

Lessons for the Coalition: an end of term report on New Labour and criminal justice

'On crime, we believe in personal responsibility and in punishing crime, but also tackling its underlying causes – so, tough on crime, tough on the causes of crime, different from the Labour approach of the past and the Tory policy of today.'

1997 Labour Manifesto



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About the editor

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Arianna Silvestri

Introduction

This report provides an independent assessment of the Labour government's approach to criminal justice during their three terms in power between 1997 and 2010. Because of the crowded nature of this area of policy and law, we had to be selective in the themes addressed and we concentrate on some key areas of the adult criminal justice system in England and Wales. Likewise, whilst the views expressed here may not be necessarily representative of the whole field of opinion in a specific area of criminal justice, they present rigorous and well researched arguments, which we hope will generate discussion and reflection.

New Labour and criminal justice: some reflections

'Tough on crime, tough on the causes of crime' was New Labour's well known, if not quite realised, slogan. Labour skirted the 'causes of crime' toughness element. It was definitely tough on *some* crimes: as many authors in this report argue, those perpetrated by the more marginalised sections of society¹. On the other hand, it exercised a remarkable light touch with regards to corporate, environmental or health and safety offences, where it continued previous policy to regulate rather than criminalise.

With such notable exceptions, the New Labour years saw the incursion of criminal justice into more areas of life. One of Labour's main aims was to 'rebalance' justice in favour of an ideal-type wronged 'community', both in its quality of life and in its contact, as 'a community of victims', with the criminal justice system. To a degree this influenced a penchant for pre-emptive action, responding to the risk of criminal behaviour. It also meant a criminalisation of nuisance which ended up in net widening, as it caught more and more people (especially children) in the criminal justice system.

New Labour's concern with re-establishing social controls and norms of respectability through the criminal justice system was evident from the start with the *Crime and Disorder Act 1998*, which inter alia introduced ASBOs and abolished doli incapax. Whilst the justice system focus became more clearly punitive and less welfare oriented, civil institutions like local authorities (e.g. through Crime and Disorder Reduction Partnerships) and welfare agencies became increasingly involved in surveillance and punishment (McLaughlin et al., 2001).

It can be argued that New Labour's communitarian 'crusade' for the benefit of an idealised 'Middle England' ended up normalising and institutionalising intolerance (McLaughlin et al, *ibid*). Liberty and civil rights became redefined as the rights of 'the community' to be protected from crime and nuisance: in this context, public protection imperatives could override civil liberties. Hence the raft of measures and legislation intended to control civil behaviour and potential terrorist threats (e.g. the increasing use of CCTVs; the surveillance powers granted by the *Regulation of Investigatory Powers Act 2000*; control orders and extended detention without trial; the use of stop and search under section 44 of the *Terrorism Act 2000*: see EHRC, 2010).

The crime control, punitive attitudes existed in tension with a managerial, cost effective, morally neutral, non ideological stance, based on performance monitoring via audits

¹ This may not have been always intentional: for example, improving criminal justice performance, one of New Labour's central preoccupations, led to the application of targets and performance management measures, inherent in which were perverse incentives like the picking by criminal justice agencies of the 'low-hanging fruit' (Morgan, 2007).

and targets. Micro-management from the centre existed alongside ‘community empowerment’ discourses on one hand and liberalisation, outsourcing pushes on the other (see Painter, 2008; Gamble, 2010). New Labour’s determination to ‘bring more offences to justice’, ‘fill the justice gap²’ and achieve ‘speedy justice’ also meant bypassing traditional routes by using summary justice and enhancing out of court disposals. It was accompanied by the shedding (or attempts to shed) traditional criminal justice protections (e.g. double jeopardy; attempts to abolish right to trial by jury; use of hearsay evidence and of anonymous witnesses; extraordinary rendition; increased powers of arrest: see Cape 2010.)

Building on the populism espoused by both major parties since at least 1993 and pandering to media appetites, New Labour presided over a period of further politicisation of criminal justice. However, neither the out-toughing polemic with the opposition nor the falling crime rates managed to improve public confidence or the belief that we are safer from crime. This is, in a way, hardly surprising, given that populist punitiveness fuels expectations that crime can be contained via deterrence through punishment (Brownlee, 1998). It also fuels a ‘criminology of the other’, which externalises vice and ‘evil’ onto the outskirts of society (towards ‘illegal immigrants’, ‘feral youths’, benefit ‘scroungers’, ‘terrorist’ religious minorities etc.), thereby exacerbating a sense of a divided society in conflict with itself.

In this report

Andrew Sanders overviews the New Labour years in criminal justice and introduces areas covered in detail by following essays. Sanders examines the bifurcation in New Labour policy, with an authoritarian, punitive, ‘othering’ approach running alongside a ‘managerialist’, regulatory drive. He argues for an alternative, communitarian approach to counter such tendencies, which he regards as costly, ineffective and iniquitous; an approach that would offer, for example, a genuinely progressive diversion from prosecution.

The diversion theme is taken up by Rod Morgan, who examines the *Doing Law Differently* policy and the staggering growth under Labour of non-court disposals. Morgan acknowledges the potential advantages of such summary measures (if they were to be used proportionately and accompanied by adequate safeguards) for an overburdened justice system, especially in a time of recession. He warns, however, about their legal and ethical validity and their role in net widening. He also asks whether some of the behaviours which have been criminalised in this process could not be more effectively dealt with through socially-based, non-criminal forms of control.

Andrew Ashworth picks on some of these questions and looks at the reasons behind New Labour’s move away from the conventional prosecution-court-determinate sentence paradigm. Ashworth highlights inter alia the different attitudes towards diversion and prosecution displayed by regulatory agencies like the Health and Safety Executive. The conciliatory, compliance-based attitude to health and safety breaches was also a seminal influence in the creation of the *Corporate Manslaughter and Corporate Homicide Act 2007*, which is examined in Arianna Silvestri’s essay. The Act, which was supposed to make big organisations accountable, is seen as symbolic in nature and not meant to have significant impact.

The self-regulation model of corporate behaviour that New Labour embraced is further examined by Reece Walters, who considers policy making with regards to environmental harms to be also mainly symbolic in nature. Overall, Labour actions on the environment

2 Perceived as the disparity between the offences reported and those dealt with: for a critique see e.g. Garside 2006.



were not focussed on corporate behaviour, control of which was under resourced, but on low-level 'crime' like 'fly tipping', 'littering', 'graffiti' and 'vandalism': the environmental version of the nuisance, quality of life issues where the 'anti-social behaviour' was perpetrated by the young and the most poor and marginalised groups.

Anette Ballinger considers another harm on which New Labour took less – or arguably less effective – action than hoped for: violence against women, especially in the home. New Labour attempted to deal with these issues in ways which de-gendered them, made it into a public arena problem and did not invest in effective responses like refuges and rape crisis centres. Ultimately, Ballinger argues, this was a failure to confront women's subordinate position as being at the root of domestic violence – an example of New Labour's difficulty or unwillingness to be 'tough on the causes of crime'.

The symbolic strand of law and policy making is picked up in Sandra Walklate's essay, where she illustrates the populist uses of the 'victim as citizen' in invoking an imagined community in which justice is 'for all'. She argues that New Labour's preoccupation with 'rebalancing' the criminal justice system in favour of victims underpins concerns about ensuring the system's legitimacy and being seen responsive to pressures about perceived victims' needs, 'neither of which imply an understanding of what the criminal justice system is about and whose interests it serves.'

The rhetoric function and populist aspects of policy making are also highlighted by Julian Buchanan in his essay on drugs and alcohol, where he points at the tension between scientific evidence and media driven policy, New Labour leaning towards the latter. During this period drug agencies became overly criminal justice orientated and treatment more coercive, tough approaches being based on the 'over-simplified and unsubstantiated' assumption that drug use causes crime. Whilst controls on illicit drugs tightened, alcohol access was liberalised and the rates of alcohol-related mortality among young people soared.

How New Labour policies impacted on the ground is explored by essays written from the perspective of authors who experienced them at first hand, either as practitioners or researchers. Probation Association Chief Executive Christine Lawrie outlines the profound changes the probation service underwent between 1997 and 2010. Probation had to be seen to be working for the 'law abiding majority' and its main focus shifted to public protection and law enforcement. Lawrie argues that performance and risk management contributed to better and more consistent standards of work, like increased levels of contact with those under supervision and more focus on education and work. Standardisation of practice meant, however, a loss of autonomy for probation officers and less scope for a tailor-suited, interactive and 'therapeutic' engagement. The shift to automatic breaching for 'almost any infringement' of court orders that caused recalls to prison to soar added to an already heavy workload for overcrowded prisons. This and other aspects of prison policy under New Labour are explored by Eoin McLennan-Murray, President of the Prison Governors' Association.

The period of New Labour in government coincided with a fall in official crime levels (as recorded by the police and as illustrated by the British Crime Survey: see Appendix) that had started before the party came to power, since a peak in 1995. We use the word 'coincided' intentionally, as the links between 'crime' and criminal justice policy are complex and a direct correlation cannot be assumed (see e.g. Maguire, 2007). Tim Hope examines in this report how Labour dealt with crime statistics and Rebecca

Roberts explores what other dimensions of harm in our society are worth examining which the criminal justice system cannot deal with.

Following the 'end of term report' theme of this document, a report card-style summary has been added to the essays when appropriate.

Looking ahead

David Faulkner overviews New Labour's achievements and shortcomings, as well as asking what the criminal justice system is supposed to and can achieve. He looks forward at what we can expect of the new Coalition Government in an age of austerity and spending cuts. Faulkner argues that this provides a moment of opportunity for policy to be more realistic and less febrile, less top down and more mindful of public service and research evidence. Criminal justice does not operate in isolation and whatever changes are to come (contraction? further outsourcing and expansion of summary justice?) will interact with and have to be understood in the context of social conditions created elsewhere: in the economy at large but also in other areas of social policy, such as employment, education, housing and welfare.

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What was New Labour thinking? New Labour's approach to criminal justice

Andrew Sanders

The aim of this paper is to examine the evolution of criminal justice policy since 1997. I look at how New Labour's policies developed along two main, diverging themes: an authoritarian, punitive, 'othering' approach running alongside a 'managerialist', regulatory drive. However, this 'bifurcation' was not new. The previous government had failed to consistently apply the retributive principles that underlay the *Criminal Justice Act 1991* (CJA 1991) and so all New Labour needed to do was to nurture the seeds laid down by the Conservatives (Sanders, 1998).

Criminal justice policy in the 1980s and 1990s

Work by Young (1999), Garland (2001), Lacey (2008) and many others shows that the mid to late twentieth century expansion of the middle classes and generally raised aspirations led to an increased sense of inequality among marginal sections of population. This contributed to both a rise in crime rates and increased exposure of the middle classes to crime. This, in turn, led to pressure for an authoritarian penal policy. One result was the ending of consensus around penal welfarism (the high point of which was probably the *Children and Young Persons Act 1969*). The end of the post-second world war economic boom made integrative, inclusionary welfarist penal policies less affordable than they had been – or, at any rate, less easy to defend in the face of claims that such policies both fuelled crime rates and cost money that could otherwise be spent on shrinking welfare budgets. Neither the absence of evidence for such claims, nor the (as it turned out) greater cost of authoritarian policies, undermined their force.

A key moment was the ostensibly principled retributivist framework of the 1991 CJA. Not only did this end the (perhaps nominal) pre-eminence of welfarism, but it introduced 'longer than commensurate' sentencing, which was a prototype for the hugely extended sentences that developed later. And then, beginning as soon as the *Criminal Justice Act 2003* (CJA 2003), the Major government of the mid-1990s immediately set about dismantling even such principled retributivism as was embodied in the 1991 framework.

This can be characterised as a process of 'government through crime' (Simon, 2006); and, by extension, as anti-social behaviour (ASB) is criminalised, 'governing through ASB' (Crawford, 2009). One bizarre result was an ever-increasing share of a decreasing government budget being spent on criminal justice, prisons and police in particular.

New Labour's bifurcated policy

Bifurcation denotes a policy of divergent trends, so that it consists of two or more prongs. This multi-track approach could be discerned from the very beginning of the New Labour Government in its *Crime and Disorder Act 1998*, which contained both 'othering' and 'managerialist' elements. The way New Labour policy bifurcated is illustrated below.

Criminology of *The Other*

Promotion of a 'Criminology of the Other' (the exclusion and demonisation of ostensibly serious offenders) is the hallmark of an authoritarian state. Elements of this were deeply embedded in New Labour's policies in the guise of 'public protection'. Indeed it may be this, and this alone, which is truly 'new' about the post 1997 Labour Government's criminal justice policies. The most important examples are:

- **Anti-terrorism laws:** New Labour introduced ever-wider definitions of terrorism offences, increased powers of stop-search and detention and created control orders. The worst aspects of some of these have been successfully challenged under the *Human Rights Act 1998* (HRA 1998), but the main elements remain (Gearty, 2006; Sanders et al., 2010, passim). These are such clear examples of authoritarianism, and are so well-known, that this paper will deal with just one point about control orders. They were introduced under the *Terrorism Act 2005*, as a result of previous legislation allowing detention without trial having been declared non-compliant with the European Convention on Human Rights. To secure a control order the government has to claim reasonable suspicion that someone is engaging in terrorist-related activities; and that it is 'necessary', in order to protect the public from the risk of terrorism, to restrict that person in the proposed terms of the control order. In a test case¹, the House of Lords restricted the use of confidential information that could be hidden from someone subject to a control order and the use of 'special advocates', acting on his or her behalf and who were allowed to see the information but could not communicate with the controlled person. In many subsequent cases the courts therefore told the Labour government that it had to either disclose the information or not use it. The government generally decided not to use it, either revoking the order or accepting that the court would quash it. Yet if it was truly 'necessary' to impose control order conditions on suspects, how could the government accept their absence with such equanimity? Was the risk of disclosing sources really higher than the apparently high risk that those suspects would engage in terrorist activities? If, as seems to be the case, none of those suspects have, since their release, engaged in such activities, what does this say about that 'necessity' and the 'reasonable suspicion' that government had about them? One suspects that most of these cases were about the disruption of 'extremist' groups with only the most speculative and tangential relationship with terrorism. In other words, the legislation was used, as was probably intended, to 'other' certain groups, as much as it was to protect the public.
- **Penal policy:** The demonisation of certain groups of people can be seen in, for example, increasingly severe sentences at the top end (e.g. CJA 2003 guidelines on minimum tariffs for murder); warehousing of prisoners (e.g. indefinite sentences of 'imprisonment for public protection') and very cautious risk-based policies for release from prison on licence. Thus there are now (at the time of writing in October 2010) over 85,000 prisoners in England and Wales alone. This is a doubling of the prison population over 30 or so years, one of the highest incarceration rates in the EU (Lyon, 2010). And it will rise further, as – on current trends – by 2012 one-third of the prison population is likely to be serving indefinite sentences (Ashworth and Zedner, 2008).
- **Increased police powers:** Powers to stop and search, arrest and detain in the police station all increased substantially under New Labour. Related to this were powers to engage in mass surveillance and data gathering (e.g. through the DNA databases). Like terrorism powers, some of these have been curbed, but not repealed, by the courts' application of the HRA 1998. All too often these laws are used to control

¹ AF ([2009]) UKHL 28.



marginalised groups rather than as aids to crime detection. Coupled with this is decreased access to legal advice under the Unified Crime Contract, which is policed by the Defence Solicitor Call Centre (Sanders et al., 2010: ch. 2–4). There have also been many changes to the law of evidence that undermine the rights of suspects and make miscarriages of justice more likely – for example, on hearsay, bad character and double jeopardy in the CJA 2003. This all combines to increase the already great pressure on suspects to confess and make incriminating statements and, ultimately, to plead guilty to crimes of which they may not actually be guilty.

- **Civil-criminal orders:** these can be hugely penal if breached. See Ashworth in this report for some examples (for more examples see Crawford, 2009). As with terrorism laws, these orders allow categories of marginalised people (e.g. young people, sex offenders) to be demonised.

Managerialism

A bifurcated, rather than universally authoritarian, policy might be expected to regard less serious crime as an unwelcome distraction. This did not happen under New Labour. Indeed, New Labour vastly increased criminalisation, making criminal (or quasi-criminal) that which was not previously so. This increased criminal justice expenditure yet further. The government therefore looked for ways of managing less serious crime more cost effectively. This managerialist (or ‘actuarial’) approach was characterised by regulatory and preventive strategies: that is, speed, economy and effectiveness (in the crime control sense), rather than quality of service, proportionality, safeguards and justice. Examples of this approach are given below.

- **Probation staff as risk managers:** probation as offender management (see Lawrie, in this report).
- **Preventive orders:** e.g. notification orders under the *Sexual Offences Act 2003*, requiring offenders to register name, address and other details with the police. (See also Ashworth, in this report).
- **Diversion, fixed penalties and securing guilty pleas** Some diversion can be benign, or even progressive, such as restorative justice and programmes that genuinely aim to tackle offending. But diversion is not always benign. It is often net widening, punitive, avoids trial where guilt would be hard to prove and is actuarial in ambition, seeking to create records and controls rather than to punish. A decreasing proportion of crime became formally prosecuted as new measures replaced prosecutions at the bottom end of the criminality scale, e.g. Crown Prosecution Service conditional cautions (under the CJA 2003), Penalty Notices for Disorder (PNDs) (under the *Criminal Justice and Public Order Act 2001*). For more details see Morgan, in this report. See also Amadi, 2008; Young, 2008 and 2010. At the same time, New Labour was pursuing a policy of increasing pressure to secure guilty pleas (using the CJA 2003, Schedule 3): for more details see Ashworth, in this report.
- **Regulation and corporate crime** We might have expected the party of Labour to legislate to protect the safety of working people and to enforce those laws rigorously. But managerialism includes taking the perspective of managers. Thus the Regulators’ Compliance Code (2007, para 3) states: ‘Regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.’ This is the opposite of the Director of Public Prosecutions’ Code for Crown Prosecutors, which does not take into account financial matters except in the *manner* of intervention. This legitimises what (Tombs and Whyte, 2010) call ‘regulatory degradation under

New Labour', i.e. increasingly *less* pressure to secure compliance with the law (although there is considerable continuity with enforcement practices in the 1980s and 1990s). This illustrates the multi-stranded nature of New Labour criminal justice policy (for most pollution and health and safety laws do include criminal elements, despite the dearth of prosecutions): not only are criminal management practices not demonised, they are usually not even criminalised in practice. See also Silvestri and Walters, in this report.

New Labour, same old criminal justice policy?

It would be too simplistic to regard criminal justice policy under New Labour as simply one of continuity with previous administrations (that is, an authoritarian policy with managerialist elements) or one of change (that is, increased diversion from courts and use of genuine restorative justice). It was an uneven mixture. The same could be said in relation to victim policy if space permitted (see also Walklate, in this report). But it was far tougher on crime, the crime of marginalised sections of society, than it was on the causes of crime.

Ashworth and Zedner (2008) identify three types of state in criminal justice policy under New Labour: authoritarian, preventive and regulatory. In the main, New Labour followed the evolutionary trend since the 1980s of more authoritarianism in the guise of public protection. But what about the preventive aspects and light-touch regulation? The former is apparent where law bears down on the most marginalised populations (stop and search, for example, is often used as a preventive power with no intention to prosecute) and the latter is apparent in relation to the most privileged. Arguably, this is not because of overt class bias but because it makes short-term economic sense. There is nothing new here in principle: what is new are the tools created to fit with changing conditions and to make use of new technology such as DNA identification and digital CCTV.

Prospects for change

Is all this necessarily true of 'late-modern' society? Lacey (2008) argues that as other types of European society resist these authoritarian and managerialist tendencies, it is possible to change direction. Whether we will choose to is another matter. She argues that in England and Wales authoritarian penal policy is a product of:

- liberal market economies on the US model, with
- non-proportional electoral systems; and
- minimal respect for expertise (thus providing politicians with no shield from media/public opinion); and
- minimal ideological differences between major parties.

If she is right, the structural changes required to make a difference will be huge and unlikely to occur. But the financial situation arising from the global economic crisis provides an opportunity, for authoritarianism is very costly.

What type of change?

For simplicity, I posit two choices, as follows.

(a) Liberal Individualism

Ashworth and Zedner (2008) argue that New Labour undermined (through the processes that we have documented) a liberal conception of criminal law and justice, whereby conviction and punishment should only follow a human rights-compliant trial for behaviour that is clearly criminalised (as distinct from quasi-criminal civil-penal



orders). They argue that we should return to that model. It is true that their conception of a liberal justice system is being undermined. And I share many of the concerns they raise. But I have some reservations too, because theirs is an individualist approach.

Ashworth and Zedner focus on measures, not structures. It is true that diversion, fixed penalties, summary trial, strict liability, civil-criminal orders, for example, as currently practiced are more concerned with managerialism than justice. But if the police, Crown Prosecution Service, courts etc. had different structural underpinnings, aimed at reducing marginalisation instead of exacerbating it (through, among other things, 'othering' marginal groups), these could all be highly progressive developments.

