource allocation is now taken by local authority councillors who often find it difficult to put the interests of the wider CJA ahead of their own authority. However, CJAs have succeeded in improving co-operation between CJSW and the SPS and introduced a greater degree of financial oversight into CJSW spending.

However, repeated criticisms from many of those involved in CJAs include that they have not meaningfully engaged with wider agencies and services also crucial for reducing reoffending and that they continue to be dominated by CJSW which remains reluctant to meaningfully engage with them. Furthermore, CJAs have been unable to develop strategic assessments into resource allocation so decisions are not made based on evidence and they have introduced an unhelpful political element into the management of community justice. The question of how to achieve national consistency with locally tailored delivery has not been answered by CJAs, and chief officers report that this can only be achieved with more robust performance management than currently exists. Many agencies also feel that rather than rationalising the management of community justice, CJAs have added to an already cluttered

landscape of agencies involved in offender management in Scotland (see also Audit Scotland, 2012; Commission on Women Offenders, 2012). One chief officer commented that CJAs raise the question about whether such a body can ever act as both a scrutiny body and a partnership body. If it attempts to do both, it ends up doing neither particularly well.

The fortunes of the NAB were comparatively worse. Those who sat on it reported a disinterest from the Labour minister and her team to listen to evidence presented and, following the change in administration in 2007, there was a feeling that bureaucrats in the Justice Department did not encourage the NAB's continuation, preferring instead smaller advisory groups which they could control better.

All in all, the reforms of CJSW under the Scottish Labour Party, which were diluted in the first instance due to coalition politics, fell away largely with the SNP's victory in the 2007 Parliament election.

The 'Redesigning the Community Justice System' reforms

The Scottish Prisons Commission (2008) was a landmark moment in Scottish penal reform (McNeill, 2011) and, although diluted in the Parliamentary process, nonetheless resulted in legislation passed which sought to abolish prison sentences of three months and under, and which created a new, single community penalty, the Community Payback Order which would replace all existing community penalties. The intention of the commission, and subsequently the government, was for community penalties to become the default sanction for low-level offending (Scottish Prisons Commission, 2008). Although levels of reoffending have moderately reduced over the past decade (Scottish Government, 2014a), the prison population continues to rise (Scottish Government, 2014b) and, in the context of a government which has publicly spoken about the need to reduce the prison population (Scottish Parliamentary debate 2009; Scottish Government, 2008b), the need to improve community sentences if they are to be regarded as the legitimate default sanction in Scotland, has contributed to renewed calls for reform of community justice.

The momentum for reform escalated with the publication of two critical reports into community justice in Scotland. The first examined provisions for female offenders which concluded that there are 'inherent barriers in the structure and funding for CJSW which greatly inhibit the potential to reduce reoffending' and that 'radical transformation is required' (Commission on Women Offenders, 2012). The report argued that this would not disconnect the service from other local services and that a single national service would increase its status and influence,

increase integration between actors, reduce inconsistency and improve accountability and leadership (Ibid.; Angiolini, 2013).

The second, perhaps more damning, report came from Audit Scotland, which argued that the landscape of bodies involved in reducing reoffending in Scotland was crowded and complex with competing structures and accountability arrangements. It was also very critical of the ability of CJAs to rationalise this landscape arguing that although CJAs have enabled greater partnership working, they have made little progress on reducing reoffending primarily because of their structure and constitution and their inflexible funding arrangements (Audit Scotland, 2012).

Between them, the two reports illustrate the continuing concerns relating to a lack of accountability, the inefficiency of organising services across 32 units, a cluttered landscape of service providers, inconsistent provision and a lack of integration between CJ and other public services. That these concerns have remained little changed over five decades, despite repeated reforms, is noteworthy and it is not surprising that the issue of CJSW reform remains on the Scottish policy agenda.

As part of phase two of the government's Reducing Reoffending Programme (Scottish Government, 2014c), in 2012/2013 the Justice Department published plans to once again reform community justice. Gone is the populist language of 'correctional agencies' or 'Tough Options', instead a more muted title of 'redesigning the community justice system' was favoured. The justice minister at the time was on record saying the 'status quo is untenable' (Scottish Government, 2012) and although he spoke about the need for cultural change, it is structural change which lies at the centre of the proposals once again. One of the options for reform was a 'single service model' which would be a non-departmental public body and, while maintaining the values and principles of social work, would not be part of social work departments or under local authority control (Ibid.).

Following consultation, the government opted for a compromise which seeks to create national oversight, but which nonetheless leaves CJSW in the control of local authorities. CJAs would be abolished and delivery of CJSW would be handed over to existing local planning bodies, Community Planning Partnerships (CPPs), which have the remit of bringing together a range of bodies including local authorities, health boards, housing authorities and relevant Third Sector organisations and of engaging with communities on their plans. There are 32 CPPs in Scotland, one for each local authority area. All existing employees of CJSW would remain within their social work teams. In order to create

national oversight, the Scottish Government will also create a new national body and national strategy which will set the strategic direction nationally and also provide a unified set of measures against which performance can be measured. The national body will also have the ability to commission services nationally 'if required' (Scottish Government, 2013a).

The rationale for these proposals is the perception that this model is better able to provide leadership, strategic direction, profile and status. Whereas the police, prisons and young people have clear leaders, community justice does not and it is unable to speak with a single voice at the top table. Resolving this would also help to raise the legitimacy of community sentences to the Judiciary (Scottish Government, 2012), indicating the continued belief that a lack of legitimacy in community justice is perceived to influence the ongoing rise of the prison population.

The desire to remove the service from social work and the social work ethos, present in previous reforms, is absent now: the new service will remain firmly embedded in social work and local authorities, albeit with the creation of a national body to create greater status, oversight, accountability and consistency.

In the context of reduced Holyrood finances in the future and an increased agenda of integrated services (Commission on the Future of Delivery of Public Services, 2011), abolishing CJAs and handing over CJSW delivery to an existing body can be seen as a desirable rationalisation of the public sector landscape (see also Miller, 2013). However, if CJAs were created in order to reduce the inefficiency of delivering a service over 32 units, then handing delivery over to another planning body also organised over 32 units does not seem entirely logical, although CPPs would, at least, integrate CJSW into a wider network of public services.

The success of the new proposals will depend first on the ability of CPPs to prioritise CJSW in a local planning environment in which there are many other competing demands. One key question will be whether the number of people in prison will be a performance measure for each CPP. Second, success will depend on the ability of the new national body to hold CPPs and local authorities to account and provide real national leadership, unlike its predecessor the NAB.

The redesigning of community justice proposals will require primary legislation to make the necessary structural changes and it is uncertain whether this will occur before the next Scottish election in May 2016. Their eventual shape is therefore very much unknown and there is every

chance that what emerges at the end of the process may be considerably different to the current proposals.

That these proposals have been publically endorsed by local government, which praised the then Cabinet minister's consensual approach (Scottish Government, 2013b), shows that, whatever misgivings there are in central government about local authorities' ability to deliver services, there remains a reluctance to remove it from their hands entirely at this stage. This may be due to the fact that the government has just removed another justice service from local authority control with the creation of Police Scotland and so to wrestle yet another service from their hands would be regarded as unwise (particularly in the context of a need to keep the Scottish polity on side in the run up to the independence referendum (McNeill, 2014; Mooney et al., 2014)). The political timing may simply have made it impossible to risk confrontation with local government once again.

However, the location of CJSW within local authorities may, it has been argued, foster a kind of conservatism within the service. Subject to repeated calls for reform as detailed above, there may be a tendency for the service to 'look inwards' rather than embrace a more dynamic approach to developing practice and incorporating the latest research. The 'readiness for change' within the service may in fact be hampered by its structural position within local authorities (McNeill et al., 2010; McNeill, forthcoming). It is important to note that removing CJSW from local authorities need not inevitably entail the removal of its social work underpinning. As McNeill argues, 'what matters is not where social work is located, but what it stands for' (2013). However, those within CJSW management continue to resist any move which would remove its current location from within local authority social work (Miller, 2013).

Concluding comments

The current administration has indicated a desire to maintain the social-work ethos of the service and its place within local authorities for the time being. Although much will depend on the outcome of the election in May 2016, at the moment there seems little appetite in Scottish political circles for more radical reform. Though we should be careful not to romanticise a more welfarist or collaborative approach to policy-making in post-devolution Scotland in both justice (Munro et al., 2010) or wider public policy (see for example Stewart, 2013), the degree of private involvement and structural reform which has wreaked havoc on

the Probation Service in England and Wales seems, for the moment at least, very unlikely in Scotland.

The mixed successes of the CJAs and of the Tough Option groupings before them highlight the persistent difficulty of introducing democratic processes into criminal justice management. However, although vested interests and populism are less easily avoided by political actors, moving decisions 'behind closed doors' to be taken by unaccountable elites is not something we should wish to return to either (Loader, 2006; Loader and Sparks, 2010).

The history of CJSW reform in Scotland also illustrates the continued perceived link between the quality of community justice and the rise in number and cost of the prison population. While this may be due to the actual ability of community justice to promote desistence, the perception within the judiciary that CJSW is a legitimate enough sanction for it to become 'the default' is arguably as important and has underpinned the repeated calls for reform in Scotland.

Any account of community justice reform in Scotland over the past decades must acknowledge the crucial role played by the changing dynamics of central/local relations. The ability of local authorities to deliver a dynamic and consistent service and the perceptions of this at a national level have been central. Alongside a concern about the ethos and values of the service, part of the reason why CJSW continues to be under the aegis of local government, is because local government views any attempt to remove it from its control as creeping centralisation. CJSW's location within local authorities has certainly protected it from various attempts at reform over the decades, which, while preventing some of the more populist proposals of the Labour-led coalition, may also, as argued above, have prevented more progressive reform within the service.

However, it is important to note that it is not only the issue of vested interests which prevents central government imposing changes on local government. There is also a greater tradition of co-operation between central and local government in Scotland than exists in England and Wales (McGarvey, 2012) and central government is less able to interfere with local government services (Keating, 2010). As the example of Police Scotland shows, this does not mean that reform of a locally organised service is impossible, but rather that the occasions on which it does occur are chosen carefully. Many of the problems with CJSW might be resolved were it were not organised over 32 units over the small geographical area of Scotland and the political element of local authority involvement were removed. However, this is very difficult for

central government to impose when it requires local government's support on other crucial policy areas (most recently the SNP's promise to freeze council tax which is now in its 7th consecutive year).

Community justice reform also tells us something about the structure of Scotland's political institutions and their mediating effects on rapid changes to policy. Whereas Westminster operates a first-past-the-post electoral system, Scotland's version of proportional representation (PR) means that ruling administrations are likely to be composed of either a minority or a coalition (making the SNP's majority victory in 2011 even more remarkable). Thus major decisions requiring primary legislation will, more often than not, undergo the process of compromise and negotiation that minority or coalition rule requires, leading to a more moderate and less changeable penal agenda (Lacey, 2008; Tonry, 2007). Were it not for the fact that Scottish Labour were in coalition with the Liberal Democrats in the second term of the Scottish Parliament, it is far more likely that Scotland would have created a single correctional agency along with a raft of other New Labour policies.

However, coalition politics is no guarantee of a more moderate penal agenda. The current coalition government at Westminster has been able to introduce an astonishing degree of private involvement into probation in England and Wales, which illustrates that other political factors are important too (Lacey, 2012). The fact that the SNP was returned to power in 2011 with a majority, something the constitution of the Scottish Parliament makes unlikely (Keating, 2010), would in theory make it much easier for it to push through more radical reforms. However, it continues to be more moderate and pragmatic than its predecessors due to factors including ideology and the desire to shore up support in the run-up to the independence referendum (Mooney et al., 2014). Nonetheless, the fact that the two main political parties in Scotland, the SNP and Labour, are to the centre left, shifts the whole political axis to the left (Keating, 2010). This, together with the constitution of the Parliament meaning that ruling administrations are likely to be composed of either coalition or minority, indicates the possibility of a more stable penal outlook ahead than that which faces England and Wales.

As argued above, community justice in Scotland has been heavily influenced by the dynamics of multi-level governance and the structures of Parliamentary politics. Political institutional structure is central to understanding differing penal climates (Lacey, 2008) and the example of CJSW reform in Scotland suggests we should pay closer attention

to the penal state (Garland, 2013) in understanding penal change more broadly.

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10

Developing Local Cultures in Criminal Justice Policy-Making: The Case of Youth Justice in Wales

Stewart Field

Introduction

This volume seeks to assess the explanatory power of different ways of understanding how criminal justice policy relates to practice. How far should practice be seen as something that is shaped by central government and implemented from the top by legislative and administrative command? How far should practice be seen as more localised, negotiated at a number of levels between relatively autonomous groups of practitioners in which relationships with the centre are more diffuse and indirect and where influence runs in both directions? This chapter reflects on recent Welsh experience in relation to youth justice as an example of the ways in which local relationships between practitioners and policy-makers may shape the development of local cultures in the making of criminal justice policy and its implementation in practice. I will try to show the ways in which Wales provides a particularly rich and complex example of multi-relational negotiation of practice. The argument is not that this is something unique to youth justice in Wales. Criminal justice (and especially youth justice) in both England and Wales is founded largely on coordinate rather than hierarchical institutional relationships (to adopt Damaska's terms, 1986). Insofar as different agencies (such as the Crown Prosecution Service, magistracy, police and probation) rarely have hierarchical powers of direction and command as between each other, much depends on inter-professional dynamics (often played out at a local level). But I will argue that the localised negotiation of practice between policy-makers and practitioners has paradoxical effects in its impact on the 'dragonization' of youth

justice in Wales. This is the claim sometimes made that youth justice in Wales demonstrates a distinctive emphasis on the primacy of welfare and children's rights, which can be contrasted with an England more influenced by neo-liberal policy discourses based on the management of risk. The symbolic force of such claims should not be underestimated: the affirmation of a distinctive set of values with reference to the English 'other' may enable local politicians and practitioners to put those values more consistently into practice. But the very nature of negotiated local practice means that there is significant variation in youth justice cultures in both Wales and England and those differences may be as important as differences between Wales (taken as a whole) and England (taken as a whole).

Devolution and national frameworks for the formation of youth justice policy in Wales

As a result of the Government of Wales Acts 1998 and 2006, certain specified matters are devolved to the National Assembly for Wales and can be subject to what is effectively legislation as well as administrative initiative from the Welsh Government (WG).[1] If one sees youth justice as the outcome of the combined responses to youth crime of the police, Youth Offending Teams (YOTs), courts and the secure estate, then some elements of that response are devolved and others not. The criminal justice system itself is not devolved and the statutory powers and responsibilities specific to the youth justice system are common to England and Wales. Yet the YOTs, charged with organising intervention in the community and providing reports, information and advice to the courts, are created by and within local authorities. Local government is devolved and so YOTs are interdisciplinary teams drawn mainly from public services for the delivery of which responsibility has been devolved to Wales: youth and social services, health and education. The police and probation services are the exceptions: they are required by statute to provide officers as members of the YOT but responsibility for these matters is not devolved. The Youth Justice Board, a non-departmental public body based in the Ministry of Justice in London, has key statutory functions applicable to both England and Wales but these are mainly of an advisory and monitoring nature: setting standards, giving advice on and disseminating and promoting best practice.[2]

This adds a significant twist to the earlier observation that youth justice in both England and Wales is governed by complex coordinate institutional relationships. The twist is that in Wales these coordinate

practitioner relationships are rendered even more complex by divided political responsibilities. How then to coordinate the action of youth justice practitioners when they are answerable to a variety of different agencies and even different legislative and governmental bodies? This question is all the more pressing when the key political bodies are talking different policy languages. The Crime and Disorder Act 1998 (CDA, 1998) introduced New Labour's new youth justice policy which defined the primary goal of intervention as being crime prevention: responding to the child's needs and welfare became merely one means to pursue that primary goal. On the other hand, the devolved policy towards children developed in Wales from 1998 began very quickly to develop a distinctive primary stress on joining a welfare vocabulary to that of children's rights. The response of the then Welsh Assembly Government (WAG) and YJB was to negotiate a way forward which enabled reconciliation of these different policy inflections: the result was the 'All Wales Youth Offending Strategy' (AWYOS), a joint document agreed originally in 2004 (now see WG/YJB, 2014). The strategy was worded in a way that reflected at a number of points what some academics (Drakeford, 2010; Haines, 2010) identified as a distinctively Welsh stress on seeing those coming into the youth justice system as 'children first, offenders second'. The document provided a joint definition of general aims and underlying principles. This in turn created the need to develop 'bespoke' policies for Wales consistent with the strategy and to implement them on the ground and thus an additional institutional layer was created in which that policy formation and implementation could be 'negotiated' between the WG and the YJB.

Key to this bespoke arrangement are the YJB Cymru and the Wales Youth Justice Advisory Panel. The YJB Cymru exists as a separate division within YJB with functions that go beyond those of regional teams in England. Like regional teams in England, part of its work is influencing practice on the ground by setting and monitoring standards, identifying and promoting good practice inter alia by giving advice and making grants. But it also has a distinct part to play in the policy-making process because it works with WG and YJB to agree ways that policy can be tailored to the distinct emphasis of the AWYOS (Morgan, 2009, pp. 55, 73). The current head of YJB Cymru sees it as fulfilling two major roles.[3] First, it takes the broad strategies of YJB and WG and formulates more detailed policy options appropriate to that strategy and puts those options to YJB and WG. Second it is involved in the implementation of the chosen strategy and policy options, for example by the provision of guidance and training or the commissioning of new services. Thus it

can be seen as a bridge between policy and practice, at a point at which making that bridge has a particular political significance and sensitivity.

The second distinctive institution is the Wales Youth Justice Advisory Panel (WYJAP) which is jointly convened by the WG and the YJB. Under the agreement between the two, its primary purpose is to 'assist the Welsh Government and the YJB to implement policy that prevents offending and reoffending by children and young people in Wales'.[4] It both 'oversees' the implementation of YJB strategy in relation to Wales and advises the WG on policy in relation to the provision of services to children and young people made 'vulnerable by offending'. WYJAP was originally set up at a time when developments in Wales and London were thought to require an arena to manage certain significant tensions: not just between the 'new' youth justice's primary focus on crime prevention and WG's accent on 'children first' but also between the very logic of devolution and that of detailed centralised monitoring using new public management techniques. In more recent years, there has been less tension between England and Wales requiring mediation by YJB Cymru and WYJAP: as Tony Blair was replaced in 2007 by Gordon Brown and then in 2010 by the new coalition government, both the accent on formal intervention through the criminal process and centralising new public management has diminished. This has been reflected in the shift from a YJB led by Norman Warner (a figure close to New Labour) to one led by several figures more keen to encourage initiatives in Wales, reflecting a more child-centred and diversionary approach.[5]

Sitting between two arms of government, the relationship of the WYJAP to youth justice practice in Wales is indirect rather than direct. Its formal role is to advise and guide WG and YJB (rather than YOTs, police and magistrates) on matters of policy and implementation. It is in essence a stakeholder group comprising senior representatives of key services in Wales involved in dealing with young people involved in, or at risk of, offending (with academic representation from the Welsh Centre for Crime and Social Justice). Meeting three or four times a year, the panel considers the latest youth justice statistics and performance indicators, hears presentations from practitioners about distinctive practice in Wales and receives reports on proposed changes. It offers advice on how changes might or might not work within the different sectors of practice, considers issues from the constituent agencies and its members take back information to their parent organisations,. It thus provides a context for discussing the implementation of AWYOS and feeding back to WG and YJB. So while the 2014 reworking of the strategy was not drafted in WYJAP it was commented upon and amended as a result of

those comments. It does not determine the particular set of key performance indicators applied in Wales, but it has provided a framework for them to be discussed and refined.

Local negotiation of youth justice policy and practice in Wales

Thus, both the YJB Cymru and WYJAP provide a distinctive institutional framework for developing youth justice policy in Wales. But it is less clear that this produces a distinct approach to youth justice common to Wales. This is because youth justice requires coordination and negotiation, not just between the Youth Justice Board in London and Swansea and the Welsh Government in Cardiff, but also between individual YOTs and Welsh Government, between YOTs and Local Authorities and between YOTs, the four Welsh police forces and local benches of magistrates. As Rod Morgan pointed out in his 2009 report to the Welsh Government on devolution of youth justice, many of the key elements of the administration of youth justice are currently a matter for local authorities (Morgan, 2009, p. 19). The precise arrangements for rendering YOT managers accountable to the local authority itself vary across Wales, but in the end that line of accountability leads to local authority chief executives and elected councillors rather than the Welsh Government. And that overall responsibility is exercised with a great deal of discretion: under s 39 Crime and Disorder Act 1998 local authorities have a statutory duty to constitute a YOT and to fund it, but how they do so is a matter for each local authority. The evidence is that not only do funding formulae differ but that, more generally, where YOTs sit within the framework of their local authority varies significantly across Wales. Morgan, on the basis of widespread interviews with actors in Welsh youth justice, concluded that both governance arrangements (such as the constitution of the YOT Management Board) and the relative priority accorded to youth justice by particular local authorities varied significantly across Wales. So the nature and shape of youth justice provision within Wales varies significantly in the light of the way relationships between 15 YOTs are formally constituted and informally negotiated with 22 local authorities.

Neither the YJB in London nor in Swansea has the power to issue individual directions to YOTs as to how to perform its functions. Its statutory functions under the CDA 1998, s.41 are primarily defined in terms of monitoring practice, advising ministers (for example in relation to national standards) and promoting good practice, inter alia by using

grant-making powers. It became associated in its early years with the use of new public management techniques of auditing, setting key performance indicators and providing financial incentives to pursue those targets. But the centralising image that that gives has to be seen in context: these indirect levers of influence had to be used exactly because there are no direct levers enabling the YJB to direct YOTs as to how to perform their functions. So YOTs decide what kinds of programmes to provide in the community (for example, particular offending-related programmes or support and treatment in relation to addiction or mental health). Furthermore, they decide whether to do this directly, in co-operation with other YOTs or to sub-contract provision out to the voluntary or commercial sectors. And the balance of spending between interventions for young offenders and general social crime prevention is also a matter for YOTs.[6]

This high degree of legal autonomy makes the views of YOT managers critical to the approaches and priorities adopted on the ground (particularly where the members of the local YOT Management Boards are not driving any particular agenda on youth justice). How far these are child-centred and rights-based, or otherwise steeped in the terms of AWYOS, and how far they are rooted in delivery standards common to England and Wales will largely be a matter for particular YOT managers. Almost all of them in Wales participate in the YOT Managers Cymru Forum. This does provide an opportunity to discuss matters of mutual interest and, given that there are now only 15 YOTs in Wales, this provides a genuine opportunity to develop common policy.[7] But this depends not only on managers' dynamism but also their view of the need or usefulness of a common approach to particular issues.

If that gives an impression of great localised power within YOTs, it is an image that must be qualified by their need to negotiate with other centres of local power within the youth justice system, particularly two other prestigious and powerful institutions also founded on traditions of local autonomy: the police and local magistrates. The doctrine of constabulary independence still leaves substantial discretion to chief constables in relation to operational matters. Although the negotiation of policing priorities is now substantially shared with police and crime commissioners, this merely adds another local variable to the factors potentially influencing youth justice practice. Lay magistrates have traditionally defended their discretion to administer criminal justice in accordance with their notions of the values of the local community (Skyrme, 1983, p. 2; Parker et al., 1989, pp. 78–80, 171–172). In the youth courts, they have substantial discretion to determine sentences:

YOTs may advise and inform but cannot dictate solutions except insofar as they determine the locally available programmes for intervention. During the course of an empirical study of youth justice in South Wales (Field, 2007; Field and Nelken, 2010) we interviewed a number of members of Welsh YOTs in 2002–2004: they emphasised that building the credibility of the YOT and its interventions in the eyes of local magistrates was essential to exercising influence over sentencing. Bateman and Stanley's study (2002) of youth justice sanctioning identified wide variations across YOTs in both Wales and England and suggested that particular local relationships of trust or mistrust between YOTs and magistrates were a key explanatory variable. In Wales that has meant wide variation in rates of custody across the principality (Morgan, 2009, pp. 97–98).

This means that the nature of practice in Wales (and probably in England too) is strongly shaped by the local relationships of particular YOTs. For example, one of the practice developments often associated with the 'dragonization' of youth justice in Wales is the Swansea Bureau. Developed from 2006 before full implementation in 2008, this is a diversionary initiative that uses a form of restorative conferencing but one in which the young person speaks first and is the centre of the process (there is no victim present) (Haines et al., 2013). It was an initiative developed between the Swansea YOT manager and the local police divisional commander, with evaluations conducted out of the Swansea Centre for Criminal Justice and Criminology. At various times leading figures in the YJB in London have been supportive of such local initiatives and have been keen for them to be properly evaluated with a view to broader dissemination. This is now very much the approach of YJB Cymru too. But it was the partnership between the local YOT and police that was the central driver behind implementation.

'Dragonization' of Welsh youth justice?

This should encourage some degree of scepticism or at least agnosticism in relation to claims of the 'dragonization' of Welsh youth justice, at least insofar as that seems to imply that there are characteristics common to Welsh youth justice that are distinct from those evident in England. Devolution and the negotiations it requires between the YJB and the WG do introduce an additional layer of coordinate rather than hierarchical relationships into the making of youth justice in Wales. But youth justice in both England and Wales – and this includes practices thought to be distinctively Welsh, such as the Swansea Bureau – is

necessarily largely made at a local level. This calls into question characterisations founded on simple bi-polarisations: variations within both Wales and England may be as great or greater than those between Wales and England.

The extent to which the presence or absence of a distinctive Welsh approach can be identified through a quantitative analysis of outcomes is a moot point. To make authoritative comparisons, one would need to control for input (for example by matching Welsh YOTs with English YOTs with similar youth crime problems). In the absence of such controlled comparisons we can say that raw data do not suggest major overall differences in outcome or performance (Morgan, 2009, pp. 20–22 and Appendix 2). Custody rates in Wales as a whole do not differ significantly from custody rates in England as a whole. On the other hand custody rates within both England and Wales are extremely variable. Furthermore, the use of pre-court disposals, first tier and community penalties have followed similar trajectories in England and in Wales (Thomas, forthcoming). The differences between Wales and England again seem small in comparison to the variations within both nations.

Modelling the formation of youth policy and practice in Wales: From influence to partnership?