Further, it is hard to see where corporate crime or victim-centredness fits into a liberal individualist approach. Victim concerns would be an add-on, to be satisfied only to the extent that is compatible with their liberal pre-requisites, and corporate crime would be reduced to Macrory-style (2006) 'monetary administrative penalties'. This would perpetuate the view that only marginalised groups commit serious crime, and marginalises victims of corporate crime, who are some of the most vulnerable victims of all.

(b) Liberal communitarianism

A communitarian approach would recognise the inability of traditional criminal law to take into account patterns of behaviour and to incorporate *reasons* for action or omissions into traditional notions of 'fault'. Non-molestation orders and genuinely diversionary restorative justice, for example, show what a progressive communitarian criminal justice policy (one that genuinely protects the public) could look like.

This policy would:

- move away from individual acts to patterns of behaviour
- regard the protection of civil liberties as a form of public protection that is as important as other forms of protection
- increasingly link civil and criminal systems (in the way it is beginning to happen in relation to domestic violence)
- take the interests of victims seriously
- factor scarcity of, and competition for, resources, into the equation (Green, 2008); pound-for-pound, putting money into reducing inequality is far better at reducing crime than is putting money into criminal justice agencies
- wage a war on industrial accidents, pollution, company fraud/corruption, tax evasion and police malpractice that would be as vigorous as the war on 'crime'
- apply the 'regulatory pyramid' advocated by Braithwaite (2002) equally in relation to 'regulatory' and 'normal' crime; this would show how artificial that distinction is
- require accountability and control of criminal justice institutions such as the police, the Crown Prosecution Service, the Health and Safety Executive in order to secure the structural underpinnings aimed at reducing the marginalisation referred to earlier. This accountability requires the dispersal of power to the communities being policed, that is, a strategy of 'anchored pluralism' (Sanders 2008).

The 'freedom' perspective advocated by my colleagues and I sets out roughly what this approach would look like (Sanders et al., 2010; Sanders 2010). It would, in short, enshrine most of the liberal values espoused by Ashworth and Zedner; be far less costly than current practices as police resources would be used more effectively, custody less frequently, and re-offending should fall; not be authoritarian. In order to do better we

do not have to go back in the way Ashworth and Zedner urge us to do. It is just (in both senses of the word) that there are better ways forward than most of those chosen by New Labour.

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Austerity, subsidiarity and parsimony: offending behaviour and criminalisation

Rod Morgan

Introduction

I assume the following about the period after the 2010 General Election:

- A significant reduction in public expenditure affecting all services, including all criminal justice-related services; though, given the small proportion of total spending represented by ‘law and order’ (5–6 per cent) and the high political salience of the policy area, I anticipate that the cuts to law and order services will be among the least severe (Garside, 2010)
- Continued high unemployment, particularly youth unemployment
- No reversal, and possible exacerbation, of the increased wealth and income inequality trend of recent years (recessions generally hit the least well off worst)
- Increased social strains (more offending behaviour, inter-racial and inter-faith tensions) potentially increasing the demands on ‘law and order’ services.

The trend under New Labour

Various analysts have from time to time announced how many new criminal offences have been created under New Labour.¹ These estimates are disputed. Nonetheless leading representatives of all branches of the criminal justice system have complained about the welter of criminal justice legislation and change and more than one ex-Home Secretary has offered mea culpa agreements (Clarke, 2009). Whatever the real increase in the number of behaviours capable of being criminalised by police and Crown Prosecution Service (CPS) decision-makers, the huge increase in the number of incidents criminalised is indisputable. Further, the increase was a specific New Labour government objective and will no doubt be represented by the Party as an achievement: ‘the justice gap’² will be said to have been substantially closed. Practically all of the increase has been achieved through greater use of summary, out-of-court sanctions, namely by *Doing Law Differently*,³ arguably New Labour’s most significant policy change within the criminal justice system of recent years.⁴ Tony Blair, it should be noted, always took pride in introducing changes which bypassed the traditional criminal justice system in tackling both crime and anti-social behaviour.⁵

A case can be made for arguing that the huge expansion in the use of out-of-court summary penalties,⁶ an increase of 100 per cent during the period 2004–2007 (Ministry of Justice, 2010: Table 7.1), has been, and in a time of recession will continue to be, the ideal policing and criminal justice solution for coping with the pressures on the system. Unlike ASBOs, for example:

- Introduction of the new out-of-court summary penalties (principally penalty notices for disorder and warnings for possession of cannabis) can scarcely be labelled draconian and have not excited major controversy

1 In August 2006 the Liberal Democratic Party estimated that the figure was ‘more than 3000’ and in August 2008 ‘more than 3600’.

2 Home Office (2001) *Criminal Justice: the way ahead*, Cm 5074, London: Home Office, para 28. See also Labour Party Election Manifestos for 2001 (*Ambitions for Britain*) and 2005 (*Britain Forward Not Back*).

3 The title of Lord Falconer’s 2005 pamphlet setting out the policy.

4 For a review see Morgan 2008.

5 See Tony Blair, reported speeches delivered on 2 Sept 2005 and 23 June 2006.

6 These comprise: cautions, reprimands and final warnings; fixed penalty notices (FPNs); penalty notices for disorder (PNDs); cannabis warnings; conditional cautions; youth restorative disposals (YRDs); and, potentially, deferred PNDs.

- They do not obviously offend due process principles (if contested there is guaranteed access to the courts)
- They arguably avoid expensive, slow and arcane court proceedings thereby freeing up the courts to deal more effectively with serious matters
- Public concerns about relatively minor, but nonetheless quality-of-life-sapping repetitive offences are dealt with, and possibly seen to be dealt with, more swiftly.

So, should we not applaud the trend and argue for certainly its maintenance and possibly its extension as a way, constructively, of meeting the competing pressures which over the next year or so, will almost certainly besiege the criminal justice system? Does the trend not satisfy the legal disposal principle of *proportionality of imposition*? (Ashworth and Redmayne, 2005: chapter two). Is this not the application of parsimony and, if the police have restored to them some of the discretion that in recent years was lost in the thicket of centralised managerialism, is this not an application of the desirable principle of subsidiarity that we need during a time of austerity?

Reasons for caution

Possibly. But there is desperate need to undertake an analysis of what is happening before we applaud. The following questions need answering:

- Are we satisfied that all the business being dealt with out-of-court is consistent with the proportionality principle? On 9 November 2009, for example, BBC's Panorama programme provided evidence that quite serious, violent offences were being dealt with by means of out of court cautions. In addition to 39,000 cases of actual bodily harm, the programme cited the 739 cases of grievous bodily harm that were sanctioned in this manner. Jack Straw, then Secretary of State for Justice, immediately announced that the inter-departmental Office for Criminal Justice Reform would review the use of out-of-court penalties, but by the time of the General Election no review had been published.
- Is the business being dealt with out-of-court creating perverse incentives? In a 2007 news item in *The Times*⁷ Chief Superintendent Derek Barnett, Vice President of the Police Superintendents' Association, was reported as saying that the government target for 'offences brought to justice' (OBTJs) had 'corrupted' police use of penalty notices for disorder (PNDs). He suggested that some officers were using PNDs inappropriately as a way of fulfilling the government's OBTJ target. Offenders paying a PND of £50 or £80 might, it was suggested, have caused criminal damage of £500 or shoplifted goods to the value of £200 and might therefore consider such a fine as a reasonable price for a larger benefit. Superintendent Barnett provided no evidence to support his hypothesis, but it is nonetheless worthy of examination.
- 'Closing the justice gap' is 'net widening' by another name. The Labour government's avowed purpose was to net widen, to reduce impunity: offences and offenders previously not criminally sanctioned have become so. But can we be confident that it is impunity alone that is being reduced? That net widening of a deleterious character has not been happening? Namely that more constructive, informal, non-criminal, control mechanisms are being supplanted or undermined, thereby increasing the likely, long-term criminal justice system burden? We know, for example, that, all other things being equal, criminalising young people increases rather than reduces the likelihood of re-offending (McAra and McVie, 2007). Might not social control of many of the behaviours that the British Crime Survey indicates concern the public be more cost effectively dealt with through the application of non-

7 13 August 2007.



criminal sanctions? Interventions such as: assisting hard-pressed, inadequate parents better to control their children; facilitating restorative justice; or sanctioning licensed premises whose sales practices make more likely drunkenness and violence.

- Is it clear that the courts are being relieved of minor matters such that they can more effectively devote their attention to more serious business? There were 176,200 PNDs issued in 2008. Only one per cent were challenged, meaning that only some 1,750 cases came, after all, to be heard before the magistrates' court (MoJ, 2010:27). However, only two fifths of PNDs are paid within the 21 days allowed and 52 per cent before a fine is registered (ibid), which it is then the courts' role to enforce. This means that over 84,000 fines originally imposed as PNDs end up being enforced by the courts. We need to know more about what is involved in that enforcement exercise and the cost of it.
- Finally, is there sufficient accountability for the enlarged system of out-of-court penalty decision-making? Can we be confident that injustices are being sufficiently safeguarded against? For example, it has from the very beginning been argued that police cautions carry the risk that vulnerable suspects, particularly young people, might coercively accept them when they had no real case to answer⁸, insufficiently appreciating the consequences of out-of-court penalties. There is evidence that the legal criteria for issuing a caution and the safeguards that should be in place are not always complied with⁹. And the fact that arrests leading to no further action (NFA) have greatly declined during the period, 2004–2007, during which the use of cautions and PNDs have significantly increased, suggests that in the absence of these penalties the police and CPS might not have had the evidence to proceed to charge and prosecute (Young, 2008).

What is clear is that the proportionate use of the new out-of-court sanctions varies greatly between police forces, as cautions have always done (Morgan, 2008:24). We may therefore concur with the Chief Inspector of the CPS in his 2007 judgement that:

...use of the alternatives to prosecution can be both pragmatic and sensible provided that it is done with appropriate discretion.... [but] the power to fine is now vested in many authorities and brings the risk that over zealous use may lead groups of citizens to believe that they are in reality the subject of a revenue raising initiative. There is often a perceived link with the way staff are managed and incentivized when there is outsourcing. This may cause substantial damage to public confidence.

(HM Chief Inspector of the CPS 2007, HC 769)

Finally, it is noteworthy that following the 2007 decision to abandon the general, numerical, police target for OBTJs (emphasis being given to clearing up serious offences and increasing public confidence), the number of cautions and PNDs issued greatly declined. During the period 2004-2007 the number of cautions had increased by over 40 per cent and the number of PNDs issued had tripled. But in 2008 the number of PNDs issued (176,200) fell by 15 per cent and the number of cautions (326,900) was down 10 per cent (National Statistics 2010, op.cit.: 24 and 28). This coincidence, which applied as much to adults as under 18 year olds, rendered implausible the suggestion by the Youth Justice Board that the decline in the number of first time entrants to the youth justice system was principally attributable to the investment in early prevention programmes with young children at risk of offending¹⁰. All the evidence pointed to the fact that the police were no longer earning Home Office brownie points for criminalising children and young people, not that there was any change in youth behaviour.

⁸ See for example Steer, D. (1970), *Police Cautions: A Study in the Exercise of Police Discretion*, Oxford University Penal Research Unit, Occasional Paper No. 2, Oxford: Basil Blackwell.

⁹ See for example Sanders, A. and Young, R. (2006), *Criminal Justice*, 3rd Ed., London: Butterworths.

¹⁰ Frances Done, YJB Chair, Statement of 26 November 2009, YJB website.

Conclusion

Cut-backs in 'law and order' expenditure during the period 2011–2014 will almost certainly see a continuation of, possibly an increase in, the policy of imposing criminal sanctions out-of-court by the police and the CPS. Out-of-court sanctions have their place and the policy has several merits, *providing* they are used in a proportionate manner, are accompanied by adequate safeguards to protect the vulnerable, do not displace effective, non-criminal sanctions and are themselves cost-effective as far as enforcement is concerned. No incoming administration should change the direction of policy without first providing evidential assurances on these points.

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Andrew Ashworth

Avoiding criminal justice: diversion and sentencing

To what extent, and for what reasons, did the Labour government progressively move away from the paradigm of prosecution-court-determinate sentence-release? In answer to this question I will give brief consideration to five trends: the paradoxes of diversion, the proliferation of civil preventive orders, the increased pressure towards pleading guilty, the policy of bifurcation in sentencing and the application of the judicial brake.

The paradoxes of diversion

For many years it was a mark of enlightenment to call for the diversion of more offenders away from the criminal courts – less stigma, less contamination, no public labelling, improved reconviction rates, less cost etc. There were concerns about net-widening, but, to the extent that such excesses were controlled, cautioning was expanded in the 1980s and reined back only a little in the mid-1990s. The 2000s saw the arrival of more Fixed Penalty Notices, Penalty Notices for Disorder (including shop theft), Cannabis Warnings and other forms of out-of-court penalty, plus the advent of Conditional Cautions (see Morgan, 2008; Young, 2008). Conditional cautions are the responsibility of the Crown Prosecution Service (CPS), but all the others are controlled by the police. Whilst the buzzwords were streamlining, on-the-spot fines, cutting paperwork etc, there should be deep concern about aspects of these out-of-court penalties: see Morgan in this report and Morgan, 2008; Young, 2008.

We also need to consider whether there should be a more structured framework of diversion, with proper safeguards incorporated and used as frequently as in the regulatory sector. It remains a stain on the criminal justice system that there is such a marked difference between the diversion and prosecution policies of the regulatory agencies (such as the Health and Safety Executive, who regard prosecution as a last resort) and the approach taken by the police, when comparing offences of similar seriousness: see Sanders in this report and Ashworth and Redmayne 2010, chapters 6 and 7.

Civil preventive orders – the elasticity of criminal law

In a policy document before coming into office, the Labour Party asserted that the criminal law was not effective to deal with anti-social behaviour and neighbourhood disputes – particular charges could not represent the continuity of the nuisance and witnesses were reluctant to give evidence (Labour Party, 1995). Thus was born the Anti-Social Behaviour Order (ASBO), a civil measure imposing prohibitions reinforced by a criminal offence of ‘doing anything that is prohibited by an ASBO’, carrying a maximum sentence of 5 years (7 years in the original bill). Since then the ASBO has become available in criminal proceedings and has been joined by around a dozen other civil preventive orders, including sexual offence prevention orders, drinking banning orders, serious crime prevention orders and others: see the table below for more details. These hybrids amount to individual criminal codes, effectively extending the criminal sanction to various kinds of behaviour that Parliament has not criminalised but which is now

Examples of civil preventative orders introduced under New Labour

Title of Order	Behaviour to be Prevented	Act	Duration of Order	Punishment for Breach
Anti-Social Behaviour Order	Anti-social behaviour	Crime and Disorder Act 1998	Min – 2 years Max – indefinitely	Maximum – 5 years imprisonment
Terrorist Control Orders	Terrorism	Prevention of Terrorism Act 2005	12 months	Maximum – 5 years imprisonment
Sexual Offences Prevention Order	Sexual offending	Sexual Offences Act 2003	Min – 5 years Max – indefinitely	Maximum – 5 years imprisonment
Risk of Sexual Harm Orders	Sexual offending	Sexual Offences Act 2003	Min – 2 years Max – indefinitely	Maximum – 5 years imprisonment
Violent Offender Orders	Violent offending	Criminal Justice and Immigration Act 2008	Min – 2 years Max – 5 years	Maximum – 5 years imprisonment
Forced Marriage Protection Orders	Forced Marriages	Forced Marriage Civil Protection Act 2007	Max – indefinitely	Contempt of court – 2 years maximum
Serious Crime Prevention Orders	Serious Crime	Serious Crime Act 2007	Max – 5 years	Maximum – 5 years imprisonment
Drinking Ban Orders	Drinking related anti-social behaviour	Violent Crime Reduction Act 2006	Min – 2 months Max – 2 years	Maximum of Level Four Fine
Non-Molestation Orders	Domestic Violence	Domestic Violence, Crime and Victims Act 2004	Max – indefinitely	Maximum – 5 years imprisonment
Parenting Orders	Juvenile anti-social behaviour or criminality	Crime and Disorder Act 1998	Max – 12 months	Level Three Fine
Protection from Harassment Order	Stalking and general harassing behaviour	Protection from Harassment Act 1997	Max – indefinitely	Maximum – 5 years imprisonment

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criminal for the specific individual. Lack of enthusiasm for using these orders led the Labour government to re-launch them in its Respect agenda.

Among the many objections to ASBOs in their current form, five may be mentioned:

- they delegate a wide rule-making discretion to a civil court
- the prohibitions may be extensive, going beyond the behaviour proved (Simester and von Hirsch, 2006)
- around half the ASBOs are made on young people, despite the Labour government's original statement that they were not intended for the young (some orders have also been imposed on mentally disturbed people)
- the maximum penalty of 5 years is higher than that for many significant crimes (e.g. affray, assaulting a police officer, drunk driving) and applies even if the prohibition breached is not otherwise a crime
- one of the effects of the ASBO legislation is covertly to reverse previous parliamentary decisions, such as those taken in 1982 when begging and soliciting for prostitution were both made non-imprisonable, after a long struggle – but if included as prohibitions in an ASBO, prison can now follow (Ashworth and Redmayne, 2010: ch. 13).

None of this is to deny that some of the conduct classified as anti-social behaviour amounts to a serious setback to the quality of life of people affected, and that ways of preventing it need to be found. But greater use should be made of less oppressive orders, such as Acceptable Behaviour Contracts (ABCs), and the ambit of other orders (such as the draconian serious crime prevention orders) must be carefully examined. With appropriate safeguards, some of these orders (along with other supportive interventions) would be acceptable. Unfortunately, the Labour government's aim seems to have been to use all methods of reducing the number of safeguards for individuals against whom anti-social behaviour, inappropriate sexual behaviour or other is alleged. Civil preventive orders should be positive and constructive measures that form part of a framework of response to a genuine social problem, rather than negative prohibitions with severe penalties and scant respect for the due process rights of those subjected to them.

Guilty pleas: pressures towards diversion from trial

Three steps were taken in order to persuade more defendants to plead guilty. Section 144 of the *Criminal Justice Act 2003* re-enacted the statutory provisions on sentence reduction for pleading guilty. The Sentencing Guidelines Council (SGC) strengthened this by means of a definitive guideline requiring all courts to give a discount on a sliding scale from one-third at the earliest opportunity to 10 per cent at the door of the court, applicable to all forms of sentence and sometimes making the difference between immediate custody and a community sentence (SGC, 2007). The Court of Appeal turned the screw still further in its decision in *R v. Goodyear [2006] 1 Cr. App. R. (S) 23*, introducing a system of 'advance indication of sentence', whereby a defendant pleading not guilty can ask a judge for an indication of what the sentence would be if the plea were to change to guilty. This is a binding indication from which any mitigation should then be deducted.

The Labour government favoured this approach for many reasons, including savings of cost. Little was said about the risk of innocent people pleading guilty to 'cut their losses', even though the problem of false confessions and pressured pleas is well

documented (Ashworth and Redmayne, 2010: ch. 10). The Court of Appeal in *Goodyear* could see no reason 'why a judicial response to a request for information...should automatically be deemed to constitute improper pressure' on the defendant: remove the word 'automatically' and, in the light of the history, this statement is unconvincing. Moreover, sentence reductions often seem to be greater than one-third: in 2007 average Crown Court custodial sentences for those convicted after pleading not guilty were 42 months, compared with 24 months for those pleading guilty. It still seems to be the case that more non-white defendants plead not guilty, and that more people from an Afro-Caribbean background are acquitted, though those who are convicted receive longer sentences because they cannot benefit from the guilty plea discount. The argument for a re-appraisal of the possibility of avoiding unnecessary trials while respecting the presumption of innocence, considering some examples from the United States, has become overwhelming (Ashworth and Redmayne, 2010: ch. 10).

Bifurcation as justice in the sentencing sphere

It was apparent from the outset that Labour was going to continue the tough approach to sentencing of Michael Howard: in the last days of the previous administration the *Crime (Sentencing) Act 1997* had been passed, introducing presumptive minimum sentences for repeat house burglars and repeat drug dealers. Labour didn't need to implement these provisions, but it soon did so. In the early 2000s it showed an interest in highly restrictive measures for so-called 'dangerous people with severe personality disorder', but the strong professional reaction to the government's claims (for which no secure evidential base had been provided) put this on the back burner. In the 2003 *Criminal Justice Act* the government brought in the IPP sentence, an indeterminate prison sentence for public protection, which was effectively mandatory for a large cohort of repeat non-property offenders. Judges found themselves passing indeterminate sentences on people who were not dangerous, the prisons filled up, and both the Chief Inspector of Prisons and the House of Commons Justice Committee were strongly critical of this ill-thought-through and over-extensive measure. The law was changed in 2008 so as to remove its mandatory element, but what a policy-making disaster.