Enough has been said to emphasise that youth justice practice in Wales is being negotiated at a range of institutional levels and does not conform to any top-down model of the relationship between policy and practice. In part this is the product of a distinct political and institutional framework in Wales which creates a particular need – and a distinctive institutional site – for negotiations between YJB and WG that have no direct equivalent in England. However, as we have also seen, that adds only an additional layer of negotiation to what is, even within England, a complex set of coordinate relationships between YJB, local authorities and the various partner agencies, YOTs, police and magistrates. Indeed, the range of diverse relationships that need to be negotiated and the diversity of sites of negotiation is such that it is hard to draw a clear line between policy-making, policy implementation and practice. So the very separation that is posited by any top-down formulation of the relationship between policy formation and implementation becomes problematic. If youth justice in Wales is produced by a range of institutions in complex multi-layered relationships of interdependence, it might make sense to think of this in terms of 'policy networks'. This is a concept developed within political science

by Rod Rhodes in trying to understand the relationship between central and local government (1997). He wanted to get beyond either a top-down presentation of local authorities as implementing national policies determined and supervised by central departments or more pluralist presentations which seemed to give local authorities a great deal of discretion to make and implement policy. Rhodes felt that neither model captured the contingent nature of relationships between agencies involved in policy-making and implementation. He saw local government institutions as neither dependent nor independent but rather characterised by complex and varied relationships of interdependence (Rhodes, 1997). He argued that when coordinate agencies are fragmented and specialised in their functions, outcomes depend on negotiations, but these do not take place in a pluralist universe in which each agency has equal influence. Power shapes these relationships in that different agencies have different resources that can be used to shape outcomes. He distinguished five types of resource: legal-constitutional, hierarchical, financial, information and expertise and, finally, political authority.

How far can one trace the influence of such resources on negotiations between youth justice agencies? Within the confines of this paper and without up-to-date detailed empirical data, I can only hope to be suggestive of interesting lines of possible explanation. But if constitutional-legal resources are constituted by the allocation in statute or case-law of legal powers to direct or legal duties to obey, then within the context of coordinate relationships, such resources play only a limited role in determining policy and practice. We have seen that the duties imposed by the Crime and Disorder Act 1998 on the YJB and local authorities are very broadly defined. The YJB has duties to monitor and advise but YOTs and local authorities are only required to provide information and reports to the board (s 41). Local authorities have a duty to provide youth justice services and establish a YOT (ss 38–39) but how those services are provided and the YOT is constituted is a matter for the local authority (s 40). YOTs have a legal duty to carry out the functions set out in the Youth Justice Plan (s. 39(7)) established by the local authority. But generally YOTs do not have a legal duty to follow instructions from the YJB, whether it be based in London or Swansea. And of course neither local authorities nor the YJB have any power of compulsion in relation to local benches of magistrates. Thus the legal powers of any agency within the system to compel another do not tell us very much about how influence is really exercised in the construction and implementation of policy.

The way in which youth justice practice emerges from the interrelationships of several distinct agencies also limits the influence of hierarchical resources in the sense of the authority to issue commands and to require compliance conferred by the position of an actor in an organisational hierarchy. Such hierarchies operate within police forces, YOTs and local authorities and within the Youth Justice Board. But the key relationships are often those between these distinct hierarchies. And once again the doctrine of judicial independence limits the extent to which Ministry of Justice or Courts Service can control local magistrates. This seems to make the last three resources identified by Rhodes particularly important as levers of influence within the youth justice system. First, the use of financial resources may enable the YJB Cymru, local authorities and, to a certain extent, the Welsh Government to exert influence over YOTs.[8] In particular, the Youth Justice Board, like the local authorities, has the power under CDA 1998 to make payments or grants to YOTs (ss 38–40) but, unlike the local authorities, has no duty to provide youth justice services or routinely finance YOTs. Rather, its grant-giving power is linked specifically to its duty to promote best practice. So YJB Cymru can threaten to withdraw all or part of its funding without any fear that it may be in breach of a legal duty to provide direct services. It can attach terms and conditions to funding and has on occasion not just threatened but actually suspended elements of funding where YOTs have been perceived to be failing in relation to particular elements of national standards or aspects of governance. The Welsh Government provides less of the overall funding for YOTs but has a significant Youth Crime Prevention fund: it monitors the spending on the basis of criteria developed with YJB Cymru. The criteria therefore in turn influence the policy and practice of those actors who want funding.

Rhodes also picks out information and expertise as an important resource in the playing out of negotiations within policy networks. Insofar as particular actors within the network are perceived to have expert knowledge and/or access to authoritative data or research findings this can enable them to exercise influence over other actors. Interviews conducted for earlier research with youth justice magistrates and YOT practitioners in Wales in 2002–2004 illustrated this process in the particular context of the relationship between the two (Field, 2007). The constitutional principle of judicial independence combines with magistrates' conception of themselves as representatives of their particular community (Parker et al., 1989) to produce a highly localised youth court culture. Apart from the appeal system and broad sentencing guidelines, magistrates cannot be told what to do. But in our interviews,

many magistrates stressed the way that they essentially relied on what they regarded as the expert recommendations of their local YOT when making decisions about community orders (Field, 2007). More broadly, the monitoring powers of the YJB mean that YJB Cymru has access to an enormous amount of data about trends in youth crime and the responses of the youth justice system. This can, for example, be used to challenge magistrates' conviction that their distinctive local response is justified by distinctive local conditions and experience. But access to research, data and inspection reports is also used to reinforce the credibility of YJB Cymru's advice to WG, local government agencies, YOTs, police services and PCCs about what constitutes best practice.

The significance of finance and information in negotiations around policy and practice may seem fairly evident. The influence of 'political resources' as conceived by Rhodes may be less obvious. This is the public legitimacy and authority that is associated with democratic election and the public support that it is assumed to reflect. But here too there are possibilities. The distinctive inflections that have been given to youth justice policy in Wales through the intervention and participation of a democratically elected WG may draw rhetorical and persuasive power from that association. Actors within Welsh youth justice may find others referring to the AWYOS or particular policies of WG to reinforce the need for action. This is a useful argumentative tool even for an institution like the YJB Cymru whose 'arms-length' relationship with government situates it far from a direct source of political authority. And a more direct way of using 'political resources' is to raise concerns with the Welsh Government who can then directly play the political authority card. How powerful this is as a form of influence relative to levers like finance and information is hard to gauge without detailed empirical research: there are suggestions that many practitioners in YOTs still have little awareness of the detail of Wales' 'children first' policy (Thomas, forthcoming). It may be that the significance of different resources will vary for different agencies and different practitioner levels within each agency.

Rhodes' analysis of policy networks in terms of resources and their impact on influence in negotiation may provide useful tools for understanding the way policy and practice is constructed in youth justice that goes beyond assumptions of either top-down imposition or pluralist negotiations on the ground. But how far is it adequate to see youth justice policy-making in Wales as simply a matter of agencies exercising levers in relation to each other? Actors, particularly if they move fairly freely between agencies, may share certain values and purposes

in a way that enables them to adopt common approaches rather than arriving at compromises on the basis of respective power and influence. For example the relationships of some YOTs with YJB Cymru might, at least in relation to some issues, become a genuine co-production of policy and practice. This is certainly an ideal which at least some of those involved in policy-making and implementation in Wales articulate. Perhaps the strongest claim for evidence of this kind of relationship is the Practice Development Panel. The YJB itself describes this as stemming from a 'strong culture of partnership working' in Wales and as based on collaboration between the research community, practitioners, the Welsh Government and YJB.[9] In essence the Effective Practice Team of YJB Cymru looks for areas of promising practice innovation around Wales. This could be from within the voluntary sector but mainly comes from YOTs. Particular quarterly meetings might be grouped into themes around for example, compliance and engagement, health and education. YOTs present their innovative practice for 15–20 minutes and this is followed by a Q&A session in which other practitioners from various backgrounds can offer informal peer review with further input from academics, WG policy leads and YJB Cymru staff. The discussion seeks to identify potential strengths and potential limits or difficulties of the practice and to encourage and facilitate more systematic evaluation (perhaps involving the academic members of the panel). It is out of the Practice Development Panel that new systems of case-management have been developed and disseminated. The YJB Cymru has been keen to encourage this but for at least some YOTs this has been a genuinely collaborative process: the author, in giving an early version of this paper to an audience including Welsh youth justice practitioners was corrected by a YOT manager for suggesting that the YJB Cymru was trying to 'sell this' to Welsh YOTs. As far as the YOT manager was concerned they had been involved in the whole process of development through the Practice Development Panel.

Even with the advantage of the smaller size of institutions in Wales, which more easily permits the development of ongoing relationships of trust and confidence, practice development is not always going to feel like co-production. Relationships between local police, local benches of magistrates, particular YOTs and YJB Cymru are likely to be variable. A triage system that works in Cardiff may not work in Newport because of differences in the capacity of local police and YOT to work closely together. To YOT managers who are highly experienced practitioners, some of the practices of monitoring – for example, requests for further information about recent statistical trends – may, even on the reduced

scale of recent years, still feel wearying and unnecessary. Do these recent changes in small cohorts require the time and effort necessary to further examine them now? Those being monitored and those monitoring may well take a different view at least some of the time. Different YOTs may well vary in their preparedness or willingness to see their relationship with YJB Cymru as one of partnership and not performance management. Some may be keen to seek advice (for example through the PDP) while others may be keen to avoid close scrutiny (either because they feel confident of their own ability to practise autonomously or out of a spirit of defensiveness). For those reluctant to engage it may be that YJB's levers of indirect influence (particularly finance) are critical. For others, there may be a relationship conceived by both parties as more a partnership. In the absence of detailed interview evidence with actors across youth justice institutions in Wales it is not possible to do more than identify the range of possibilities. But the smaller size of Wales, with only 15 YOTs and four police services, offers the possibility of building long-term relationships of personal trust and confidence which bridge policy and practice. Certainly this is the kind of relationship to which the current senior officers of the YJB Cymru aspire.

Towards conclusions: From myth to reality?

What does this tell us about the nature of the making and implementation of youth justice policy in Wales? Does it confirm or deny the suggestion that devolution has created a localised policy-making process that has promoted 'dragonization'? The argument has been that any all-Wales dimension to practice is mediated by the institutional independence of local authorities, YOTs, benches of magistrates and police services that both permits and necessitates more local negotiation of practice. These variable, localised youth justice cultures within Wales are rooted in a fragmentation of system that is shared with England. This makes it very hard to see youth justice in Wales as an established common practice rooted in diversion and welfare, particularly if one seeks to contrast it with a risk-based scaled intervention common to a neo-liberal England. The variations within Wales and England are too significant and the distinctions between outcomes in Wales (as a whole) when compared to England (as a whole) too uncertain to justify this kind of stereotyping. But Welsh devolution and the sense of a distinctive identity that it feeds (and feeds off) may have two important effects. First, the distinctive institutional arrangements generated by devolution may combine with the smaller scale of the relevant networks to enable

policy-makers and advisers, practitioners and academics to get to know each other in ways which open up the possibility of genuine partnership (or at least sustained dialogue) between them. Yet it has been emphasised that partnership or active dialogue are not continuous features of the making of youth justice on the ground across Wales. Much of the coordination between agencies that exists within the system remains a product of persuasion and negotiations in which the indirect levers of influence exercised by YJB Cymru and the WG play an important part. But there may be a second sense in which 'dragonization' – while not (yet) reflected in common outcomes or even consistent processes – may help to reinforce the distinctiveness of Welsh youth justice over the coming years. It may be a 'useful myth' which will help to build a cohering identity for a fragmented system by affirming a distinct and different set of values by reference to the 'other' on the far side of Offa's Dyke. The very image of Welsh youth justice as an inclusive policy community resisting the neo-liberalism and new public management of England may itself give collective dialogue around policy options a particular appeal. The Silk Commission (2014, p. 115) recently recommended further devolution of the making of youth justice in Wales without spelling out exactly what that might entail. Given the criticism voiced in both the Morgan Report (2009) and the WG's recent Green Paper (2012) of the variable governance structures and priority accorded to youth justice across Wales, it may be that this will lead to stronger levers of influence over local management and governance arrangements. The paradox might be that greater devolution of policy-making *to* Wales might lead to greater centralisation of policy-making *within* Wales. What seems critical is that any new structures are designed to facilitate and develop existing attempts to construct genuine dialogue and partnership between policy-makers, practitioners and academics.

Notes

1. Beyond the sources cited in the text, my observations relating to the working relationships within and between the distinctive policy-making institutions in Wales draw on three semi-structured interviews conducted in 2014 with interviewees with extensive, direct experience of the construction of policy, practice and its evaluation in Wales. Two have direct experience of the work of the Wales Youth Justice Advisory Panel and two of the Youth Justice Board Cymru. All three have direct experience of the Practice Development Panel. My thanks to all three of them for sharing their time and experience. Responsibility for the overall interpretation and the particular assertions in the text remains mine.
2. Crime and Disorder Act 1998, s 41.

3. Interview with Dusty Kennedy, Head YJB Cymru, August 2014.
4. See Terms of Reference under, wales.gov.uk/topics/childrenyoungpeople/safe/youthjustice/wyjap/.
5. The change in direction corresponded with oversight of the YJB being shared by the Ministry of Justice and the Department for Children, Schools and Families and became expressed in the Youth Crime Action Plan 2008.
6. There is still a tendency in Wales for social crime prevention to remain within YOTs rather than becoming part of mainstream services.
7. Until recently there were 18, but Merthyr and Rhondda Cynon Taf (RCT) have merged to become Cwm Taf while Neath Port Talbot, Swansea and Bridgend have become Western Bay YOT.
8. The vast majority of YOT funding comes from YJB and local authorities, with only a relatively small percentage coming from the Welsh Government.
9. See generally YJB (no date) *A Blueprint for Promoting Effective Practice and Improving Youth Justice Performance in Wales,* http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/publications/corporate-reports/yjb/yjb-cymru-blueprint-2012.pdf, last accessed 4 November 2014. More specifically see YJB (no date) 'The Practice Development Panel', http://wccsj.ac.uk/thematic-networks/young-people-justice-and-community-safety/yjbpdp, last accessed 15 October 2014.

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11

Regulating Street Sex Workers: A Reflection on the Use and Reform of Anti-Social Behaviour Measures

Theresa Lynch

Introduction

A broad range of behaviour is covered by the concept of anti-social behaviour (ASB) and includes behaviour which is criminal (such as vandalism, graffiti and harassment) and incidents of disorder and everyday nuisance. Minor incidents of ASB may be trivial in isolation, but the cumulative impact of such behaviour can have a devastating effect on individuals and communities (Squires, 2008, p. 312; Field, 2003, p. 45; Wilson and Kelling, 1982, p. 5). Illustrative of the public concern with ASB in England and Wales, are the 2.1 million incidents of ASB which were recorded by the police for the year ending June 2014.[1] However, if we take into consideration the potential number of ASB cases reported to landlords and local authorities, as well as those left unreported, the total number of ASB incidents is likely to be far greater. In order to prevent incidents of ASB measures such as the Anti-Social Behaviour Order (ASBO) and the Criminal Anti-Social Behaviour Order (CrASBO) were implemented, which have been used to regulate street sex workers. It is impossible to say how many such orders have been issued against street sex workers (or, how many orders might have been breached) because the Home Office and local authorities are not required to keep records of the types of behaviour for which the orders were imposed. Following the implementation of the Anti-Social Behaviour, Crime and Policing Act 2014, the ASBO and the CrASBO will be replaced by two new measures. These measures are the Injunction to Prevent Nuisance and Annoyance (IPNA) and the Criminal Behaviour Order (CBO). It is highly likely that both the IPNA and CBO will also be used to regulate street sex workers.

This chapter does not disregard the fact that sex workers are a heterogeneous group which includes male, female and trans-gender workers. However, the focus here will be on street sex working women. The first section of the chapter will introduce the approach taken towards regulating street sex workers in England and Wales. This will be followed by an assessment of the ASBO and CrASBO and the problems associated with their use against street sex workers. Attention will then be turned to the policy rationale behind the new measures introduced by the Anti-Social Behaviour, Crime and Policing Act 2014. Finally, an assessment of the potential use of the IPNA and the CBO against street sex workers will be given. It will be concluded that ASB measures should not be used to regulate street sex workers at all.

From regulation to 'enforcement plus support'

The formal legal approach to sex work in England and Wales is regulation. Regulation aims not to suppress sex work in general but to control the excesses, abuses and disorder often associated with it. This regulatory approach dates back to the Wolfenden Committee which recommended changes to the laws regarding sex work and homosexuality (Wolfenden, 1957). The Wolfenden Committee defined sex work as 'a matter of private morality. The only exceptions . . . [being] . . . activities and behaviours which caused an affront to public decency or public nuisance' (Phoenix, 2008, p. 291). In defining sex work as a matter of private morality, the Wolfenden Committee's approach could be depicted as tolerant, perhaps even (especially for its time) progressive. However, as this part of the chapter will explain, subsequent policy reforms (outside of the remit of the Wolfenden Committee), have created 'an intolerant system of regulation, intervention and zero-tolerance policing strategies that target the most socially, economically and politically vulnerable and exclude women street sex workers for punishment or coercive state sponsored welfare' (Phoenix, 2008, pp. 290, 293).

The regulation of street sex work has been dominated by the Street Offences Act 1959, section 1 of which made it an offence 'for a common prostitute to loiter or solicit in a street or a public place for the purpose of prostitution'.[2] This offence has been explained on the grounds of nuisance, but the 'creation of a nuisance or giving of offence [was] assumed to be present simply by virtue of the public presence' (Childs, 2000). Soliciting has become the most commonly charged sex work related offence. In 2012, a total of 699 offenders were cautioned or found guilty of 'offences by prostitutes' (Ministry of Justice, 2013).

This regulatory approach was not subject to reform till the beginning of the millennium. Phoenix states that 'for the better part of the 20th century, policing prostitution translated into arresting, prosecuting and punishing (by fining) street-based sex workers for soliciting or loitering in a public place for the purposes of prostitution' (Phoenix, 2008, p. 38). Despite the lack of reform in terms of the regulatory approach to sex work, concerns were raised in the 1990s about the regulatory policy on street sex. The main problems, it was claimed, 'were that the policies did not limit the nuisance caused by sex work to neighbourhoods and residents any more than they addressed the social, political and welfare difficulties of those in prostitution' (Phoenix, 2008, p. 35).

At the same time as this concern was raised a number of independent support agencies, operating substantially but not exclusively with street sex workers, began to come to the fore (Phoenix, 2008, p. 39). By 1999, the police scaled down their direct regulation of prostitution, 'and instead worked in conjunction with the outreach projects . . . without resort to coercive, punitive, hard-line policing, arrest and conviction' (Phoenix, 2008, p. 40). The regulation of prostitution had made a significant move away from a criminalisation/enforcement agenda to one that focused upon welfare-based responses and multi-agency support (Matthews, 2005). This was viewed as a positive change in direction as it is generally acknowledged that a 'non-judgemental approach on the part of staff and volunteers in support projects is . . . vital to ensure engagement of sex workers' (Pitcher, 2006, p. 249).

Just as these independent support agencies were beginning to make an impact, the ASBO was introduced by section 1 of the Crime and Disorder Act 1998. Street sex workers were not a class of person originally envisaged as falling within the remit of this ASB measure (Labour Party, 1995). Yet, in March 2000, the *Independent* reported the first case of an ASBO being issued against a street sex worker (Sengupta, 2000). The recipient, Miss Simpson, had 45 previous convictions under the 1959 Act. She was prohibited by the ASBO from soliciting anywhere in the city of Derby. It has been said that the ASBO provided 'a potent mechanism through which local authorities and police constabularies could continue to clamp down on the activities of those most vulnerable . . . street-based sex workers' (Phoenix, 2008, p. 299). The use of ASB measures to regulate street sex work was a strategy that signalled 'a shift away from tolerating the exchange of sex for money, to an explicit abolitionist agenda (that is, abolishing prostitution)' (Phoenix, 2008, p. 297; Carline and Scoular, 2015, p. 110).

Reform of prostitution policy in England and Wales was initiated by the Home Office Setting the Boundaries Review (Home Office, 2000) and in 2004 the Home Office published its final consultation document on reforming prostitution policies and laws (Paying the Price). The result of the Home Office review exercise was *A Co-ordinated Prostitution Strategy and Summary of Responses to Paying the Price*, published in early 2006 with a further review two years later entitled *Tackling the Demand for Prostitution* (Home Office, 2008). It is argued that this period of review(s) offered an opportunity for the adoption of provisions premised on the notion of prostitution as work. Unfortunately, those engaged in the reform process 'failed to consult sex workers', and 'alternative approaches – such as the use of managed zones to deal with street sex work . . . were rejected without discussion' (Scoular & Carline, 2014, p. 611). As Phoenix explicates: 'The main trend which emerged both within the policy documents and in relation to practice has been a drift away from non-judgmental, harm-minimisation support towards a move to abolish prostitution altogether' (Phoenix, 2008, p. 44).

The phrase 'commercial sexual exploitation' proliferated in the review policy documents and 'was deployed, in effect, as a synonym for prostitution. Men were constructed as the problem and consequently the aim was to shift the burden of criminal justice interventions from sellers on to buyers' (Scoular & Carline, 2014, p. 610). This was all in an effort to promote the rehabilitation of the sex worker, evidence of which can be found in legislative reforms that followed the policy review process and are aimed at targeting both the purchaser of sex and promoting rehabilitation for the sex worker. For example, section 14 of the Policing and Crime Act 2009 introduced a strict liability offence of paying for the sexual services of a prostitute subject to exploitation. This offence has had limited effect, however, because of difficulties regarding enforcement and the declining number of convictions (Scoular and Carline, 2014, p. 613). In terms of rehabilitating sex workers, Engagement and Support Orders have also been introduced through section 17 of the Policing and Crime Act 2009. The serving of these orders would replace a fine (Home Office, 2010, pp. 1.3).

In order to complete an Engagement Support Order, three sessions will need to be attended with a court-appointed supervisor (a person who may belong to one of the specialist support services, depending on the needs of the individual (Home Office, 2010, pp. 3.2)). The aim of the meetings is to engage those involved in sex work with vital services that can help address the issues underlying their involvement in sex work (Home Office, 2010, pp. 1.5). Ultimately, the goal of the

Engagement and Support Order is to help street sex workers find a route out (Home Office, 2010, pp. 1.5) since the lives of street sex workers are often depicted as being 'precarious, complex and chaotic' (Pitcher, 2006, p. 236). It has been well documented that street sex workers face particular difficulties such as 'drug and/or alcohol use', 'homelessness', 'low self-esteem', 'harassment from police and communities', 'criminalisation' and 'negative experiences of accessing statutory services' (Pitcher, 2006, p. 236; Phoenix, 2008, p. 293). Such difficulties can make exiting prostitution 'an exceptionally difficult and lengthy process' (Carline and Scoular, 2015, p. 107), often involving periods of re-engaging in sex work and requiring multi-agency support (Hester and Westmarland, 2004; Cusick et al., 2011).

At face value, the introduction of the Engagement and Support Order appeared to be a positive step towards tackling the difficulties faced by street sex workers. Indeed, commentators had suggested that these orders signalled a 'renewed welfarism' (Matthews, 2005). Yet the practical implementation of the Engagement and Support Order has been criticised by some. Scoular and Carline, for example, say that Engagement and Support Orders impose a system of 'forced welfarism' (Scoular and Carline, 2014, 2015) through which the State can sidestep its responsibility for the social factors causative of prostitution, in favour of an 'individualised responsibilisation' agenda (Scoular & O'Neill, 2007). The Enforcement Support Order is justified not only in terms of reducing the public nuisance of sex work (as before) 'but also to help or force, women into making better choices. The best choice is, simply to exit prostitution' (Phoenix, 2008a).

It is suggested that the justification for such a policy, which shifts the burden of criminal justice interventions from sellers on to buyers, is 'the official recognition of women's victimisation in prostitution' and 'recognition of the violence and exploitation that many women in prostitution experience' (Phoenix, 2008, pp. 44, 297). Scoular and Carline argue convincingly that policy in England and Wales is 'becoming increasingly simplified into rigid definitions of criminal responsibility that divide the world into victims and victimizers' (Scoular & Carline, 2014, p. 622; Bernstein, 2001). Furthermore, these 'victims' of 'prostitution are constituted as women for whom the responsible local authority should not provide non-judgmental support, but support and services aimed specifically at getting women to "exit", or leave prostitution' (Phoenix, 2008, pp. 44, 297). The desire to 'help', or force street sex workers to exit, reflects an abolitionist approach to sex work which has

been described as 'taking hold across Europe' (Scoular and Carline, 2014, p. 608; Weitzer, 2013).

An abolitionist approach is justified against a backdrop of radical feminist thinking which constructs prostitution as a form of patriarchal violence against women.[3] According to this discourse, 'female sex workers are seen as passive, disempowered victims of violence, [and] their clients as male exploiters' (Levy, 2013, p. 3). The abolitionist approach may be a useful rhetoric, employed to give the impression that the State can tackle the sex industry, but as Levy and Jakobsson (2014) point out, 'it is likely to be the sex workers who pay the price for it' as they face 'progressively hostile environments and the increasing expectation that the only way to be recognised, to have rights and be safe, is to exit' (Scoular & Carline, 2014, p. 613). It is contended that rather than trying to reduce supply and demand via criminal justice measures, it would be better to think about how the criminal law could, indeed should, 'be used alongside other social initiatives to improve conditions and safety in and out of sex work' (Scoular & Carline, 2014, p. 622).

There remains a distinct lack of political will in England and Wales to abolish offences relating to those who sell sexual services. This is notwithstanding research that has shown the ineffectiveness of a hard-line approach and which has called for alternative, inclusive approaches to provide much-needed drop-in centres, counselling services and practical assistance for sex workers (Sagar, 2007, p. 165). The current system in place to regulate street sex workers is best described as an 'enforcement plus support' approach. Such an approach ensures that support mechanisms and enforcement strategies are not mutually exclusive (Phoenix, 2008, p. 46; Home Office, 2006, p. 39). An illustration of this can be found in a Home Office document entitled *A Co-ordinated Prostitution Strategy and Summary of Responses to Paying the Price*, which was published in the aftermath of the deaths of five women who worked as street sex workers in the same red light district in Ipswich in 2006. In 2008, Steve Wright was sentenced to life imprisonment for the murder of the five sex workers. The Home Office document states as follows:

> for a woman who is identified as soliciting or loitering . . . she will be told about various support agencies in the locality at the same time she is given her first prostitutes' caution. The second time that she is identified, she will be 'encouraged' to access the support services

> and given her second caution. The third time she is seen, she will still continue to be encouraged to access the support services, at the same time as being arrested and charged with soliciting or loitering. On the fourth time . . . she will be arrested and charged and an ASBO on conviction will be applied for.
>
> (Phoenix, 2008)

Although a recent report from the All Party Parliamentary Group on Prostitution did suggest abolishing the offence of soliciting (APPGP, 2014), criminal sanctions and enforced rehabilitation remain a possibility with the continued use of ASB legislation.