Throughout this period the government's mantra was that prison should be reserved for 'dangerous, serious and seriously persistent offenders' – this is the upper track of the bifurcated policy, yet it has never been explained what 'seriously persistent' means. Does it mean serious and persistent, or does it include the 25th shop theft? In the meantime, what was the government doing about the lower track of bifurcation? It is not difficult to find speeches by every Home Secretary trumpeting the value of community sentences, but while ministers have talked up the use of prison (and signed the cheques for more prisons), they have done precious little to generate any movement from custody to community, and virtually nothing to revive the fine as a penal measure. Custody Plus was intended to move the emphasis from prison to supervision in the community, but that part of the 2003 Act was never implemented.

Are the two Carter reports (Carter, 2003; 2007) evidence of the government's desire to change the emphasis on more prison use? No. As a form of enquiry intended to form the basis of policy-making, they were half-baked and shallow – quick jobs, not suitable for the profound issues involved. The Halliday report of 2001 was fuller, and its appendices remain a good source of evidence on which policy might be based (including the results of the report on deterrence commissioned by the incoming Labour government from the Cambridge Institute (von Hirsch et al., 1999), and then studiously ignored when it did not back up the populist policies that were thought to be



electorally best). In other words, the Labour government's engagement with 'experts' was relatively low and distant. Despite its declared aspiration for evidence-led policies, Labour often ignored the evidence and listened to its political advisers. At the time of writing we await the sentencing review, in the hope that it will re-examine the types of people who are inside our prisons, and re-assess the justifications for imprisoning them at all, or at least for such long periods, when neighbouring European countries manage with distinctly less use of prisons (cf. Lacey, 2008; Commission on English Prisons Today, 2009; Ashworth, 2010: ch. 9).

The application of the judicial brake

It must be admitted that the Labour government was not always able to pursue its policies as set out because of judicial opposition. Since this usually occurs behind closed doors, it is difficult to be certain about what happened, but two sequences of events may be indicative. First, the *Criminal Justice and Immigration Act 2008* was intended to re-structure the sentencing of young offenders. Section 9 of the Act set out the purpose of sentencing young offenders, on the same model as section 142 of the *Criminal Justice Act 2003* for adults. But whereas section 142 lists five purposes, section 9 lists only four – deterrence was omitted from the list, presumably as unsuitable for the young. The Sentencing Advisory Panel (2009) pointed this out, and concluded that deterrent sentences on young offenders would no longer be lawful. When the government implemented the 2008 youth justice reforms, it brought into force all the sections except section 9. Why was a provision thought important enough to pass through all parliamentary stages suddenly abandoned? Was this because the judiciary objected to the probable loss of its power to impose deterrent sentences on the young?

Secondly, there has been much agitation among judges and magistrates about the requirement in the *Coroners and Justice Act 2009* that sentencers 'must follow' definitive sentencing guidelines. Given that the words 'must follow' are accompanied by the phrase 'unless the court is satisfied that it would be contrary to the interests of justice to do so,' one might have thought that there was adequate flexibility for judges to respond to the facts of particular cases. However, the government gave way to the agitation in a curiously under-hand way: the wording above remains, but what the sentencer 'must follow' is not the category or level of the guideline which is relevant to the particular case, but merely the whole of the 'offence guideline'. In other words, the only obligation is to 'follow' by passing a sentence somewhere between the top of the highest guideline category for the offence and the bottom of the lowest category. That is so watered down as to emasculate the scheme recommended in the Gage Report (2008) and accepted by the government. Judicial co-operation is necessary if any new sentencing policy is to be implemented, but it can be bought at too high a price.

Conclusion

What steps should the Coalition Government ideally take, in relation to diversion and sentencing? A fair amount of fundamental re-thinking needs to happen, which should lead the government to:

- Re-affirm the value of diversion, re-assess the proper roles of the police, the CPS and the magistrates' courts and re-consider the divergence between the policies of the police and the various regulatory agencies.
- Re-affirm the need to reduce behaviour that significantly lowers people's quality of life, but focus on constructive social initiatives rather than negative prohibitions with severe penalties and scant respect for human rights.

- Re-affirm the right to a fair trial and set the goal of reducing unnecessary and costly trials without compromising the presumption of innocence, for example by more direct judicial dialogue with the defendant.
- Re-examine the justifications for the high imprisonment rate and long sentences which are not found necessary by our closest European neighbours, placing far more emphasis on social programmes, community sentences and fines.
- Be prepared to stand up publicly for policies that are based on sound reasons and on appropriate consultation, and to do so both against media criticism and behind closed doors against judicial opposition.

To accomplish any of this will require considerable political courage, of a kind that the Labour governments rarely showed in penal affairs. But fundamental re-thinking is necessary to arrest the trends highlighted in this article. The new Government should take its cue from the report of the Commission on English Prisons Today (2009) and reverse its prison building policy in favour of a more community-based approach: this will require fresh legislation and the co-operation of the new Sentencing Council, and it will take some time to achieve. But this must feature among the several new goals for the criminal justice system.

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Tough on corporate crime? Negligence, death and the *Corporate Manslaughter and Corporate Homicide Act 2007*

Arianna Silvestri

Promised: Legislation to increase the legal accountability of large companies.

Achievements: *Corporate Manslaughter and Corporate Homicide Act 2007* created corporate criminal liability and introduced publicity orders, which may be effective in 'shaming'.

Disappointments: Took eleven years to bring into force. Expressly devised not to be burdensome on companies. High threshold of proof and the 'senior manager test' make it still difficult for large companies to be prosecuted. Not applicable to deaths abroad. Criticised for lacking real 'teeth'.

At the first Labour Party conference since its election victory in May 1997, the then Home Secretary Jack Straw committed to legislate to bring big companies to account for deaths caused by their actions. Passed in 2007, the *Corporate Manslaughter and Corporate Homicide Act* did not come into force (and then only in part) until April 2008. This article looks at the Act's long and difficult gestation in the context of Labour's regulation of business behaviour, the part played by conflicting lobbying interests and its impact so far.

Before the Act: corporate killings

A number of well-known public disasters¹ had resulted in no large company being successfully prosecuted for manslaughter, despite some highly critical public inquiries. Cases involving many fatalities, including the Herald of Free Enterprise (against P&O Ferries) and the Southall rail crash in 1997 (against Great Western Trains), had folded spectacularly. Case law had established that corporate criminal liability depends on the 'directing mind' principle: for a corporation to be found guilty, an individual of sufficient seniority, who can be 'identified' with the company, has to be found criminally negligent. The difficulty with finding such a clear, direct link between a criminal act or omission and a director or officer of adequate seniority had meant that only a handful of prosecutions² had ever been brought successfully, all against small companies.

The new Act was meant to overcome this impasse, by enabling a criminal prosecution to be mounted without having to identify a 'directing mind'. It was intended to restore confidence in the criminal justice system and to achieve a sense of justice for the victims' families (Home Office, 2005a).

¹ The 1987 Kings Cross fire, where 31 people were killed; the Alpha Piper oil platform explosion in which 167 people were killed in 1988; the capsizing of the Herald of the Free Enterprise in 1987, with nearly 200 fatalities, the sinking of the Marchioness on the Thames, and the various rail 'accidents' including Clapham in 1988 (35 dead and nearly 500 injured), Southall in 1997 (seven dead), Hatfield in 2000 (four people dead and over 70 injured), Potters Bar in 2002 (seven dead).

² Under the common law offence of gross negligence manslaughter.

The development of the Act

Following a 1996 Law Commission paper, the Labour government launched a consultation paper in 2000. The paper was highly punitive in its proposals. It included suggestions about freezing company assets before criminal proceedings, to prevent their transfer to evade sanctions and taking action against parent or other group companies if their own management failure were a cause of death. It proposed imprisonment or disqualification for individuals guilty of contributing to the management failure that had resulted in death, and advocated that private prosecutions should *not* require the consent of the Director of Public Prosecutions (DPP).

Unions and pressure groups (safety organisations and groups representing victims' relatives like Disaster Action and Families Against Corporate Killers) favoured these measures which would, they believed, work as a deterrent and help change a corporate culture that they saw as prioritising profits over health and safety. Most industry representatives argued that businesses were on the whole law-abiding, that punishment was not the best way to motivate them and that there were already adequate health and safety measures available to bring to justice the minority of law-breakers³. Typically, the Confederation of British Industry (CBI) warned that harsh sanctions could deter the involvement 'of the most able and diligent people', to the detriment 'of the whole UK business base' (CBI, 2000:6–7).

Although these measures received support from most consultees, they were absent in the draft Bill – which took five years to appear and was 'carefully drawn up not to increase regulatory burdens on business' (Home Office, 2005b:2). In commenting on the Bill, the Institute of Directors (IoD) agreed with the statement of the Better Regulation Executive⁴ that 'we must ensure that new legislation does not place unnecessary burdens on business or make them more risk averse' (Home Office, 2005c:14). Despite numerous amendments being tabled at every stage of the parliamentary process to strengthen the law, they never made it onto the statute book. Any prosecution under the Act needs the consent of the DPP and the proof threshold is very high.

The senior management test: the identification principle by any other name?

The Labour government had initially accepted the Law Commission (1994) proposal that a new offence of corporate manslaughter be based on 'management failures' in the running of an organisation. Such a wide definition would capture the 'underlying causes' of what are often the acts or omissions of individuals, as well as the 'diffuse negligence' that could be 'endemic' in a business and might not be directly attributable to any one manager (Home Office, 2002). This was however dropped in the draft Bill of 2005, which stated that for an offence to have taken place failings had to be specifically those of an organisation's senior managers. The government's argument was that the original definition 'potentially made corporations liable for failings at relatively junior levels' (Home Office, 2005b:5). This was widely criticised for reintroducing the individualisation of the 'directing mind' (albeit in an aggregate form) and hence for effectively failing to address the problems that had afflicted the common law offence; it would cause lengthy legal arguments about who is a 'senior manager' and it would be as difficult as in the past to determine the responsibility of executives of large companies. The senior management test was also seen as potentially having 'the perverse effect of encouraging organisations to reduce the priority given to health and

³ The *Health and Safety at Work Act 1974* imposes a duty on employers to conduct their business in such a way as to ensure, 'so far as is reasonably practicable', that workers and other people who may be affected by the employer's activities are not exposed to risks to their health and safety. Breaches carry a fine (unlimited in theory) and imprisonment (for up to two years) is possible in a few circumstances (e.g. where a notice has been breached, but *not* for secondary liability). However, what this Act proscribes are *failures* to comply with a duty, not their consequences nor the harm they cause (Wells, 1993) – what Box (1983) explains as the equivalent of being punished for carrying a knife rather than for stabbing a person to death.

⁴ The Executive (later part of the Department for Business, Enterprise and Regulatory Reform, in which the former Director General of the CBI Rigby Jones was made a minister) was created by Labour to 'reduce and remove unnecessary regulation' (Cabinet Office website, 2007).



safety' (Committees, 2005a, para 136) by delegating responsibility down in order to deflect responsibility from senior levels.

Notwithstanding wide opposition from unions, safety organisations and representatives in both Houses of Parliament, the senior management test was carried through, unchanged, into the Act. However, whilst the government chose to focus on a specific set of individuals when determining an organisation's culpability, it refused – apparently paradoxically – to make any such individuals (whether senior officers or directors) accountable for the new offence.

Holding directors and senior managers to account

Unions and pressure groups had argued that individuals obviously involved in corporate manslaughter should be held to account. They pressed for custodial sentences for senior managers and directors as well as disqualification for the latter. The government's 2000 consultation paper had concurred with the need for 'a sufficient deterrent' and had also argued for secondary liability⁵.

Industry representatives however claimed that individual liability would make whoever was tasked with health and safety a 'scapegoat', and would discourage people from taking on the role. The CBI (2000) argued that the government should deal with the worst offenders without creating a 'climate of fear' among management. After the consultation the government ended up mirroring industry arguments by supporting 'round about, back-door' routes to secondary liability⁶, i.e. using common law and health and safety legislation routes, all of which are rarely used⁷.

The Act ended up containing no sanctions for individuals and no secondary liability: this constitutes a remarkable exception in criminal law (Law Commission, 1996). Although the legislation was meant to pin down corporate responsibility, it does not hold anyone responsible on behalf of corporations. In contrast, directors can be disqualified and imprisoned for a gross breach of their financial duty of care towards their shareholders' investments, giving the impression that 'money in the United Kingdom will remain more valuable than human life' (Monbiot, 2005).

Sanctions

There had been repeated calls in Parliament for a more imaginative approach to sanctions. However, the only sanction for a company convicted of corporate manslaughter under the Act is a fine. A court may also issue a remedial order⁸ or a publicity order, but is under no obligation to do so. Failure to comply with either order also receives only a fine.

Although remedial orders were generally regarded by consultees as a positive step, there were reservations that similar provisions under health and safety legislation are rarely used, and that the time delay between the events and conviction may make orders redundant (Committees, 2005b). Many respondents to the consultations believed that such orders, combined with fines, would neither provide a sufficient deterrent against poor health and safety practices nor deliver justice. In relation to net incomes, fines generally tend to be 'proportionately insignificant' (Geis and Dimento, 1995). Even relatively large fines are unlikely to have a punitive effect on large companies when one considers them in relation to a corporation's profit. Levying fines linked to companies' turnover was suggested in Parliament, but not taken up by the government.

The Sentencing Council guidelines (2010) now state that in deciding the level of fine for a corporate manslaughter offence, 'a court should not be influenced by the impact on

⁵ Simply put, secondary liability can be described as holding someone legally accountable for contributing to, facilitating or being in some other way responsible for acts carried out by another party.

⁶ John Denham MP, Commons Debate 4/12/06, Hansard col. 72.

⁷ The small number of directors successfully prosecuted for gross negligence manslaughter indicates how difficult it is to prove the individual offence in common law. Under the *Company Directors Disqualification Act 1986*, the Health and Safety Executives can press for disqualification following a conviction for breach of health and safety. However, research shows that between 2002 and 2004, although 620 people were killed and 60,177 people suffered major injuries at the workplace, not one director was disqualified as a result (TGWU, in Committees, 2005b).

⁸ Only if the prosecution applies for one (s.9(2)).

shareholders and directors... However, the effect on the employment of the innocent may be relevant, as may the effect on provision of services to the public.' Equity fines, which were proposed during the passage of the Act, could have dealt with this issue. Companies would be required to issue shares into a compensation fund: such stock dilution would impact on shareholders rather than employees or consumers. Equity fines could also overcome the problem of achieving deterrence without resorting to a level of fine that could send a company into bankruptcy (Wells, 1993).

Other suggestions for alternative corporate penalties were put forward and discussed at length in parliament, but not taken on in spite of vague commitments (Home Office, 2006). These included: naming and shaming; restorative justice; confiscation of assets or equipment; trading restrictions; licence revocation; product recall; company probation orders; corporate 'imprisonment' – restraining corporations in various ways; and in the final instance, corporate 'death sentence' (i.e. mandatory dissolution). Training orders and community service orders could be applied, it was suggested, to both companies and directors⁹. Community sentences could require corporations to undertake unpaid work for public benefit, e.g. by building new hospitals or paying for roads and schools, selling products at cost price to under-privileged groups, seconding executives (see e.g. Box; 1983; Gobert and Punch, 2003).

Territorial application

Concern about liability of firms operating abroad was raised during the development of the legislation. Although foreign companies operating within the UK are liable for the new offence, the Act does not cover any death abroad, even if caused by a management failure in this country¹⁰. This was seen by critics as a serious 'diminution of responsibility'¹¹ and a failure of the duty of care towards UK and foreign employees working abroad, often in dangerous situations.

The Act's significance and impact

By focusing on organisational fault, the *Corporate Manslaughter and Corporate Homicide Act* appears to effect a significant break from conventional legal thinking, with its individualising focus on *mens rea*. The idea that corporations may be criminally liable challenges 'the ideological and normative basis of criminal law and its mode of expression and operation' (Lederman in Wells, 1993:13). However, the 'senior management test' continues to identify the offence with the culpable actions of individuals: it therefore remains to be seen whether the Act will achieve an actual departure from the 'directing mind' principle.

The development of the Act and the form it finally took provides a valuable illustration of conflicts of ideas (and of underlying interests) about how corporate crime should best be controlled. Broadly speaking, the camps divided between unions and interest groups supporting punitive and deterrent measures, and industry representatives rejecting criminalisation and advocating the advantages of a co-operative and preventative approach. Although initially Labour appeared to embrace a punitive stance, all the measures advocated in the 2000 consultation paper were subsequently withdrawn.

By confining itself to fines, the Act can be seen as a missed opportunity to use more innovative penalties, including those with a restorative or restitutive element. However, publicity orders (the only alternative type of sanction adopted) are potentially significant in the control of corporate behaviour: businesses have been shown to be extremely susceptible to shaming and the concurrent loss of prestige and reputation (see e.g. Fisse and Braithwaite, 1983).

9 E.g. corporate community service orders were mooted by NAPO and an amendment to this effect was proposed by the Lords on 18/1/07. IoD had suggested community service for individuals (Committees, 2005a).

10 Section 28(3) of the Act states that the harm resulting in the death has to have taken place in the UK (or on British aircrafts, hovercrafts etc) for the offence to apply.

11 Lord James of Blackheath, Bill 2nd reading 19/12/06, Hansard col. 1921.



Neither the Police, the Crown Prosecution Service nor the Health and Safety Executive foresaw their costs, resources or number of investigations to significantly change (Home Office, 2005b) as a consequence of the Act. The Association of British Insurers did not anticipate changes for employers, 'as the financial impact is likely to be minimal across the economy' (Committees, 2005b). The Labour government itself clearly expected the same: its regulatory impact assessment estimated that the new offence would result in only five extra prosecutions a year. They seem to have been over-estimating: at the time of writing at the end of 2010, only one case has been taken to court¹² and involves a small company, which could have been caught in the net even without the existence of the Act.

In conclusion

New Labour's brand involved a 'governance mix' in which business and corporate capital work in 'partnership' with the state (and the voluntary sector). A 'light touch' approach to business regulation can be seen as New Labour's effort to cultivate its new electoral constituencies in the business world. This, however, sat uncomfortably with the more robust measures advocated by its traditional working class supporters and trade unions. The development of the *Corporate Manslaughter and Corporate Homicide Act* illustrates the tension between the two opposing discourses and the compromise the government attempted to achieve.

By creating a new offence of corporate manslaughter, with the stigma its criminal label implies, New Labour appeared to have been 'tough' on corporate crime. However, the Act has a soft underbelly, underlined by a conciliatory stance typical of New Labour's approach to business regulation.

Whether the Act will meet its aim of increasing the legal accountability of large companies depends of course on how it will be implemented¹³: on the effect of the 'senior managers test' in establishing culpability and on the use of fines, remedial orders and publicity orders. The jury is therefore still out on its effect in controlling corporate behaviour and management failure; whether it will work to punish, deter and ensure compliance or whether it is in fact, as it seems likely, merely symbolic, an expressive gesture towards 'justice'.

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¹² R v. Peter Eaton and Cotswold Geotechnical Holdings Limited, adjourned until October 2010.

¹³ The Act only applies to deaths that occur after its implementation on 6 April 2008 and any supporting evidence cannot relate to anything prior to that date. This in itself, leaving aside all other limitations, is likely to restrict cases that can be brought under the Act for a while yet.

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New Labour and the environment: too little too late – symbolic success but real failure

Reece Walters

Achievements: Introduction of the *Climate Change Act 2008*, Low Carbon Transition Plan, the creation of the Department of Energy and Climate Change, establishment of several ‘green’ quangos and Green Investment Bank, Warm Front Scheme, international leadership on Kyoto and the *European Directive for Landfill and Renewable Energy*.

Disappointments: Increased green house gas emissions that fail to meet domestic UK targets, let alone Kyoto; significant increases in energy and transport emissions; EU air pollution violations; failure to regulate the importation of illegally logged timber and wildlife; increase in chemical agriculture; unwillingness to tackle corporate environmental crime; road expansions and runway projects at the expense of low emission alternative public transport.

Biggest broken promises: Global warming, low carbon transport; protection of biodiversity.

Introduction

When Tony Blair’s New Labour came to power in 1997, the environment was centre-stage on the government’s policy agenda; ‘all Departments must promote policies to sustain the environment’ (Labour Party, 1997). The word ‘sustainability’ was commonly used in New Labour manifestos and in Prime Ministerial speeches. Achieving environmental objectives in climate change, green house emissions and renewable energies was to be financed through a revamped tax system. The Treasury issued a ‘statement of intent’ that would explore reforming ‘the tax system to increase incentives to reduce environmental damage. That will shift the burden of tax from “goods” to “bads”; encourage innovation in meeting higher environmental standards: and deliver a more dynamic economy and a cleaner environment, to the benefit of everyone’ (HM Treasury, 1997).