The use of ASBOs and CrASBOs to regulate street sex workers

The ASBO was implemented by Section 1 of the Crime and Disorder Act 1998 and subsequently became known as the 'stand-alone ASBO' or 'ASBO on application'. The ASBO was deemed necessary to provide protection in circumstances where it was not possible to obtain a conviction via the traditional criminal law and/or where victims were too afraid to provide evidence (Labour Party, 1995; Home Office, 1999). In addition, it was an attempt to allow the criminal justice system to recognise the accumulating distress for victims where campaigns or repeat instances of minor ASB have occurred (Hansen et al., 2003, p. 82; Squires, 2008, p. 312; Field, 2003, p. 45).

The concept of a multi-agency approach was central to the Crime and Disorder Act 1998 which introduced the ASBO. In particular, the Crime and Disorder Act 1998 made it mandatory for there to be co-operation with every probation committee or health authority operating within the geographical area affected by the crime reduction partnership. In theory, the multi-agency approach provided the necessary legislative framework for the development of a holistic approach to dealing with problems associated with street sex work:

> one might reasonably have expected extra-legal initiatives to include welfare and housing strategies, poverty-action plans, the development of health, education and child support programmes, leading ultimately to practical 'exit' strategies for those women and girls who want to leave the streets.
>
> (Sagar and Jones, 2001, p. 883; see further Sagar, 2007; 2008)

It did not take long, however, before cracks started to appear in the multi-agency approach set out in the act. Home Office Guidance issued in 1999, for instance, suggested that applicants for an ASBO need not 'demonstrate that every other remedy has been exhausted before applying for an order' (Home Office, 1999, para 3.2; Burney, 2002, p. 481). It became clear that, in an attempt to encourage the serving of more orders, the multi-agency approach should be by-passed when necessary. Sagar, however, offers a note of caution:

> In the context of tackling on-street sex work, fast tracking ignored the fact that social/welfare agencies working independently (as other agencies, including the police) can achieve negligible results . . . Fast tracking also neglects the complexity of female sex work.
>
> (Sagar, 2007, pp. 159, 165)

An application for an ASBO could be made to a magistrates' court sitting in its civil jurisdiction. A large number of authorities were able to apply for an ASBO, including police, registered social landlords, local authorities and environment agencies. The test for granting an ASBO was to be found in section 1(1) (a) and 1(1) (b) of the Crime and Disorder Act 1998. Section 1(1) (b) states that it must be necessary to grant the order to protect persons from further anti-social acts by the named person. Section 1(1) (a) describes the type of behaviour that needed to be established prior to an order being granted. The behaviour is described as that which 'caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as the defendant'.

The ASBO is best described as a 'hybrid' order because, although classified as civil in nature, the criminal law was invoked to punish breaches of the order. The civil status of the ASBO allowed the legislature to evade 'the procedural and evidential obstacles of using existing criminal law mechanisms to regulate certain forms of offensive conduct' (Simister & von Hirsch, 2006, p. 175). As the case of R (on the application McCann and others) v Crown Court at Manchester; Clingham v Kensington and Chelsea Royal Borough Council (2002) illustrates, for example, hearsay evidence was admissible in ASBO proceedings. However, it was also confirmed in McCann that the standard of proof was the criminal standard, this is beyond reasonable doubt. This aspect of the order was criticised by practitioners for making applications costly and cumbersome (Home Office, 2013). One significant feature of ASBOs was that they tended to be publicised through court records and the local media. The civil nature of the ASBO assisted in the practice of publicising the names,

addresses and photographs of the recipients. Some authorities adopted a name and shame approach to street sex workers subjected to ASBOs which served to stigmatise the street sex worker.[4]

The maximum penalty for breach of an ASBO was an unlimited fine and/or five years imprisonment (section 1(10) and (11) of the act). Not unlike the sanctions for contempt of court, criminal proceedings for breach of an ASBO were brought primarily because an order was breached: the nature of the contravening behaviour was irrelevant. The ASBO was not necessarily effective at changing the behaviour in question, however, as the breach rate of 57% shows.[5] The potential to imprison street sex workers for breach of an ASBO undermined section 71 of the Criminal Justice Act 1982, which abolished the use of imprisonment for 'common prostitutes' found guilty of loitering or soliciting in a street or public place for the purpose of prostitution. Until 1982, the sentencing system was built upon the Wolfenden Committee's recommendation that the punishment for prostitution-related offences should start with a fine and, where offenders were persistent, should become progressively more severe and culminate with imprisonment of up to three months. The partial decriminalisation of prostitution, including the abolition of imprisonment for offences of soliciting, was a reform which 'was achieved after extended public discussion and parliamentary debate' (Simester & von Hirsch 2006, p. 191). Yet the use of the ASBO 'permitted de facto disregard of these reforms, with virtually no discussion' (Simester and von Hirsch, 2006, p. 191).

ASBOs allowed a court to prohibit a wide range of specified forms of behaviour where it was deemed necessary to protect the public from further anti-social acts. Examples of prohibitions include exclusion zones and curfews, as well as non-association clauses. Many of the prohibitions served upon street sex workers have been criticised for being unrealistic. Burney, for example, cites the case of a prostitute who was prohibited from carrying condoms upon her person when in the vicinity of the actual clinic which provided her with free supplies (Burney, 2009, p. 112). Breach of such a prohibition would appear not only foreseeable, but also inevitable.

ASBOs that prohibited prostitutes from soliciting, or which excluded them from a specified area altogether, were designed to act as a deterrent. The use of the ASBO in this way mirrored a policing strategy which favoured periodic clampdowns and 'zero tolerance' campaigns that endeavoured to tackle the existence of street sex workers in public spaces. The ASBO operated to discriminate against street sex workers, a fact illustrated by there being no known examples of such orders being

imposed on the purchasers of sex. To add insult to injury, the law's framing and application is class biased: affluent prostitutes who do not work on the street are very rarely subject to such orders since '[t]heir discrete activities are tolerated, unlike those of on-street sex workers, who tend to be the poorest and the most vulnerable of the women working in the sex trade' (Childs, 2000, p. 213). In October 2013 Mariana Popa died as a result of stab wounds she received whilst working as a street sex worker. According to an article published in *The Observer*, the Metropolitan Police were running an enforcement campaign ('Operation Clearlight'), which forced women such as Mariana, who had previously worked with colleagues in relative safety, to work on their own in the interests of avoiding detection by patrolling officers (*The Observer*, 2014).

But while ASBOs may have provided some temporary respite for locals, Jones and Sager note 'what research there is, indicates that exclusion will not deter street prostitution but simply relocate or bury the problem' (Sagar, 2007, p. 156). 'Crucially,' it is added, 'both displacement and concealment may pre-empt any possibility of "rehabilitation" by placing the women out of reach of assistance from health and welfare agencies' (Sagar and Jones, 2001, p. 881; see also Sagar, 2007, p. 156). In this way, it can be viewed that displacing street sex workers from deprived areas was as much to do with the 'reclaiming of public space for the respectable', as it was with 'the nuisance associated with on-street commercial sex' (Hubbard, 2004, p. 1689). As such, it can be concluded that use of the ASBO to regulate street sex workers was based on the notion that the 'real' problem of street sex work was the distress that prostitution caused to the wider community (Flint, 2006, p. 4; Phoenix, 2008a, p. 302; Burney, 2009, p. 6; Sagar and Jones, 2001).

Surprisingly little use was made of the ASBO when it was first introduced.[6] Yet this did not curtail the political will for the use of the order and a raft of legislation followed the Crime and Disorder Act 1998 which extended the powers available to impose an ASBO. For example, the Police and Reform Act 2002 extended the powers to impose ASBOs following conviction in criminal proceedings in addition to sentence (CrASBO). The order was granted on the basis of the evidence presented during criminal proceedings and any additional evidence provided after the verdict. The court could make an order on conviction on its own initiative, or one could be requested by the prosecution, who would have made representations to the court in support of that request. Further reform came in the Anti-Social Behaviour Act 2003, the Housing Act 2004, the Serious and Organised Crime and Police Act 2005, the Drugs Act 2005 and the Criminal Justice and Immigration Act 2008.

The order on conviction was a civil order and had the same effect as an ASBO made on application – it contained prohibitions akin to an ASBO. Furthermore, the order would last for a minimum of two years. Breach of a CrASBO was a criminal offence, with a maximum penalty of five years. An order could be imposed on anyone aged ten or over who had acted in an anti-social manner and where the order was necessary to protect people from further anti-social acts. It is argued that the use of ASBOs and CrASBOs to regulate street sex workers did not prevent the nuisance caused by sex work to neighbourhoods and residents and they failed to address the social, political and welfare difficulties of those involved in street sex work. It is believed that such failures indicate that ASB measures should not be used to regulate street sex workers. However, despite these failings, the new ASB measures (IPNA and CBO) set out in the Anti-Social Behaviour, Crime and Policing Act 2014 replace the ASBO and CrASBO but will continue to be available to regulate street sex workers. Nothing in the debates during the passage of the bill suggests otherwise.

Reform: The 2014 act (IPNAs and CBOs)

From 2011, the governing coalition outlined a commitment to reform the powers available to deal with ASB. In response to this, in 2011 the Home Office launched the consultation More Effective Responses to Anti-Social Behaviour. A year later, in May 2012, the Home Office published a White Paper entitled *Putting Victims First: More Effective Responses to Anti-Social Behaviour* (the White Paper included a summary of responses to the earlier consultation). The consultation and subsequent forms set out to streamline the existing ASB legislation, 'replacing 19 of the complex existing powers . . . with six simpler and more flexible new ones' (Explanatory Note, 2014, para 13; Home Office, 2012, p. 3). The reforms were deemed necessary to ensure professionals had 'effective powers that were quick, practical and easy to use, and acted as real deterrents to perpetrators' whilst 'giving victims a say in how agencies tackle ASB' (Explanatory Note, 2014, para 13; Home Office, 2012, p. 3) (16). The upshot of this consultation and review process was the Anti-Social Behaviour, Crime and Policing Act 2014.

The IPNA was implemented 'to stop or prevent individuals engaging in anti-social behaviour quickly, nipping problems in the bud before they escalate' (Home Office 2014, p. 20).[7] The IPNA (presented as the Crime Prevention Injunction in the 2012 White Paper) appears in Part 1 of the Anti-Social Behaviour, Crime and Policing Act 2014 and is a purely civil injunction available in county courts for adults and in youth courts

for those under the age of 18 (Explanatory Note, 2014, para 114) (17). This is a change from the ASBO on application, for which applications were heard in magistrates' courts. An injunction may be made against a person aged 10 or over if the court is satisfied on the balance of probabilities (the civil standard of proof) that the person has engaged in, or is threatening to engage in, ASB and determined it is just and convenient to grant the injunction (Explanatory Note, 2014, para 115). Unlike the ASBO, the requirement of 'necessity' is not part of the test for serving a civil injunction (Home Office, 2014, p. 22).

Section 1 of the 2014 act sets out a two-part test for granting an IPNA. Where the applicant is a housing provider, local authority or chief officer of police and the ASB is related to a housing context, it is defined as 'conduct capable of causing nuisance or annoyance' (subsections (1)(b) and (c) and (2)). This is similar to the previous Anti-Social Behaviour Injunction which had been used by registered providers of social housing and local authorities (in relation to their housing-management functions) to stop ASB (Explanatory Note, 2014, para 115). Outside of the housing context, ASB is defined as 'conduct that has caused, or is likely to cause, harassment, alarm or distress to any person' (Explanatory Note, 2014, para 115).

The IPNA can include prohibitions or requirements that assist in the prevention of future ASB (section 1(3); Explanatory Note, 2014, para 116). Requirements have been introduced in an attempt to combat the underlying causes of an individual's ASB and could include, for instance, attendance on an alcohol- or drugs-misuse course (Explanatory Note, 2014, para 116; Home Office, 2012, para 3.11). Home Office guidance further suggests that: 'Including positive requirements addresses a major flaw of the ASBO – that by focusing solely on prohibitions and enforcement, the order fails to change the behaviour of the perpetrator, and therefore fails to stop breaches and protect victims' (Home Office, 2012, para 3.11).

There is no minimum or maximum term of the IPNA for adults. However, in the case of injunctions against under-18s, the maximum term is 12 months (section 1(6); Explanatory Note, 2014, para 118). It was hoped that the IPNA would 'build on the success of the Anti-Social Behaviour Injunction, which social landlords use effectively to stop problems and protect victims, and which is faster and easier to use than the ASBO' (Home Office, 2012, para 3.10). In an attempt to build on the Anti-Social Behaviour Injunction and to bring it more in line with the breadth of the ASBO, the range of agencies who can apply for the IPNA will be much broader than that of its predecessor (Home

Office, 2012, para 3.10). The list of agencies set out in section 5 of the Anti-Social Behaviour, Crime and Policing Act 2014 include: a local authority; a housing provider; a chief officer of police (inclusive of the British Transport Police); Transport for London; and the Environment Agency.

A court may vary or discharge an IPNA upon application by the original applicant or respondent. A variation may take a number of forms, including the addition of a new prohibition or requirement or the removal of an existing one, the extension or reduction of the duration of an existing prohibition or requirement and the attachment of a power of arrest (Explanatory Note, 2014, para 125). In addition, a power of arrest may be attached to any prohibition or requirement contained in an injunction if the court believes that the individual has used violence, or threatened violence against another person when they committed the ASB, or if there is risk of significant harm by the respondent to others (Explanatory Note, 2014, para 125, 126).

Breach of an IPNA by an adult will be deemed contempt of court, punishable in a county court with a term of imprisonment of up to two years or an unlimited fine; breach of an injunction by someone aged under 18 could result in a youth court imposing either a Supervision or Detention Order (Explanatory Note, 2014, para 127). Unlike ASBOs, breach of the IPNA will not be a criminal offence in itself, thus meaning that individuals dealt with for low-level, persistent ASB might avoid the stigma of a criminal record. For those who do not change their behaviour, however, there are still serious sanctions available to the court, including the passing of a custodial sentence (Home Office, 2014).

The second new ASB measure implemented by the Anti-Social Behaviour, Crime and Policing Act 2014 is the CBO. This order will be imposed by a criminal court (Crown Court, a magistrate's court or a youth court) upon being convicted of a criminal offence 'to tackle the most persistently anti-social individuals who are also engaged in criminal activity' (Home Office, 2014, p. 28). The CBO replaces the CrASBO and the Drinking Banning Order upon conviction. A court will be able to make a CBO against an offender only if the prosecutor applies for it; this would usually be at the instigation of the police or local authority (Explanatory Note, 2014, para 133, 137). Unlike the current process, local authorities would be able to apply directly to the prosecution without requesting the permission of the police (Explanatory Note, 2014, para 133, 136).

The 2014 act sets out the two-part test for granting a CBO, as follows: first, an order may be made against a person over the age of 10 if

the court is satisfied that the offender has engaged in behaviour which caused, or was likely to cause, harassment, alarm or distress to any person; and second, the court considers that making the order will assist in preventing the offender from engaging in such behaviour. The standard of proof would be the criminal standard, that is, 'beyond reasonable doubt' (Explanatory Note, 2014, para 134). The proceedings which give rise to the serving of a CBO could relate to wider relevant behaviour than that strictly proved through a criminal conviction (section 23(2)). Hearsay evidence, which may not have been admissible in the criminal proceedings, is likely to be allowed in Criminal Behaviour Order proceedings (Home Office, 2014, p. 29; Explanatory Note, 2014, para 139). This approach is synonymous with the CrASBO.

The duration of a CBO made against a person under 18 years of age must be for a fixed period of between one and three years (Explanatory Note, 2014, para 141). Reviews must be held every 12 months for offenders under the age of 18 (section 28, Anti-Social Behaviour, Crime and Policing Act, 2014). In the case of an adult, there is no maximum duration for the CBO and no requirement for review of the order (Explanatory Note, 2014, para 141). A court can vary or discharge an order upon the application of the offender or the prosecution (Explanatory Note, 2014, para 143). Like the IPNA, the CBO can include prohibitions and/or positive requirements that assist in preventing the offender from engaging in behaviour that could cause harassment, alarm or distress in the future (Explanatory Note, 2014, para 135; 140 and Home Office, 2012, para 3.14). In the remainder of this chapter, the potential effect of these new measures on street sex workers will be considered.

The potential use of IPNAs and CBOs to regulate street sex workers

Reform notwithstanding, several of the problematic features associated with the ASBO and CrASBO remain. Examples include: the potential to imprison; prohibitions; lack of multi-agency consultation; and publicity campaigns. In addition, it is argued that the availability of the positive requirements for both the IPNA and CBO is a further example of the move to towards an abolitionist approach to the regulation of street sex work.

For many, arguably, one of the key improvements in the 2014 act is the move away from the hybrid ASBO to a wholly civil IPNA and a CBO available following conviction (Bakalis, 2007; Ashworth, et al., 1995,

1998, Gardner et.al., 1998; Ramsay, 2010; Macdonald and Hoffman, 2010; Macdonald and Hoffman, 2010a). I contend, however, that this advantage is drastically undermined by the presence of the severe sanction of imprisonment which sex workers would face for breach. This will continue to single out street sex workers for enforcement and contradicts the general policy which abolished imprisonment for loitering or soliciting in 1982.

Both IPNAs and CBOs provide for the imposition of prohibitions. In this way, street sex workers subject to IPNA and CBO would be equally as likely to be subjected to the effects of prohibitions which exclude and displace. It is worth noting that one major difference between the IPNA and CBO and their predecessors (the ASBO and CrASBO), however, are the positive requirements which can be imposed. Positive requirements, in the context of street sex workers, could offer an opportunity to focus on long-term solutions by addressing the underlying causes of the offending behaviour. On closer inspection, though, it could be argued that these positive requirements have the potential to operate in a similar fashion to Engagement and Support Orders, by imposing a system of 'forced welfarism', which focuses on increasing social control on the most vulnerable sex workers (street sex workers). The assumption made by the introduction of positive requirements is that these will be beneficial for the individual street sex worker as well as the wider community. However, as Carline and Scoular explain when assessing the Engagement and Support Order,

> these benefits are not shared by all. Such models restrict social inclusion and citizenship to those who are deemed to be responsible citizens.
>
> (Carline and Scoular, 2015, p. 110; Sanders, 2009, p. 513)

It is suggested that in relation to the positive requirements which can accompany an IPNA or CBO, that those street sex workers who fail to operate within the limits of 'responsible citizens' will be unable to access support. In keeping with an abolitionist approach to street sex work, it is suggested that those who fail to accept support (abide by their positive requirements) and seek to exit sex work, are as unlikely as they would have been under the ASBO and CrASBO regime to be offered support. Following the implementation of the 2014 act, for the IPNA and CBO there is no requirement for consultation between the relevant agencies, except in relation to those under 18 (Explanatory Note, 2014, para, 122,

138). The Home Office has reaffirmed that the 2014 act provisions have 'deliberately kept formal consultation requirements to a minimum, to enable agencies to act quickly where needed to protect victims and communities' (Home Office, 2014, p. 28). This is a missed opportunity, in the author's opinion, to reintroduce a veritable multi-agency approach to assist street sex workers.

Home Office guidance on the Anti-Social Behaviour, Crime and Policing Act 2014 states clearly that publicity campaigns will continue following the introduction of the IPNA and CBO, 'making the public aware of the perpetrator, and the terms of the order, can be an important part of the process in dealing with anti-social behaviour' (Home Office, 2014, p. 25). It is likely, therefore, that street sex workers subject to these ASB measures will continue to suffer the effects of campaigns of 'naming and shaming' (Explanatory Note, 2014, para 131, 139, 145). Furthermore, while there is nothing to prevent the new measures being used to target the purchaser of sexual services, it is suggested that (as with the ASBO and CrASBO) this is not likely to happen since the target of the IPNA and CBO is likely to be street sex workers. In summary, it looks likely that the IPNA and CBO will duplicate several of the failings of the ASBO and CrASBO and, in light of their potentially damaging effects, their use against street sex workers should be reconsidered. Those scared of taking such a drastic approach should be reminded of what Childs has appropriately observed: 'where the damaging effects of laws outweigh their benefits, they can and should be eschewed, without this stance being regarded as supportive of the activity regulated' (Childs, 2000, p. 229).

Conclusion

This chapter began with a summary of the legal approach to street sex workers in England and Wales and explained that the official approach is one of regulation which began with the introduction of the soliciting offence in 1959. However, the current policy on sex work is now aimed at shifting the burden of criminal justice interventions from sellers on to buyers and to promote the rehabilitation of the sex worker. These policies have led to an 'enforcement plus support' approach for street sex workers, in which the support is aimed at getting women to 'exit' street sex work. The use of ASB measures against street sex workers can be positioned within this recent shift in policy, which no longer tolerates the exchange of sex for money and seeks to abolish sex work. The use of the ASBO and CrASBO to regulate street sex work operated to criminalise,

imprison, discriminate, stigmatise, exclude and displace street sex workers. In addition, these orders failed to prevent the nuisance caused by sex work to neighbourhoods and they failed to deal adequately with the social, political and welfare difficulties of those involved in street sex work. The present author argues that, rather than trying to reduce supply and demand via criminal justice measures, it might be better to think about how the criminal law could be used alongside alternative, inclusive approaches and initiatives like drop-in centres, counselling services which would provide practical assistance for sex workers and improve their conditions and safety in and out of sex work.

Unfortunately, an opportunity was missed when ASB policy review was taking place to tackle the issue of ASB and street sex workers and particularly to discuss more inclusive options for support. Instead we have the 2014 act which creates new ASB measures which can now be used against street sex workers. It is accepted that the new ASB measures (IPNA and CBO) overcome several of the structural and procedural problems of the earlier law. Even so, the IPNA and CBO will operate to mirror several of its failings. These failings include: the potential to imprison, the availability of prohibitions, a lack of multi-agency consultative approach and the availability of publicity campaigns. In addition, the availability of the positive requirements for both the IPNA and CBO is a further example of the abolitionist approach to the regulation of street sex work in England and Wales. In conclusion, it is submitted that, in light of their potentially damaging effects, the use of ASB measures against street sex workers should be reconsidered.

Notes

1. Data taken from the Crime Survey for England and Wales: http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-june-2014/stb-crime-stats–year-ending-june-2014.html.
2. The Policing and Crime Act 2009 abandoned the term 'common prostitute' in favour of the more neutral term 'person'. The offence of soliciting has been amended with a requirement that the soliciting and/or loitering be 'persistent' (two or more occasions within three months) by inserting section 51A into the Sexual Offences Act 2003.
3. For example, radical feminists such as Catharine Mackinnon, Andrea Dworkin, Janice Raymond, Melissa Farley and Sheila Jeffreys might well be in favour of this approach.
4. The practice of publicising ASBOs was declared legal in Stanley, Marshall and Kelly v Commissioner of Police for the Metropolis and Chief Executive of London Borough of Brent (2004) EWHC 2229 (Admin). For example, in Reading street workers' ASBOs are advertised on the police website with names,

addresses and pictures. See: http://content.met.police.uk/News/31-year-old-woman-given ASBO/1400022118923/1257246745756.

5. Home Office (2011) ASB Order Statistics England and Wales: http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/asbo-stats-england-wales-2011/.
6. Of the 4649 ASBOs issued to the end of 2004, only 466 were issued between 1 April 1999 and 30 September 2001 (Home Office (2013) Anti-Social Behaviour Order Statistics: England and Wales, Home Office. London).
7. The IPNA replaces a range of current tools including the ASBO on application, the anti-social behaviour injunction, the drinking banning order on application, intervention orders and individual support orders (Explanatory Note, 2014, para 114).

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Part III
Managing Policy Implementation

12

Managing Magistrates' Courts: A Loss of Local Control

Penelope Gibbs

Introduction

The tension between local and central services has played out in government over the last century. Ministers and their London-based civil servants are keen to gain and maintain control over policy and how it is implemented. Local politicians and other stakeholders say central control does not work and stifles innovation. There are many areas of justice which have see-sawed between local and central control, of which the administration of the courts is a good example. This chapter offers an overview of how and why the administration of magistrates' courts in England and Wales was centralised in 2003, and what implications that has had for local and other stakeholders.[1]

Before 2003, magistrates' courts were run by committees of local magistrates – magistrates' courts committees (MCCs). Each committee managed all the courts in its area with the help of a chief executive and of a justices' clerk, who advised on legal matters. Funding came indirectly from Whitehall and directly from the local authority. Lord Justice Auld's *Review of the Criminal Courts of England and Wales* in 2001 suggested that this system was inefficient, ineffective and unaccountable and the government seized upon Auld's recommendation to centralise the administration of all the courts (Auld, 2001). The centralised service later took on the management of tribunals too. Supporters of the centralised court service (Her Majesty's Courts and Tribunals Service) say that it has achieved economies of scale, provided more career opportunities for staff, enabled courts to work together better and has brought about a more effective system of justice. Critics suggest that centralisation has led to unnecessary court closures, the disempowerment of magistrates, the disappearance of the justices' clerk as a powerful local

figure, courts becoming distanced from local government, reduced local accountability and low morale among court staff.

What did local management look like?

Before 1949 local authorities managed the magistrates' courts in their area. An administrator employed by the local authority, who sat in council offices, did day-to-day tasks while decisions on how to manage the court were made by councillors sitting in committee.

During the early decades of the 20th century the justices of the peace (JPs), who were part-time and untrained, came under increasing criticism as being amateurish and often unsuited for the task of dispensing justice. A Royal Commission on JPs, chaired by Lord DuParcq, reported in 1948. Though it strongly defended the position of the JP within the judicial system, it proposed that the administration of magistrates' courts be modernised. The commission also recommended that courts be staffed by barristers acting as full-time clerks (justices' clerks) who could advise lay magistrates on aspects of their work. Parliament implemented these and other recommendations in the Justices of the Peace Act 1949. That act brought MCCs into being to administer the courts. Local authorities continued to fund the magistrates' courts, contributing 20% of the costs themselves and receiving 80% of the costs from the Home Office. The local authority delegated the management of the budget to the magistrates' court committee (MCC). Apart from the justices' clerk, all those sitting on the MCC (including the chairman) were magistrates. The MCC managed the budget, hired staff including the justices' clerk, organised training for magistrates and contracted services for all the courts in that area. From 1994, the MCC hired both a chief executive to run the courts (and to sit on the MCC) and a justices' clerk who gave legal advice to magistrates. Local magistrates gave their time voluntarily to sit on the MCC.