Some achievements

The belated introduction of the *Climate Change Act* in 2008 was a substantial achievement. Its key objectives are to: ‘improve carbon management, helping the transition towards a low-carbon economy in the UK; demonstrate UK leadership internationally, signalling that we are committed to taking our share of responsibility for reducing global emissions in the context of developing negotiations on a post-2010



global agreement at Copenhagen in December 2009' (Department of Energy and Climate Change, 2010).

The Act established the independent Committee on Climate Change, introduced legally binding targets for the reduction of greenhouse emissions (including shipping and aviation emission) and introduced a range of recording and reporting processes that require responses.

New Labour also introduced several 'green quangos' or non-departmental government bodies such as the Renewables Advisory Board, the Commission for Integrated Transport and Carbon Trust, just to name a few, all independent and expert bodies with remits to monitor, research and advise on environmental issues such as reducing carbon emission, renewable energies, conservation and wildlife protection. Recent announcements indicate that the new Conservative/Liberal Democratic Coalition seeks to abolish many of the green quangos, including the influential and widely respected Sustainable Development Commission and the Royal Commission on Environmental Pollution – a move which some commentators have suggested is less about 'cutting red tape? More like axing the green economy' (Shrubsole, 2010).

One of New Labour's initiatives announced in early 2010, namely the Green Investment Bank (GIB), has received a more favourable, yet uncertain reaction from the incumbent Government. The purpose of the GIB was to finance low carbon and renewable energy projects from the sale of assets such as the Channel Tunnel link. New Labour initially projected up to £2 billion would be generated through the GIB and invested in low energy UK based initiatives. The Cameron Government has expressed support for the GIB and has committed some financial support to it in its 2010 Comprehensive Spending Review (HM Treasury, 2010).

Trade and economic progress come first

Despite the above, New Labour was far from a green focussed government. International politics and environmental agreements provided the impetus for New Labour to set internal UK targets – most of which were not met. The progressive steps taken in landfill, renewable energies, recycling and household insulations were all welcomed initiatives but relatively inexpensive, politically uncomplicated and driven by EU directives. New Labour's policies of economic growth, which would contribute to credit crunch crises and million pound bank bail outs, epitomised a government determined to enhance and prioritise trade well ahead of sustainability and environmental protection. Such trade activity came with unacceptable levels of emissions. Too often, when discussing the environment, a country's contribution to environmental degradation through global warming and war is overlooked. The perilous circumstances facing countries such as Bangladesh through flooding are recognised to be the result the excesses of the West rather than 'natural disasters' (Muncie et al., 2010). Moreover, the UK government's role in the Iraq and Afghanistan conflicts has proven disastrous to the environment as well as to sites of heritage and international antiquity. Such broader contexts of environmental damage should never be overlooked.

The opportunity for New Labour to engage and respond to 'bigger' environmental events and consequences resulting from the actions of governments and corporations did not pass them by. In 2005 a parliamentary select committee examined 'corporate environmental crime' as a serious issue warranting government intervention (House of Commons, 2005). However, New Labour actions were not focussed on the actions of corporations that pollute and exploit the environment but on 'environmental crime'



defined as ‘fly-tipping’, ‘littering’, ‘graffiti’ and ‘vandalism’ (Home Office, 2007). As a result, actions such as the annual illegal importation and sale of 3.2 million cubic metres of timber stolen from the Amazon rainforest and other protected habitats was not on the New Labour environmental crime radar. Nor was the sale of 12,000 tonnes of fish illegally taken off the shores of debt stricken countries in western Africa. Or the polluting activities of corporations that cause the premature death of thousands of Britons each year. Moreover, during the Blair/Brown years, the priorities of trade contributed to substantial increases in wildlife crime and the irreversible loss to biodiversity and Sites of Special Scientific Interest (Walters, 2008). Commercial enterprises that damaged the environment and harmed humans were overlooked in favour of environmental crime discourses that targeted anti-social behaviour, at the expense of the poor, disempowered and marginalised.

For example, imported fish is worth £4–9 billion to Britain per annum. By conservative estimates more than 12,000 tonnes originate from illegal fishing in the offshore waters of poor countries, an activity that decimates the industry and food supply of debt-stricken countries in western Africa, while destroying marine biology. Yet unregistered pirate vessels increasingly entered British ports during the New Labour years unchecked and the stolen fish were sold at London markets without question (Environmental Justice Foundation, 2007). Moreover, Britain became the world’s third largest importer of illegally logged timber during the Blair/Brown years. Up to 3.2 million cubic metres of timber sold in the UK and used for household furniture or garden woodchip was stolen from the Amazon rainforest and other protected habitats, comprising a £700 million per year British industry (EIA, 2007).

The emphasis on trade has a concomitant effect on air quality. Throughout New Labour’s government air quality witnessed a dramatic decline in the UK. Thousands people in the UK are hospitalised or die prematurely every year because of air pollution. Yet, the control of air pollutants caused by corporations was under-resourced and based on a model of self-regulation under New Labour, which resulted in the UK government being issued with court proceedings by the European Commission for repeatedly exceeding EU guidelines on air pollutant (Walters, 2009).

On the food agricultural front, New Labour’s record is appalling. The increased use of chemicals and the loss of biodiversity and soil erosion; antibiotic resistance and drug residues in food, declining crop yields, the promotion of unproven and dangerous technologies in genetic modification, combined with BSE, salmonella and record levels of food poisoning have all contributed to a complete lack of agricultural vision with long lasting environmental and human consequences (Walters, 2010).

Unfortunately the major tax reforms mentioned above that would deliver on environmental objectives would become nothing more than an 11 per cent increase in fuel duty, the proceeds of which were not spent on environmental sustainability. Indeed, subsidies for the motor vehicle industry ensured that a car at the beginning of New Labour’s term was no more expensive when they left office, while public transport charges had risen by up to 20 per cent (Johnson et al., 2010).

Conclusion

New Labour’s environmental achievements were first and foremost ‘symbolic’. The rhetoric espoused by UK political leaders and ministers played an important role on the international policy stage through steering debates towards greener initiatives. However, the lack of progress and implementation on home soil led others countries to criticise Britain for ‘tough talk’ but ‘no action’. Moreover, Britain’s involvement in the

war on terror and its significant contributions to the devastating effects of global warming further eroded New Labour's environmental kudos at an international level. The biggest environmental achievements under New Labour, notably the introduction of the *Climate Change Act 2008*, the creation of a government department committed to energy and climate change, allowances for household insulations and green business initiatives were eleventh hour developments in the Blair/Brown administrations and peripheral to the priorities of trade, war and security. In that sense, it was too little, too late.

Finally, what is more alarming is that the so called environmental successes under New Labour are already threatened by the proposals of the Coalition Conservative/Liberal Democratic Government, where environmental issues, such as green house gas emissions have been overshadowed by economic recovery and fiscal restraint. At this stage, future UK Government report cards on the environment do not look good.

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Anette Ballinger

New Labour and responses to violence against women

Achievements: Substantial efforts made to raise the profile of sexual violence against women.

Disappointments: Despite criminal justice spending of around £187 bn between 1997 and 2007, the dwindling number of shelters, refuges and rape crisis centres continue to suffer chronic under-funding, financial crises and threats of closure.

Introduction

Why ... given the government's supposed commitment to fight violent crime, does it leave to volunteers in refuges funded by the National Lottery a crime that one in four women experience in their lives and that kills more than two women every week?
(Wykes and Welsh, 2009: 70).

Following the exposure of the nature and extent of violence against women by second-wave feminists, a trail of data can be traced from the 1970s to the present which reveal the persistence of such violence as a serious problem in the UK. For example, the British Crime Survey of 1996, the year before Labour was elected, revealed that '2.9 million domestic assaults took place in England and Wales, compared to 1.6 million burglaries in 1998' (Hall and Whyte, 2003: 4). It is estimated that approximately 50,000 rapes occur annually in Britain (Cochrane, 2007) and national statistics concerned with domestic violence have consistently demonstrated that, on average, two women are killed a week 'by a current or former partner', which 'constitutes 42% of all female victims of homicide' (Ballinger, 2009:21; Boyle, 2005:85; Fawcett Society, 2003:2; Edwards, 1989:126). There is therefore no indication that four decades of greater knowledge and awareness of violence against women have led to its decrease. Nor indeed was there any indication in the 1997 Labour Party Manifesto that it was overly concerned about the extent of such violence, devoting only half a sentence to the subject of rape and (ungendered) sexual assault, subsumed under a heading entitled 'Victims' (Labour Party, 1997:23). The subject of domestic violence was omitted altogether.

New Labour in power

Yet, New Labour was not indifferent to women's plight whilst in power. With regard to domestic violence, 1998 and 1999 saw the publication of two 'substantial reports', *Tackling Violence against Women and Living without Fear*. Other initiatives included awareness campaigns such as *Break the Chain* and *Zero Tolerance* (Hall and Whyte, 2003:4; 10). *The Domestic Violence Crime Victims Act* was introduced in 2004, and the Home Office published additional government strategies on domestic violence in 2005 and 2006. Furthermore, violence against women became an important strand within the government's Crime Reduction Programme (Wykes and Welsh, 2009:86-87).

Similarly with regard to rape and other sexual offences, New Labour produced two consultation papers – *Setting the Boundaries* in 2000 and *Protecting the Public* in 2002 (Home Office, 2002). Following the government’s 2002 Rape Action Plan, 30 Sexual Assault Referral Centres (SARCs) have come into existence with ‘15 more in the pipeline’ and funding has become available for Independent Sexual Violence Advisors to support complainants (Stern, 2010: 49).

The implementation of the *Sexual Offences Act 2003* (SOA 2003) can be linked to another achievement by second wave feminists – the exposure of the private sphere as a dangerous place for women. Thus, the traditional definition of ‘real’ rape as an act taking place between strangers in the public sphere has been challenged, for example, by statistics in the 2001 British Crime Survey, which revealed the perpetrator was a stranger in only 17 per cent of rapes and 18 per cent of serious sexual assaults (Wykes and Welsh, 2009:40). Yet, rape complaints against intimates are the least likely to result in a conviction, which helps to explain the persistence of notoriously low conviction rates for this crime, hovering between 5 and 6 per cent during New Labour’s reign (Ballinger, 2009: 21). According to Phoenix and Oerton, these factors led to a ‘legitimacy deficit’ – generated as a consequence of the criminal justice system’s inability to respond adequately to cases of sexual violence. The implementation of the SOA 2003 can be understood as the state’s response to this deficit (2005: 32).

However, as indicated by the above statistics, none of New Labour’s initiatives have succeeded in reducing the volume of violence against women. In what follows, possible explanations for this failure will be explored.

Failing women

The Home Office published new guidance for policing domestic violence in 2000 which emphasised pro-arrest and pro-prosecution strategies, thus, bearing a close resemblance to 1990 guidance which had already failed to reduce the volume of incidents – for as Stanko has noted – ‘police ... can do little to protect women ... from men’s violence’ (Stanko cited in Hall and Whyte, 2003: 9; 14). In contrast, refuges protect women, and ‘are consistently valued and praised ... as effective in intervening in cases of domestic violence’ (Hall and Whyte, 2003: 12). Yet, *Living Without Fear* promised only ‘£6 million for projects to reduce violence against women’, constituting only 2 per cent of funding ‘available for the government’s Crime Reduction Strategy’, compared to £153 million allocated for CCTV, despite consistent research findings that the latter has failed to reduce either crime or fear of it (ibid:11). Such statistics indicate not only Labour’s continued prioritising of crime control in the public sphere, at the expense of the private sphere, but also the marginalisation of *effective* responses to domestic violence through failing to provide secure funding for refuges. Instead New Labour’s continued support for strategies such as police initiatives and awareness campaigns – both of which fail to address the wider unequal power structure that allows such violence to be commonplace – helps to explain why there has been no reduction in incidents of domestic violence. In short, New Labour’s strategies have failed to confront women’s subordinate position as being at the root of domestic violence.

A similar pattern (albeit via a different strategy) emerges with the introduction of the SOA 2003 in response to the ‘legitimacy deficit.’ While statistics indicate ‘that over 90% of reported victims of sexual assault and rape are women and girls’, the SOA nevertheless managed to ‘gender neutralise’ these crimes (and victims) by first, shifting the meaning of the feminist critique of gendered violence and second, redefining the



term ‘gender inequality’ (Phoenix and Oerton, 2005:36, 45; EVAW, 2007). Thus, unlike the feminist critique which puts inequality of power between *men* and *women* at the centre of analysis, SOA 2003 emphasises that sexual assaults are committed by men and women, hence both can be victims thereof. Consequently such crimes are redefined as ‘a problem of [ungendered] individuals who damage others’, and justice is equated with harsher punishment in order to clamp ‘down on those who destroy the lives of others’ (ibid:44-45). This gender-neutralisation of sexual offences erases not only ‘the problem of men’, but also ‘the social context that [makes] sexual violation routine’ (ibid:39). In short, the existing social order remains unchallenged – unsurprisingly so – since in ‘patriarchal, capitalist societies the law functions to protect dominant male interests’ (ibid:37).

Furthermore, the totalizing notion of ‘victimhood’ evident within the SOA 2003 provides the space for the assertion of a new ‘moral authoritarianism’ which legitimises the government’s implementation of harsher punishment to protect individuals (ibid:36). The outcome of this strategy is, however, similar to those implemented to combat domestic violence – a failure to reduce the volume of sexual violence, since the wider structures of heteropatriarchy which provide the starting point for such abuse, have not only remained unchallenged, but have been erased altogether:

... even as the state has taken on gendered violence, it has done so in a manner that has failed to see the violence as gendered ... as such, there has been little challenge to the gendered assumptions that dominated state service provision in the 1970s and 1980s ... The context of these assumptions has clearly changed but the failure to confront gender has not.

(Wykes and Welsh, 2009: 86 – original emphasis)

¹ The Fawcett Society suggests Worboys may have attacked ‘up to 100 women’ (2009: 45). Nor is this an isolated case. For example, see also the case of Alan Pemberton who murdered his wife Julia and their son William after police failed to respond to her complaints and took no action. It took police seven hours to respond to her last 999 call, by which time both she and her son had been shot dead (Rose, 2007).

² Independent Police Complaints Commission.

³ In response to the criticisms relating to the investigation of the Worboys and Reid cases, the Metropolitan Police established what it claimed to be the biggest rape intelligence unit in the world (Laville, 2009).

⁴ The scoring was conducted by EVAW, which published the results in a report entitled *Making the Grade?* (2007).

The question of gender

Labour has undeniably responded to the challenge that statistics of violence against women present, and legislation such as SOA2003 has become more inclusive – capturing and attempting to respond to more victims. Yet, cases such as that of John Worboys – who remained free to rape ‘at least 85 victims despite numerous women reporting attacks over many years’ – demonstrate the failures of pro-arrest and pro-prosecution strategies.¹ Indeed, following an investigation into the case, the ‘IPPC² upheld complaints against five Met Officers’³ (Laville and Dodd, 2010; Ballinger, forthcoming).

Moreover, recent statistics reveal that only 15 per cent of serious sexual assaults are reported, while the current (at the time of writing in 2010) conviction rate of reported rape cases is 6.5 per cent, and the ‘2008 domestic violence arrest rate was only 30.1% ... down 1.3%’ since 2007 (Fawcett Society, 2009: 9; 49). Hence, not only have the New Labour strategies outlined above failed to deliver on their own terms, they have also undermined the gendered nature of domestic violence, rape and other sexual assaults, by redefining them as gender-neutral, which, in turn, has reinforced the marginalisation of the long history of effective responses to gendered violence such as refuges and Rape Crisis Centres (Hall and Whyte, 2003:10; EVAW, 2008: 4). For example, chronic underfunding has resulted in the number of Rape Crisis Centres falling from 68 in 1984 to 32 in 2007, the same year the government scored “‘just two out of ten” for its efforts in ending violence against women’⁴ (Ballinger, 2009: 27; Amnesty Magazine, 2007). A similar erosion of refuges has taken place, despite the fact that they support ‘the vast majority of women who do not report’ attacks (EVAW, 2008: 4). Wykes and Welsh (2009: 75) note:

From the beginnings of the refuge and rape crisis movements over 30 years ago, [the] reliance on women volunteers has remained unchanged. It, perhaps more than any other feature of the funding situation these organisations face, reveals the abdication of responsibility for tackling men’s violence and the associated projection of this responsibility on to women.

It also explains the state’s responses to violence against women since the 1990s as a trend towards redefining gendered violence as a crime problem. In turn, this promotes ‘the criminal justice processes and priorities attached to ‘crime’ in service provision for them, rather than the priorities that are associated with approaching them as gendered violence’ (ibid:87). That is, the pro-arrest, pro-prosecution initiatives outlined above prioritise police targets and criminal justice goals, whereas most women prioritise ‘immediate protection’ – something which police action is unlikely to provide. This trend thus marginalises women’s priorities, and with it, the voluntary sector which provides these priorities for victims:

Through approaching gendered violence in a manner that diminishes and denies its very gendering, attention is turned away from violence as gendered – violence is allowed to be neutralised and the gender politics therein are negated.
(Wykes and Welsh, 2009: 88)

Put differently, all the initiatives outlined here focus almost exclusively on women after they have been victimised – SARCs, helplines, pro-arrest, pro-prosecution strategies and so on, while men remain invisible as do issues around masculinity and male power, which lead to gendered violence in the first place. Thus, ‘there has been an emphatic and enduring failure to tackle men and their violence’, for example through lack of facilities for male abusers. In particular, there has been a failure to address the place where ‘male power is most operationalised and male violence is most routinely exercised – the home and family’ (Wykes and Welsh, 2009: 89).

Conclusion

Taken together, the evidence presented here indicates that New Labour’s initiatives and strategies have been failures – leaving women exposed to unchallenged and unchecked male violence (Wykes and Welsh, 2009:82). As such, the philosophy behind the state’s policies can be seen to support – rather than challenge – the dominant heteropatriarchal social order within which women’s priorities carry little importance.

However, the launch of the *Violence against Women Strategy* by the CPS in 2008 leaves room for optimism for the future with its recognition that “‘violence against women is rooted in the inequalities found throughout society between men and women” and occurs within a ‘context of power and control used by men against women”” (cited in Fawcett Society, 2009: 53). Only when this important recognition of the wider social structures that allow gendered violence to flourish is adopted by all agencies of the state – particularly its criminal justice system – can we expect to see a significant change to the ways in which such violence is addressed.

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Victims policy: 1997–2010

Sandra Walklate

Achievements: *Domestic Violence, Crime and Victims Act 2004, Victims Code of Practice 2006.* Taken together these provided the opportunity for the most wide ranging policy commitment to victims of crime in England and Wales.

Disappointments: Disadvantaging defendants made to appear as a way of aiding victims (through for example the ‘rebalancing’ agenda), fixing ‘victims’ and ‘offenders’ as totally separate and separable categories; the perpetuation of the use of the victim as a political symbolic and rhetorical device.

Biggest broken promise: The unmet expectation that the Victims Code of Practice would give people ‘rights’ as victims/complainants in the criminal justice system.

Victims and witnesses are not at the heart of the system – if anything they are the poor relation.

(Louise Casey, Commissioner for Victims of Crime, in Casciani, 2010)

Whilst in the 1960s victims were referred to as ‘the forgotten party’ of the criminal justice system, in the light of the wealth of research and policies that have contributed to our collective awareness of the nature and extent of criminal victimisation and what Karmen (1990) has referred to as victimisation prevention, such a claim now carries little weight (see for example Zedner, 2002). So it is intriguing that the Commissioner for Victims (appointed in March 2010) feels able to make the statement quoted above. Leaning heavily on the report ‘Redefining Justice’ (2009) produced by Sarah Payne, who was appointed Victims Champion for that year, Casey goes on to say that, ‘Too often victims found themselves a “sideshow” as police prisons, lawyers, and the courts focused on the offender’. However, many practitioners might find themselves expressing a contrary view and feel justified in suggesting that victims are now seen to be key players in the system, since much of their energy is now dedicated to ensuring that this is the case. So how might these apparently contradictory assessments of victims’ policy co-exist? In this short overview of the New Labour years in office I shall endeavour to offer an answer to this question.

From the periphery to the centre?

By the time New Labour came to power in 1997, awareness of the impact of crime and the importance of the presence of the victim to the criminal justice system had been recognised. For example, the first *Victims Charter* of 1990, extended in 1996, significantly re-orientated the work of the Probation Service to the victim rather than the offender (see also Garland, 2001). Alongside this kind of development, Victim Support had by the 1990s established itself as the voice for crime victims and the extension of their services into crown and magistrates courts during the 1990s added impetus to responding to victims as consumers of the criminal justice system (see Mawby and Walklate, 1994). Simultaneously, by 1997 police forces were being required to respond



more appropriately (better) to victims of sexual assault and of racial harassment. So, when New Labour came to power it was assumed that their desire to modernise the criminal justice system in conjunction with being 'tough on crime' would, by implication, improve experiences for victims. The *Crime and Disorder Act 1998* exemplified this 'symbolic' reference to the victim in two ways. That legislation required local authorities to produce crime and disorder reduction strategy documents and consequently 'hate crime', and domestic violence amongst other issues, became transformed into quality of life indicators. In addition that same legislation reflected a desire to include victims in restorative justice initiatives.