The move away from local management started well before 2003. In 1997 there were 105 MCCs, but they were soon reduced to 42, to match police areas.

Why were MCCs criticised?

MCCs were local, in that the magistrates who sat on them were local residents, but it is true that MCCs were not representative of the wider local community, or of criminal justice agencies. Other local stakeholders,

including district judges, had little influence. The MCC had no representation from the local council and none from court users. A frequent criticism was of inefficiency – that MCCs had no incentive to save money, that their independence prevented economies of scale and that their practices were too diverse.

One of the first central government critics was a civil servant, Julian Le Vay, who in 1989 carried out a review of magistrates' courts. He was concerned by the lack of accountability, as well as inefficiency, in MCCs:

> the (1949) Act left the justices' clerk with responsibility for day to day running of courts and court offices, but did not make clear to whom he was answerable (if at all), now that he was appointed by a body separate from the bench he served. Nor was central Government given any say in the level or use of resources it was committed to provide.
>
> (Le Vay, 1989)

Le Vay's criticisms were echoed and quoted by Auld in his 2001 report, which was commissioned by the government. Auld added many criticisms of his own, including that of MCC independence. He found that 'This results in inconsistency among themselves in implementation of national policy, in court practices and procedures and, indirectly, in local sentencing levels.' Auld also referred to the funding system for MCCs as 'cumbrous and inefficient and their dependence on local authorities for their court and other accommodation can obstruct orderly planning and fail to make optimum use of court space'.

Auld advocated a centralised criminal court, eliminating the separate management and existence of magistrates' courts and Crown Courts. Clearly such a change would require a centralised administration. But he still saw a role for local decision-making, recommending that there should be 'an executive agency providing a national service, but with maximum delegation of managerial responsibility and control of resources of an accountable local manager working in close liaison with the professional and lay judiciary'.

In the end, the Labour government was not persuaded of the case for a single criminal court, but it did take on the idea of centralising the administration of the criminal courts and abolishing MCCs, stating that 'the current fragmented court framework was divisive, inefficient and lacked national accountability' (Select Committee and Lord Chancellor's Department, 2003). In the *Justice for All* White Paper published in 2002,

the Lord Chancellor's Department proposed a single courts organisation and gave the advantages as:

- allowing judges and magistrates to be deployed more flexibly;
- delivering an improved service to the community, victims and witnesses;
- greater standardisation of procedures, management and culture;
- better performance, for instance, in speed of hearing cases.

Even so, *Justice for All* still emphasised the importance of keeping management of the courts local, at least to some extent. The new agency

> will build on the best attributes of both organisations to work to deliver decentralised management and local accountability within a national framework. The aim of the new agency will be to enable management decisions to be taken locally by community focused local management boards, but within a strong national framework of standards and strategy direction.
>
> (Home Office, 2002)

As this policy was translated into draft legislation and then implemented (in the Courts Act, 2003) it seems that the community focus and local accountability were somewhat lost. MCCs were abolished. A new centralised agency to manage all the courts, and a new structure of local boards and committees was created. But it turned out that these new local forums (courts boards) had no levers of power and responsibility and ended up as merely 'consultative', while financial power and accountability was assigned to the new centralised agency.

The government in 2003 accepted the importance of communication with magistrates on key decisions regarding the courts and agreed a protocol attached to section 21 of the Courts Act. Baroness Scotland, in introducing this, acknowledged that

> The partnership between judges, magistrates and the agency is fundamental to the work of the courts – therefore, good communication at all levels is essential . . . Our amendment offers magistrates a guarantee that they will be kept informed of matters affecting them, and they will be given the opportunity to give their views.

The problem with Baroness Scotland's assurance is that magistrates were given no guarantee that their views would be acted upon. From

a position of having power to hire and fire, to set local priorities and policy and to manage court spending, magistrates now had to make do with receiving information and being consulted.

The statements and assurances of government ministers at the time suggested that there was no intention to radically reduce local accountability. Baroness Scotland wrote in 2003: 'we rejected the model of a centralized agency in favour of greater local decision making and accountability across all the courts.... I cannot emphasize how much the Government is committed to local justice, and to taking account of magistrates' concerns' (Scotland, 2003). Chris Leslie MP, who steered the courts bill through the House of Commons as a junior minister, has said that the government had no intention of wiping out local control over the courts. They believed that the newly created courts boards would maintain local influence over administration.

It is not clear why ministers' intentions were not translated into policy and practice. Further research should consider the various roles played by civil servants, the draftsmen and scrutineers of the legislation as well as those tasked with implementing it, and also the effect of changes in ministerial personnel.

Were criticisms of MCCs fair?

Critics claim that the magistrates' court committees were insular and extravagant, spending huge sums of money on staff, with some MCC chief executives commanding six figure salaries in 2001. Supporters say such salaries were rare and that most MCCs managed their budget efficiently and effectively. Unfortunately no independent research has been conducted into the working and management practices of MCCs, so we are reliant on conflicting anecdotal accounts and just a few facts. The annual report of the Gloucestershire MCC for 2003 cites one member of staff in the £45,000–49,000 pay bracket and two in the £65,000–69,000 range. The Gloucestershire MCC annual budget was £3.7 million (Annual Report, 2002/2003). The Courts Inspectorate examined some MCCs on the eve of their demise. Ironically, many of the reports are very positive. South Yorkshire 'clearly understands its strategic role and has shown effective leadership'; Hertfordshire 'places commendable emphasis on corporate governance, and has shown leadership, not least in its early and sustained attention to equality and diversity'; and in Manchester 'the Committee and senior officers have an excellent grasp of both national and local context, and the MCC is justifiably highly regarded for its contribution to

inter-agency working'.[2] Perhaps MCCs were axed just as they were becoming more effective? To be fair, the range of views expressed to this author from interviewees suggests that MCCs were probably a mixed bag, with some being pretty efficient and others rather parochial and self-serving.

Ironically, some of those who served on MCCs have blamed influence from the centre as one of the causes of their inefficiency. John Hosking, a businessman and JP, chaired the Kent MCC between 1984 and 1988. This MCC wanted to extend a computer system, operational in one court, to the whole of Kent. The Home Office refused the extra budget required, because a national IT system was in development (the later notorious, Libra system). In reality, it took more than 16 years for that national system to be developed, years in which Kent was hampered by inefficient and incompatible systems.

Those employed by MCCs contrast them positively with the current arrangements. David Simpson, a recently retired district judge who was, in the 1990s, a justices' clerk in West London, has told the author that the old magistrates' courts were like a family – everyone supported each other and staff were passionately loyal and committed to 'their court'. David Simpson says the modern system of administration is impersonal and, to an extent, impenetrable – it is difficult to get hold of important bits of information, like the result of appeals to the Crown Court. Staff move on frequently and appear to be demotivated.

Some see the independence of local staff as a key reason why civil servants wanted to centralise administration. Just as magistrates were independent of central government because they held the purse strings locally, so the local court staff were independent of the centre. Their loyalty was to the MCC, to its chief executive and to the justices' clerk. Justices' clerks were often powerful local figures who were not afraid to fight for their court and who wielded huge influence over their bench and the MCC.

Why did magistrates relinquish control of MCCs?

MCCs were abolished in the Courts Act 2003 and they were dismantled over the following two years. In hindsight, it seems surprising that such a major weakening of magistrates' power and responsibility was successful. No research has been carried out on why and how MCCs were abolished. Harry Mawdsley, who was chairman of the Magistrates' Association from 2000 to 2003, explained to the author that at the time lay magistrates were pre-occupied with their very existence. They feared

that the Auld Report would recommend the abolition of lay magistrates, and their focus was on preventing that happening, rather than on preventing the abolition of MCCs. MCCs and their representative body, the Central Council of Magistrates' Courts Committees, did campaign fiercely against the impending changes, but the council was separate from the Magistrates Association, the most powerful advocacy body for magistrates. The opposition to the abolition of MCCs was not strong enough to stop it.

How are the courts run now?

Magistrates' courts are now run by Her Majesty's Court and Tribunals Service (HMCTS). HMCTS is an agency of the Ministry of Justice, run by a board chaired by Bob Ayling, formerly chief executive of British Airways. On the board sit senior staff members of HMCTS, two non-executive members and three members of the judiciary – the senior presiding judge, the head of tribunals and a district judge, Michael Walker. Accountability is to the board and from the board to the Lord Chancellor and the senior judiciary and, ultimately, to Parliament. HMCTS is the result of a 'merger' in April 2011 between Her Majesty's Court Service (set up by the Courts Act, 2003) and the Tribunals Service. It runs the administration of all civil and criminal courts (except the Supreme Court) and family courts as well as all tribunals. All those who work for HMCTS are civil servants, employed by the Ministry of Justice. Budgets are set centrally and allocated to each region.

How much influence do practitioners, magistrates and the local community have on courts now?

Having had immense power over the management of their courts, magistrates now have practically none and the local community even less. Boards and committees performing different functions were set up by the Courts Act 2003, but none has the statutory powers enjoyed by the MCC. The *Justice for All* promise of creating 'community focused local management boards' was never realised. In addition, magistrates have been barred from sitting on many of the boards and committees which help run the current justice system. Committees and boards set up by the Courts Act 2003, or since, were courts boards, local criminal justice boards, community safety partnerships and a series of judicial forums.

Courts boards

The 2003 act set up courts boards, on which sat local magistrates, members of the local community, courts users and at least one judge. They were presented as being a replacement for the MCCs. Courts boards were intended to improve the links between the community and the courts, and to give court users real influence over the administration of the courts. According to a 2005 statement from the Department for Constitutional Affairs:

> the Secretary of State expects Courts Boards and HMCS to work together to see that high standards of administration are delivered across the country, as well as meeting local needs. In order to achieve this, Courts Boards need to perform their role in a way that is constructive but challenging. They need to use their independent judgement to ensure that the perspective of the local community and those who use the courts is taken into account.
>
> (DCA, 2005)

Courts boards were to meet quarterly and to hold at least one public meeting a year. They were to 'offer an opportunity for local people to contribute to decisions like: where courts are located, how customer service can be improved, how the best use can be made of resources to deliver a high level of service across the jurisdictions: civil, criminal and family' (Ibid).

There is very little evidence on how courts boards operated and whether they succeeded in bringing community influence to bear on the administration of the courts. However, it is clear that they did not generate enough support to stave off their abolition. Lacking any real power or influence, they were soon seen as a drain on resources and in 2010, only five years after they first met, the Labour government moved to dissolve them. The coalition agreed with this policy and, in the Public Bodies Act 2011, courts boards were abolished. The saving of an annual cost of £450,000 was one of the reasons given for their abolition. A sign of their lack of influence is that their axing happened without a public murmur, though they did enjoy some support – of the 23 responses to the consultation on the abolition of courts boards, many more were against abolition than in favour. Those against abolition were concerned that independent scrutiny of the administration of the courts would be lost:

> There will be no medium for court administrators to hear the voice of the local community, to ensure that local and community issues

> are given adequate attention and there is no guarantee that Courts Boards functions will be exercised by any alternative means after abolition, particularly in the face of financial constraints.
>
> (Cited in Ministry of Justice, 2011)

In discussing the Public Bodies Bill in the House of Lords in April 2012, Lord Henley suggested that court boards were unnecessary, because other strong mechanisms existed for community, court user and magistrate consultation. He pointed to

> strong local relationships between HMCTS and local magistrates' bench chairmen. Additionally to these groups, Section 21 of the Courts Act 2003 requires the Lord Chancellor to ascertain the views of magistrates on matters of relevance to them. This will of course continue after courts boards have been abolished. As for engagement with members of the public, courts already use a variety of methods to engage with their local communities, such as open days, open justice week, representation at local community meetings, customer satisfaction surveys and mock trials. These methods provide more direct engagement with local communities than courts boards do.

The government also suggested that court user groups could take on some of the functions of courts boards. Lord Beecham, Labour Justice spokesman expressed concern that there was no current link between courts and local authorities, to which Lord Henley responded: 'Courts and the wider criminal justice system certainly try to work hard and liaise with local authorities and local authority groups, and they will look at how they can improve that in due course.' Despite Lord Henley's assurances, councillors and local government officials interviewed by this author felt that the relationship between HMCTS and local authorities was weak and had not improved in recent months.

The House of Commons Justice Select Committee in 2013 criticised the Ministry of Justice in general terms for its failure to foster local links:

> we have seen little compelling evidence of how it is seeking to engage with others within central Government, local government and the voluntary and private sectors. It will be essential for these different groups to work together more effectively, if momentum to transform the justice system is to be maintained.

Community safety partnerships

Community safety partnerships (CSPs) are made up of representatives from the police and police authority, the local council and the fire, health and probation services (the 'responsible authorities'). Community safety partnerships were established as statutory bodies by the Crime and Disorder Act 1998.

> The responsible authorities work together to protect their local communities from crime and to help people feel safer. They work out how to deal with local issues like antisocial behaviour, drug or alcohol misuse and reoffending. They annually assess local crime priorities and consult partners and the local community about how to deal with them.
>
> (Home Office, 2013)

They also work with other stakeholders, including community groups and registered social landlords. From 1998, magistrates sat on CSPs in some areas, but in May 2012 the Judicial Office sent out a circular preventing their participation 'The Senior Presiding Judge has decided that it is inappropriate for magistrates to either be members of CSPs or to fulfil an administrative support (including liaison) function for a CSP as part of their employment or other activity' (Judicial Office, 2012).

Local criminal justice boards

These local forums provide an opportunity for criminal justice agencies in a particular area to discuss issues which affect them. The CPS, HMCTS, the police, prison service, probation service, YOTs and the Legal Aid Agency are all represented. Neither judges nor magistrates are members.

Area judicial forums, judicial issues groups, judicial business groups and judicial leadership groups

In recent years the judiciary has made clear that judicial matters, such as court listings and work allocation, are the preserve of the judiciary and should be managed in judicial forums. These forums changed in 2014. Previously, the magistrates' liaison judge chaired an Area Judicial Forum which dealt with judicial matters in relation to the business of the magistrates' courts and coordinated with the Crown Court and other family courts. There were also Judicial Issues Groups (JIGs) – consultative groups set up to discuss issues affecting magistrates' courts in a particular area. JIGs were set up after the abolition of the MCCs, and had a not dissimilar membership. Each was chaired by a magistrate.

Like courts boards, their role was mainly consultative and they had no budgetary responsibility. JIGs considered judicial matters such as listing, rota arrangements and case management.

Area Judicial Forums and JIGs were both abolished in 2014 to be replaced by Judicial Business Groups (JBGs) and Judicial Leadership Groups (JLGs). The JBG fulfils a similar function to the JIG but there are fewer of them across the country – there is one for each justices' clerk area. A maximum of three bench chairmen can belong. JLGs discuss listing, judicial performance and so on at bench level. These changes in judicial governance have followed the trend towards centralisation and removing power from local magistrates. The key committee – the JBG – now operates at a regional rather than local level, and not all the bench chairmen are represented on it.

The Governance Working Group (2013), which recommended these changes, also suggested that 'regular court user groups for magistrates' courts should not be necessary'. Court user groups used to be held regularly in each magistrates' court and included representatives who attended that court – defence advocates, CPS, probation service, YOTs and so on. They provided a forum for users of the court to have some influence over its administration. The existence of court user groups had been given as one of the justifications for the abolition of courts boards. Now the abolition of court user groups represents a further diminution of local participation in the running of the courts. There remains no formal mechanism for court users to discuss their concerns.

As a result of these administrative and constitutional changes, there is a disconnection between local government and the courts, and between magistrates and court staff and other criminal justice agencies. All this has been accentuated by the closure of magistrates' courts.

The closure of magistrates' courts

Every town of any size used to have its own magistrates' court, some of which sat just once or twice a week. The number of courts has been steadily shrinking since 1900. Larger court buildings have been built in our cities, containing many court rooms. No fewer than 143 magistrates' courts were closed between 1995 and 2003, often in the teeth of strong local opposition. But, in 2010, Her Majesty's Court Service (HMCS) proposed that a further 142 courts be closed within the next two years. This proposal was unprecedented in scale, in suggesting that so many courts should be closed within such a short space of time.

HMCS consulted on all court closures and received a huge number of responses, most of which were negative. Senior Presiding Judge Lord Justice Goldring, expressed serious concerns about the impact of extra travelling time to more distant courts for all court users, and questioned the lack of detail about court usage in the consultation. Considering the scale of the closures, however, it seems that public protest was relatively muted. Three areas did launch legal campaigns, but these were all unsuccessful. The group in Sedgmoor in Somerset gave up their fight after issuing proceedings. Mike Dodden, former chairman of the Sedgmoor bench explained: 'We got the feeling that, although we had a strong case, the MoJ [Ministry of Justice] would find another way to close the court even if we succeeded. We didn't feel they had taken note of anything we had said, and we lost faith in the system.'

Pressure to close courts continues. The Ministry of Justice has been made subject to some of the most stringent cuts in government over the last two years, and it is said that some courts are still 'under-used'. But objections to future closures are likely to be muted, given campaigners' lack of success so far. As Donoghue (2014) has written: 'Greater centralisation risks removing the community dimension from the majority of criminal cases, and in turn undermining the fundamental principle of the lay bench as a democratic bridge between the community and the legal system.'

Courts are distanced from other agencies, and from their local community

Many of the public servants who use the magistrates' court are based in local authorities, or in regional centres. YOTs, social workers and community safety teams are based in local authorities and have regular business in the court. Court users are also reliant on housing, education and family support services, which are based in local authorities. Police and probation service areas have far larger geographical footprints but, in each case, officers are located in offices in the same towns and cities as local authority staff. But the central organisation of the courts means that court staff are not closely linked in to local services and may be located miles from the court user's local authority. There are now few boards or committees on which representatives of local criminal justice agencies and local authority services both sit. Further, local agencies have virtually no mechanisms through which to influence the management of the courts in their local area.

Local communities are almost completely divorced from their courts. Many people do not know where their nearest magistrates', family or civil court is, and they have no ownership of, or involvement in, courts except occasionally as users. The invisibility of courts to most members of the community is likely to exacerbate lack of confidence in, and understanding of, the criminal justice system.

All this is in contrast to some other jurisdictions. The United States has pioneered close links between community and court. The San Francisco Community Justice Center, for example, has an advisory board which meets monthly and holds a community town hall meeting bi-monthly. It is chaired by the resident judge who is the centre's coordinator and is composed of representatives of community-based organisations as well as the agencies that serve the court. Community courts have spread throughout the world. At the Neighbourhood Justice Centre in Collingwood, Melbourne, Australia, the Advisory Group is actively involved in circulating information, in initiating and participating in research, and in hosting activities such as Talking Justice, a series of community conversations (www.courtinnovation.org/research/community-courts-around-world).

There is an increasing gulf between the government's community and restorative justice agenda and the courts system

The government is promoting neighbourhood justice panels as part of a wider commitment to 'opening up and increasing community involvement in justice' (MoJ, 2014). Neighbourhood justice panels bring local victims, offenders and criminal justice professionals together to agree what action should be taken to deal with certain types of low-level crime and disorder. They are set up by local criminal justice agencies and/or the local authority and could deal with offences that might otherwise go to a magistrates' court. They can deal with anti-social or criminal behaviour that is 'not serious enough to merit more formal action, or with criminal offences that will or have resulted in an out of court disposal' (MoJ, 2014). Given the discretion available to the agencies to proceed either to more formal action or to use out-of-court disposals, there is clearly an overlap between cases to be dealt with by the panels and those which could be dealt with in magistrates' courts. Yet there is no structural link between the two systems. The CPS will sometimes (but not always) be the middleman, deciding whether a case should be referred to a panel, diverted, or prosecuted formally. Magistrates may be

involved in neighbourhood justice panels as volunteer mediators. But the two systems are geographically, administratively, structurally and culturally miles apart from each other. Efforts to introduce problem-solving courts, and other innovations, have been hampered by central control.

There are few recent examples of innovative practice in the way courts are run but, under the Labour government, a community court modelled on Red Hook in New York was established in North Liverpool in 2005. It introduced a single judge for all cases, new ways of listing, a new way of handling cases and a new approach to integrating local services. But the Liverpool Community Court has now been closed (Wasik this volume).

Within a centralised administration, it is very difficult for local innovation to flourish. Strategy is set by HMCTS and decisions on spending are made in the centre. Nearly all the innovations that have been introduced to courts in the last ten years (drug courts, domestic violence courts, community courts) have been conceived and directed from the centre. These ideas all originated in the United States, where courts are managed locally and where judges are given power to innovate and run things their own way. While courts in England and Wales are directed from the centre, it is questionable how innovative they can be. The 2013 HMCTS staff survey found that only 23% of staff believe that changes made in HMCTS are usually for the better and only 37% feel that it is safe to challenge the way that things are done in HMCTS (HMCTS, 2013).

Why has courts administration been centralised?

It is clear that power to administer magistrates' courts has moved from local areas and local stakeholders to the centre, most radically with the abolition of MCCs in 2003, but with many other significant changes since then. The abolition of courts boards, the move to regional forums for judicial governance, and guidance to stop the court user group meetings have all contributed to the centralising of power and influence.

Given a lack of published research on this subject, interviews conducted by the author with informed criminal justice practitioners suggest the following as having been likely drivers towards centralisation:

1. Since the 1970s, there has been something of a culture of distrust of magistrates and, in particular, of MCCs, amongst civil servants, particularly those who have worked on courts administration. This distrust

was fed by, and reflected in, Le Vay's (1989) review of magistrates' courts, and in the Auld Review (2001).
2. The Auld Review, with its criticism of MCCs, gave centralisers in the department a justification for the extension of central power which they had long desired.
3. Ministers accepted civil servants' recommendations to abolish MCCs without fully understanding that they were thereby also radically reducing local and magistrate influence.
4. Courts boards were presented as an improvement on MCCs, given that they included representatives of the community and court users, and were more community focused.
5. The powers given to courts boards were, however, weak, depriving them of real influence over the administration of the courts. Whether this was deliberate or not is unclear.
6. Ministers in the department changed frequently and the ministers who were presented by civil servants with the proposal to abolish courts boards were different from those who had steered the Courts Act 2003 through Parliament. By then, memories of local management of the magistrates' courts were fading and few stakeholders lobbied against further centralisation.

The senior judiciary has become involved in the management of magistrates' courts since 2003, but it is unused to working closely with local agencies, court users and local authorities and is concerned that such interaction may threaten judicial independence. These concerns have influenced the increasing separation between magistrates and local agencies, and the gradual centralisation of judicial governance over magistrates' courts. The centralisation of the administration of magistrates' courts is now seen as the status quo and there are few who are calling for its relocalisation. Few of the supporters of localisation in think tanks, amongst politicians, local government or the civil service are familiar with magistrates' courts administration and understand how local it used to be. Clearly, the main driver for courts administration now is saving money. Few people in HMCTS, or in the judiciary, were involved in MCCs, and so the collective memory of local management, with its benefits and challenges, has been lost.

Conclusion

There is no 'golden age' when the local community had a close involvement in, and responsibility for, the management of the magistrates'

courts in England and Wales. But when every local authority handled the budget and contributed 20% to court expenditure, local stakeholders had more ownership of and involvement in their courts. And before 2003 the local community, as represented by local magistrates, had control of the administration of local magistrates' courts. The Auld Report led to a removal of all real local power over magistrates' courts, whether by the local authority or by magistrates themselves. Since then, the localisation agenda has led to some parts of the criminal justice system, such as the police, having increased local accountability while, with court closures and the abolition of courts boards, courts have become less accountable to local people or local government.

Why change the status quo? There is no public clamouring for more centralised control over the courts. The court closure programme is, seemingly, a done deal. But there are serious problems in the system at the moment. Magistrates, who preside over most criminal cases, feel increasingly bitter that they have no means of influencing how the courts which they serve are run. Most importantly, there is a concerning lack of community involvement in, and interest in, local courts.

Notes

1. The author has benefited greatly from discussions with the following people. The views expressed in the chapter are, however, hers alone. Thanks to John Fassenfelt (chair, Magistrates' Association); Chris Stanley (magistrate and trustee Transform Justice; Chris Jennings (HMCTS); Sean McNally (Legal Services Commission); Ian Magee (former chief executive of the Courts Service); Professor John Howson (former deputy chair, Magistrates' Association); John Hosking (former chair, Magistrates' Association), Mark Ormerod (senior official in the Department for Constitutional Affairs, 1996–1999), Sally Field (senior official, Ministry of Justice, 1998–2010). Philip Evans (deputy chair, Local Government Association Safer and Stronger Communities Board), Harry Mawdsley (former chair, Magistrates' Association), David Simpson (retired district judge and justices' clerk), Bryan Gibson (Waterside Press, former justices' clerk), Chris Leslie, MP (former minister in the Lord Chancellor's Department), Jeremy Beecham (House of Lords, shadow front bench team Justice and DCLG).
2. All figures are taken from Courts Inspectorate Reports for 2003, www://webarchive.nationalarchives.gov.uk/20110206184228/http://www.hmica.gov.uk/files/South_Yorkshire_linked.pdf (May 2003), www://webarchive.nationalarchives.gov.uk/20110206184228/http://www.hmica.gov.uk/files/Hertfordshire_linked.pdf, www://webarchive.nationalarchives.gov.uk/20110206184228/http://www.hmica.gov.uk/files/Manchester_linked.pdf.

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13
The Crown Court: Unified Structure or Local Justice?

Martin Wasik

Introduction

The Crown Court was created in 1971 and replaced the old system of assizes and quarter sessions. Reform followed recommendations in a Royal Commission on Assizes and Quarter Sessions (1969), which referred to the previous arrangements as 'a patched, antiquated, and fragmented network of courts'. The new Crown Court was to be regarded as a single entity, which could sit at any designated population centre, staffed by a new permanent bench of circuit judges and administered by a unified court service (see, further, Rock, 1993). These changes were promptly implemented in the Courts Act 1971, but against the views of the judiciary and the legal profession more generally. They also departed from the earlier conclusions of the Streatfeild Committee (Home Office and Lord Chancellor's Office, 1961), which had argued against a specialist criminal court. Streatfeild had warned that it would be 'dangerously monotonous' for judges to sit only in criminal cases and that it would lead to staleness and to judges becoming case-hardened and 'prosecution-minded'. The Royal Commission dismissed these concerns, in what has been described as a triumph of 'managerial efficiency' over 'traditional professional values and local loyalties' (Bottoms and Stevenson, 1992).

So now, while there are many magistrates' courts, in managerial terms there is only one Crown Court, a court which sits at 77 different locations. Each location belongs to one of six circuits. Each circuit has a presiding judge, with an administrative role in relation to distribution of work within the circuit and each court centre has a resident judge, who is responsible for allocation of trials and other business at that location. While, as the name implies, resident judges tend to spend most of their

time at their designated court centre, other Crown Court judges split their work across different Crown Court locations within the circuit, or may for some weeks or months move out of criminal work altogether and sit in civil or family cases. There is thus a core of consistency of personnel at any given Crown Court centre, but with a fair amount of movement. Recorders (part-time Crown Court judges) are allocated to a particular circuit, but take their sittings at whichever court centre in the circuit they can. More detailed management and personnel matters are the responsibility of Her Majesty's Courts and Tribunals Service (HMCTS), which is based in London but has regional offices contiguous with the court circuits. The circuit boundaries relate only approximately to the 46 criminal justice areas within England and Wales.

A centralised system

The Crown Court displays many of the features of a unified and centralised structure. Obviously, the substantive criminal law and the rules of evidence are identical across the jurisdiction of England and Wales. There are also common Criminal Procedure Rules to be applied, relating to the proper and efficient management of pre-trial work, criminal trials and sentencing. These rules are integrated with Criminal Practice Directions applicable to the Crown Court and issued by the lord chief justice (Criminal Procedure Rules, 2014). These directives from the centre may suggest that there is little scope for judicial initiative in managing local issues. In *Baybasin* (2013) it emerged that at Liverpool Crown Court, on instruction from the resident judge, the jury panel was balloted by number rather than having their names read out in court. The Court of Appeal dismissed an appeal saying that no injustice had been done to the defendant, but the lord chief justice warned that local initiatives were appropriate only if referred in advance to the Criminal Procedure Rules Committee. In another example, the resident judge at Hull Crown Court issued a 'local practice statement' in June 2014, providing guidance on dealing with unrepresented defendants, an increasing problem following cuts to legal aid provision. This is now a pervasive issue, not confined to one area of the country, but there is no specific guidance from the centre. The Hull initiative has received no general endorsement from the lord chief justice, but it may be that efforts are being made centrally to address the issues (Gibb, 2014a). On the other hand, some procedural changes emanating from the centre are trialled locally and best practice is adopted nationally. This seems to have been the case with 'early guilty plea schemes', which operated briefly under local

control but are now subject to national protocol. Legislative changes to sentencing are sometimes trialled in one or more local area in advance of national roll-out and sometimes local 'experiments' in sentencing can be tested in one or more Crown Court centre, with the prior approval of the senior judiciary (see Baker, 2014, for an example).

The Crown Court, wherever it sits, must follow national sentencing guidelines produced by the Sentencing Council. Guidelines have been centrally produced since 2000, mainly in an effort to increase consistency and reduce regional variation. While many judges now regard guidelines as offering valuable guidance and an aid towards structured decision-making, that was not always the case and some still regard them as an unjustified interference in judicial discretion and independence. In *Blackshaw* (2012) the Court of Appeal made it clear that it is wrong for judges sitting at one Crown Court centre, or in one area of the country, to set local sentencing guidelines. In that case the Court of Appeal dealt with sentences imposed for a range of offences committed during the summer 2011 riots. The resident judge in Manchester had issued local guidelines in *Carter* (2011) to deal with these unusual and challenging circumstances and local colleagues adopted them. The Court of Appeal said that the resident judge had exceeded his powers. One might feel that this was an example of a resident judge of great experience taking the initiative to deal with a serious and exceptional problem when there was (at that time) no help available from the Sentencing Council or the Court of Appeal. Even so, it is now clear beyond doubt that sentencing can only be set centrally, by Parliament, by the Sentencing Council or (if there are no relevant guidelines in place) by the Court of Appeal (Roberts, 2012). The particular issue of adjusting sentences because of a local prevalence of offending is considered later in this chapter.

Currently, it appears that Lord Chief Justice Thomas is strongly centralist in his outlook. In a keynote speech (Thomas, Lord Chief Justice, 2013) he emphasised the need for uniformity across the Crown Court. He referred with approval to the work of the Criminal Procedure Rules Committee and went on to say:

> Until this was done, judges in localities had sought to devise their own solutions. It has not been easy to persuade some that local practices are no longer necessary or lawful. We all have a tendency to think that the solution we have devised is the best.

According to Lord Thomas, uniformity is essential because there is a single legal jurisdiction in England and Wales and local practices are

not consistent with a consistent application of the law. Such differences can also be a barrier to competition in legal services. He also asserts (a favourite theme) that uniformity is a prerequisite to the delivery of 'joined-up' services, including IT, across the criminal justice system. These centralist observations about procedural rules stand in stark contrast to Darbyshire's research findings from 2012, that many resident judges had developed their own local trial management regimes, predating the national rules and that there existed a 'diverse set of cultures, attitudes and practices' across Crown Court centres (Darbyshire, 2014). She found that the tone and approach at each Crown Court centre was set by the particular resident judge. Some Crown Court judges interviewed by Darbyshire admitted that they had not heard of the Criminal Procedure Rules and, even for those who were aware of them, there was often a preference for local practice, which was well-known, well-understood and perceived as being superior. Another example of the varied levels of judicial co-operation with requirements from the centre can be seen in the rate of statistical returns on sentencing outcomes, which are provided by all Crown Court centres to the Sentencing Council. At some court centres the compliance rate with this process is 90% or better. In some (perhaps as an indication of disinterest, or a small gesture of defiance) the compliance rate is 10% or less (Sentencing Council, 2014, App B).

Local judging in the Crown Court

Inevitably the professionals, including judges, who work wholly or substantially at a particular court centre have a loyal attachment to it, by virtue of working alongside their colleagues and because that centre is an important part of their working lives. Judges are strong-minded and fiercely independent, for very good reasons of character, professionalism and independence. There is a strong judicial allegiance to the Crown Court centre and, to a lesser extent, to the circuit of which it is part. Darbyshire's important ethnographic study of the judiciary in England and Wales (Darbyshire, 2011) is full of such judicial observations, often accompanied by disparaging remarks about how things are done in a different part of the country. Local allegiance can be seen as a virtue, because it encourages an environment in which everyone who works at the court centre feels valued and part of a common effort. On the other hand, it tends to reinforce the natural inclination of independent-minded judges to be sceptical about directives from the centre. The centre requires that local services carry out their functions ever more efficiently, providing the greatest possible value for money (see Raine,

2014). The Crown Court is no exception, and judges, especially resident judges, have a tough job to perform. Between 2004 and 2014 there has been a 25% increase in Crown Court workload. The number of trials on indictment has increased over the same period by 20% and an increasing number of those trials are long and difficult. Senior judges are required to deal with an unremitting diet of cases involving homicide, terrorism, serious sexual offending including complex 'historical' abuse cases and mind-numbing fraud trials. At the same time there have been very substantial budgetary cuts to court administration, resulting in a sharp reduction of staff posts within Crown Court centres. Full-time judges work longer hours than ever before. This has had a knock-on impact on recorders, who have to be paid out of the court centre's dwindling budget and who consequently have to look further afield for their opportunities to gain sitting experience. One (perhaps minor, but telling) symptom of financial constraint is that catering contracts at many Crown Court centres have been terminated, so that all court staff (including judges) are now required to provide their own lunches (Gibb, 2014b). Much more concerning, however, is the lack of catering facilities for juries. Jurors now have to be given longer lunch breaks during trials, to give them time to go into town to buy something to eat. This brings increased risk of jurors bumping into defendants or witnesses involved in the trial. This economy on catering simply does not make sense, since it will soon be offset by an increase in the need for trials to be aborted because of concern over jury intimidation. Also, surely members of the public required to take time out from their lives to perform jury service, often at considerable personal inconvenience, should be treated with greater consideration.

Darbyshire's interviews, conducted in 2006–2009, showed that most Crown Court judges enjoyed the job and found being a judge more congenial than practice at the bar (Darbyshire, 2011). While this may still be the case in 2014, there appears to be greater discontent amongst Crown Court judges with central leadership which, some say, is too remote from them and too close to government. Regret is expressed at the abolition of the post of lord chancellor, formerly the only figure in government with the ear of the prime minister who could be relied upon to speak up for the judiciary. It is seen as symptomatic that the current (unpopular) secretary of state for justice has no legal qualification and that lawyers below the rank of QC have been appointed as the government's legal officers following the sacking of an attorney general whose advice on human rights law was unpalatable to government. Many judges privately express dismay at the level of cuts to legal aid in both civil and

criminal cases and the associated degrading of standards at the criminal Bar. Crown Court judges are sceptical about the skills of some prosecutor advocates and the criminal defence service. It is common to hear judges complain about the marked decline in courtroom skills of advocates, particularly in the art of effective cross-examination of witnesses. There are also concerns that, in pursuit of further economies, some of the smaller Crown Court centres may be closed, following the magistrates' courts example. If that was to occur, victims, witnesses and jurors would all be inconvenienced by having further to travel. That would not chime well with placing the interests of victims and witnesses at the centre of the system.

In her chapter on Crown Court judges, Darbyshire provides a short section on their 'managerial, pastoral and other out-of-court work' (Darbyshire, 2011, p. 183 *et seq*). She notes that resident judges have a great deal of paperwork to get through when they are not actually sitting in court, although much of it is judicial rather than purely administrative (applications to appeal, to vary a trial timetable, applications from defendants to change their legal representation, requests from potential jurors to be excused and so on). Resident judges are routinely provided with Ministry of Justice statistics comparing the performance of Crown Court centres against various benchmarks (speed of throughput of cases, sitting days completed, number of cracked and ineffective trials and so on). Darbyshire notes that resident judges are 'constantly aware of their court's statistics, which they compile and disseminate' to colleagues (Darbyshire, 2011, p. 183). Currently, local court area comparisons on sentencing outcomes, which were published by the Sentencing Guidelines Council from 2005 to 2009, have not been available since the Sentencing Council took over responsibility for guidelines in 2010. This may soon change, the council having stated recently that it is considering resumption of local Crown Court centre sentencing figures (Sentencing Council, 2014).

Local judicial knowledge

From time to time the Court of Appeal makes approving reference to the specialised local knowledge of resident judges. Some courts, by virtue of their locality, deal with particular issues. For example, courts close to major ports and airports deal with nearly all cases of importation of drugs, such matters being rarely encountered elsewhere. A recent example of the value of local knowledge is *Southern Water Services* (2014), where a water company pleaded guilty to allowing large amounts of

untreated sewage to enter the sea off the coast of Kent. The case was heard at the Crown Court at Canterbury by Her Honour Judge Williams, described by the Court of Appeal as 'very familiar with local conditions' and who made various findings of fact about the standards of cleanliness of local beaches, the fact that part of the coast was designated as a site of Special Scientific Interest and that there was extensive use of the areas for amenities, particularly bathing and water sports. Furthermore, the waters were used for shell fisheries. The judge found that any loss of confidence in the use of the coastal waters of Kent could have a serious effect on the local economy. All this fed directly into her assessment of the seriousness of the offence. The Court of Appeal was very approving of the judge's understanding of local concerns. There are, however, limits to the way in which a judge's local knowledge of the area can be put.

Suppose a local judge believes that there is a particular crime problem in his or her locality. Can this local knowledge be put to use when passing sentences for that particular form of crime? The sentencing guideline *Overarching Principles: Seriousness* (SGC, 2003) says that local prevalence of an offence should not affect sentencing in the relevant area, unless there are 'exceptional circumstances'. If the judge wants to mark a local problem by a severe sentence the judge must have supporting evidence from an external source, such as the local Criminal Justice Board (on which more is said below). In *Oosthuizen* (2006) the judge had passed deterrent sentences on offenders for committing robberies by grabbing handbags from women in the street, saying that such crime was a particular problem in that area. The Court of Appeal said that it was 'hazardous' for a judge to assume that an offence was worse in his area than nationally. In *Lanham* (2009) sentences of 30 months for theft of lead from a roof were reduced to 16 months by the Court of Appeal since the judge had cited no evidence to support the claim of local prevalence. In *Moss* (2011), a 30-month sentence for theft of copper cabling from a telephone installation was reduced to two years on appeal. The judge had been told by the prosecution that there had been 20 similar offences locally within a short period of time, but the Court of Appeal said that this was insufficient material upon which to pass a deterrent sentence. The *Criminal Practice Directions* (as re-issued in 2015) refer to the possibility of a 'community impact statement' being drawn up by the police 'to make the court aware of particular crime trends in the local area, and the impact of these on the local community'. Community impact statements seem to have had their origin in youth justice around 2009, linked to local anti-social behaviour strategies. They are documents designed to express the concerns of a specific community

over a set time period. They are compiled by the police and must be tendered in evidence as a witness statement. HMCTS now produces a standard form for this purpose and the reports are beginning to appear more frequently in the Crown Court. In one example, *Brzezinkski* (2012), a Crown Court judge was handed a report on the deleterious psychological effects (including increased fear of crime) on the local community of graffiti sprayed on local railway sidings and associated railway buildings. The judge used this report as the basis for a heavier sentence and an anti-social behaviour order on a persistent sprayer of graffiti. Sentence was upheld on appeal. *Wicks* (2014) is another example. The offender had installed a hydroponic unit for cannabis cultivation in an outbuilding. Offending of this kind is quite widespread in different parts of the country and is the subject of a sentencing guideline and several Court of Appeal decisions. In *Wicks*, however, the prosecution presented a community impact statement suggesting that part of the concern about such offending in the locality was associated violence directed at cannabis producers and sometimes at those wrongly believed to be producers. This material was taken into account by the judge and relied upon, in part, as justification for a heavier than usual sentence. The Court of Appeal upheld the sentence, saying that the judge had been entitled to rely on the material to show that there was a particular local problem. These cases illustrate a continuing tension in the Crown Court between the values of overall consistency and the benefit of flexibility in light of local knowledge of local problems.

The community court – A missed opportunity

While the tide has been flowing in favour of centralisation at Crown Court level for a considerable period of time, there have always been voices raised against that approach. For example, the Commission on English Prisons Today (2009) argued strongly in favour of localism. It claimed that:

> A more local approach could lead to more effective ways of spending the considerable amounts of money currently expended by criminal justice agencies. Devolution of spending and an opening up of policy choices should lead to less money spent on process and more money on actions which would produce beneficial outcomes for the whole community.

The commission proposes that budgetary and policy-making authority on criminal justice issues should be devolved to local strategic

partnerships. The commission referred with approval to the decision of the Scottish Executive to reject the idea of a single agency to deliver custodial and non-custodial sentences (a body similar to the National Offender Management Service (NOMS) in England and Wales) in favour of the establishment in Scotland of eight regional Criminal Justice Authorities (see Morrison, this volume). The commission also referred with approval to the North Liverpool Community Justice Centre, set up at the initiative of the Labour government, and which opened in 2005. That exciting experiment offered a radical alternative criminal justice strategy at a local level. The centre was set up in a former school, was presided over by a judge exercising both summary and Crown Court powers, and it contained under the same roof probation, social work and other community support services. As such, the Liverpool centre can be characterised as a form of 'problem-solving court', which has been pioneered in the United States and experimented with elsewhere. It can be more closely compared with the Red Hook community court in New York. The commission's report continues in glowing terms:

> We were impressed by the combined North Liverpool court-room/support centre. It delivered a humane and respectful approach to the myriad problems represented by the offenders before it. The Court has the powers of the youth, Crown and district courts but its ethos is focused around 'problem-solving' in the community, not punishment. The centre has on site a range of community and criminal justice services (police, CPS, citizens' advice bureau, drug support agencies, victim support, and the witness service, community reparation, housing support, restorative justice schemes etc.) which can respond immediately to the needs of offenders as identified by the court.

There is no doubt that the centre was dynamic and innovative and it was led by a judge, His Honour Judge Fletcher, who was a committed enthusiast for the project. Perhaps it was these very features which led ultimately, and sadly, to its downfall. Funding for the Liverpool court centre was removed by the coalition government in 2013, despite strong opposition from the Merseyside police and crime commissioner (a former Labour minister) amongst many others. Announcing its closure, a spokesman for the ministry said that the community justice centre was 'expensive to run' and 'did not deliver value for money for the taxpayer' (BBC News, 2013). A detailed, balanced report into the working of the Liverpool centre by Mair and Millings (2011) found a great deal

to admire in the work being done by the court, but conceded that staff were not always able to demonstrate clearly that the court had met the range of government-set performance indicators set out by the Office of Criminal Justice Reform (OCJR, 2009). There is a handful of magistrates' courts in England and Wales designated as 'community justice courts', such as the one in Plymouth, but their jurisdiction is limited to low-risk offenders and their procedures are little different from traditional magistrates' courts.

Crown Court judges and criminal justice policy

According to the influential Review of the Criminal Courts by Lord Justice Auld (Auld, 2001) the system of administration of the Crown Court 'is centralised and, some say, too monolithic and inflexible to meet local needs' (p. 92). The managerial relationship between the centre and the local criminal justice areas is complex and, as Auld put it, 'there is much in the way of attempted joint planning and coordination, but little or no overall direction' (p. 329). Auld described a confused grouping of inter-departmental and inter-agency bodies concerned with the management of Crown Court justice. These bodies included a Ministerial Group, a Strategic Planning Group, a Criminal Justice Joint Planning Unit, and National and Local Trial Issues groups.

Auld reported there was also in place a Criminal Justice Consultative Council (CJCC), together with associated local area committees. These had been set up in the early 1990s to meet a key recommendation of the Woolf Report into the riots in Manchester Prison (Woolf, 1991). Woolf's first recommendation in his report had been the need for closer co-operation between the different agencies of the criminal justice system at both national and local level. The CJCC was chaired by a senior judge (Lord Justice Rose and then Lord Justice John Kay). Its remit was 'to facilitate discussions and agree action across the criminal justice system, [providing] a forum for senior officers of the criminal justice agencies (including government departments) to address issues of mutual interest and resolve problems through an agreed agenda' (CJCC, 2000). Area committees comprised representatives of local criminal justice agencies including the police, Probation and Prosecution services and magistrates and were almost always chaired by the resident Crown Court judge. They met regularly to discuss issues of local common concern and, crucially, they were the only inter-agency bodies which had Crown Court judges as members. Auld found that some of the area committees worked better than others, but the main problem

was their lack of executive authority to budget or enforce their decisions so that, sometimes, they became little more than 'talking shops'. Lord Woolf himself conceded in 2001 that the CJCC 'had struggled' in the ten years since publication of his report, especially at local committee level. It turned out to be 'nigh on impossible', he said, to have sensible coordinating bodies for 56 probation authorities, 42 police areas, 12 Prison Service areas, six Crown Court circuits and hundreds of petty sessional divisions (Woolf, 2001). Although Auld had some reservations, he proposed that the CJCC be placed on a statutory footing, with enhanced responsibilities and powers. The Howard League made a similar proposal. In the event, however, the CJCC and its area committees were abolished and hence the only local bodies upon which Crown Court judges sat together with senior representatives of other criminal justice agencies was lost. Darbyshire refers to meetings taking place between resident judges and listing officers and court managers over judicial deployment, and to occasional court user committees but, crucially, no scheduled meetings with representatives of other local criminal justice agencies (Darbyshire, 2011, p. 183). Auld reported that resident judges have 'informal, ad hoc' relationships with representatives of various criminal justice agencies at court centre level (p. 321), but in conversation with resident judges in recent years it has become clear to this writer that now there are few, if any, regular meetings. Pressure of work is given as the reason for them being squeezed out of the schedule. This is surely a matter of regret.

A problem of judicial independence can arise when judges are involved in cross-disciplinary bodies concerned with criminal justice policy. It is clear that to do their job of deciding individual cases, judges have to maintain some distance from management, not least because the High Court may at some date be called upon (in judicial review) to determine the lawfulness of a particular policy, or its implementation in a particular case. In his report, Auld said that the administrative role of judges must be 'indirect, consultative, and persuasive' only (p. 320). While recognising judicial independence as one of the key principles of the separation of powers, it is a card which can be overplayed (Munro, 1992). It was mentioned earlier that sentencing guidelines were characterised by judicial sceptics as a threat to their independence – a claim which, in the form they took in English law, was never remotely sustainable. Before that, in the 1980s, the introduction of judicial training (in sentencing and other matters) was resisted by some judges as being a threat to their independence, a claim which seems laughable now but which was dealt with at the time by ensuring

that Judicial Studies Board (now Judicial College) courses were (and still are) almost entirely designed and run by judges. It may be noted in passing that the college has suffered significantly from financial cuts, and training courses are now shorter and offered less frequently than they used to be.

In the same vein, judicial involvement in the CJCC and area committees was initially problematic. Lord Chief Justice Lane decreed that it was quite wrong for judges to take part in these committees at all, because to do so would compromise their independence, but his decision was rapidly reversed by his successor Lord Taylor (Roberts, 1994). Auld suggested that the CJCC might be replaced by a 'more effective advisory body with a statutory remit', such as a national Criminal Justice Board. Local Criminal Justice Boards (LCJBs) had already been around for some years, initially established by local chief officers as a mechanism for local joint planning or management, often operating in parallel to the CJCC area committees. Auld considered whether a senior judge should sit on a national Criminal Justice Board if established, noting that:

> judges have shown through their chairmanship both of the CJCC and the Area Strategy Committees that they can contribute to the collaborative working of the various agencies, including the courts, without compromising their independence.

Even so, he felt that if the board were to have a direct role in formulating and advising ministers on objectives for criminal justice and for planning, budgeting for, directing and managing their attainment, it would be constitutionally wrong for any judge to be involved (p. 341). In other words, the more relevant and influential the body, the less appropriate it would be for judges to be part of it.

In 2013, a new national Criminal Justice Board met for the first time. The board is chaired by a justice minister. As its launch Minister Damian Green, said:

> Last week I set out my vision for reforming the criminal justice system – I want to drive forward a more efficient and effective system that actually delivers justice for victims of crime. 'That is why today I am bringing together the new Criminal Justice Board for the first time which includes representatives from Policing, the Crown Prosecution Service, the Courts and, for victims, the Victims' Commissioner. These experts will help me identify exactly where the delays occur in the system and work with me to tackle these issues.

In fact, there is no judicial representation at all (and the board is clearly political), but the senior presiding judge does attend meetings as an observer. Latterly, local Criminal Justice Boards have become increasingly associated with delivery of policy from the centre. Their stated aim, according to one such board (Sussex CJB, 2014) is to deliver a 'joined up modernised criminal justice service in Sussex that delivers value for money for the community and inspires local confidence'. The board is chaired by the local police and crime commissioner and has four representatives from the police and prison services, three from local authorities, two each from criminal defence, the NHS and HMCTS, and one each from the Probation Service, a community rehabilitation company, the CPS, the Legal Aid Agency and Victim Support. The board states that it is making significant progress in achieving national set targets, aiming to deliver a more effective, transparent and responsive system for victims and the public. Once again, Crown Court judges are not members of these boards.

Conclusion

It is fair to say that there is in many judges an inherent conservative resistance to change. As we have seen, judges were opposed to setting up the Crown Court in the first place. Many objected to the establishment of the Judicial Studies Board. Most were opposed to the introduction of sentencing guidelines. They are now opposed to what they see as the degrading of the criminal bar and the introduction of less well qualified and inexperienced solicitor advocates. They are opposed to the process of appraisal, whether of their colleagues or the advocates who appear in front of them. Even so, all of these changes have taken place, or are soon likely to. It is clear that judges have no veto over policy change within the criminal justice system, even over change which impacts directly on the Crown Court. Judges are routinely consulted on plans for change, principally via their own organisation, the Council of Circuit Judges. The council is active in responding to policy proposals and consultation papers, but it is very 'part-time' in nature, and judges who serve on the council must do so in addition to their normal duties.

The fact is that many rank and file judges, whether full time or part time, tend to 'catch up' with changes to criminal justice policy when these have already happened and are about to impact on daily practice of the Crown Court. Judicial College seminars provide updates on recent developments but judges attend only one national seminar every three years. In light of the above discussion, it is probably fair to conclude

that most Crown Court judges, far from being creatively active in the development of criminal justice policy, are for the most part passive recipients of criminal justice policy created at the centre. This is a pity. The depth of knowledge of local criminal justice issues which Crown Court judges possess is considerable and is not currently being put to best use. We need to reconsider the extent to which judges' involvement in policy matters really does risk compromising judicial independence. At the very least, we should reinstate consultative inter-agency bodies which contain resident judges, along the lines of the CJCC and local area committees. Such bodies could draw upon local knowledge to propose practical solutions to some of the serious problems which beset the criminal justice system today.

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14
The Youth Court: Time for Reform?

Alexandra Wigzell and Chris Stanley

Introduction

The youth court was formed more than 100 years ago, having been established by the Children Act 1908 to hear, for the first time, the cases of children (those aged 10–16 until the Criminal Justice Act 1991 extended the court's remit to include 17-year-olds) separately from adults. Known then as the juvenile court, it took a holistic approach to the children appearing before it, dealing with welfare as well as criminal matters (Goldson and Muncie, 2006, p. 8). The court, in which specially trained magistrates sat, had the power to hear all offences but murder (Rutherford, 1992, p. 50). For 80 years following its inception, the arena bore witness to a shifting policy emphasis on punitive and welfare responses to crime, culminating in the Children Act of 1989, which saw the jurisdiction of the court being split into the youth court (crime) and the family court (welfare).

In this chapter we argue that, over a quarter of a century on, the time has come again to consider reform of youth proceedings. This has been the conclusion of a range of reviews undertaken over the past 15 years (Carlile, 2014; Centre for Social Justice, 2012; Police Foundation, 2010; Police Foundation and JUSTICE, 2010; Michael Sieff Foundation, 2009; Audit Commission, 2004; Auld, 2001; Hazel et al., 2002; Royal College of Psychiatrists, 2006). Further impetus for reform has been created by the recent contraction in the numbers of children in the youth justice system, the more complex profile of those remaining and the shrinkage of the youth court estate.