This symbolic use of the victim in the interests of policy responses to deal with crime did little to address the evidenced problems that victims were experiencing with the criminal justice system (see inter alia Shapland et al., 1985; Goodey, 2005; Dignan, 2005; Spalek, 2006). It also arguably perpetuated a political use of the victim that had begun with the establishment of the Criminal Injuries Compensation Board in 1964 (see Miers, 1978). However, as Rock (2007) intimates, the embrace of the *Human Rights Act in 1998*, interpreted by Jack Straw as giving entitlements to protection for victims as well as suspects, the greater willingness to listen to women's experiences of the criminal justice system in pursuing complaints of rape, and the unfolding legacy of the Lawrence Inquiry, led to a review of overall policy direction in relation to victims of crime.

In the light of this review in 2002 the government published a White Paper, *Justice for All* (Home Office, 2002). As Paul Clark (2004: 21) stated, 'Justice for All is guided by a single clear priority – to rebalance the criminal justice system in favour of the victim and the community so as to reduce crime and to bring offenders to justice'. This pre-occupation with rebalancing the justice system has been a key policy platform since then and reached a particular high point in the passing of the *Domestic Violence, Crime and Victims Act* in 2004. This piece of legislation introduced surcharges on fines and fixed penalties for motoring offences that contribute to the funding of the Victims Fund; allowed the Criminal Injuries Compensation Authority to recover payments made to victims from their offenders; widened the opportunities for victims to be given information and to provide information in cases where their offender receives a prison sentence; provided for a Commissioner for Victims and Witnesses and set out a Code of Practice for Victims. The breadth of this legislation in relation to victims of crime was without precedent in England and Wales.

The *Victims Code of Practice* published in October 2005, and effective from April 2006 (to which one suspects Louise Casey was referring), codified all the expectations and obligations that a victim might have of the criminal justice system and set targets for how and when criminal justice agencies need to have responded to and/or delivered services to victims of crime. It also laid out the procedures for complaint should these services not be delivered. In this respect it constituted a stronger, more all embracing document than either of the previous charters. However, it did not offer any legal redress for anyone who had a complaint with respect to service delivery. Nevertheless, for some this Code of Practice marked the move of the victim from simply being a complainant to being an equal participant in the criminal justice system with rights. In this way the criminal justice system was to be rebalanced.

A particular example of this policy direction is the 'victim personal statement' scheme introduced in England and Wales in November 2000. The purpose this scheme is to offer the opportunity to the victim of crime to relate to all the agencies of the criminal

justice system how a crime has affected them, and to provide the system with more information about the impact of a crime. However, as Tapley (2005: 32) reported, 'Victim Personal Statements were not being offered to victims on a consistent and regular basis' and Graham et al.'s (2004) qualitative evaluation of this scheme pointed to similar problems in victims' understanding of the scheme. On the other hand, their report suggested that those who participated felt that it had been a positive process. Giving the victim a voice in relation to making statements to the court was extended in the form of a Victims Advocates Scheme, introduced in April 2006. This scheme offers the families of those bereaved in cases of murder and manslaughter to present a statement to the court as to the impact that that event had had on them (a Family Impact Statement), once a conviction has been secured for the crime and before sentencing is pronounced. Sweeting et al., (2008) suggest that families welcomed this as an opportunity to have their voice heard in court and felt a sense of positive and active involvement in the trial, reporting the process to be therapeutic.

Rebalancing?

As Miers (2007: 337) has observed, the metaphor of 'rebalancing' the criminal justice system is contentious. This metaphor not only puts victims/witnesses (complainants) and offenders (defendants) in an oppositional relationship with one another (which may be more imagined than real); it also begs the question as to the purpose of the criminal justice system itself. At this juncture it might be useful to be reminded that whilst the victim/witnesses role in the criminal justice system might have changed through history, they are nonetheless an essential component part of the workings of that system. However, codes of practice notwithstanding, this does not mean that they are equal partners in that system. Some time ago McBarnett (1988: 300), in discussing individuals' experiences of the witness box, observed that:

*The offence is not just against the victimised person, the offence is against the state.
The state is not just the arbiter in the trial between victim and offender; the state is the victim...If the victim feels that nobody cares about their suffering, it is in part because institutionally nobody does.* (Emphasis added)

Understanding the central nature of this relationship is crucial in appreciating how the adversarial system works and it is also central to understanding the problematic nature of the rebalancing metaphor. What or who is being rebalanced and in what direction? It is clear that the intention is to rebalance the system so that the victim receives better/more favourable treatment, but if the victim is the state, how might that be translated into practice? Of course, what underpins this preoccupation with rebalancing are arguably at least two concerns: to ensure the continued legitimacy of criminal justice (that is, people as victim/witnesses continue to participate in it); and to appear to be responding to populist pressures in responding to actual and/or perceived victims' needs for punishing the offender (securing votes). Neither of which imply an understanding of what the criminal justice system is about and whose interests it serves.

The 'good' of criminal justice

If we take the view that the criminal justice system is a public good the value of which is felt by us all collectively, that is, of *social* import, as a public good it is in all our interests that it delivers justice. Not for victims or defendants but for all of us. However, what it is that the criminal justice system represents contemporarily is both uncertain and unclear: hence the disjunction between the statements made by Louise Casey, the



experiences of criminal justice professionals and the available evidence (as opposed to opinion) on what it is that might be of benefit for victims of crime. However, what is clear and certain, in the context of contemporary criminal justice policy, is that sight has been lost of the potential *social* value of the criminal justice system. This is clearly demonstrated in the moves to centre the victim of crime in the criminal justice system in the absence of any widespread debate as to whether or not such moves are in the social (public) interest. In the absence of such a debate, of course, it is relatively easy for politicians and policy makers to make claims for 'Justice for All'.

And who pays the price?

The symbolic appeal to the victim can be also be viewed as an appeal to an 'imagined political community' (Jessop, 2002) (hence the victim as citizen), whilst simultaneously offering a vehicle for envisaging a 'good society': a society in which we are all safe. This symbolism accommodates a 'quality of life' approach to criminal victimisation adopted by many crime and disorder strategy documents alongside the rebalancing agenda. However, it is clear that despite these ideological and political efforts we are not all safe. Neither are we all (equal) victims (see for example Dixon et al., 2006). But simultaneously it is the case that we are all the subjects and objects of contemporary criminal justice policy; policy that rests on the assumption that 'all of us' are potentially victims in one form or another. These contradictory forces have the resultant effect that the real needs of both individuals and communities who may have a just call on resources and policies to make their lives better, and which as a consequence would be in the interests of society as a whole (a collective interpretation of 'all of us'), are subsumed or lost. Thus, arguably a generalised project to render us all victim-citizens serves only political purposes, for which the public good of justice is paying the price in the process of being 'redefined'.

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Drug and alcohol policy under New Labour: pandering to populism?

Julian Buchanan

Achievements: The considerable investment under the Drug Interventions Programme increased the number of treatment places available, brought together different agencies in partnership work and helped shift the focus away from a medical model of addiction.

Disappointments: The failure to adopt a progressive, pragmatic and scientifically informed approach to the management of substance use and misuse fitting for the twenty-first century. The much criticised and out-dated *Misuse of Drugs Act 1971* should have been repealed.

Biggest Broken Promises: New Labour achieved a landslide victory on a 'promise of change', but their drug law and policies offered little change. Instead, they continued the failed 'war on drugs' adopted by the previous Conservative government by further enmeshing treatment within the criminal justice system and attacking civil liberties under the *Drugs Act 2005*. Not surprisingly this has resulted in a significant increase in the prison population.

UK drug use 1980–1998

When New Labour came to power in 1997 it coincided with a watershed for illicit drug use. In the 1980s the outbreak of heroin use was largely to escape harsh socio-economic realities and confined to areas of high unemployment, poverty and crime (Buchanan and Young, 2000), whereas drug use in the 1990s attracted a broader demographic. The new users were young, employed or at college, and generally more discerning, using drugs recreationally and selectively for pleasure. By the late 1990s exposure and experimentation of illicit drugs had become a mainstream, 'normalised' adolescent experience (Parker et al., 1998).

The 'war on drugs' adopted by the previous Conservative government (1979-1997) portrayed illicit drug use as dangerous and life threatening. However, this contrasted with the experience of thousands of young people in the 1990s who used drugs relatively trouble-free (Measham et al., 2000). The attempt to demonise illicit drugs seemed disproportionate and potentially misleading, given the harm caused by legally approved substances such as alcohol¹ and tobacco². Indeed, young people often felt safer from physical and sexual violence in nightclubs centred on illicit recreational drugs than they did at alcohol-fuelled nightclubs.

1 In 2010 there were 9,031 alcohol-related deaths in the UK (Office for National Statistics, 2010).

2 Every year over 100,000 people in the UK die from tobacco-related harm (Cancer Research UK, 2010).



Given the severe punishments for possession and supply of illicit drugs³ it is difficult to be certain about the number of people using them. However, the British Crime Survey, despite its limitations⁴, indicated that in 1998 52 per cent of young people aged between 16 and 24 had used an illicit drug at some point in their life and a further one in five had used an illicit drug during the past month (Ramsey and Partridge, 1998). During the same year law enforcement agencies made 149,900 drug seizures, three quarters of which related to cannabis (Drugscope, 2000). Continuing to promote a drug policy that risked criminalising vast numbers of young people seemed undesirable, the problems caused by driving drugs underground seemed counterproductive and attempting to eradicate what appeared to be an endless supply of drugs seemed futile. New Labour had inherited what was arguably an unworkable and seriously outdated drug policy centred upon a *Misuse of Drugs Act* (MDA) established back in 1971 when Edward Heath was Prime Minister. Prime Minister Tony Blair, with a considerable overall majority, had an excellent opportunity to deliver on his ‘promise of change’ and introduce a more informed and culturally relevant policy, better equipped to manage and control the recreational and problematic use of licit and illicit substances.

Missed opportunities for a change of approach

The creation of a US style ‘Drugs Czar’ by New Labour, with the appointment of Keith Halliwell, a former police Chief Constable, signalled from the outset there was to be little shift in drug policy from the ‘war on drugs’ established by the Thatcher/Reagan era. The subsequent ambitious ten year drug strategy (1998–2008) *Tackling Drugs to Build a Better Britain* was designed ‘to break once and for all the vicious cycle of drugs and crime which wrecks lives and threatens communities’ (HMSO, 1998) and coincided with the United Nations Drug Control Programme (UNDCP), a ten-year drug strategy which was launched with the farfetched slogan ‘a drug free world – we can do it’ (Arlacchi, 1998).

The ten-year drug strategy, strong on rhetoric, offered little in terms of change. It was largely a beefed-up Conservative government drug policy with bold objectives and deliverables. The targets to reduce levels of crime and drug use seemed unrealistic and difficult to achieve. The strategy missed a number of important opportunities: it failed to incorporate alcohol and tobacco; it failed to establish a review the MDA 1971; it continued to promote an unwinnable and damaging war on all illicit drugs; and worryingly the policy failed to differentiate between the risks posed by different illicit drugs (Buchanan and Young, 2000a). Not surprisingly, five years later a revised Updated Drug Strategy (DoE, 2002) appeared and many of the targets in the original strategy were shelved. Keith Halliwell, the Drugs Czar, resigned and was not replaced. More positively, the Updated Drug Strategy concentrated resources upon the most problematic substances – crack cocaine and heroin.

A year later, in response to advice from various drug advisors including the Police Foundation (2000), MPs sensibly voted to downgrade cannabis from Class B to Class C. These changes, informed by a scientific evidence base, suggested a shift away from an indiscriminate war on all illicit substances, to a more considered approach that diverted resources and attention towards the more problematic substances. The tension between the scientific evidenced-based knowledge from experts in the field and the populist knee-jerk reactions from media and tabloid press is one that politicians must manage; regrettably too often the latter tends to dominate debate and shape policy. Contrary to popular expectations, downgrading cannabis to Class C resulted in fewer young people using the drug and potentially could have freed up considerable time for

³ The maximum sentence available to the court under the *Misuse of Drugs Act 1971* for giving someone LSD or an ecstasy tablet (supply Class A drug) is life imprisonment.

⁴ The British Crime Survey does not include people who are homeless or those living in certain institutions such as prisons. In practice, it tends to exclude those people whose lives are so busy or chaotic that they are hardly ever at home or are unable to take part in an interview.



law enforcement agencies to concentrate on crime, but fuelled by the tabloid press and against the advice of the ACMD⁵, cannabis was reclassified to Class B In January 2009. Later that year, in an unprecedented move Professor Nutt, Chair of the ACMD, was sacked by the government. A further example of ‘moral panic’ shaping New Labour drug policy was evident in April 2010, when following a number of unsubstantiated media reports concerning the risks posed by mephedrone, and without reference to the ACMD, the drug mephedrone⁶ (called ‘Meow Meow’ by the popular press) was made Class B under the MDA 1971. Politically led decision making rather than scientifically informed decision making resulted in a number of resignations from the ACMD during this period⁷.

Coercive treatment and inter-agency collaboration

The UK Drug Strategy did successfully promote a multi-agency approach so that drug work ceased to be dominated by the medical profession and new partnerships emerged, integrating health and law enforcements agencies (Buchanan, 2009). This was facilitated by significant investment in the Drug Interventions Programme (DIP), designed to reduce drug-related crime and get offenders into treatment. However, drug agencies became too criminal justice orientated and treatment became more coercive in order to satisfy the requirements of the new Drug Treatment and Testing Order (DTTO), while drug users not on court orders often faced lengthy waiting periods to access treatment on a voluntary basis. Coercive treatment locked into the criminal justice system risked propelling people with drug problems towards prison. When New Labour came to power the prison population stood at around 55,000: by March 2010 it had risen in excess of 84,000 prisoners, many of whom had difficulties with illicit drugs and alcohol.

Although the Drug Treatment and Testing Order pilot programme (1998 to 2000) was not particularly successful⁸, DTTOs were rolled out across the UK in October 2000, before being replaced by the similar Drug Rehabilitation Requirements (DRRs) (as part of new Community Orders introduced under the *Criminal Justice Act 2003*), which were implemented from April 2005. Like the DTTO, the DRR included court reviews and frequent drug testing, which encouraged expectations of abstinence rather than harm reduction. However, the expansion of treatment places made available through the DTTO and DRO had an overall positive impact upon patterns of crime and drug use (Jones et al., 2009), supporting earlier evidence that investment in treatment is money well spent⁹.

Upping the ante

Further tough measures were introduced by the *Drugs Act 2005*, which gave the police new powers to: impose drug testing for Class A¹⁰ drugs on arrest rather than when charged with an offence; detain and remand a suspected drug user in police custody for up to eight days to recover the evidence if they suspect it has been swallowed; carry out an intimate body search, x-ray or ultrasound scan on ‘suspected’ drug users. These infringements of civil liberties hardly seemed justified by the risks posed. The Act also made provisions for anyone arrested who tested positive for Class A drugs to be directed to see a drugs worker as part of a new civil order, similar to an Anti-Social Behaviour Order (ASBO).

These tough approaches were based on the over-simplified and unsubstantiated assumption that drug use causes crime: the relationship between drugs and crime

5 The Advisory Council on the Misuse of Drugs (ACMD) is an independent expert body that advises government on drug related issues in the UK.

6 e.g. on 26th November 2009 *The Sun* reported that a man ripped off his scrotum after taking mephedrone, www.thesun.co.uk/sol/homepage/news/2747979/Meow-meow-drug-teen-ripped-his-scrotum-off.html On 17 March 2010 the Daily Mail reported that two teenagers died within hours of taking mephedrone www.dailymail.co.uk/news/article-1258384/Schools-mephedrone-Meow-Meow-ban-teenage-deaths.html

7 See e.g. <http://news.bbc.co.uk/1/hi/uk/8601315.stm>

8 Of the 210 offenders’ who started a DTTO pilot, 46% of the orders were revoked and overall outcomes were not overwhelmingly positive (Turnbull et al., 2000).

9 The National Treatment Outcome Research Survey (NTORS) five year review estimated that for every extra £1 spent on drug misuse there is a return of £3 through cost savings associated with lower levels of victimisation, costs of crime and reduced demands upon the criminal justice system (Gossop, Marsden and Stewart, 2001).

10 Class A drugs include heroin, cocaine, ecstasy and LSD.

is much more contentious. The 2.7 million 16–24 years olds who have used an illicit drug (Hoare and Moon, 2010) could hardly be seen as drug-driven criminals; arguably, the only crime committed by the vast majority is that of possessing an illegal substance. Labour's £1.2bn a year drug strategy was criticised by a cross-party committee for failing to carry out a 'sufficient evaluation of the programme of measures in the strategy' and for not knowing 'if the strategy is directly reducing the overall cost of drug-related crimes' (House of Commons Committee of Public Accounts, 2010:3). While relative to the late 1990s there does appear to be some evidence¹¹ of a slight decrease in demand for illicit drug amongst young people, their consumption of alcohol has reached new levels both in terms of volume and patterns of use. In 1992 UK alcohol-related deaths stood at 6.7 per 100,000 population: by 2008 the figure had doubled to 13.6 (Office of National Statistics, 2010). Intoxication remains firmly rooted within the culture of leisure and pleasure; the challenge is in managing the associated risks without creating additional, more serious risks.

Conclusion

Coming to power with an overwhelming majority in 1997, New Labour had the opportunity to lead the world by adopting a much needed progressive, pragmatic and scientifically informed approach to the management of substance use and misuse in the twenty-first century: by some distance, they failed to deliver on the election promise of change. Instead, they mistakenly continued the pursuit of eradicating drugs through prohibition, perpetuated the misleading distinction between legal and illegal drugs, and failed to overhaul the much criticised and outdated *Misuse of Drugs Act 1971*, which continues to inform (or some would argue misinform) the public about the risks of drugs. However, to their credit New Labour did significantly invest in treatment, although the benefits of coercive treatment locked into the criminal justice system are debatable and has contributed to the rise in the prison population. Another important contribution was replacing the medical approach dominated by health agencies with a more holistic, inter-agency collaborative approach. These are relatively superficial changes when a fundamental overhaul of drug law and drug policy was required. The UK now needs to look to countries like Portugal¹² and Switzerland¹³ for more effective, scientifically informed drug policies.

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¹¹ See the ESPAD (European School Survey Project on Alcohol and Other Drugs) study: www.espad.org/keyresult-generator.

¹² In 2001 Portugal effectively decriminalised personal use and possession of illicit drugs and saw the matter as a public health issue rather than a criminal justice issue.

¹³ Following the ongoing success of a 14 year trial of prescribing heroin and drug consumption rooms, in 2008 the people of Switzerland voted in favour of rolling out the programme across the whole country.



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What happened to probation between 1997 and 2010? A probation professional's perspective

Christine Lawrie

Achievements: support for professional practice based on evidence of what works; national standards leading to improved, universal standards of work; statistically significant reductions in reoffending; cultural changes leading to public protection and services to victims being the priority; creation of a more managed service, enabling standards and outcomes to be more easily delivered.

Disappointments: a central 'command and control' approach, stifling professional decision-making and innovation and thus improvements in effectiveness; a focus on hitting numerical targets rather than on the professional engagement with individuals that supports reduced reoffending; unwillingness to implement the spirit of the *Offender Management Act 2007* that would free local probation trusts to be entrepreneurial and outcome focussed.

Biggest broken promise: that there would be a genuine investment in tackling the causes of crime.

The probation service in 1997

In the 1990s the Conservative government had been concerned that the probation service was not being held to account well enough, nationally or locally, and that variations in performance between the 54 local services could not be explained by differences in their respective funding levels. There was a political view of the service as 'soft on crime' and out of touch with public opinion about how offenders should be dealt with.

Although critics tended to ignore the improvements being created in practice by the National Standards, which were introduced incrementally from 1989 onwards, this censure was not without foundation. HM Inspectorate of Probation had tried – and largely failed – to influence probation committees (who were responsible for the oversight of each service) to respond to such criticism by being more assertive in managing operational and financial performance.

The imperative to modernise

The new Labour government shared the previous administration's view that the service must be modernised. Its solution was the creation in 2001 of the National Probation Service (NPS), with its 42 areas coterminous with other criminal justice agencies.



To begin with there was an attempt to run the NPS on innovative lines. There was talk of a 'matrix model' of management and accountability and of the NPS' National Probation Directorate (NPD) as the hub of a wheel, rather than the apex of a hierarchy. Soon, though, the political imperative to produce speedy results became pressing and the NPD became the *de facto* headquarters of an unambiguously 'top-down' command and control structure.