Here we draw heavily on the findings and subsequent policy activity that has been prompted by the most recent review, of which the

authors of this chapter were a researcher and an adviser, respectively: the Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court.[1] Under the chairmanship of Lord Carlile CBE QC, a cross-bench panel of all parties and none (i.e. cross-bench), supported by expert advisers and a researcher,[2] took evidence from 43 witnesses and received 55 written submissions. These included young people with experience of the system, academics, local and national policy-makers, managers and practitioners.[3] The inquiry's terms of reference were broadly to explore whether youth proceedings were operating effectively under the principal statutory aim of the youth justice system – preventing offending – and their duty to have regard for the welfare of the child. We focus on its findings in the areas of competence and welfare as well as the relevance of desistance theory to youth proceedings.

History

The developments that led to the formation of the youth court can be traced back to the beginning of the 19th century. At this time, children as young as nine were sentenced to death (Rutherford, 1992, p. 40). Reformers, such as Mary Carpenter, introduced a range of other institutions, including reformatory schools and industrial schools, to respond to the offending behaviour of children.[4] By the turn of the century, 24,000 children were held in such establishments (Ibid. pp. 49–51). In 1896 the Lushington Committee was set up to examine reformatories and industrial schools. It questioned the wisdom of placing young people in institutions at all and wanted alternatives: remedies for youth crime within the home and school (Ibid. pp. 48–49). It took the reforming Liberal government of 1906 to make the fundamental changes that introduced the Children Act 1908.

Over subsequent decades the pendulum swung between welfare and punishment. In 1933, the Children and Young Persons Act (CYPA) pointed to treatment as the way forward, creating the principle that a child's welfare was of paramount importance. This section of the act remains with us today, reinforced by the Criminal Justice and Immigration Act 2008.

During the mid- to late 1930s the 'clamour' for punishment increased and grew further after the war, leading to the opening of the first youth detention centres in 1948 (Ibid. pp. 55–57). The 1960s saw the return of welfare approaches. The CYPA 1969 on the face of it raised the age of criminal responsibility to 14 and encouraged care rather than criminal

proceedings. However much of the act (including raising the age of responsibility) was not implemented by the incoming Conservative government in 1971. The 1980s bore witness to another shift as the 1982 Criminal Justice Act replaced borstals (indeterminate sentences) with youth custody, and restricted custodial sentences. Moreover, the government made £15 million available to fund alternatives to custody and care (Ibid. pp. 57–64).

During this period, the holistic approach continued, whereby child crime and welfare issues were dealt with in the same jurisdiction. This ended with the Children Act 1989, marking a watershed in the court's history.

The current landscape

It remains the case that the current youth court deals only with the criminal behaviour of children (aged 10–17). Its principal aim is to prevent offending by the child, as provided by the Crime and Disorder Act 1998. The court also has a duty to have regard to the welfare of the child (Children and Young Persons Act, 1933, s.44). Other key considerations include the seriousness of the offence – the 'starting point for sentencing' – as well as the likelihood of further offences and the potential harm of these (Sentencing Guidelines Council, 2009, pp. 6–8).

The youth court has a maximum custodial sentence of 24 months. The majority of youth cases are heard here. The remainder are sent to the Crown Court, which presides over

- cases of 'homicide';
- cases subject to a statutory minimum sentence;
- 'grave crimes' which would require a sentence exceeding the powers of the youth court;
- and cases in which a youth is jointly charged with an adult.

(Ibid. 26–27)

Magistrates must sit in the adult magistrates' court for a minimum of 18 months (Watkins and Johnson, 2010, p. 127) and must undertake at least six hours' youth justice training before they can sit in the youth court (Judicial Studies Board, 2010). District judges (magistrates' courts) are expected to complete youth justice training prior to sitting in the youth court and should also undertake annually a half- to a full day of youth court refresher training (personal communication). This is in contrast to their Crown Court colleagues presiding over youth cases who

undertake 'little, if any, formal training' in youth justice (Youth Justice Board, 2009, p. 28; Carlile, 2014, p. 34).

Barristers and solicitors are not required to have any specialist training to practise in youth proceedings (youth court and Crown Court), although some may choose to do such training. The proportion of advocates with such training or youth justice expertise is unknown. Furthermore, the youth court is often used as a training ground for junior barristers who 'cut their teeth' on youth cases (Carlile, 2014, pp. 29–30; Centre for Social Justice, 2012, p. 84). Some prosecutors are trained as specialist youth justice prosecutors, for which they must have practised for two years and completed three days' youth justice training (Carlile, 2014, p. 29). However, such specialist prosecutors tend to be reserved for trials in youth proceedings, while non-specialist associate prosecutors deal with the majority of youth cases (Ibid.).

The current time is one of significant contraction. In recent years, there has been a large reduction, both in the number of children entering the youth justice system for the first time and being sentenced at court. Between 2002/2003 and 2012/2013, the number of first-time entrants into the youth justice system fell by 67% to 27,854 while the population of young people sentenced at courts decreased by 54% to 43,601 (Ministry of Justice/Youth Justice Board, 2014, pp. 9–10). This is understood to be a consequence of a reduction in offending by children, coupled with a fall in detected (recorded) youth crime, supported by a renewed government commitment to reducing the number of children entering the system and court, particularly for low-level misdemeanours (Bateman, 2014, pp. 5–20). Research has been commissioned by the Ministry of Justice to gain a better understanding of the reasons for the reduction in first-time entrants; it is expected to be available by the end of 2014/2015 (MoJ/YJB, 2014, p. 9). Meanwhile, a coalition government court closure programme, implemented in 2011 as part of its deficit-reduction agenda, has led to the closure of 93 magistrates' courts, with more scheduled (MoJ, 2013).

As a result of these developments, many youth courts are sitting less frequently and may be shared with a number of YOTs who attend on a rotational basis (Carlile, 2014, p. 5). This usually means that each YOT has an allocated court day. Thus, it is responsible for any cases that arise from other YOTs on that day. There are reports that as a result there can be a reduced amount of time to deal with cases (due to heavily listed sittings) and a greater likelihood that children will appear in an adult magistrates' court if they are remanded overnight, or without the presence of their home YOT (Carlile, 2014, pp. 4–6).

Ministry of Justice figures indicate that there is a greater proportion of children in the youth justice system with 'more prolific' offending profiles and who are 'more challenging to work with': between 2006/2007 and 2011/2012 the average number of proven previous offences increased by 58% (from 1.59 to 2.51) and the predicted rate of reoffending increased by 13% (from 31.3% to 35.5%) (Ministry of Justice/Youth Justice Board, 2014, p. 26). This is likely to be a reflection of the reduction in the number of children entering the system for low-level matters. Youth justice professionals also describe the cohort as presenting with 'greater and more complex needs', in terms of their individual and social difficulties (Carlile, 2014, p. 6).

Taken together, the reduced number and changing profile of children coming to court and the shrunken youth court estate create a strong impetus to reconsider the status quo. The reasons are three-fold. First, while children with complex needs have always been a feature of the wider youth justice population, their greater concentration is likely to emphasise some of the existing weaknesses in the system, such as lack of training in such issues. Second, engaging this cohort is likely to become more difficult as a consequence of the above-mentioned developments, such as the absence of a child's home YOT in court. Third, the reduced throughput offers a rare opportunity to consider and adopt approaches that were not possible in the previously overstretched system.

Competence

In recent years, a number of research studies and policy papers have concluded that legal practitioners should be certified to practise in youth proceedings (Carlile, 2014, p. 30; Centre for Social Justice, 2012, p. 84; Advocacy Training Council, 2011, p. 41; Police Foundation, 2010, p. 64; Jacobson and Talbot, 2009; Royal College of Psychiatrists, 2006, pp. 67–69). Additional proposals have been put forward that this should be accompanied by compulsory content on working with young or other vulnerable witnesses and defendants in basic advocacy training (Advocacy Training Council, 2011, p. 47; Carlile, 2014, p. 37). The need for youth specialist Crown Court judges has also been identified (Carlile, 2014, p. 30; Centre for Social Justice, 2012, p. 84; Police Foundation, 2010, p. 64; Jacobson and Talbot, 2009; Royal College of Psychiatrists, 2006, pp. 67–69). Indeed, in 2003 the government published plans – these were never implemented – to 'improve lawyers' training with a view to accreditation for youth cases' and to introduce the 'specialisation of Crown Court judges in youth cases through selection and

training' (Home Office, 2003, p. 6). There have been additional proposals for the training curriculum for youth court sentencers to be strengthened to include core content on speech, language and communications needs, child and adolescent development (Carlile, 2014, p. 30; Centre for Social Justice, 2012, p. 84; Police Foundation, 2010; Jacobson and Talbot, 2009) the factors underlying offending, effective interventions (Police Foundation, 2010, p. 65) and the capacity of children to participate effectively in the court process (Law Commission, 2014, pp. 91–92).

The basis for such recommendations is that particular expertise is required to practise in youth proceedings. The sentencing framework is very different from that in adult courts, and youth court law is complex (Carlile, 2014, p. 30). Research indicates that neurodevelopment is ongoing during adolescence, which results in those under 18 finding it difficult to take part in core criminal proceedings tasks, including: understanding interview questions and the significance of their answers; understanding charges and court processes; deciding how to plead; and instructing lawyers (various authors, cited by Farmer, 2011). Thus, child defendants have particular needs by virtue of their young age, which requires a 'developmentally appropriate child-centred approach' (Royal College of Psychiatrists, 2006, p. 10).

There is also a high prevalence of neurodevelopmental difficulties among children who offend that may affect their understanding and presentation in court (Carlile, 2014; Royal College of Psychiatrists, 2006; Jacobson and Talbot, 2009). Consider the following figures: 60% of children in the youth justice system have a communication disability (Bryan et al., 2007, cited in RCSLT, 2009); around 30% children who have 'persistent offending histories' in custody have IQs of less than 70, signifying a learning disability (Rayner et al., 2008, cited in Hughes et al., 2012, p. 26); and between 65% and 75% of children in custody have a traumatic brain injury (various authors, cited in Hughes et al., 2012, pp. 35–37). In short, as argued by Jacobson and Talbot, the evidence suggests that child defendants are 'doubly vulnerable' because of their developmental immaturity in addition to their experience of other needs, including learning disabilities, mental health problems and communication difficulties (2009, p. 37).

Little in-depth research has been undertaken into the impact of insufficient competence in these areas for young defendants. However, several studies conducted in the youth justice field in England and Wales over the last 12 years have found evidence of poor practice and outcomes associated with lack of specialist knowledge in court. This includes inappropriate sentencing (Audit Commission, 2004,

p. 30); young people's lack of understanding of the court process (Ibid; Carlile, 2014, p. 22; Plotnikoff and Woolfson, 2002, pp. 27–33); and related confusion and distress (Hazel et al., 2002, pp. 12–13); as well as provision of poor advice and representation of child defendants by defence practitioners (Carlile, 2014, pp. 31–32). There are related concerns that child defendants' difficulties may go unnoticed by non-specialist defence practitioners – the Royal College of Psychiatrists have highlighted this as 'particularly worrying', given that it falls to such advocates to request mental health and other assessments (2006, p. 680) – impeding their effective participation in the court process and potentially resulting in inappropriate sentencing decisions (Carlile, 2014, p. 25). The case that follows, related by a solicitor at a recent conference (Westminster Policy Forum, 2014), well illustrates the issue:

> I represented a young man a few weeks ago who had had seven previous cases in the youth court, I was dealing with him at the point of sentence, I hadn't met him before and I was presented with a pre-sentence report … it said that he had communication issues … So I spoke to him in the cells and it was quite clear to me that there were actually issues there that hadn't actually been looked into further. So the court started by telling me that they were going to send my client to custody and effectively I needed to just address them on the length of the detention and training order that they were going to impose … in fact I thought that my client needed to have a psychological assessment, to which there were various sighs in the court. I subsequently managed to get them to agree to adjourn the case for three weeks. The client was returned to a secure training centre, was seen by a psychologist at our request and actually is showing six or seven of the traits for autism and much of his presentation is because the kind of autism that the psychologist thinks he has is a very passive form of autism which means that much of the way that he will come across is as if he doesn't care about anything, because he's incapable of actually showing any emotion whatsoever about anything.

Unidentified need is, however, symptomatic of a wider problem: child defendants are not currently routinely screened and assessed for such needs prior to attending court (HMI Probation et al., 2011, p. 39). Instead 'child defendants' needs are identified by chance and there is an over reliance on … individual practitioners to identify these' (Carlile, 2014, p. 25). In recognition of this, the Law Commission has

provisionally recommended, as part of its work on reform to the law on unfitness to plead, that there is mandatory screening for capacity issues of all defendants aged under 14 (2014, p. 92; similar recommendations have also been made by: Carlile, 2014, 24–25; Jacobson and Talbot, 2009, p. 44; HMICA, 2007, p. 12).

Nevertheless, as noted by the Royal College of Psychiatrists, there may also be 'ethical issues' raised where untrained advocates interview vulnerable and disturbed children (2006, p. 68). Inadequate youth specialist knowledge may also play a role in the limited adherence by Crown Court judges (Carlile, 2014, p. 42; Plotnikoff and Woolfson, 2002, p. 21) to the 2013 Criminal Practice Direction, which requires that proceedings are modified for child defendants to enable their effective participation (Lord Chief Justice, 2013, p. 13). It should be noted that several reviews have advocated the removal of all youth cases from the Crown Court due to concerns about its unsuitability for children. It has been recommended that these should instead be heard in the youth court and presided over by a specially trained Crown Court judge, flanked by youth court magistrates (Auld, 2001; Police Foundation, 2010; Centre for Social Justice, 2012). Ultimately, insufficient competence in these areas may impede the engagement of child defendants in the court process, breaching their right to a fair trial under Article 6 of the European Convention of Human Rights.

There is arguably a stronger case for competency requirements for practitioners in the youth court. This is because, as a closed court, there may be greater potential for poor practice: practitioners can neither learn from more experienced colleagues (with the exception of magistrates who sit as a bench of three) nor have their conduct observed and assessed by them. The Carlile Inquiry also heard that child defendants are perceived to be less able than adults to recognise and report inadequate advocacy (Carlile, 2014, p. 33):

> Cases involving children are held in private, so that other practitioners are unable to observe the practice of their peers. This can lead to poor practice not being corrected. It means there is greater need for training, as there is no opportunity to learn by a process of 'osmosis'. The youth court can be seen by some therefore as a safe place for inexperienced or inadequate advocacy – the consumer of this service (the child) is often regarded (wrongly) as a poor assessor of the service they receive and the inadequacies or inexperience of the advocate is not exposed.
>
> (Ibid.)

As indicated by the above extract, such circumstances have seen the youth court contrived as an ideal training ground for junior advocates (Carlile, 2014, pp. 29–30; Centre for Social Justice, 2012, p. 84). This compounds the problem still further.

A related issue to that of advocacy inexperience is that youth court magistrates are losing their specialism due to the decreasing quantity of youth cases and, thus, their number of sittings (Carlile, 2014, p. 33). There is an associated risk that this can lead to an increased number of sittings in the adult court, resulting in a dilution of their expertise with an adult-orientated approach. The Carlile Inquiry recommended that youth court magistrates be allowed to specialise in the youth court only, as previously was the case in the Inner London Youth Court (National Children's Bureau, 2013, p. 27). In a similar vein, following their wide-ranging review of the youth justice system, the Audit Commission recommended that youth court magistrates should become 'more specialist' by undertaking a greater number of sittings in the youth court and fewer in the adult court (2004, p. 53).

Aside from increasing the likelihood of poor practice, the absence of competency frameworks for legal practitioners and Crown Court judges in youth proceedings is inconsistent with the standards expected of magistrates and district judges in such proceedings (Carlile, 2014, p. 35). Furthermore, it is out of kilter with the standards expected of advocates and Crown Court judges to deal with cases of a similar nature in other jurisdictions. With respect to Crown Court judges, they are required to undertake specialist training to preside over vulnerable cases, such as those involving sexual offences (Carlile, 2014, p. 35). One must question why such standards are not expected of those presiding over youth proceedings, which involve vulnerable defendants and witnesses. The parallel for legal practitioners is the family court: all legal practitioners are trained in family law and procedure and there is an accreditation scheme for solicitors representing children, who must be accredited to operate in the court (Law Society, 2014; Carlile, 2014, p. 35). Given that the children appearing in the youth court and family court share many of the same needs, it is incongruous that the training requirements differ so severely.

The key point is that youth proceedings – serious or not – have significant implications for the future of the children involved. The price for incompetence is therefore high. Yet the evidence is that many professionals – particularly legal practitioners and Crown Court judges – do not currently possess the youth-specific knowledge necessary to optimise the effectiveness of youth proceedings. Those with

such expertise – which include leading practitioners and academics in the field – believe that top-down intervention is needed to address this problem, through mandatory youth-specialist training or accreditation. It is notable that at the time of writing the Bar Standards Board and Ilex Professional Standards, which regulate barristers and chartered legal executives, respectively, are in the process of commissioning an independent study to 'widen and deepen' the insights of the Carlile Inquiry and 'to establish what, if any, regulatory action needs to be taken' (Counsel Magazine, 2014).

Welfare considerations

It is well recognised that children in the youth justice system are a 'similar and overlapping population' (Centre for Social Justice, 2012, p. 39) with those in receipt or need of children's services and child and adolescent mental health services. The figures well illustrate this fact: 39% of children in custody have been on the child protection register and/or have experienced abuse or neglect (Jacobson et al., 2010, p. 51); and 17% of incarcerated children have a diagnosed emotional or mental health condition, 20% have self-harmed and 11% have attempted suicide (Ibid, p. 62). There is a wealth of evidence that the problems inviting intervention from such services, such as abuse, neglect and lack of parental supervision, heighten a child's risk of offending, although these can be mitigated by the presence of positive factors (Farrington and Welsh, 2007; Youth Justice Board, 2005). In reflection of this, local authorities and their partners have a statutory duty to prevent offending (Crime and Disorder Act, 1998, s.17; see also, Children Act, 1989, s.17 and schedule 2 and Children Act, 2004, s.11).

Given the multi-faceted nature of children's needs, there is debate about whether the youth court – as it is currently configured as a purely criminal justice entity – can effectively meet its principal aim of preventing offending. This is so for two reasons. First, there is a growing body of evidence that mainstream children's services are not fulfilling their responsibilities to children in trouble, which hinders the ability of the court to meet its aim (although the engagement of children's services are our focus, there is also evidence that children who offend, struggle to gain access to mental health services (Centre for Social Justice, 2012, pp. 42–44; Talbot, 2011, pp. 33–35)). Second, there is concern that the youth court currently lacks any means to address this problem.

Taking the first issue, there is evidence that children's services are not fulfilling their responsibilities to children in trouble in some areas. A 2010 survey commissioned by the Youth Justice Board (YJB), to which 98 of the 157 YOTs responded (62%), showed that nearly one in five rated their ability to access children's services as 'poor' or 'very poor' and a further 39% described it as 'fair' (Matrix, 2010, p. 42). This is not a new problem: a National Audit Office/Audit Commission census of YOTs conducted six years earlier found that over 60% said that were only able to access social services 'sometimes' or 'rarely/never' (2004, p. 77). Youth justice practitioners, in evidence to the Carlile Inquiry, reported that a small number of child defendants appeared before them who were not in care, but arguably ought to have been (Carlile, 2014, p. 16). There is evidence that resource constraints on children's services are a key part of the problem with only the most acute cases receiving support – babies and young children – while vulnerable older children are overlooked (Carlile, 2014, p. 39; Centre for Social Justice, 2012, p. 17). However, the involvement of youth offending teams has also been found to further raise the threshold for support (Chard, 2010, p. 8), as there is often a perception that YOTs should be the sole service tackling the welfare needs of children who offend (Centre for Social Justice, 2012, pp. 181–183; Allen, 2006, p. 15; Audit Commission, 2004, p. 63). There are reports, however, that some children's services have engaged more closely with YOTs following the recent introduction of new remand arrangements[5] (LASPO Act, 2012), which have created a financial incentive to do so (for further information see Carlile, 2014, p. 17).

A focus of debate in this area is that youth courts have limited powers to take action in cases in which child defendants have not received the support they require. This has led to the proposal of significant structural revisions, including: that youth proceedings should be afforded the power under section 37 of the Children Act 1989 to order children's services to conduct an investigation into the circumstances of child defendants (Carlile, 2014, p. 20; Michael Sieff Foundation, 2013; Centre for Social Justice, 2012, p. 95; Bevan, 2004) or that there should be provision for the youth court to refer cases to the family court (Police Foundation, 2010, p. 66; Justice Committee, 2013, p. 26; Royal College of Psychiatrists, 2006, p. 72; Allen, 2006, p. 20). Some in the field have expressed concern that such changes could result in an influx of referrals to children's services, impeding delivery of support; although others argue that the powers would only be used for a small minority of

extreme cases (for further discussion of the viability of such proposals see: Carlile, 2014, pp. 18–19).

Wholesale reform

Such proposals are situated in a wider debate about whether youth proceedings need comprehensive reform. We argue that the desistance research literature is particularly relevant here given its concern with understanding the process of how and why people cease offending. Desistance typically happens to people during their 20s and 30s. However the concept is clearly relevant to children too, since the majority 'grow out' of offending (see for example Bateman, 2014, pp. 12–13). Furthermore, studies of children in the youth justice system have identified many common factors in the process of desistance with the adult domain. Desistance is often discussed with regard to the potential role of criminal justice agencies in supporting the process. Yet the theory is equally relevant to youth proceedings; their operation has the potential to support or discourage desistance.

The key features of desistance thinking are that: it is a process, characterised by 'ambivalence and vacillation' (Burnett, 2000; cited in McNeill, 2006, p. 48); agency is critically important to stopping offending as it is the offender who decides to stop committing crime; support services, such as YOTs, can only assist the desistance process (they cannot force it) (Maruna and LeBel, 2010, p. 68); one-size-fits-all interventions will not work since desistance is an individualised process (Weaver and McNeill, 2010); interventions are likely to be more effective if they focus on the person who has offended as well as on their personal and social circumstances (Farrall, 2002, p. 219); and a single and continuing relationship of trust is centrally important to assisting desistance (McNeill et al., 2005). It points to a number of principles as bearing particular importance for criminal justice practice, including: supporting offenders to tackle the difficulties connected to their behaviour (Farrall, 2002); the key role of relationships in achieving engagement and reducing reoffending (Rex, 1999; Healy, 2012; Liebrich, 1994); focusing on 'desistance-related factors' rather 'offence-related factors': that is, what can help one desist – and celebrating progress – rather than focusing on the factors that led to the offending (Farrall, 2002); and a collaborative approach with the offender as 'its implementation in practice will fall flat unless the offender recognises its relevance, appropriateness and visibility' (McNeill et al., 2005, p. 37).

The desistance literature thus suggests a different model is required if the youth court is to better meet its principal aim of preventing offending. Implicit here is the adoption of a more participative, problem-solving approach, rather than the current adversarial process, which prioritises sentencing and the finding of guilt or innocence. Many have called for such an approach in recent years, with a number of different models having being recommended, including: the integration of the youth and family court jurisdictions (Centre for Social Justice, 2012); and the introduction of a restorative justice (RJ) conferencing model, as exists in Northern Ireland, which would see RJ used as an alternative to prosecution and as the default response at court to children's offending (Police Foundation, 2010; JUSTICE and the Police Foundation, 2010) (for comparison of alternative judicial models for children, see Police and JUSTICE, 2010; Hazel, 2008). Most recently, there has been enthusiasm for problem-solving courts, which are characterised by judicial continuity and sentence reviews; multi-agency support to address underlying needs; and collaborative decision-making. Some such courts (for example family drug and alcohol courts) established in England and Wales have reported positive results (various authors cited in Ward, 2014; Harwin et al., 2014). The approach arguably offers the added attraction that it can be incorporated into the existing court approach and does not require a radical overhaul. However the North Liverpool Community Justice Centre was closed following evaluation findings that reoffending rates remained unchanged relative to the comparison group (Booth et al., 2012) and its high cost (Ministry of Justice, cited by Ward, 2014, p. 8) (although commentators have argued that reoffending is a narrow measure of its effectiveness (see Ward, 2014, p. 8)). Following publication of the Carlile Inquiry, a group of practitioners and policy-makers established a group to consider how to bring about a 'problem-solving' youth court; their next step is to seek funding to pilot such an approach.

Bringing about change

There is consensus amongst those with youth justice expertise – including leading practitioners and academics – that reform is needed, following many years of inaction. There is a compelling case that all those practising in youth proceedings should have youth specific expertise; the indication is that many – particularly, legal practitioners and Crown Court judges – are currently lacking in this respect. The introduction of mandatory youth justice training or an accreditation

framework for those practising in youth proceedings are possible routes to addressing this. Likewise, there is a strong argument, underlined by the messages from the desistance literature, that youth proceedings need to be configured differently if their aim of preventing offending is to be better met. In this regard, we think that adoption of the problem-solving approach in youth proceedings should be considered at a national level, on the basis of its promise and relative feasibility. There is also scope to learn from alternative models that are seen internationally, such as the Children's Hearing system in Scotland.

Reform is unlikely to be successfully realised unless there is capacity and support for change amongst professionals. These are important factors in successful implementation (Damschroder et al., 2009). For example, the evidence is that children's services have often not fulfilled their duties to children in trouble due to resource constraints and structural issues. Equally, there are cases where YOT professionals have found ways to overcome difficulties accessing children's services, such as through reinvigorating the secondment of children's and families' social workers to their teams, to improve links and understanding between the two services (Carlile, 2014, p. 18).

However we argue that impetus is also needed at the national level to bring about a more appropriate form of youth proceedings for the 21st century. In this respect, there has been a notable absence of a single, dedicated overarching authority to address poor practice or to champion reform in youth proceedings, despite a complex array of government departments, quangos and independent organisations involved in youth court policy and practice. For this reason, the Carlile Inquiry recommended that a senior judge be appointed to be the statutory youth proceedings representative at a national level (Carlile, 2014, p. 38). The potential value of such a role is apparent from the analogous example of the president of the Family Division, who in April 2014 challenged every designated family judge to implement the family drug alcohol court problem-solving approach and report back on their progress in a year's time (Munby, 2014). In reflection of this, in late December 2014 the lord chief justice appointed a judicial lead for youth justice who 'will chair a committee to provide judicial oversight of and co-ordination for matters relating to youth justice in the criminal courts' (Courts and Tribunals Judiciary, 2014). While such an appointment may not be a panacea, we believe that it will help to effect improvement by signalling the importance of youth proceedings, highlighting poor practice and championing reform. An effective response to the offending of children and young people is arguably particularly important.