This was presented as an absolute necessity. It was said that the future of the service, its ability to attract resources and to grow, depended on whether it could meet the performance challenges being set by government. Probation had to conform. The NPD and subsequently the National Offender Management Service (NOMS) set and drove a non-negotiable agenda through the first decade of the twenty-first century.

The probation service is now a very different organisation. Each commentator will have his or her own perspective on the dominant themes of the last ten years. For me they are:

- development of an overt public service ethos, exemplified by a shift from an offender focus to one of public protection and services to victims
- acceptance that practice must be based on approved standards and processes and its effectiveness must be capable of being demonstrated
- acceptance of managers' right to manage
- the potential for a further revolution in culture and effectiveness created by the *Offender Management Act 2007* (OMA 2007).

Working for the public and victims

The government was very clear that probation was a law enforcement, rather than a social work, agency because the public primarily wanted offenders punished and made to make reparation for their crimes. (Later, Louise Casey returned to this theme, saying 'the public don't believe wrong-doers face adequate consequences for their crimes' (Casey, 2008)). These views informed the way the government's aims and objectives for probation were framed and thus the way probation staff worked.

NPD quickly produced a suite of national targets and indicators that would compel probation to deliver what the public was said to want and, in particular, rigorously enforced compliance with the requirements of orders and post-release licences. Performance against targets was reported in the 'weighted score card', a league table of probation areas.

Although, as with many targets based systems, resources and activity tended to be directed towards what got measured, and this was often process rather than quality or outcomes, overall this approach succeeded in creating more consistent, and improved, standards of work. For example, it produced increased levels of contact with people under supervision and universal enforcement action against those who failed to comply. It legitimised work on practical matters such as employment and education that can make or break a person's chances of 'going straight'. People under supervision were more likely to be recalled to prison or resentenced by the courts, but they were also more likely to receive good, consistent standards of professional input from the service.

Multi-Agency Public Protection Arrangements (MAPPA) transformed the way local agencies, and in particular probation and police, worked collaboratively, and effectively, to manage the highest risk offenders in the community. Probation victim liaison teams provided information and support services to victims of the most serious crimes.

All these developments reinforced probation's identity, amongst its own staff and with other agencies, as working for the 'law abiding majority'.

Evidence based work

From the mid-1990s onwards, HM Inspectorate of Probation had led the 'What Works' initiative to base probation work on research evidence about effectiveness in reducing reoffending and NPD had sponsored the accreditation of supervision programmes that demonstrably met standards of effectiveness. Probation areas were required to implement only these programmes, incentivised to do so by targets in the weighted score card.

Over time, scepticism has developed about whether it was wise to put so many eggs into the What Works basket, despite these achievements (Mair, 2004). Accredited programmes produced better results than non-accredited options but they were tightly prescriptive about process. This meant there was little or no scope to adjust their content in the light of experience in order to enhance their effectiveness. The accreditation process by which new programmes were approved was lengthy and potentially a deterrent to innovation. Less inflexibility in requirements about process might have enabled the achievement of even better results by encouraging iterative improvements and innovation in practice.

However, while 'accredited' programmes were certainly not a panacea, they did demonstrate that probation could reduce, if modestly, the likelihood of further offences being committed. By 2007 NOMS was able to report statistically significant reductions in reoffending. For example, the Annual Report from the NOMS Interventions and Substance Abuse Unit reported an overall reoffending rate of 54.9 per cent against the predicted rate of 61.2 per cent for people subject to accredited programmes (NOMS, nd). This was a definitive rebuttal of the assertion that probation could do no more than be a less damaging sentencing option than prison, an 'alternative to custody', a less than inspiring principle that had informed probation practice for some ten to fifteen years until the advent of the What Works agenda. For the future, this can only play to probation's advantage as it endeavours to deliver the new Coalition Government's rehabilitation agenda.

These changes were supported by a new probation officer training programme. Created at the end of the 1990s, and still in most respects in place today, it delivers offender supervision that is systematic, evidence-based and delivered against pre-set standards.

Effective management

Underpinning the recasting of the service as one working systematically and effectively in the public interest was a reformation in management style and ethos. For perhaps all of its history up to the mid-1990s the probation service tended to give greater respect to front-line staff than to managers, who were regarded as there to support those who supervised 'clients'. There was a culture of autonomy for probation officers which may have derived from their historical role as 'officer of the court', with a direct personal accountability to sentencers.

The imperative to hit government targets, and to deliver only standardised programmes of supervision, meant such autonomy was no longer acceptable. Managers began to set clear objectives for their staff based on targets, national standards for practice and record keeping requirements and to monitor their compliance with them. The 'right to manage' was established and staff are now held properly to account, if necessary



through formal disciplinary and competence processes. As a consequence, the service is better able to deliver what is asked of it because it has the mechanisms to ensure this happens.

While these changes to managerial practice were necessary, though, it is arguable that they were at the expense of a focus on the more interactive, 'therapeutic' aspects of engagement. Research findings on 'desistance' (see e.g. Porporino, 2010), i.e. why and how people stop committing crimes, emphasise the importance of the supervisor-offender relationship. The Coalition Government has revived the importance of rehabilitation as one of the four purposes of probation supervision (the others are punishment, public protection and reparation) and for the future more attention on the effectiveness of the professional relationship will be necessary to support best rehabilitative outcomes in supervision.

Where next?

Until 2001 the 54 probation services were governed by largely self-governing probation committees. They were replaced by boards in 2001, but their existence was short-lived. By April 2010 the 42 boards had been reconstituted, via the OMA 2007, as 35 trusts. Trusts are non-departmental public bodies, arms-length organisations sponsored by the Ministry of Justice and delivering services under contract to the Secretary of State. Ironically, trusts are in many ways like the pre-2001 committees, semi-independent local bodies, but with the advantages of a modern service delivery orientation in their ethos, organisation and processes.

The OMA 2007 removed the 'monopoly provider' status for probation trusts. The Secretary of State became responsible for the provision of probation services and able to source them from any provider. Thus far all services are delivered through the 35 public sector trusts but this need not remain the case. In future trusts may have to compete with others to deliver probation services and the new Coalition Government has signalled its keen interest in a payment by results approach and in buying these results from whichever provider will deliver best value for money, whether public, private or not-for-profit.

Trusts have been disappointed by the failure of their sponsoring Department to grant those business flexibilities and freedom from regulation that would enable them to be genuinely competitive in this new marketplace. The restriction of the contract, which emphasises inputs and processes rather than outcomes, has also been a frustration and the contract management process has been experienced in many cases as more akin to line management than to a contract-based relationship. Innovation, in pursuit of better outcomes and greater efficiency, was supposed to be a by-product of the 2007 Act, but this has, with some exceptions, yet to materialise.

Conclusion

In 1997 the probation service was already distancing itself from its origins as a social work service for offender 'clients'. The then new Labour government drove further radical change in culture, structure, systems and activity.

Probation boards were obliged to achieve challenging pre-set standards of professional practice, financial management and organisational development in order to become a trust. Probation is now a disciplined and outward-facing service that accepts it must demonstrate the value of what it does against public expectations and it largely delivers what is expected of it.

Trust status brings enormous potential to deliver the ‘rehabilitation revolution’ aspired to by the Coalition Government. It remains to be seen whether the spirit of the 2007 Act will be realised and probation freed to take the next steps in delivering effective rehabilitation and community protection.

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Eoin McLennan-Murray

New Labour and prisons: a practitioner's perspective

Achievements
<ul style="list-style-type: none"> • Improving prison stock • Increased funding for education, interventions and regime activity • Formation of the Social Exclusion Unit • Support for the Decency Agenda
Disappointments:
<ul style="list-style-type: none"> • Increasing prison population • Rise in managerialism • Move to risk aversion • Poor legislation with regards to sentencing practice • Costly and ineffective restructuring above establishment level
Biggest broken promise:
Continuation and increase of privatisation of prisons

To begin with I feel I must point out that this paper may not reflect events in an exact chronological sequence or be academically well researched. There are other contributors to this report who may compensate this and redress my very personal view of how it felt to be an operational governor during most of the 13 years of Labour administration from 1997.

Heady days and hopes of social progress

'Tough on crime and tough on the causes of crime': what a soundbite and one that probably, if acted upon, could fundamentally alter the use of imprisonment and more widely the nature and role of other social/welfare services. I remember this was one of my initial thoughts back in 1997, when New Labour swept to power with a landslide majority in the House of Commons that made them appear invincible.

My expectation was that there would be the political will to revitalise the recommendations and direction of travel of the highly respected Woolf report (1991), which the previous administration had started to implement under Kenneth Baker but then abandoned and even reversed under Michael Howard's years as Home Secretary.

The Woolf report had been commissioned in the aftermath of the Strangeways riots and its main recommendations were accepted by Baker, who pledged to implement many of them. Recommendations that were introduced included the end of slopping out; the appointment of an independent Prisons Ombudsman and the introduction of payphones for prisoners. The Woolf Report had clearly set a reforming agenda for the prison service and paved the way for the 'decency agenda'.

During their years in opposition Labour had been strongly against the Tory policy of privatising prisons. I had hoped that following their election further prison privatisation

would cease and arrangements put in place to take privatised prisons back into public ownership. This was not to be and under New Labour further privatisation took place. This was but one of many policy surprises that they had in store for prisons.

When New Labour took power I was the governor of a resettlement prison which specialised in taking in long term prisoners in their last two to four years of sentence from the category B estate. Our primary role was to try and prepare these men for a safe re-entry into society. One of the main tools I could use to assist with this objective was 'Release on Temporary Licence' (ROTL). This had been restricted by new policy which reflected Michael Howard's punitive views and I was optimistic that this trend would be reversed by the new administration. Sadly, I did not see this reversal.

However, there was a massive injection of funding, as part of Labour's first Comprehensive Spending Review (HM Treasury, 1998), which provided the bedrock on which accredited interventions (based on the 'What Works' literature) were scaled up. This was also matched by a massive increase in education provision to support tackling the low levels of literacy and numeracy that were endemic within the prison population.

In December 1997 the government set up the Social Exclusion Unit, which provided some thorough and well researched reports identifying those groups within society who were vulnerable or disadvantaged in some way. A clear link could be seen between this work and the government's manifesto mantra of 'being tough on the causes of crime'.

Within those heady days of New Labour's first term of office there was a sense of social progress and justice. In prisons there was a clear move towards the 'decency agenda' and a firm belief that real progress could be made in changing the lives of prisoners for the better. The decency agenda had its origins in many of the Woolf recommendations that related to improving standards of justice and the end of slopping out. Within the prison service further work was undertaken on the handling of prisoner complaints, and reviewing a whole range of internal processes that impacted on the daily lives of prisoners.

Fading optimism, rising bureaucracy and the performance culture

That sense of optimism began to fade and coincided with the change of Home Secretary from Jack Straw to David Blunkett in June 2001. The prison population had been rising steadily for most of Straw's tenure and despite introducing Home Detention Curfews (HDCs) in 1999 he was able to leave a 5,000 increase in population as an inheritance for Blunkett. Not to be outdone, Blunkett presided over a further 8,000 increase before he left office in December 2004. During Blunkett's reign the 2003 *Criminal Justice Act* (CJA), or parts of it, came into force and we saw the introduction of the poorly thought through Indeterminate Sentences for Public Protection (ISPP). This measure was to leave an indelible scar on the prison service which, despite further amendment in the 2008 CJA, still remains as a stain on our criminal justice system. The ISPP not only drove up the prison population but it seriously undermined both staff and prisoners' perceptions of what was fair and decent.

At about the same time the Carter Report (Carter, 2003) and the government's response to it (Home Office, 2004) were also published. 'End to end offender management' was born and prisons and probation would come together under a new structure, the National Offender Management Service (NOMS), which was established in 2004. From a prison perspective this new structure appeared to be a dysfunctional duplicate of already large prison service headquarters (HQ). The new structure had regional arms headed up by a Regional Offender Manager (ROM), who was responsible for the



commissioning of services within the custodial and community settings. These arrangements were totally ineffective and ROMS had no control over the budgets for prisons or probation areas. However, it was very successful at increasing the level of bureaucracy and setting prison area managers against ROMS.

Operationally the prison service was being driven hard and the performance culture was being truly embedded. Decision making at establishment level was always checked against what impact it would have on the 'weighted score card'. The weighted score card is a process whereby the performance of every prison is assessed against a number of factors. Each of these factors is weighted numerically. The bigger the number, the heavier the weighting and the more important that factor is to the perceived performance of the prison. Thus, prison performance can be translated into a numerical score and prisons can then be compared to one another in a performance table. The needs of the prisoner may come a poor second. The Chief Inspector of Prisons (HMCIP) was aware of this and talked of the 'virtual world' (Owers, 2010) of prison as seen by HQ via the performance data, as opposed to the reality of prisoners' experience.

All prisons, including the smallest ones, were committing disproportionate amounts of resources into having secretariats/support units to collect, collate, manage and analyse performance data. This performance infrastructure was duplicated at area level and then again at HQ.

Additionally, the world of auditing was evolving and expanding. Swathes of operational managers were consumed in either preparing for or responding to the aftermath of audits. The number of baselines to be audited, which were often a manifestation of the plethora of instructions that rained down from HQ, seemed to increase exponentially. It was all about process and not outcome and this too was part of the 'virtual world' we seemed to have drifted into.

The probation service appeared to have transformed. I always remembered the probation culture being based on compliance but it had now moved to enforcement. Probation officers had traditionally aimed to establish a relationship with their clients, building up a rapport and trust. They managed their clients with the ability to use discretion and take judgements on when clients had breached court orders. Clients complied with court orders within this context, whereas now the discretion and judgement once used has been replaced by automatic breaching for almost any infringement of the court order, an enforcement approach.

Breach rates went through the roof and recalls to prison rocketed, putting more pressure on prison numbers and swamping those sections of HQ/NOMS which processed recall appeals. It seemed as both prisons and probation were moving further and further down the road of risk aversion and any high profile exposé in the tabloids resulted in the inevitable knee-jerk reaction that led to further regulation or restriction.

Blunkett was replaced at the end of 2004 by Charles Clarke who, before he could make any meaningful impact, succumbed to a political maelstrom on immigration. His successor, Dr John Reid, ensured that any vestige of hope from Clarke was quickly extinguished.

Overcrowding, building – and more restructuring

In the meantime, the Estates Section at NOMS was frantically reviewing planning applications and permissions to see what could be built and where. Many prisons, including the old Victorian local I was governing, were funded for one or more new wings. The prison service was locked into a race to see if it could build its way out of

overcrowding. In an act of pure desperation, Lord Falconer introduced in June 2007 an early release scheme whereby selected prisoners were released 18 days early. For a while population versus prison capacity was on a knife-edge and credit must go to the operational management of that scenario.

At about this time Lord Carter produced another report on the prison service. It advocated a further building programme and recommended Titan prisons as well as some sentencing reforms (Carter, 2007 and Straw, 2007). The 2008 CJA set minimum two-year tariffs for ISPP. Although welcomed by practitioners, this highlighted the injustice for those prisoners who remained in prison, post tariff, for offences which, had they been committed after the implementation of the 2008 CJA, would attract, at worst, a determinate sentence of up to two years.

Following the departure of Reid in 2007 and a government reorganisation, NOMS became part of the newly formed Ministry of Justice (MoJ), with Jack Straw as its ministerial head. This was accompanied by another change of letterheads and logos and we learnt that NOMS itself was to be restructured. The wider economic crisis was now driving an agenda of cost cutting and the NOMS restructure was meant to achieve significant savings.

The prison service realised that it would not be able to afford to pay its staff within a few years unless some radical reforms were made to pay and grading systems. Work Force Modernisation (WFM) was their answer: in its simplest form it sought to delayer and reduce prison management and open up governor grade work to Treasury-grade civil servants, which was meant to reduce the wage bill in the long term. After months of negotiation, WFM was overwhelmingly rejected by the NOMS unions. However, the imperative of reducing cost was an unstoppable reality and a version of WFM is being implemented, which at establishment level would see both delayering and a reduction of management grades, although the operational management is to remain the preserve of properly trained governor grades.

The NOMS restructure in 2007/2008 saw the demise of the ROM, the arrival of NOMS Agency and of the Director of Offender Management (DOM) and an amalgamation of the ROM and Area Manager teams into a new regional structure. A further refinement, albeit post the 2010 election, has seen the Chief Operating Officer post go and two existing DOMS being transformed into super DOMS, affectionately known as 'Mama DOM' and 'Papa DOM'. This is both a cost cutting measure as well as having the other DOMs line managed by Mama and Papa DOM.

In conclusion

On one hand, after 13 years of Labour it feels as if the prison service has come a long way. Undoubtedly, the prison stock has improved, as have living conditions for prisoners. There is more regime infrastructure such as education provision, interventions and activity places and prisons are safer and more decent than ever before. On the other hand, there has been an explosion in process management; a love affair with performance management and audit that has sucked in resources, curbed innovation and made the service more risk adverse. Whether this is the inevitable price to be paid for the other improvements is a question I am unable to answer. What is clear though is that the new Coalition administration will have to choose whether the increased managerialism across NOMS is sustainable in the current financial climate; or will the clock be turned back?

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New Labour's crime statistics: a case of 'flat earth news'

Tim Hope

Of the Three Rs, how good has New Labour been with the arithmetic of crime? The answer depends upon who is doing the marking. By self-assessment, it felt it had done remarkably well: '...we have had ten years of sustained investment in crime reduction – not just financial, but also expertise, new policy and legislation, and rigorous focus on delivery. The benefits are clear: overall crime has fallen by around a third since 1997, following rising crime throughout the 1980s and first half of the 1990s' (Home Office, 2007: 3). Certainly, the Head Boy and valedictorian was in no doubt '...I more or less made my name on changing Labour's traditional stance on law and order...over these ten years of government, crime has fallen. This is in fact the first post-war government to buck the rising trend' (Blair, 2007). Yet New Labour's actual achievement with the crime trend has been less to do with its efforts and more to do with its skill in rigging the examination system. Not that there has been any outright dishonesty; after all, a system that allows those sitting the exams to set the questions and to mark the papers has no need to cheat; a fact that was never going to be lost on the new boys of Home Office House.

'Lies...'

Habitually, British governments are reticent about holding themselves to account, other than when they have to via the ballot box. So why would any incoming government want to set itself the hostage to fortune of 'evidence-based policy'; what if it didn't have much evidence of what worked; what if the evidence showed that what it did do subsequently didn't work? Still, the happy circumstance of having enunciated particularly strident and ambitious crime reduction plans whilst in opposition, winning a landslide election in 1997 in part on the basis of such promises, promulgating programmes and legislation once in office and thence presiding over year-on-year reductions in the official indicators of crime; all must have seemed incontrovertible. Yet this is a deception due not just to the inaccessibility of figures so much as to the interpretation placed upon them; and it is the latter that won New Labour its early successes (at least in their own minds), even if, as with so many things, it squandered public trust in the process.

New Labour's first Home Secretary, Jack Straw, put in place a conceptual apparatus that would stack the odds in favour of coming up with success. Two innovations were central to this: the first was governance via press release. To be fair, New Labour was merely furthering the practices that had brought it into power. Indeed, as Nick Davies (2008) has shown with *Flat Earth News*, the ability of government to produce figures, facts and claims that go unchallenged relies upon the competitive pressure of 24-hour news production and the concentration of media ownership, which renders news journalists incapable (even if they wished) of checking their stories; far easier to re-hash a press release than to independently source and corroborate a story. Second, Straw sought to co-opt social science into the machinery of governance of crime reduction. An aura of scientific expertise would help quell contrary challenge (not least from the political opposition) while the connotation of scientific progress would appeal to an awe-struck



general public. Here, the Home Secretary was much helped by the expert crime scientists and statisticians within the in-house Research, Development and Statistics Directorate (RDS); an outfit whose denizens had been woefully neglected by the previous regime, scorned alike both by politicians and their academic peers, subjected to market-testing (save for the reluctance of anyone to buy them), with only the occasional Philosopher-Chief Constable left to impress. A toxic brew was bubbling away: politicians who lived by the news, crime reduction experts who wanted to make it.

Prior to New Labour, the Home Office RDS had invested periodically in statistical forecasting of trends in crime and punishment. The political value of such forecasting is not sooth-saying or doom-mongering but serving as hypothetical projections of what would happen if what may be about to happen were not to happen; in this case, the government's promise of crime reduction. Such a strategy however needs to be handled correctly. Ironically, the first effort at what in later years would become known as the 'Home Office model' (a statistical model of the long-term crime trend) had caused considerable consternation, largely because it suggested, contrary to the then Conservative Government's thinking and Mrs Thatcher's firm belief, that crime trends were susceptible to government economic policy, especially concerning unemployment. Indeed, the Labour Party in opposition had used the model as a stick to beat the Conservatives in its successful campaigning over crime. It would have been unwise for Labour in government to make the same mistake.

'...Damned Lies...'

One of New Labour's chief electoral pledges in 1997 was to put government spending itself upon a more rational, evidence-based footing through the first Comprehensive Spending Review, which required spending departments to justify the need for their expenditure. As part of its case for a large investment in crime reduction – particularly what would become known as the Crime Reduction Programme (Home Office, 1999) – the Home Office produced a revision of its model of the crime trend. Unlike the downward trend, this new forecast appeared to predict a counter-intuitive, 26 per cent rise in crime, particularly in the key target-crime of burglary (Dhiri et al., 1999). While the forecast amply and successfully demonstrated the need for massive investment from the Treasury – funding the experimental Crime Reduction Programme and its extra CCTV add-on to the tune of half a billion smackers, there was a presentational problem: if the crime forecast was so bad, would the public continue to believe in the government's promises or instead call for even more costly bobbies on the beat; but if crime wasn't that bad, why give the cash away when it could go on schools and hospitals instead. Some fancy footwork was needed, so Straw issued a press release:

... There is nothing inevitable about the trend in the model. Halfway through this period there is good evidence we are in fact bucking the projected trend. Burglary in the first two years of this period [i.e. since the General Election] is down, not up; and vehicle crime is down, not up. This research therefore underlines the relative success achieved so far, but also the scale of the challenge we must face.

(Jack Straw, quoted in Travis, 1999)

As *The Guardian* helpfully went on to explain (presumably briefed by the Home Office Press Office):

...The resulting projections are based on a forecast of what will happen if current demographic and economic trends continue without any impact from crime reduction measures taken by the police and the government.

(Travis, 1999)

So, we have the Home Secretary gamely rising to the challenge. But can you see what he did here? The sleight-of-hand is to insinuate that ‘current demographic and economic trends’ will necessarily bring about increases in crime, while governmental crime reduction measures will also necessarily (though not tautologically) bring about reductions. It follows that this polarisation between social forces (bad) and government actions (good) are the only drivers of the crime rate, setting up a titanic struggle from which, if crime goes down, the government will emerge victorious.

‘...and Crime Statistics.’

Still, a further twist was necessary in order to cover the government’s bet. In the past, statistics of recorded crime (and more recently from the British Crime Survey) had been seen as measuring the public’s *demand* for action against crime, placing responsibility on the government to provide the necessary resources and means. In contrast, the Simmons Review (Home Office, 2000) turned this definition on its head, suggesting that the crime statistics should be a measure of the *supply* of criminal justice services, comprising a basis for the performance management regime that the government itself was to impose on the various criminal justice agencies. After all, the demand for government action had already been expressed through the ballot box, and it was now up to the government to prove that it could do the job. A further refinement to this subtle shift would seek to place New Labour in a win-win situation: if crime went down, it could take the credit, no question; if it didn’t, it could either (a) blame the criminal justice services, especially the police, for their incompetence and/or (b) blame those darn economic and social conditions, whose global origins lay beyond the government’s control. Either way, it hoped that the public could be persuaded to vote in even more resources as New Labour set its shoulder to the wheel in its heroic ‘crusade (sic) against crime’ (Jack Straw in Home Office, 1999: Preface), thus garnering its just reward at the ballot box.

The overarching task, then, was not so much to reduce crime but to be seen and believed to have reduced crime. Having assumed effective responsibility for the crime problem, New Labour’s task was not just to deliver on its promises but to eradicate the possibility of doubt that it had not done so. Clearly, the odds seemed favourable since the key crimes chosen to indicate performance, especially the crimes of burglary and car crime that hit the property-owning public the hardest (remember, it was these voters who had sustained the Thatcher Revolution), had been diminishing steadily and without precedent since the mid-1990s. But leaving things like that, or pointing vaguely at its policies, would not be enough to win the next election. Rather, it would be necessary to avoid a few classroom howlers: that crime might have gone down despite rather than because of the government’s actions; having to accept blame and responsibility (or failing to shift the blame elsewhere) for known failures in practice; that the public wouldn’t believe that crime had gone down anyway; or, worse, refusing to give government the credit even if it had. So, the main task was to present crime reduction in the best possible light, using ‘hard-facts’ and ‘evidence’ to demonstrate success or, if necessary, to pretend it had worked, even when it hadn’t.

How did it all pan out?

So, how did it all pan out? On the one hand, as we have seen, the Head Boy managed to bow-out believing he’d done it (Hope, 2008b); on the other hand, his ‘fags’ had to resort to ever-more sleight-of- and under-hand tactics of pretence. Not surprisingly, perhaps, to seasoned observers of the performance of criminal justice agencies in the face of hare-brained government schemes, the massive Crime Reduction Programme



(CRP), soon led to equally massive muddle, confusion and general implementation failure across much of the board. Yet what was the official response? On the one hand, to pretend that the CRP wasn't actually about *delivering* crime reduction but about experimenting with 'what works' (in the noblest tradition of Management Science), and then to blame all and sundry (except the management science experts) for not putting enough effort in to getting it right; nothing wrong with the ideas, just feeble political leadership (from sacked Ministers), even more research and investment needed (Homel et al., 2004). On the other hand, officials set about blaming the evaluators, suppressing unfavourable evaluation reports (Hope, 2008c), reanalysing data to come up with more favourable results (Hope, 2008a; 2004), and issuing blatant Ministerial press releases (e.g. *Groundbreaking Projects Crack Burglary*, Home Office Press Release 177/2003, 25 Jun 2003).

But did New Labour get away with it? Even in its own lifetime, Parliament began to suspect it had been pulling a fast one with the facts (STC, 2006), though officials continued to ignore such criticism as if it didn't matter (Hope, 2008c). And just as the independent UK Statistics Commission launched what was in fact a rather innocuous enquiry about the public and private uses of crime statistics (Statistics Commission, 2006), an evidently paranoid government not only commissioned its own, pre-emptive report (Home Office, 2006) but also abolished the Statistics Commission itself. And things went from bad to worse: not only had the Home Office taken to releasing its findings en masse on 'Research Thursday', giving journalists no time to corroborate the accompanying press releases (Davies, 2008), but when it became engulfed in an administrative crisis, the supposedly new-broom Home Secretary John Reid banned the release of any research report for five months, without explanation. Such cavalier attitudes to the evidence continued, earning the Home Office the distinction of becoming the first government department to breach on various occasions the government's new *Code of Practice for Official Statistics* (UK Statistics Authority, 2009); while a similar incident in defence of another indefensible policy – the retention of DNA records (Pease, 2009), attracted immediate condemnation (Goldacre, 2009).

And the rest is silence... Home Office research reports continue to dribble out from time to time, though these often seem pallid reflections of past standards of quality; and the Home Office continues to publish its annual 'pictures' of crime (*Crime in England and Wales*) although the editorial policy continues to allow plenty of scope for 'impressionism' (Hope, 2008d). Finally, having been held up until after the election, the UK Statistics Authority published its report on *Overcoming Barriers to Trust in Crime Statistics* (UKSA, 2010). As we were going to press, Home Secretary Theresa May announced that she has asked the National Statistician to lead an independent review into the collection and publication of crime statistics, and that the responsibility for their publication would move from the Home Office to an independent body¹.

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Rebecca Roberts

Justice, harm and official statistics

This section is in two parts. The first looks at trends in justice and harm under New Labour. This includes briefly touching on criminal justice statistics and setting them in context against other measures of justice and harm during the period. It is followed by an outline of administrative data on sanctions, spending and staffing.

Criminal justice statistics

The list of 'crimes' codified in law and then enacted by various authorities are products of complex historical, political and economic circumstances. They change over time and between countries, yet one of the continuing themes of criminal justice in a variety of jurisdictions is that while legal codes and justice systems vary – and the associated numbers of people in prison and crimes recorded and prison numbers – there is a systematic focus on individual acts of the 'poor' as opposed to harmful consequences of the acts of the 'powerful'. Jeffrey Reiman in his seminal text 'The Rich Get Richer and the Poor Get Prison' offers a radical critique of criminal justice and popular understandings of statistics about harm and crime. Reiman describes the criminal justice system as offering a 'carnival image' of crime – arguing that definitions of crime and the associated 'criminal statistics' distort reality by presenting information about some harms, but not necessarily the greatest threats to wellbeing (Reiman, 2007). Criminal justice statistics tell us an awful lot about what the criminal justice system targets and the intensity with which it focuses on particular acts and particular people.

To summarise, there are two key problems with contemporary understandings of crime and criminal justice figures. Firstly, when looking at 'crime' data, it is important to keep in mind that crime figures are an incomplete picture of harm and justice in society. Legal definitions of crime are narrow and the activities of policing and criminal justice tend to focus on what is often low level, easily detectable 'crime' acts. Secondly, there are the sheer number of 'crimes' never counted by the two most popular sources of 'crime' data – the British Crime Survey (BCS) and Police Recorded Crime (PRC). Indeed, this so called 'dark figure of crime' is vast and 'crime and related harms are far more common and widespread than official statistics – such as the BCS and PRC incident data – would suggest' (Garside and McMahon, 2006). In 2006, an analysis of New Labour's approach to criminal justice highlighted that 'crime' is far more common, everyday and widespread than official statistics would have us believe. When the true scale of victimisation of a range of harms is acknowledged, it is clear that the criminal justice system is never likely to have anything but a marginal impact (Garside, 2006). This section highlights some indicative, although clearly not exhaustive, sets of data as an illustration of the disproportionate focus on 'crime' and 'criminal justice' as a key mechanism through which harm is measured and resolved in society. In fact, criminal justice can often do more harm than good, perpetuate social inequalities and largely fails to resolve or address injustice.

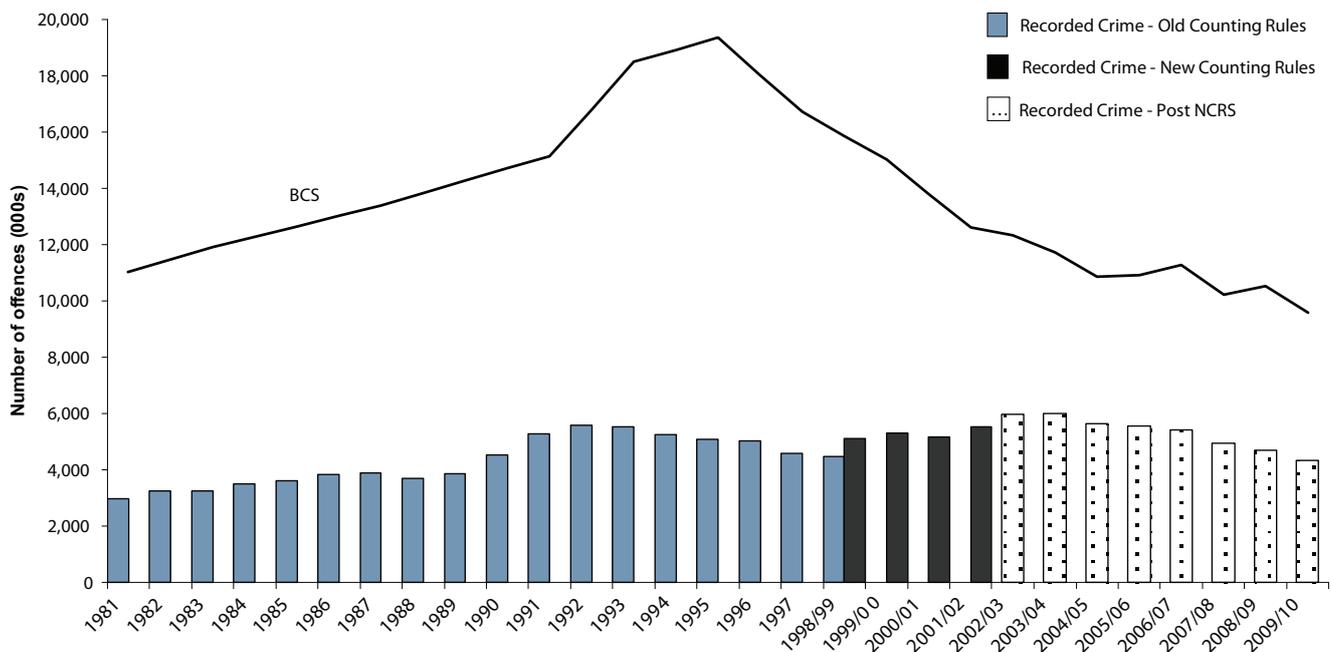
Harm and justice

There has been ongoing debate about the two main official datasets upon which ‘crime rates’ are discussed – the British Crime Survey (BCS) and Police Recorded Crime (PRC). BCS is a household survey of residents in England and Wales, with over 45,000 respondents. PRC covers a wider range of offences in terms of ‘victimless’ ‘crimes’, such as drugs offences, but is limited to those ‘crimes’ reported to and recorded by the police (Flatley et al., 2010). While they give some indication of trends in certain types of offending behaviour and tell us how policing activities have been targeted, we should not overstate their importance in terms of understanding levels of justice, harm and safety in society. Both tend to vastly undercount ‘crime’ and are also based around problematic definitions of harm and justice (Garside, 2004; Dorling et al., 2005).

The following graph gives an outline of trends in recorded crime and BCS as published by the Home Office (Flatley et al., 2010). According to the BCS, overall ‘crime’ continued to fall during New Labour’s period in office. PRC shows a decrease from 2002/2003, when new counting rules were introduced (see Appendix).

Figure 1: Trends in recorded crime and BCS, 1981 to 2009/2010

Source: Flatley et al., 2010



Given the well documented problems with BCS and PRC being narrow in their focus, we will now attempt to show data on some trends in justice and harm. In the following section on ‘criminal justice trends’ we look at data on sanctions, spending and staffing: these tell a story of overall growth, largely within the public sector arm of criminal justice and usually with a disproportionate focus on particular types of crime and unequal punishment on particular groups of people (Roberts and McMahon, 2008). A series of reports published as part of the Equality and Human Rights Commission’s Triennial Review of Fairness in Britain describe in detail some of these inequalities (EHRC, 2010a; EHRC, 2010b). The extensive final report details the findings such as black people are five times more likely than white people to be imprisoned; that while overall levels of violence according to the BCS is falling, reductions have not been seen in violent incidents against some people – for example those who experience hate crime and ‘intimate’ violence (EHRC, 2010b).



Death and injury is of particular interest in any discussion about crime and the disproportionate focus on particular forms of harm. Research shows that people are two to three times more likely to be killed by a work related injury than a homicide. As an example, table 1 shows the recorded figures on homicides and occupational fatalities in 2005/2006. The final line estimates the ‘dark figure’ of fatal injuries to workers as running at about 5 to 6 times occupational fatalities. Table 2 shows the homicide rate along with the number of homicides of children under the age of one.

*Table 1: Homicides and reported fatal injuries to workers, 2005/2006**

Source: Tombs and Whyte, 2008

All homicides in England and Wales	765	Homicide rate (per million population)	14
Fatal injuries to all workers	217	Fatal injury rate (per million population)	7
All work related fatal injuries (estimated x5–6)	c1,100 – 1,300	Estimated all work related fatal injury rate (per million population)	35-42

*The ‘rate’ figures in this table have been rounded to the nearest whole number.

The absolute numbers are not wholly compatible in the sense that HSE data also cover Scotland. However, the key point of the comparison is with regard to rates.

Table 2: Homicides in England and Wales, 1997/2008 to 2008/2009

Source: Smith et al., 2010

Offences recorded as homicides (all ages) ¹			Homicides (under one year old)	
Year	Number of homicides	Rate per million population	Number of homicides	Rate per million population
1997/1998	607	11.8		
1998/1999	642	12.5	34	54.0
1999/2000	672	13.0	31	50.0
2000/2001	765	14.7	45	75.0
2001/2002	795	15.2	16	27.0
2002/2003	943	17.9	31	53.0
2003/2004	771	14.6	26	43.0
2004/2005	780	14.7	21	33.0
2005/2006	711	13.3	22	34.0
2006/2007	716	13.3	16	24.0
2007/2008	753	13.9	21	31.0
2008/2009	651	12.0	19	27.0

¹ As at 24 November 2009.

Caution is needed when considering trend figures, as they are based on the year in which offences were recorded, rather than the year in which the incidents took place. Also note that there were a number of victims of unknown age in the following years: 2000/2001: 58; 2003/2004:1; 2004/2005: 6; 2005/2006: 2 victims and 2006/2007: 1.

Death and injury are not evenly distributed amongst the population – we find that those people bearing the brunt of social, health and economic inequalities are more vulnerable to injury and early death. Ethnic minorities were the victims of around a quarter of homicides recorded in England and Wales between 2006/2007 and 2008/2009, with just over half of these ethnic minority victims being black (EHRC, 2010b). Class, ethnicity and gender are key factors in the high prevalence of premature death – this might be through what are called ‘one on one’ incidents (often measured by the crime statistics), but looking at other, ‘health’ related measures similar patterns emerge. This is shown time and time again through the recent reports published by the Equalities and Human Rights Commission Triennial Review on fairness in Britain. Whether we look at life expectancy rates, standardised mortality rates, heart rate, suicide, accidental deaths, similar distributions and trends appear in the various measures.

Criminal justice trends

The data collated from mainly government sources indicate the overall expansion of criminal justice since New Labour came into power in 1997 and a shift in the nature of interventions and sanctions meted out.

The official data available shows that in the decade 1999 to 2009 (see table 3 above) the number of people sentenced by all courts in England and Wales remained fairly stable. There has however been a sharp rise in the numbers of people under probation supervision, rising from 175,100 in 1999 to 241,504 in 2009, a 38% increase in ten years. First receptions into prison have varied over the period, but the figures give an overall fairly stable picture between 1999 and 2009. However, the annual average prison population shows a more definite increase: between 1997 and 2009 the average prison population went from 61,114 in 1997 to 83,559 in 2009. Excluding the 2009 figures, which may present anomalies, between 1997 and 2008 this constituted a 35% increase. (To help relate these rises in prison and probation populations to staffing numbers, see table 6 below and Mills et al., 2010b.)

The sentencing trend data available for the period 1999-2009 (table 4) show that while there were fluctuations in the numbers given immediate custody, which peaked in 2002, the decade saw a steep rise in suspended sentences. The number of people given community sentences also increased over this period, as did the average custodial sentence length.



Table 3: Number of people subject to sanctions, England and Wales 1997 to 2009
 Source: MoJ 2010a, unless otherwise stated

Year	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of people sentenced by all courts ¹													
			1,407,998	1,424,349	1,348,494	1,419,608	1,489,827	1,547,352	1,482,453	1,420,571	1,414,742	1,362,064	1,405,938
Number of people under probation supervision (as at 31 December of each year) ²													
			175,100	175,600	177,600	191,394	199,237	209,461	224,094	235,029	242,722	243,434	241,504
First receptions into prison ³													
			134,316	128,866	130,934	135,820	135,042	132,961	132,058	128,986	125,881	134,148	125,877
Total population in prison and police cells (as at 30 June of each year)													
						71,218	73,657	74,488	76,190	77,982	79,734	83,194	83,454
Annual average prison population (excludes police cells) ⁴													
	61,114	65,298	64,771	64,602	66,301	70,778	73,038	74,657	75,979	78,127	80,216	82,572	83,559

¹ Source: MoJ 2010c. These total figures include the number of people given immediate custody, suspended sentences, community sentence, fines or other disposals: see table 4.

² Data for 1999 to 2001 are adjusted for a change in the data collection system in 2002.

³ First receptions give an indication of the number of new prisoners in a time period.

⁴ 'Due to technical problems relating to the supply of data, the annual average population for 2009 uses data compiled a slightly different basis for July to December 2009' (MoJ 2010a, p.87).