If the system fails to 'get it right' at this point, it may increase the risk of children becoming the adult offenders of the future.

Notes

1. The inquiry was initiated by the Michael Sieff Foundation which has a long-standing interest in the area, along with the National Children's Bureau which provided the secretariat. The work was jointly funded by the Michael Sieff Foundation and the Dawes Trust.
2. Details of the inquiry panellists, advisers and researcher can be found in the inquiry report.
3. A full list of witnesses and written submissions can be found in the inquiry report.
4. These schools later became approved schools under the 1933 Children and Young Persons Act (CYPA), then later still, under the 1969 CYPA, became community homes with education.
5. Detention between the point of arrest and sentence.

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15

Integrated Offender Management: A Microcosm of Central and Local Criminal Justice Policy Turbulence

Anne Worrall and Mary Corcoran

For more than a decade, the government in England and Wales has insisted that a very small proportion of offenders (around 10%) are committing a very large proportion of crime (around 50%) at any point in time (Home Office, 2001; 2003; 2004). Although this received wisdom has been challenged (Hopkins and Wickson, 2013), it is in this context that we focus on intensive supervision projects for persistent and prolific offenders. The underlying principle of such projects is that a combination of greater control and surveillance, together with help and treatment, offers the best opportunity to reduce the risk of reoffending of this group of predominantly young, male, non-violent offenders. The main criticisms of the projects are that they are resource-intensive, expensive and unproven. Evaluations, though increasing in number, are based on small samples and are inconclusive in their results. At the same time these projects represent an imaginative and alternative opportunity for the effective management of this specific group of offenders, with whom agencies commonly have difficulties in engaging.

In this chapter, we consider the question of 'who knows best?' in the context of the specific model of multi-agency work that comprises integrated offender management (IOM). Broadly speaking, we consider three aspects of the question: first, the conflict between central government criminal justice policy and localised responses to local criminal justice problems; second, the differing objectives and approaches of the public, private and voluntary sectors in dealing with prolific offenders; and third, the occupational culture clashes between the police, probation and stakeholder providers of services for this group of offenders.[1] We draw on past experience of evaluating intensive supervision

projects (Hope et al., 2001; Worrall et al., 2003; Worrall and Mawby, 2004; Mawby and Worrall, 2004) and one recent evaluation of an IOM programme (Worrall and Corcoran, 2014) to illustrate our arguments.

Criminal justice policy and local responses to local needs

Intensive projects for prolific and persistent offenders in England and Wales can be viewed as both a recent innovation – emerging from the convergence of intelligence-led policing and evidence-based probation, given impetus by the 1998 Crime and Disorder Act – and as the latest incarnation of a much older penal pre-occupation with persistent offending and intensive supervision, dating back to the 1970s (Worrall and Mawby, 2004).

The latest incarnation includes, but extends beyond, existing Prolific and other Priority Offender (PPO) projects. IOM has been an attempt by the Ministry of Justice to provide a 'strategic umbrella' to co-ordinate all multi-agency approaches to intensive supervision. It has been an attempt to operationalise the concept of 'end-to-end offender management' introduced by the Carter Report (2003) with a key aim of 'disrupting' an offender's criminal activity and thus reducing the risk of reoffending. Six pioneer sites were funded by the government in 2008/2009 and have been subject to evaluation (Senior et al., 2011). IOM is now the nationally recognised framework for local multi-agency collaboration in working with offenders. A joint Home Office and Ministry of Justice document (2010) identified the five key principles of IOM as being:

- All partners tackling offenders together.
- Delivering a local response to local problems.
- Offenders facing their responsibility or facing the consequences.
- Making better use of existing programmes and governance.
- All offenders at high risk of causing serious harm and/or reoffending are 'in scope'.

Projects for prolific adult offenders were originally concerned with the reduction of volume property crime, predominantly theft and burglary, although more recent IOM projects now accept offenders with some form of current or past violence in their records. The central feature of such projects has been the combination of intensive attention from both the Police and Probation services, with ready access to provision by other partner agencies.

The other characteristics of the projects derive from this central feature:

- The project is staffed by designated police and probation personnel and normally located on either police or probation premises (the significance of different locations being under-evaluated).
- Participants in the project are required to meet local criteria that categorise them as 'prolific' – that is, among the most persistent offenders in the locality – and allocate a risk-assessment score to them.
- Participants were historically subject to formal court orders of supervision or post-custodial licence but, importantly, IOM programmes now include substantial numbers of non-statutory offenders who are not subject to current court orders.
- Participants are subject to high levels of police monitoring and intensive probation supervision which seek to address their offending behaviour and also to assist with other offending-related needs (known as 'pathways' to desistance) such as accommodation, substance misuse treatment, physical and mental health, education, training and employment (ETE), finances, family relationships, and attitudes, thinking and behaviour.
- In order to achieve this, there has to be an agreed mechanism of information exchange between participating agencies (not just police and probation).
- Finally, there is an agreed procedure for swift enforcement in the event of non-compliance or further offending (which requires the co-operation of courts).

The body of evaluation research on projects for PPOs is neither large nor conclusive. However, the number of studies is increasing, comprising a mixture of independent evaluations by academics, often on a limited budget and larger scale national or multi-site evaluations undertaken by Home Office and Ministry of Justice researchers. Evaluators have typically had to work with small sample sizes and, in some cases, without a matched comparison group. The resulting reports and their conclusions tend to be highly qualified in relation to reduced offending and cost effectiveness. Nevertheless, many of the evaluations emerging in the United Kingdom have provided optimism that PPO and IOM projects can be effective in reducing the offending of the participant group (Dawson, 2005; Dawson and Cuppleditch, 2007; Homes et al., 2005). This message, however tentatively expressed, has been politically expedient for governments. In 2009, the Ministry of Justice declared that

projects could result in a '62% reduction in recorded convictions over 17 months' (2009, p. 6). This is by far the most optimistic finding of any project, though the overall direction of findings has been consistent over more than a decade.

Two recent documents provide a national picture of IOM. The College of Policing's (2013) 'Stocktake' report covers, at a national level, many of the issues we identified at a local level in our research, in relation to both examples of good practice and the under-development of performance management. The Home Office's (2014) findings from the 2013 survey of Community Safety Partnerships highlighted the variation in provision across the country and the future impact on IOM provision of the Transforming Rehabilitation agenda.

Transforming Rehabilitation (Ministry of Justice, 2010; 2013) is having a profound effect on IOM. The Probation Service was split into two new organisations in June 2014 – a National Probation Service (NPS) remaining in the public sector and dealing with high-risk offenders (predicted to be 30% of the workload) and all court-related work, and 21 Community Rehabilitation Companies (CRCs) dealing with low- and medium-risk offenders which have been sold off to the private and voluntary sectors (see Jon Spencer, this volume). IOM programmes have been designated nationally to fall within the scope of CRCs, though this has immediately created a number of problems. First, it is by no means certain that all IOM offenders are, or will remain, low and medium risk. Our research supports the view that the risk levels of IOM offenders can fluctuate, sometimes quite wildly and the path to desistance is often a 'zig-zag' (Burnett, 2004). Second, IOM is about 'control' as well as 'change' and enforcement, for example recall to prison of statutory offenders for non-compliance with court orders (which is now the responsibility of the NPS) is a routine feature of the programmes. Thus, the future relationship between the NPS and the CRCs is crucial to the continuation of IOM. A third dilemma for IOM at a local level relates to the advent of police and crime commissioners. IOM was set up under Community Safety Partnerships with powers to commission programmes across different agents. The introduction of PCCs has had a widespread impact on the development of IOM, requiring such programmes to be both more visibly accountable and more openly competitive for resources. Consequently, multi-agency partnerships such as IOM now operate within two tiers of commissioning – local commissioning under the aegis of the Office of the Police and Crime Commissioner (OPCC) and within the 'contract area' of the new CRCs.

The selling off of CRCs to consortia of private and voluntary sector organisations[2] presents many potential and actual conflicts of interest, ethos, practices and governance of existing programmes. At the very least, it paves the way for altering structures of governance and accountability as IOM partnerships incorporate the interests of major contractual providers alongside statutory criminal justice agencies. A likely scenario is that offender interventions in the near future may be commissioned by a public sector body (police or Office of the Police and Crime Commissioner (OPCC)), managed by a private company and delivered by a combination of voluntary, public and private agencies. It will be worthwhile observing how these fundamentally different kinds of organisations interact. Equally, it is not improbable to conjecture that some distinctions between these types of agencies will become blurred, leading to the emergence of some new 'hybrid' organisational approaches (Corcoran and Fox, 2013). In turn, this prospect raises important questions about governance, accountability and power amongst the principal players in offender management 'contract areas', especially if things go wrong. This not only applies to statutory frameworks within which different partners are formally held to account, but to 'where the buck stops' – with commissioners, contractors, the Ministry of Justice or the OPCC.

What counts as 'success'? Differing approaches and contributions to IOM

It is widely acknowledged that PPO and IOM projects are complex in terms of their multi-agency nature and the needs of their clientèle. Their value should be judged beyond crime rates and cost effectiveness, though these are of course important. Other criteria which should be taken into account include, on the one hand, health, educational and social benefits for participants and, on the other hand, improved multi-agency working and information exchange between project partners and improved intelligence on prolific offenders. Participants have identified the following benefits:

- they stopped or reduced their offending whilst they were on the project;
- they were occupied;
- they were provided with a sense of purpose;
- they were helped with their drugs problems;

- they gained confidence in doing everyday things, for example finding accommodation, dealing with utility companies, social interaction; and
- were helped in rebuilding relationships with their families (partners, children and parents).

(Worrall and Mawby, 2004, p. 278)

Although by no means always clear cut, there are undoubtedly some basic differences in working practices among the public, private and voluntary sectors. In very broad terms, the public sector model of service delivery is based on principles of universalism, whereby all clients are entitled to a minimum (and are sometimes restricted to a maximum) level of service, which should apply regardless of geography or individual circumstance. The voluntary sector tends to individualise its services to a much greater degree, based on perceptions of need, clients' wishes, client-worker relationships and volunteer availability. Private sector providers tend to be driven by rational calculations about the most cost-effective way of producing specified results. The result is that it is often difficult to describe a 'standard' way of working within a single IOM partnership. What we noted in our study was the creativity, enthusiasm and positive approach taken by staff from different agencies to establish clear and common goals and co-operative working practices which would allow partnership to develop organically from the bottom up. The unanswered question remains as to whether the collaborative disposition in evidence up to this point outlasts the imperatives of competitive self-interest that are built-in features of outsourcing and service commissioning under the Transforming Rehabilitation agenda.

The difference of approaches manifests itself particularly in relation to definitions and measurements of 'success' in IOM programmes. While government policy emphasises reduction in reoffending as the gold standard of performance, in both theory and reality, the picture is far more complex. The most straightforward indicator of success for the IOM programme that we have been involved with recently is deselection after a period of monitoring that shows a consistently low level of risk of reoffending. Disappointingly, there was no simple database that collects data on deselections and this has been a missed opportunity to showcase the work of IOM. In fairness, however, the picture is usually more complex than this:

> Somebody might be on minus ten and gets to minus three by the time he's come there [IOM]. Actually, he's still offending but he

> isn't maybe burgling domestic dwellings, he isn't maybe using as many drugs, he's maybe changed his choice of drugs from heroin to cannabis. So that for me is a form of progress . . . but that doesn't get recognised.
>
> (Probation interviewee)

To complicate the picture further, it was pointed out to us on several occasions that IOM is not just about 'change' but also about 'control'. Staff are perfectly prepared to recall an offender to prison for non-compliance, even if they have not actually reoffended, in order to prevent reoffending. Approximately one-third of the IOM offenders in our study were in prison at any one time and it is a matter for debate whether, and to what extent, this should be regarded as success or failure for IOM.

Since there is no clear definition of what counts as 'success' for the IOM, it is unsurprising that both central and local government have become increasingly anxious to prove either the effectiveness or the lack of effectiveness of IOM, once and for all. As Wong puts it: 'Evidencing the impact and cost effectiveness of IOM has become the holy grail for local agencies and government' (2013, p. 60). But the impossibility of identifying exactly what it is that IOM aims to achieve, over and above other interventions – or 'assessing additionality' (Wong, 2013, p. 63) – means that the 'holy grail' has become more of a 'fool's errand' (Wong, 2013).

Given the limitations of capturing outcomes statistically, those with professional experience of working with offenders also adopt a threshold of 'success' which attributes tangible and subtler changes to offenders as a result of their engagement. These thresholds coincide with criminological desistance theory which recognises the steps towards primary desistance (the initial tentative changes in behaviour and attitude) that form the basis of secondary desistance (more consistently law-abiding behaviour and thinking) (Farrall et al., 2007). The evidence may be modest by the expectations of outside observers especially as participation in IOM may not necessarily take individuals immediately or entirely away from a life of crime. However, for staff it has an observed impact on slowing down the rate at which individuals proceed through the revolving door between prison, community and back again. One pointer of success is that IOM offenders engage with statutory and voluntary sector services to a far higher degree than other cohorts of offenders. Whilst apparently counter-intuitive, the logic is that getting offenders to engage with IOM is the first step of a longer process of

tackling the underlying, complex causes of crime. In the long run, this generates added value in that the IOM process becomes greater than the sum of its constituent parts, thereby adding to cost efficiency:

> We can provide those figures but we do them every time a client exits, we record on their exit plan exactly how many days that they stayed with us. . . . We're looking at not necessarily being the people that cure somebody and we make that massive change. Did we make a difference to that person? And actually in terms of finances, did we make a reduction just on costs in general? Because somebody staying out of prison for six weeks longer, it's six more weeks of money into a pot.
>
> (Stakeholder interviewee)

This section concludes with a quotation from the recent joint inspection of IOM by HM Inspectorate of Probation and HM Inspectorate of Constabulary. Despite its length, this succinctly summarises both the value and the challenges of IOM work:

> Overall, our findings about the outcomes of the Integrated Offender Management approach give rise to cautious optimism. It was clear to us that the right offenders were targeted; there were some indications that offenders' lives had improved because their problems, such as substance misuse, had been addressed. Although reoffending rates could be regarded as disappointing, we saw this as symptomatic of the entrenched pattern of offending among the Integrated Offender Management cohort, rather than as a failure of the approach itself.
>
> Critically, we found that the absence of a structured and systematic approach to evaluation is undermining efforts to assess and report on the effectiveness of Integrated Offender Management. It is a commonsense approach that intuitively feels right. However, the absence of clear evidence of effectiveness in terms of both crime reduction and reducing reoffending inhibits understanding of its impact and value. If the evidence showed that Integrated Offender Management was successful in reducing crime and reoffending, there would be a strong case for further investment. If not, a rethink would be needed. We think that the Integrated Offender Management approach has real potential; however, in the absence of robust evidence to support this, we cannot make a firm recommendation either way.
>
> (2014, p. 4)

Sustaining partnerships: Roles and cultures in IOM

Corcoran and Fox (2013) found that the robustness of local partnerships focusing on offenders with complex needs gains the most when operational staff are given scope to develop collaborative networks; where their work complements that of their partners; where there is equality and 'respect' among the different agencies; and where there is a clear division of responsibilities. Past research has found certain conditions to be more amenable than others for bringing practitioners from several occupational sectors and cultures together. In their analysis of joint working among Police, Probation and Prison services, Mawby et al. (2007) noted the importance of obtaining a 'conducive framework' for facilitating co-operation across several agencies. The addition of voluntary sector and statutory health, housing and educational providers brings another element of complexity to the provider 'mix'. Sustainable partnerships rely on a number of conditions for reconciling different organisational objectives within a multi-agency project. These include:

- establishing clearly defined and agreed objectives;
- all stakeholders contributing personnel and resources proportionate to their roles and responsibilities in the partnership; and
- a clear delineation of operational territory and respect for jurisdictional boundaries among agencies.

A notable feature of the IOM programme is the number and diversity of organisations involved to different degrees in the partnership. This opens up questions about the work involved in forming and sustaining partnership in the complex circumstances of multi-agency mixes, as well as the challenges involved in co-ordinating interactions across several sectors and agencies. Staff working in stakeholder organisations in our study agreed that each agency must have a clear sense of its own mission and what it contributes to the partnership and offender management process.

Research also suggests that the disposition of the 'core' (statutory criminal justice) partners is a determining factor in forging 'reluctant' or 'committed' partnerships. The former arises when a 'minimalist and grudging approach' towards partnership is adopted. By contrast, 'committed partnerships' occur where:

- partners are able to adapt policy 'from above' to local conditions;
- participants are constructively disposed towards the idea of partnership;

- clear and mutually agreed definitions of roles and responsibilities are in place;
- joint projects are underwritten by the commitment of financial or staff resources by all parties, and;
- the voluntary sector is not marginalised.

Here we consider three aspects of the roles and occupational cultures within IOM: relationships within the Police Service; relationships between the Police and Probation services; and, relationships with the wider partnership.

Relationships within the Police Service

Attitudes towards IOM within the Police Service vary considerably and there are interesting views about how far the IOM approach can be imported into 'mainstream' policing and how, if at all, neighbourhood policing benefits from the existence of IOM:

> Police officers with a lot of service have come down to the unit and you can tell they don't want to be here – this is the cuddly IOM unit. No it's not, it's not about that at all . . . I think that image is changing.
> (Police interviewee)

In our study, we found that the role of 'field officer' (by no means a universal feature of IOM) is crucial in this. Seconded from local police teams (LPTs) to the IOM for a fixed period, field officers remain based in LPTs and act as a bridge between IOM and other police teams. They act as the eyes and ears of IOM, visiting offenders at home on a regular basis, offering support but also feeding back intelligence to colleagues both at IOM and the LPT. Our observations suggest that field officers develop a strong rapport with many offenders and cultivate a level of trust that would not normally be expected between police and offenders. One original aim of the field officer was to disseminate the principles of IOM to local police and to encourage a wider adoption of IOM skills among their colleagues, thus enhancing the skill sets of neighbourhood police officers. Whether or not this has happened is a matter of debate.

Relationships between the Police and Probation services

The key to the success of IOM is the police/probation relationship. Mawby and Worrall (2004; 2013) have argued that this relationship has been one of mutual suspicion historically but that this has improved

dramatically over the past couple of decades, largely due to increased multi-agency working and a willingness on both sides to change cultures and attitudes. This suspicion is still identifiable but we did not find it widespread:

> Very suspicious of the police. I guess everybody knows that the reason they want to be involved with probation and the statutory offenders is so that they can arrest them . . . I made a decision a long time ago that if any of mine turn up here and they are wanted and they're going to be arrested, I have nothing to do with that. I stay firmly at my desk.
>
> (Probation interviewee)

Despite a general view that probation is responsible for the 'change' aspect of IOM and the police for the 'control' aspect, we found the reality to be very much less clear-cut, especially in relation to non-statutory offenders. Field officers, in particular, are very committed to a rehabilitative approach to offenders. Some believed that probation had relinquished this aspect of the work:

> If we say to a probation officer, we've been two or three times last week [on a home visit], do you know this, that and the other about him, and they go 'no'. Because they only see what that person wants them to see . . . I don't think they have a lot of time to get out of the office. I think they've got appointments, people coming in . . . work programmes and things like that.
>
> (Police interviewee)

Our evidence suggests that at ground level on a daily basis the police/probation relationship works well but there are still underlying tensions which may be creative and healthy or, alternatively, stressful and counter-productive:

> I would suggest the police were under more pressure to 'give' to make it work than the probation service were.
>
> (Police interviewee)

> It doesn't have to be harmonious . . . it's the pull and tug that makes it so successful.
>
> (Probation interviewee)

Relationships with the wider partnership

Co-operation between statutory and non-statutory agencies is critical to establishing efficient working practices which allow workers from different agencies to discharge their roles within their respective remits:

> We will look at the needs of the actual person. And we will take into account what the [police and probation] officers [are] saying, but it's about the individual and about what they think their offending is, and how they got there. But they [police and probation] manage the risk for us, they manage the boundaries of what we can do and where we can go, dependent on that. And then we do the work out in the community.
>
> (Stakeholder interviewee)

All participants observed that it was critical to retain a clear sight as to the core values and objectives of each participating agency. Agencies are not expected to undertake functions or responsibilities that are beyond their remit, or which might be likely to undermine their distinctive approach towards clients. The clear division of roles and functions underlines clarity and trust between agencies with different service principles and operational cultures and obligations:

> Probation trust us to just get on with what we need to do and let them know what's happening. We've never had any issue where they've stopped us from doing something. They trust us to know what we're doing and know that, that's what helps that person to move forward.
>
> (Stakeholder interviewee)

By contrast, other stakeholders commented on the process of adjusting to working not only within criminal justice, but also with agencies such as the police and probation which had different styles and approaches:

> Probation are just very focused on what they work for and what they want to achieve, and they perhaps don't take into account the requirements of other agencies. It's been a bit different really with the police. We didn't know what to expect when we first came, but I can honestly say, I do believe we've got a really good working relationship with the police. They share information with us, we share information with them. If there's anything we're not sure of, we talk to them about it.
>
> (Stakeholder interviewee)

The statutory-community sector relationship is underpinned by the expectation that the voluntary sector provides specialist or 'niche' services which enhance, rather than take over, the role of existing statutory services. One volunteer organisation observed that their service, although apparently a soft 'marginal' aspect, was in fact a critical 'glue' or 'cement' to the work being undertaken at the statutory level. The importance of partnership was the added value which it brought to individual services, making the whole more effective.

Conclusions

In this chapter we have sought to examine the question of 'who knows best?' about reducing reoffending and working intensively with persistent offenders. A decade or so ago, prolific property offenders – burglars, shoplifters and car thieves – were the bane of the criminal justice system and local politics. Locally driven, intensive, multi-agency 'carrot and stick' work (Worrall, 2002) caught the professional imagination. Despite equivocal evaluations, those working on the frontline 'knew' that this work was effective in terms of changing lives and creating the social and personal conditions conducive to reducing reoffending. Proving it beyond doubt to a sceptical public and to local politicians was more difficult but everyone enjoyed hearing successful case studies and the work struck a chord.

Unfortunately, this 'feel-good factor' is no longer sufficient to guarantee the sustainability of such programmes and the IOM finds itself in the much harder edged, competitive world of commissioning. Moreover, property crime has fallen dramatically (Office for National Statistics, 2014) in the past decade, for reasons that probably have little to do with intensive supervision – though that may have played its part. Central government criminal justice policy has shifted and IOM programmes are being called upon to tackle violent offenders (including domestic violence perpetrators), sex offenders and gangs. The suitability of the IOM model for dealing with different types of offenders and offences is now being scrutinised. In our study, some argued that the model is wholly inappropriate for high-risk violent and sex offenders. They pointed out that, while a multi-agency approach to such offenders may be appropriate, the IOM model is not the only one available – MAPPA (Multi-Agency Public Protection Arrangements), for example, having been around for a long time (Kemshall and Wood, 2007). They were concerned that the specific IOM model will become either overwhelmed by the demands or so diluted in practice as to be meaningless. Others suggested that IOM could be viewed as the equivalent of 'acute medicine' for a range of

offenders. Offenders could be allocated to the intensive programme for a finite period before being moved on to 'normal wards' or lower levels of supervision and monitoring. Either way, it is possible to distinguish between the principles of IOM – which may be widely applicable – and the interventions that need to be considered afresh and tailored for each new cohort of offenders.

Finally, one must consider the as yet undetermined consequences for local criminal justice landscapes populated by influential new players in the form of Offices for Police and Crime Commissioners and Community Rehabilitation Companies. Controversial and unpredictable as these developments are, there is no doubt that the formation of offender management partnerships will in future be buffeted between the need to be both market-ready and more locally responsible (Corcoran, 2014). The extent to which partnerships might facilitate greater democracy as well as accountability for resources may well be a key test of their future resilience (cf. Criminal Justice Matters, 2014).

Notes

1. In policy terms a 'stakeholder' refers to any constituency, including service users, who have an interest in the operation or outcome of a service. For the purposes of this evaluation, 'stakeholders' refers to those agencies which contribute to the integrated offender management process by providing services which support offenders. These service areas are in line with the pathways for reducing reoffending (housing; education, training and employment; health; drugs and alcohol; finance management' families' attitudes and behaviour; sex and violence prevention). Providers may be statutory (such as the NHS) commercial or voluntary sector, but are distinct from the Police, Prison and Probation services in that their remit and obligations are not concerned with criminal justice disposals.
2. The Ministry of Justice announced its list of preferred bidders at the end of October 2014 and the majority were consortia led by private companies, supported by several voluntary sector organisations.

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Wielding the Sword of Damocles: The Challenges and Opportunities in Reforming Police Out-of-Court Disposals in England and Wales

Peter Neyroud and Molly Slothower

Introduction

'Out-of-court disposals' (OOCDs) by the police have become a contentious area for policy and political focus in England and Wales. For some, notably the justice secretary, the 'cautions culture' has led to a situation where victims feel that 'offenders are walking away scot free' (Police Professional, 2014, p. 7). Other commentators have stated that the existing regime of OOCDs, which evolved incrementally, had become too complex and in need of simplification. Yet, the Magistrates Association, while calling for reform, has voiced concerns that less cautioning might lead to 'an over escalation and criminalisation of behaviour' (Police Professional, 2014, p. 7). As a key part of the Gateway to the criminal justice system, accounting for nearly 40% of all disposals (CJJI, 2011), the decisions about whether and how the police should best divert from prosecution have a very significant impact on the wider operation of the system (Neyroud, 2014). The Gateway we are concerned with here is the decision-making process, usually within the police custody environment which determines whether a case proceeds to court or is resolved by other means pre-court.

In November 2013, the justice secretary announced a trial of a new regime, to be based in three police force areas. In those areas, the police would be restricted to using only two new conditional OOCDs as against the previously possible six options.[1] The core briefing from the Ministry of Justice (MoJ) described the new approach as requiring 'offenders

to take action to comply with a disposal, rather than simply accepting a warning' (MoJ, 2014a, p. 1). The new regime appeared to be underpinned by a number of assumptions: that holding conditions over an offender will hold them to account; that the police are able to set and manage conditions effectively for offenders; that such an approach will be acceptable to victims; and that it will be cost-effective to pursue such a deferred prosecution model for the more serious offences or offenders.