Table 4: People sentenced at all courts by type of sentence and average custodial sentence, England and Wales 1999-2009

Source: MoJ, 2010c

Outcome	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number given immediate custody											
	105,323	106,187	106,273	111,607	107,670	106,322	101,236	96,017	95,206	99,525	100,190
Number given community sentences											
	151,633	155,538	164,997	186,520	191,422	201,503	204,247	190,837	196,424	190,171	195,767
Number given fines											
	992,420	1,013,347	930,121	972,737	1,033,617	1,082,690	1,025,064	961,535	941,534	890,296	945,494
Number given suspended sentences											
	3,161	3,072	2,755	2,519	2,717	2,855	9,666	33,509	40,688	41,151	45,134
Number given other disposals											
	155,461	146,205	144,348	146,225	154,401	153,982	142,240	138,673	140,890	140,921	119,353
Immediate custody rate (%) ¹											
	7.5	7.5	7.9	7.9	7.3	6.9	6.9	6.8	6.8	7.4	7.2
Average custodial sentence length (months) ¹											
	11.5	11.4	11.8	12.6	12.6	12.9	12.6	12.4	12.4	13.3	13.7

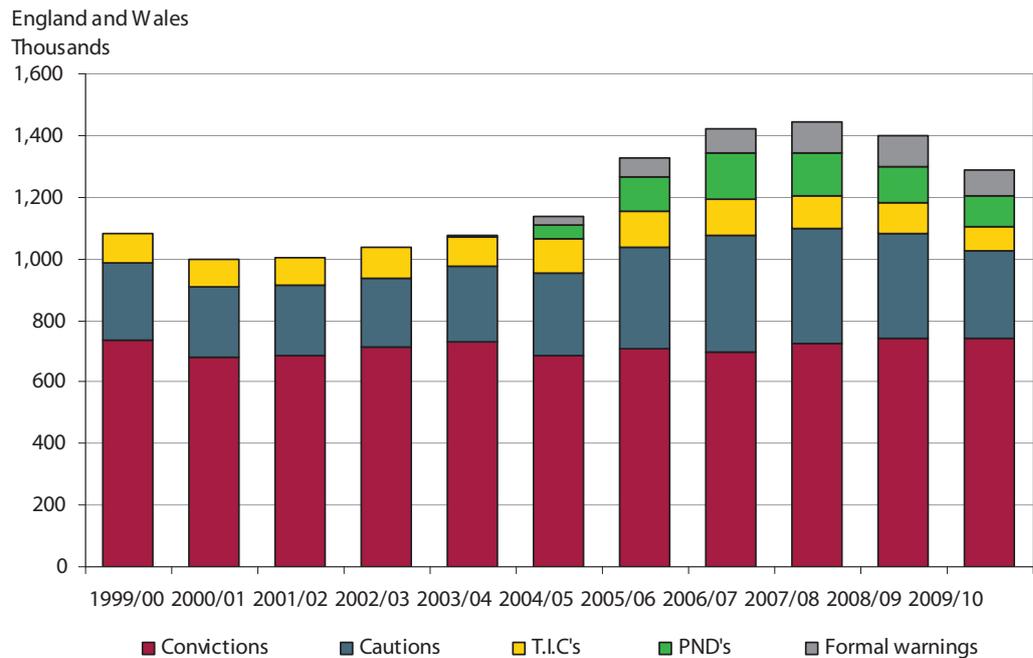
¹ Excluding life and indeterminate sentences



New Labour made an attempt to close the gap between the number of offences recorded by the police and ‘offences brought to justice’ via disposals either through or outside of the courts. Commentators have highlighted the growth in summary justice exercised by police and prosecutors in the form of cautions and out-of-court penalties (see Morgan, in this report). The growth of summary justice through the use of penalty notices for disorder (PNDs) and cautions is illustrated in Figure 2 below.

Figure 2: Number of offences brought to justice by outcome¹, 1999/2000–2009/2010

Source: MoJ, 2010b



¹ ‘An offence is brought to justice if it results in either a caution, a conviction, a penalty notice for disorder, a formal warning for a cannabis offence, or is taken into consideration [TIC] by a court’ (MoJ, 2010b, p.71).

Antisocial Behaviour Orders were a key plank of New Labour’s attempt to take on ‘low level disorder’. Data shows their use peaked in 2005, with over 4,000 issued by the Court Service in that year.

Table 5: Number of Anti-Social Behaviour Orders issued in England and Wales, 1999–2008²

Source: Home Office, 2010

Total issued	Apr 1999 – May 2000	Jun – Dec 2000	2001	2002	2003	2004	2005	2006	2007	2008
16,999	104	137	350	427	1,349	3,479	4,122	2,705	2,299	2,027

² April 1999 to 31 December 2008, unless otherwise stated.

Table 6: Criminal justice staffing numbers in England and Wales, 1997–2009

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008			
Probation¹														
All operational staff	8,267	9,054	9,462	10,702	11,615	15,251	15,890	17,234	18,247	15,386	14,991			
Probation officers (qualified and trainees)	5,240	5,502	5,458	5,885	6,214	7,142	7,342	7,231	7,062	6,506	6,267			
Courts ²	1998/ 1999	1999/ 2000	2000/ 2001	2001/ 2002	2002/ 2003	2003/ 2004	2004/ 2005	2005/ 2006	2006/ 2007	2007/ 2008	2008/ 2009			
Staff in Magistrates Courts	10,249	10,403	9,776	10,110	10,716	10,549								
Staff in Magistrates Courts post formation of HMCS						7,830		7,435	6,965	6,742				
Staff in Crown Court post formation of HMCS								2,540	2,304	2,385	2,390			
Prison Service Employees (average over the period) ¹	41,196	43,088	43,845	44,085	45,419	47,224	48,607	48,418	48,331	49,293				
Police officers (incl. secondments) ³	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
	127,158	126,814	126,096	124,170	125,682	129,603	133,366	139,200	141,230	141,381	140,514	140,230	142,151	142,132

For how the numbers in this table relate to the numbers of people in prison and under probation supervision see Mills et al., 2010a and 2010b and Grimshaw et al., 2010.

¹Source: Mills et al., 2010b. Prison staffing indicated here refers to public prisons only; agency and contract staff are included from 2006/2007 onwards.

²Source: Grimshaw et al., 2010.

³Source: Sigurdsson and Dahni 2010. Numbers as of 31 March of each year. Figures are full time equivalents and exclude civilian staff, police community support officers, traffic wardens, designated officers and special constables. For the numbers of these staff, see Sigurdsson and Dahni, *ibid*, Table 3.



Table 7: Criminal justice spending

Source: Mills et al., 2010a and 2010b

	1998/ 1999	1999/ 2000	2000/ 2001	2001/ 2002	2002/ 2003	2003/ 2004	2004/ 2005	2005/ 2006	2006/ 2007	2007/ 2008	2008/ 2009
Police											
Total police authority expenditure, actual (£bn)	7.716	8.085	8.591	9.335	9.831	10.724	12.078	13.003	13.828	14.250	14.546
Total police authority expenditure in real terms (£bn) ¹	9.828	10.099	10.593	11.258	11.485	12.186	13.353	14.112	14.577	14.600	14.546
Probation											
Total expenditure, actual (£bn)			0.539	0.597	0.66	0.768	0.768	0.906	0.920	0.976	
Total expenditure in real terms (£bn) ²			0.665	0.720	0.772	0.873	0.85	0.984	0.97	1.001	
Prisons											
UK prison expenditure, actual (£bn)	2.737	2.774	2.942	2.591	2.888						
Prison expenditure in England and Wales, actual (£bn)						2.522	2.740	3.132	3.359	3.841	
UK prison expenditure in real terms (£bn) ²	3.489	3.467	3.630	3.127	3.376						
Prison expenditure in England and Wales in real terms (£bn) ²						2.868	3.031	3.401	3.543	3.938	

¹ Using HM Treasury deflator as at 29/9/2009.

² Using HM Treasury deflator as at 4/1/2010.

Conclusion

The point to stress here is twofold. The first is that ‘crime’ definitions are problematic, as they focus on particular kinds of harm, prioritise certain harmful behaviours over others and are subject to change. Secondly, measures of ‘crime’ cannot adequately count all crimes, and we are left with a substantial ‘dark figure’. It is therefore important to be wary of talking about ‘crime’ in its totality. In interrogating harm and justice under New Labour, we can only get a very small picture from the crime statistics. When we look at the reports and findings from research in other areas – for example that shown in the EHRC reports on fairness in Britain, what we see is an increasingly polarised society in which a significant proportion of the population experience a range of harms and in unequal measure. To get a sense of these issues, it is important to look beyond crime statistics and crime definitions to measures that can provide a more nuanced understanding of harm in society.

What the data on criminal justice does show is an expanding system since 1997, with more people being processed (e.g. more in prison, under probation supervision, receiving community sentences and out of court disposals) and more being spent on criminal justice. What we have been unable to do here is explore the wider trends in ‘extra’ criminal justice expansion, beyond the traditional boundaries of courts, policing, probation and public prisons (i.e. private security services, CCTV etc.). Tracking these developments is much more difficult because of the ever complex networks of voluntary and private sector organisations delivering services in these areas and the limited public information available in terms of spending, people subject to sanctions and staffing.

The overarching message, however, is that in attempting to deliver justice and reduce harm in society policy makers and politicians should be wary of talking up the role of criminal justice in delivering security. The roots of injustice and insecurity lay beyond the services of prisons, courts, police and probation.

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Criminal justice reform at a time of austerity: what needs to be done?

David Faulkner

This essay reflects on the changes which have taken place over the last thirty years in the way in which successive governments, New Labour ones in particular, have approached issues of crime and criminal justice, the improvements which have been made, but also the failures and disappointments which the Coalition Government now has the opportunity to correct.

The 'failing system'

From the 1960s until the early 1990s, governments had limited but on the whole realistic expectations of what the criminal justice system could by itself achieve in reducing crime, reforming offenders and solving social problems. Their approach was one of moderation and restraint in the use of punishment and the criminal law. That approach was reinforced by experience and research by the Home Office Research Unit and the university institutes which had been set up at the end of the 1950s. It was the foundation of the *Criminal Justice Act 1991*, which was more about making the system fairer, and making it work better, than it was about solving the problem of crime for which other, more effective policies were being developed.

First Michael Howard from 1993, and then the Labour government from 1997, rejected such an approach and refused to accept the evidence on which it was based. The Labour government in particular took an instrumental view of criminal justice. They saw its purpose as being to protect the public; punish criminals with suitably severe sentences; support victims; and prevent re-offending. They thought the system was failing in all of them – Tony Blair said: 'of all the public services we inherited in 1997, the most unfit for purpose was the criminal justice system' (Blair, 2004).

Those criticisms reflected not so much deteriorating performance as changing expectations and a disregard of the evidence, built up over several years and summarised in the Halliday report, about what criminal justice can realistically achieve (Halliday, 2001). The Labour government was probably more ambitious than any previous government about the difference it thought it could make and about how much activity it could realistically sustain. Its record of furious activity, with constant new initiatives, a stream of new legislation and continual reorganisation, is now well known.

What has been achieved?

There have been improvements. There is less racial prejudice, victims have more consideration and support, prisons are safer and more decent, there has been some improvement in rates of re-offending by longer term prisoners, and there has been a big fall in burglary and vehicle crime. However, not many of those can be attributed to governments' headline policies¹. There is still confusion in the courts, especially over sentencing; a prison system which is in a constant state of crisis; and a continuing

¹ Most of them were the result of greater professionalism in the services themselves, of improvements in security and other forms of crime prevention, and perhaps of a more prosperous economy.



demand for new reforms of the police and penal system. The public are not conscious of improvements and seem to have no more confidence in the system than they had 20 years ago.

Wider problems of government and governance

The situation is part of a larger problem of how Britain, but especially England, is governed and its public services operate. The period since 1979 has been the era of ‘new public management’, of targets and performance measures. It brought some benefits, and targets and measurement will always have a place in responsible and accountable management. But its perverse incentives and unintended consequences have now become evident, and the Labour government was already beginning to dismantle some of its more damaging features before it left office². Despite the efforts that were made, it was not able to address the wide range of issues which cut across the boundaries of government departments, central and local government, different services and different professions. In criminal justice, young adults (Barrow Cadbury Trust, 2005), women (Corston, 2007), mental health (Bradley, 2009) and youth crime (Independent Commission on Youth Crime and Antisocial Behaviour, 2010) are all subjects where there has been a sense of frustration for many years.

The last two years of the Labour government saw the publication of reports from, among others, the Better Government Initiative, the Institute for Government, the Cabinet Office, Parliamentary committees, various think-tanks and other institutions, and the ESRC³ Public Service Research Programme. They pointed consistently towards a need for:

- policy making to be more genuinely consultative, less febrile and less politically confrontational, with more effective scrutiny of legislation by Parliament
- government to have more trust in public services and more respect for professional discretion and judgement, less direction and micro-management from the centre
- a more open approach to the commissioning and use of scientific research and expert advice
- greater freedom and independence at local level, but within a strong framework of public accountability (justice reinvestment would be an example)
- more attention to the skills, competencies and leadership that are needed in to-day’s and tomorrow’s situations.

The reports are as relevant to criminal justice as they are to other areas of government and public service. The indications are that the Coalition Government understands some of those concerns and wishes to respond to them – see for example Nick Herbert’s speech to the Policy Exchange (Herbert, 2010), with its emphasis on professional discretion and judgement, social responsibility, the importance of dynamics and relationships and of cooperation at local level.

A moment of opportunity

The formation of the Coalition Government and the crisis in public debt should together provide an opportunity for progress in penal practice and in the administration of justice which has not been politically possible for 20 years. It should now be possible to move on from the assumptions and unrealistic expectations which have hindered progress during that period, and to begin a process of change in which policy making and the operation of the criminal justice become better informed and more inclusive, thoughtful and principled that they have been in the recent past.

² Most notably, the abolition of national targets for policing and their replacement by a single target to increase public confidence.

³ Economic and Social Research Council.

New ideas are emerging for the way in which public services should be organised and public needs met, and for the role which the state should play in that process. The Coalition Government is developing the Conservative Party's vision of a 'Big Society'. Public administration scholars have described a transition to 'new public governance' which they distinguish from 'new public management' by its emphasis on partnerships, co-working, co-production and other forms of collaboration between government departments, local authorities, statutory services, the private and voluntary sectors and other bodies such as users' groups (Osborne, 2010).

There is to be a 'rehabilitation revolution', set in the context of the 'Big Society', with schemes involving the private and voluntary sectors and 'payment by results' measured in terms of re-offending. Nick Herbert gave more details in the speech already mentioned. A review of sentencing is taking place at the time of writing, and Kenneth Clarke has said, to many people's surprise, that he would like to see a substantial reduction in the use of imprisonment, especially of short sentences where the rate of reconviction is particularly high (Clarke, 2010). Crispin Blunt carried those ideas forward in his remarkable Churchill Anniversary speech to Nacro on 22 July 2010, especially with his endorsement of 'justice reinvestment', his acknowledgement of the objections to indeterminate sentences, and his recognition that a prison population of 85,000 represents a failure of policy (Blunt, 2010).

Risk and realism

There are some important gaps. No connection has been made between the 'rehabilitation revolution' and the social conditions – as distinct from the organisational arrangements – which would enable it to take place, including the consequences which might follow from the government's programmes in other areas of social policy such as employment, housing and support for families. Special care will be needed to protect those with particular vulnerabilities and the organisations which support them if the rehabilitation revolution is to have any reality. Austerity will also involve accepting higher levels of risk (for example in decisions about parole), greater degrees of trust and more tolerance of difference and sometimes failure. Government will have to be less ambitious in its claims of what it can achieve – but lower expectations may paradoxically bring higher levels of public confidence (James, 2007).

What needs to be done?

The first Comprehensive Spending Review by the Coalition Government, published on 20 October 2010, contained few surprises and not much detail. The intention to reduce the use of imprisonment is clearly welcome, although it is not yet clear how the reduction will be achieved. Much will depend on the green paper on sentencing and rehabilitation and on the outcome of the consultation paper on policing (both of which are expected at the time of writing). It is to be hoped that cuts in the criminal justice and other public services will be made with proper regard for their effects on partnerships and shared services, including the voluntary and community sector and the small and often local schemes which the 'Big Society' is intended to promote and support. It would be very sad – and damaging – to lose the small and often unseen and uncounted relationships and 'civilities' which can make all the difference to the life of a vulnerable young person or to someone's chances of rehabilitation.

One of the tests for the Coalition Government, in criminal justice and more generally, will be the extent to which it can bring together the political vision of a 'big society' and the professional and managerial wisdom that is needed to 'make things work' in a new



form of public governance. Differences of power, influence, professional culture and capacity have to be reconciled to create a sense of shared ownership of the task in hand. Subjects such as commissioning, localisation, the use of evidence and expert advice, the management of risk, the encouragement of innovation and the role of the voluntary sector will all need to be re-examined. Command models based on authority and top-down communication do not work in settings which involve disadvantaged and vulnerable people and their families, where new ways of working have to be found which are based on consultation and mutual confidence and respect. Several statutory and voluntary agencies may need to be engaged— health, social services, housing, education, as well as those that are part of the criminal justice system.

Different personal qualities and skills may be required – a determination to get something done rather than to protect positions and avoid risks. Continuity in post, depth of experience and the wisdom and respect which flow from them may need to be more highly valued. New answers may have to be found to the familiar questions about accountability, organisation and structure. There will be a need for what Amartya Sen has called ‘public reasoning and government by discussion’ (Sen, 2009).

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Appendix

A fog of statistics? A brief guide to the main terms under New Labour

Roger Grimshaw

Because what we call ‘crime’ is an aggregate product of national legislation it makes little sense to compare total crime volumes in different jurisdictions. In assessing what may have happened to crime under New Labour the two standard measures in England and Wales are the crimes recorded by the police and the British Crime Survey. Below we highlight what they can tell us but also their limitations. Also covered in this section are two indicators of criminal justice performance and impact favoured by the Labour government: ‘offences brought to justice’ and ‘reoffending’.

The British Crime Survey

The British Crime Survey (BCS) is a representative survey of private households that asks questions about victimisation experiences in the year preceding the interview. It is a large scale survey: for example, 46,000 face-to-face interviews took place in 2008/2009. While capable of delivering clear estimates of victimisation for some common offences, the BCS is subject to certain limitations, including:

- Children and young people under 16 have not been interviewed until recently; from January 2009 the survey was extended to children aged 10 to 15¹
- People in residential establishments are excluded
- Victimization of commercial establishments is not included (though a one-off survey was carried out in 2002)
- Successful frauds (where the person interviewed is unaware of having been duped) are not detected.

Recorded crime

The police record crimes according to a list of ‘notifiable’ offences:

- violence against the person (with or without injury)
- sexual offences
- robbery
- burglary
- theft and handling stolen goods
- fraud and forgery
- criminal damage
- drug offences
- ‘other’ (e.g. blackmail, treason, perjury, libel, dangerous driving).

¹ Experimental statistics derived from interviews with children between January and December 2009 were published in June 2010 (Millard and Flatley, 2010).



Inevitably the recording of many crimes depends on patterns of reporting by the public as well as on the levels of activity of the police themselves. Whilst many crimes may not be reported or recorded, police records provide a particularly informative measure of homicide and serious crimes.

Recording is governed by counting rules issued by the Home Office. Comparing different years and establishing trends have been complicated by changes in recording standards, in particular, the introduction of the National Crime Recording Standard (NCRS), which was implemented in 2002 (Mellows-Facer, 2003). The new Standard was designed to ensure that in most cases incidents believed by the people who reported them to be crimes were recorded as such, unless there was verifiable information to disprove that a crime had occurred. The focus on victims associated with the application of NCRS led to an increase in recorded crime that was at odds with a decline in the BCS measure, causing some doubt and confusion. In 2007 inconsistencies in the recording of serious violent crime by different police forces were found: these led to rule clarifications by the Home Office in 2008 (UK Statistics Authority, 2010).

Interpreting BCS and police recorded crime

The regular publication of the BCS together with recorded crime figures is often followed by media attention and political involvement which stokes controversy, with different commentators seeking to find evidence to suit their predispositions and interests. However, the definitions of 'crime' and 'violent crime' are so broad that it is impossible to grasp what both these sets of figures mean in context without considerable analysis and illustration. For example, 'in around a half of incidents identified as "violent crime" by both BCS and police statistics, the violence involves no injury to the victim' (Flatley et al., 2010: p.3).

Hence policy based on claims about 'crime reduction' is liable to misunderstanding, misperception and manipulation. It has been in this context that a recent report by the UK Statistics Authority (2010) has discussed the scope and meaning of the various statistical sources on crime. Its recommendations included providing a guide to the sources, commentaries from the National Statistician and reintroducing audit checks on recorded crime.

'Offences brought to justice' and 'sanction detections'

'Offences brought to justice' are crimes reported to the police which are resolved by means of a conviction, caution, penalty notice for disorder, offences taken into consideration at court or a formal warning for cannabis possession.

In 2005, the Labour government set a target for the police to contribute towards bringing to justice 1.25 million offences each year by 2007/2008. In 2008 the Home Affairs Committee put on record several of the qualifications surrounding the achievement of targets. The Committee noted that the targeting had led the police to enforce the law against minor offenders. To help achieve targets, the police had been relying on 'sanction detections'—offences that are detected or cleared by charging someone, issuing a penalty notice or giving a caution. For example, 7.1 per cent of the 1.4m 'offences brought to justice' in the twelve months to March 2008 were cannabis warnings.

By 2008, however, the regime of sanctions detections had been circumscribed to deal with the more serious crimes and in the same year the government proposed

that the police targets be replaced by the sole target of 'increasing public confidence'. (This was introduced in 2009 and subsequently scrapped by the Coalition Government in June 2010).

Reoffending and reconviction

New Labour used measures of 'reoffending' as targets for crime reduction. 'Reoffences' have been defined as reconvictions at court within a fixed follow up period. Since 2005 that period has been a standard one year, the same for both adults and juveniles, replacing the two-year follow up period formerly applied to adults. (Previous results have been recalculated to enable trend comparisons: MoJ 2009). The data indicate how many reconvictions have taken place and how many serious offences are included in that figure.

The use of reoffending as a measure of repeat criminal behaviour means an overlooking of incidents that do not come to the attention of public authorities, are ignored, or where evidence to convict is lacking.

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