In this chapter we want to explore those assumptions by drawing on the existing research on OOCDs, deterrence and desistance and on Operation Turning Point, a randomised controlled trial in Birmingham that has tested a deferred prosecution model in the field. In doing so, we are able to draw on newly available evidence from Turning Point (Neyroud and Slothower, 2013; Slothower, 2014a; 2014b) to understand the challenges and opportunities of the approach proposed in the new regime.

OOCDs offer promising potential rewards – faster, more effective and consistent, cost-saving disposals that may offer the opportunity to increase perceptions of police legitimacy, satisfaction of victims and the number of offenders brought to justice. They also pose risks – they could backfire on reoffending and victim satisfaction, be inconsistent, incoherent and unenforceable. The key to at least some of these benefits and to avoiding some of the risks, lies not in what the disposals are, but how they are implemented. The process-oriented elements of the Turning Point study address officer decision-making and quality of implementation, at three different OOCD officer decision-points: the gateway (to divert or not); the conditions; and communication with the victim. Turning Point finds in each of these elements that:

(1) how officers make these decisions can mean the difference between a high- and low-quality disposal;
(2) and police management can offer tools to guide decision-making and feed back to officers to generate quality disposals.

The 2014 pilot of a new OOCD framework

The detail of the proposed pilot in three police force areas was set out in a guidance note from the MoJ (MoJ, 2014c). The initial pilot was confined to adult offenders, who could only be offered one of two disposals:

- a conditional caution plus (CC+) based on the existing conditional caution;
- and a community resolution plus (CR+) for lower-level offences.

The conditions which officers were required to deploy 'must be either rehabilitative (attendance on a treatment course) and/or reparative (apology to the victim or compensation) and/or punitive (a financial penalty)' (MoJ, 2014c). Although mentioned in the guidance, it was far from clear how this menu of conditions related to the menu of conditions which police and crime commissioners had just consulted about and published under 2014 legislation creating the 'community remedy' (Home Office, 2014), which was intended to secure victim involvement in condition setting.

Offenders would be eligible to be considered for this new framework as long as their offence was not likely to result in a prison sentence or a heavy community sentence. But they must admit the offence, consent to the conditions, have a suitably minor offending history and the victim's wishes should be taken into account. In return for compliance with the agreed conditions, the offender avoided prosecution, but would still have a recorded finding of guilt.

The MoJ sets the ambitions for the new framework to be:

> fairer and more robust, and it will create improved consistency across the country . . . it will help to ensure that the right cases are escalated to court and that minor misdemeanours do not result in individuals being criminalised unnecessarily. This approach allows officers to retain a level of discretion to 'do the right thing'.
>
> (2014c, p. 1)

Although the scheme must also not result in increased bureaucracy, the 18-page long guidance note (MoJ, 2014c) suggested that this might well be difficult to achieve.

Curiously, the ambition to reduce reoffending was almost completely omitted from the guidance and only made an appearance in the press release (MoJ, 2014b). There was no reference whatsoever in the guidance to the evidence of what works, either in OOCD or in reducing reoffending. Instead, the emphasis in the guidance was on procedural, legal and bureaucratic rectitude rather than outcomes. Yet, despite some significant gaps, we do know quite a lot about what will work and, just as important, what will not work, and the problems in implementing

OOCDs. This historical and research evidence suggests that MoJ's ambitions for the trial are only achievable with careful implementation, support for key staff, focused supervision and careful attention to the way victims are treated.

Out of court disposals: Prevention or punishment?

OOCDs have a long history in England and Wales but there was a significant increase in their use by police from 2000 on, driven by government targets for 'sanction detections'. A joint inspection of 'out of court disposals' (CJJI, 2011) found that, as a result, OOCDs accounted for more than 38% of all disposals. The inspectors expressed concern about the quality of the decision-making, variations in practice and the types of offences. Policy Exchange expressed similar concerns about variation and inappropriate use (Sosa, 2012). On the other hand, the inspectorate also found that OOCDs appeared to cost less, showed comparable levels of victim satisfaction to court disposals and appeared to result in fewer reconvictions.

The inspectorate report reflected a period of development in the use of OOCDs that saw the statutory Conditional Caution introduced in 2003 and the burgeoning use of a variety of 'informal' and 'community' resolutions. The latter had been given a formal statutory framework with the provision of the 'community remedy' in 2014 (Home Office, 2014). That was only the latest twist on a long journey. Steer (1970) observed that the police had always used cautions. Through the 1960s they became an established part of a more welfare-based approach to dealing with young offenders. Adding rehabilitative conditions to a caution also has a long history. As early as the mid-1960s Rose and Hamilton (1970) were testing a 'cautioning-plus' scheme in which one group of offenders was offered a caution with additional support from a Youth Liaison Team.

Whilst 'cautioning plus' provided an example of cautioning as a means of supporting offenders to desist, there has been a competing emphasis on OOCDs as a cost-effective means of delivering fast and pragmatic punishment (MoJ, 2014a). In the middle of these two models, one rehabilitative, the other with more focus on deterrence, there has been a growing interest in using restorative justice as a means of reparation and increasing the confidence of victims (MoJ, 2014c).

The debate about OOCDs has tended to neglect the most compelling arguments in favour of using alternatives. In a systematic review of the 'formal system processing of juveniles', Petrosino et al. (2010) reviewed the evidence comparing the effectiveness of formally

processing juveniles in court, with diversion. Their conclusions, based on an analysis of 29 controlled trials in the United States, were that 'juvenile system processing appears not to have a crime control effect, and across all measures appears to increase delinquency' (Petrosino et al., 2010, p. 6). It seems highly likely that these findings also extend to young adults (Britton, 2014).

Further good reasons for exercising care in setting the boundaries for formal processing for juveniles and adults were offered by Durlauf and Nagin (2011). Their analysis, drawing on 30 years of research on sentencing and prevention, suggests that strategies that focus more on certainty rather than severity, appear to offer the greatest likelihood of a positive deterrent outcome. Durlauf and Nagin also suggest that celerity is an important component alongside certainty and that apprehension is a more effective deterrent than the risk of the subsequent processing. Their arguments would suggest that the police should concentrate their efforts on prevention through targeted strategies and, when offenders are caught, should be sparing about using severe punishments. Instead, they should aim to process offenders quickly and with certainty about the consequences of reoffending or non-compliance with conditions.

However, for a set of disposals that are so widely used, the state of research on OOCDs and, above all, their comparative effectiveness in preventing reoffending, as against court-based interventions is less than satisfactory. The Joint Inspectorate report argued for a 'strategy' based on 'what works to improve victim satisfaction, reduce re-offending, and provide value for money' (CJJI, 2011, p. 3). As we will see, the research so far has largely failed to answer these questions, but it has addressed other equally important questions about process and implementation.

The evidence on cautioning and diversion

In order to address the critical questions about 'what works?' we would need a group of randomised controlled trials (RCT) of the relative effectiveness of cautioning as against prosecution in England and Wales or, at the very least, studies with a strong control compared to the intervention (Farrington and Bennett, 1981). There has, however, only been one RCT in this area in the United Kingdom until Operation Turning Point. That was Rose and Hamilton's study in the 1960s, but that study compared two methods of delivering the caution rather than comparing cautions and prosecutions for the same offence. The studies reviewed by Petrosino et al. (2010) were US based and were exclusively focused

on juvenile offenders. However, they produce compelling evidence in favour of considering diversion rather than formal processing.

In the United Kingdom, the early studies of cautioning by Steer (1970), Ditchfield (1976) and Giller (Jones, 1982) were based on either an analysis of official statistics or, in Giller's case, detailed work in Hampshire Constabulary comparing the cases in which deferred cautions, instant cautions and prosecutions had been administered. Steer was able to draw conclusions that police cautioning was 'a sensible and useful way of dealing with certain types of offender, and that police discretion not to prosecute is exercised widely' (Steer, 1970, p. 59). Giller concentrated more on the process of cautioning and found that instant cautions appeared to be more effective, judged by reoffending rates, than deferred cautions.

Landau and Nathan (1983) also focused on the process, but they examined the ways in which offenders were selected for cautions. They found what they judged to be racially disproportionate practice, which was partly driven by the need for offenders to have enough confidence in the police to admit offences before being considered for a caution. Alongside discrimination, a succession of studies (Mott, 1983; Laycock and Tarling, 1985; Giller and Tutt, 1987; Sandars, 1988; Evans and Wilkinson, 1990; Campbell, 1997) raised concerns that the expansion of cautioning through the 1970s and early 1980s had created an unhelpful diversity of practice which impacted on the fairness and justice of the system. Campbell (1997) identified that the problems of managing police discretion were central to this.

Studies that have directly compared the relative effectiveness of OOCD models with prosecutions in court in the United Kingdom have been limited. Rose and Hamilton (1970) concluded that the additional benefits of the 'cautioning plus' model were not significant, whereas the cost was greater. Farrington and Bennett (1981) conducted an analysis of the police cautioning of juveniles in London and concluded that police cautioning had both increased the number of juveniles formally processed – 'net-widening' – and failed to result in better reoffending rates compared to court.

In the 1990s interest turned to the potential effectiveness of 'restorative cautions'. Young and Goold (1999) carried out an 'exploratory study' which identified 'restorative cautions' as a 'welcome shift'. Strang et al. (2013), on the other hand – in the Campbell systematic review of restorative justice – examined the studies with randomised designs and strong implementation. They found that restorative justice conferences, whether used as part of a diversion or as part of the

court process, produced a 'modest, but highly cost effective reduction in repeat offending' (p. 1). They also observed that contrary to the assumptions apparently held by many in policy roles, restorative justice appeared to work at least as well, if not better, where the offender was an adult. One additional finding that is particularly relevant for this chapter is their observation that restorative approaches showed the greatest cost-effectiveness when applied to more serious offenders. Moreover, Strang et al. (2013) found that restorative justice is likely to be least effective with drug-addicted property offenders.

There have been a small number of studies specifically focused on conditional cautioning. Blakeborough and Pierpont (2007) conducted an evaluation of the pilot implementation for the Home Office. They found considerable variation between and within the six forces studied. More than half the conditional cautions were for criminal damage and the most frequent condition was financial compensation to the victim. This finding has been consistently replicated in practice since (Neyroud and Slothower, 2013). Indeed, the relative absence of rehabilitative or restorative conditions suggests there are serious challenges for the new 2014 regime to overcome.

Two further studies examined the introduction of specific conditions for women (Easton et al., 2010) and community payback conditions (Rice, 2010). Both studies found problems in the custody suite, with custody officers finding the conditions complex and the task of matching suitable cases to the conditions one that they were unprepared for due to lack of training or guidance.

On the other hand, we know from Australian studies of rehabilitative diversions for drug offenders that such approaches may be effective. Harvey et al. (2007) reviewed 19 studies which involved both pre-court and court-based diversion. None of the pre-court studies had used a randomised design and the lack of high-quality designs made comparisons between the studies difficult. Nevertheless, the authors concluded, 'there is tentative evidence that diversion, in particular, can result in reduced criminal recidivism, drug use and possibly improved psychological functioning' (p. 385). They found that more mature offenders responded better to the diversionary approaches.

The evidence would seem, therefore, to give some support to restorative and rehabilitative conditions, whilst emphasising that it is difficult for the police to match the right conditions to the right offenders. This finding is given added weight by the Joint Inspectorate report on 'Integrated Offender Management', in which the inspectors found that even dedicated police offender managers had insufficient training,

skills and knowledge to 'help individuals desist from offending and lead law-abiding lives' (CJJI, 2014). This is particularly important given that we know from McKenzie's (2006) analysis that matching low-harm offenders to interventions better designed to treat high-harm offenders can backfire, rather than producing the looked-for improvements.

The MoJ framework places greater emphasis on deterrence conditions rather than rehabilitative or restorative ones. Research suggests deterrence is not as simple a concept as the MoJ implies. Classical deterrence theory proposes that crime can be avoided by deterring offenders through a credible threat of punishment, which includes the risk of apprehension (Entorf, 2013). Becker, whose work has been so influential in this area, set his central proposition that crime would be committed if the expected utility from committing a crime exceeded the expected utility from obeying societal norms (Becker, 1968). This classical model of deterrence has generated vigorous debate since 1968 (Entorf, 2013). Becker's model has been shown to be out of step with the way that many offenders make decisions. Offenders have high discount rates and tend to place a higher value on present utility and rather less on future costs, such as the risk of punishment (Jolls et al., 1998). Likewise, Kahnemann and Tversky (1979) showed that people, not just offenders, tended to assess the probability of unlikely events inaccurately. This becomes important when considering the offender's assessment of the probability of apprehension. Piquero and Pogarsky (2002) found that offenders routinely under-estimate their probability of getting caught a second time around. This suggests that efforts by the police to deploy deterrent strategies through conditions must focus on very clear communication of the consequences of reoffending.

Becker's model has also been criticised for failing to account for the context of decision-making by offenders and, in particular, the perceptions of the legitimacy of the law enforcement and societal institutions around them. As Tyler (2007) has been able to demonstrate, perceptions of legitimacy, including the perceived fairness of the procedures, appear to play an important part in decisions to obey the law. The MoJ framework did, indeed, place a high value on procedures, but Tyler's work suggests that legitimacy is more complex and nuanced than mere adherence to process.

A further, less well-documented observation about deterrence comes from two randomised trials, which were undertaken in Omaha, Nebraska in the late 1980s (Dunford, 1990 and Dunford et al., 1990). The experiments centred on the way that arrest policies for domestic violence offenders were implemented. In the first experiment, where

suspects were present when the police arrived, the suspects were randomly allocated to either arrest or to non-arrest and a warning. In the second experiment, where suspects had left the scene, the police either advised the victims how to seek a warrant or the police themselves sought the warrant. Overall, there was little difference in the outcome between arrest and non-arrest, but there was a significant reduction in recidivism where the police sought a warrant, whether they were subsequently executed or not. Sherman and Neyroud (2012) have argued that this suggests a possible hypothesis that the threat to punish is a more powerful deterrent than an actual punishment. If correct, this would lend strong support to a strategy based on deferred prosecution.

There are, therefore, some highly relevant conclusions that can and should be drawn from the existing research. First and foremost, there is the challenge of managing the exercise of professional discretion to achieve consistency. Half a century of studies repeatedly reaffirms that this is a really tough issue for the police. Second, those studies that have looked at the police involvement in the setting of conditions show that the police are not well prepared for this task, particularly if it involves rehabilitative or restorative conditions. On the other hand, deploying deterrence successfully is not a simple matter of catching offenders and processing them. The right ingredients of legitimacy, certainty, celerity and the benefits of deferred sanctions all need to be put into the intervention. Too much emphasis on severity and formal processing will probably backfire, rather than producing a reduction in reoffending. Moreover, with the exception of the restorative justice studies, too little attention has been paid to the victim's involvement, motives and confidence in the outcomes. The second half of this chapter, will, therefore, focus on the lessons from Operation Turning Point in three key areas: the management of discretion; the setting of conditions; and the needs and confidence of victims.

Operation Turning Point: The lessons from a randomised controlled trial

Experimental design and implementation

Operation Turning Point was a randomised controlled trial in Birmingham, United Kingdom, which ran from 2011 to 2014 and compared the effectiveness of court prosecution for low-harm offenders with a structured diversion to a deferred prosecution linked to a 'Turning Point Contract' (Neyroud, 2011; Neyroud and Slothower, 2013). The

experiment focused on offenders whom the custody officer had decided that it was in the public interest to prosecute – informal warning and cautions having already been discarded – and where there was sufficient evidence. Then the custody officers used the Cambridge Gateway – an internet-based randomiser tool (Ariel et al., 2012) – which took them through a triage that excluded offenders with multiple convictions, a high likelihood of prison and a serious offence.

The triage criteria bore many similarities to the MoJ guidance for the new framework. However, there were a number of differences: first, offenders were not required to admit guilt to be eligible, in order to reduce the risks of discrimination identified by Landau and Nathan (1983); second, both juveniles and adults were included in the pilot; third, domestic violence and hate crimes were excluded.

Offenders that the Cambridge Gateway showed to be eligible for the experiment were randomly assigned either to prosecution or a Turning Point treatment. In the final stage of the experiment, the gateway was also set to block-randomise offenders between adults and juveniles, and those whose crimes had a personal victim and those whose crimes did not. This allowed the research team to analyse adults and juveniles separately and to follow up and survey the victims on the completion of the case for their experience of the treatment or control interventions. There were, therefore, two RCTs nested within each other – one of offender treatments, divided into adult and juvenile offenders and the other comparing the experience of victims, whose offenders had either been prosecuted or assigned to Turning Point.

Offenders given Turning Point were asked to attend a meeting within 48 hours (to meet the 'celerity' condition) with a police offender manager or a member of the Youth Offending Service. Turning Point offenders were warned at each stage that non-compliance with this attendance requirement, reoffending or failure to meet the terms of the Turning Point contract, would result in prosecution.

Offenders were required to agree a contract as a result of a structured conversation at their meeting. The contract was voluntary, but was backed up by the threat of prosecution. The contract contained two standard conditions – no reoffending within the four-month contract period and compliance with the agreed conditions, which could be deterrent (such as curfews or community payback), reparative (apology or compensation), restorative or rehabilitative. As such the potential menu of conditions, apart from the possibility of a financial penalty, was similar to that of the MoJ. However, the incentive was that successful completion of the contract would result in no further action – a notable

difference from the MoJ guidance in which the offender still attracted a recordable finding of guilt on successful compliance.

To ensure that the intervention was securely established before formal evaluation, the experiment was developed in four stages.

- Stage 1 was preceded by training custody staff and offender managers and then switching the gateway on, but with every case set to prosecution, so that custody officers would get used to it and would road test it and feedback adjustments.
- Stage 2 (December–May 2012) saw the gateway set to Turning Point treatment only, so that Offender managers could build up their practice and, through regular debrief meetings, share it and debate it.
- Stage 3 (started 1 June 2012) the gateway went to full randomisation. During this stage the experiment was expanded to include two further Local Policing Areas. However, after initial evaluation it was clear that there was still significant variation in treatment conditions.
- Stage 4 (started in March 2013): the gateway was amended to include the approaches to strengthen officer decision-making in the light of operational experience.

At each of these stages, researchers and project team managers using the gateway data, the data from Turning Point plans and by field observations, were monitoring the implementation.

Through close monitoring of Turning Point implementation, three key processes – decision points where officers were required to use substantial discretion – emerged: the triage decisions by custody officers; the setting of conditions by offender managers; and the approach to communicating with the victims. Findings from Turning Point relating to each of these processes uncover the specific risks posed by conditional OOCDs, and Turning Point sub-studies related to each of these elements offer solutions that may be key in the implementation of OOCDs at large.

Officer decision-point one: Consistency in the custody suite

As we have seen, a number of the previous studies on diversion had identified the gateway decisions in custody – whether or not to divert offenders – as a potentially problematic process, leading both to inconsistency and under use of conditional disposals. In Turning Point the triage process was not just trying to determine the right disposal for an offender, it was also trying to ensure that all potentially eligible offenders were selected and then randomised for the experiment. The

Cambridge Gateway had been used in a previous trial in the West Midlands (Ariel et al., 2012), but not for a task of the complexity of its role in Turning Point. Moreover, in the previous trial only a very small number of trained officers were able to use it, whereas in Turning Point more than 100 custody staff across five custody suites used it to enter cases. By the end of the trial more than 15,000 cases went through the system, with over 700 cases coming through all the checks as eligible.

One particular feature of the gateway allowed the research and project team to explore the way custody officers make diversion decisions. After all other eligibility criteria had been met, custody officers were offered the opportunity to exclude cases for 'any other reason', but had then to record their reasons.

Hobday (2014), the project manager, analysed the appropriateness of the reasons and the pattern of behaviour through the experiment. In the early phases of Turning Point, the discretion used in this period was variable and included a high proportion of 'inappropriate decisions'. To address this, two approaches were used:

(1) the development of a more advanced algorithmic triage tool, which supported officers decision-making and focused their discretion on the decisions where it was most needed;
(2) and a fast coding scheme of exclusionary reasons used by management to identify patterns in officer decision-making, and quickly and easily feeding back any problems to individuals, officer teams, or the entire set of officers involved.

The proportion of 'inappropriate decisions' was significantly reduced to a tenable level following these adjustments in Stage 4. While there was still room for improvement, Hobday concluded that an 'algorithmic' decision-making model – in this case less than 20 closed questions demanding a yes/no response with termination once an exclusionary factor was identified – could be used to triage cases reliably, even where there were many staff in different stations.

From Hobday's findings it seems quite possible for the gateway model to be adapted into a normal operational environment rather than an experiment. There has been a 'Gravity Matrix' (Association of Chief Police Officers, 2009) which custody officers are supposed to use to support disposal decision-making, but Turning Point researchers observed that it was rarely used as intended. The MoJ framework and guidance continued to rely on this tool and the CPS guidance. However, Operation Turning Point findings indicate that, in order to achieve the

MoJ's target of consistency, such guidance may well need developing as an algorithmic tool that provides both a systematic decision-tree and exposes custody officers' reasoning to easily transparent peer and supervisory scrutiny for continuing professional development.

Officer decision-point two: Setting conditions

Having made the decision that a case is eligible for Turning Point, the second critical process is the assessment and setting of conditions. At the beginning of Turning Point, it was decided that the offender management team would be responsible for this work. In the West Midlands Police, this team, located in each Local Policing Area, would normally have had responsibility for medium- and high-risk offenders. As the Criminal Justice Joint Inspectorate (CJJI) Inspection of integrated offender management showed (CJJI, 2014), the fact the team was dedicated to this role did not necessarily mean that it had adequate skills or training for the task. However, it did have a network of partner agencies involved in offender management. Additionally, training was provided at Cambridge in the theory, evidence base and practice of setting conditions.

As Slothower (2014a) has set out, the discretion of police officers to make decisions such as setting conditions for a diversion is usually managed by one of two approaches: providing wide discretion or by detailed prescription. Turning Point started with the former model. Following their initial training, officers were encouraged in Phase 2 to use their discretion and the researchers then analysed the conditions for their 'SMART-ness' (Doran, 1981). The research team focused on whether the conditions were specific, attainable and measurable.

The analysis demonstrated that there were particular problems with two of the three criteria. These were whether the conditions were specific or measurable. These two criteria are crucial if the police are seeking to ensure compliance and, possibly, breach and prosecute for failure. In the first stage, in which reliance was placed on officer discretion, coding of the conditions showed that only 51% were specific and only 36% measurable. The figure for attainability was 76%. By adding training to support the discretion those figures rose to 71% specific, 93% attainable and 59% measurable. This still left around one-third of conditions that were not complying with these core SMART criteria.

In Stages 3 and 4 of the experiment, the research and project team then tested a more prescribed model of discretion, supported by training and guidance. The main addition in this phase was a set of recommended conditions that the research team had drawn up by

reference to the existing evidence. This had only a marginal impact (78/87/61% on the three criteria). Whilst it improved consistency, there were still a significant proportion of conditions that were not SMART.

Finally, an IT-based supported decision tool was put in place, designed by the offender management sergeants. It provided drop-down menus that offered SMART conditions in response to the officers entering details of the offenders' pathways to offending. Adding the LS-CMI assessment tool to guide officers' conversations with offenders further enhanced this assessment. Slothower's (2014a) analysis showed that the combination of these two tools ensured that the officers could set SMART conditions with a very high degree of fidelity (between 96% and 100% for all criteria). However, she concluded by observing 'this suggests that conditional out-of-court disposals may face considerable problems if any of these three approaches (discretion only, brief training, paper-based recommended conditions) is relied on to set conditions'. Instead, Slothower argued that consistency could only be achieved by operationalising 'bounded discretion' supported by a simple, sleek and effective computer-based decision-support tool.

Officer decision-point three: Communication with victims

The final critical process involves the victim. The research team undertook a limited survey of the personal victims from Phase 2 and found that not only had a high proportion of victims felt quite negative about the experience, the messaging they had received from officers was often counterproductive. As a result of the lessons of Phase 2, and guided by the body of literature on victim perceptions of legitimacy, the research and project team worked to develop a small team of trained officers to manage victim contact and a simple script, drawing on restorative justice practice, to guide the conversation. The effectiveness of the new approach was tested in Phase 4. The gateway was adjusted to block-randomise cases into control and treatment cases with or without personal victims, which allowed the research team to survey victims of both treatments.

Slothower (2104b) analysed the victims' data and found that the Turning Point sample was 45% more satisfied by the handling of their cases (50% 'Satisfied' or 'Very Satisfied' on the court side, 72.5% on the Turning Point side). She concluded that a key reason for the difference was accounted for by the way that the Phase 4 OCCDs were implemented – particularly the way they were communicated to victims by officers – and that this may be crucial to victims' perceptions of their legitimacy.

She anticipated that the effect would not hold if police did not use a similar approach to communicating with victims about the outcome.

Conclusions and implications for the future of OOCDs

Whilst Operation Turning Point has yet to yield reoffending and cost-benefit data, it has already demonstrated that the police can achieve consistent custody and condition setting and higher levels of confidence from victims by using OOCDs. This is a significant finding, because our review of the previous research had suggested that this was problematic for the police. However, the evidence from a 3-year experiment is that these gains cannot be achieved by relying on standard approaches to change in the criminal justice system. Guidance and training are not sufficient to deliver consistent and robust implementation. Turning Point has developed three tools – to guide each of the three key decision points required by officers described above – and these tools are designed to be adaptable to OCCDs on a large scale. Serious investment in supported decision tools and a dedicated approach to engaging victims is required.

The investment is likely to be worth the return. OOCDs seem certain to remain a major part of the gateway to the criminal justice system in England and Wales, whatever the results of the MoJ's pilot implementation of new guidance. Whether or not Turning Point results in reductions in reoffending, these tools are promising in delivery of a range of outcomes. This means that it is vital for the police and wider criminal justice system to learn more effectively from field trials and evaluations like Operation Turning Point. Weisburd and Neyroud (2011) have argued that police must reach out for a new paradigm in their practice development, in which they test key practice and interventions and then systematically use the knowledge to improve. In the case of OOCDs, such an approach would avoid the errors of the past and enable a chance of building better practice for the future.

Note

1. In descending order: conditional cautions, simple cautions, penalty notices for disorder, cannabis and khat warnings, and community or neighbourhood resolutions.

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