

THEM AND US?

The public, offenders
and the criminal justice
system

by Clare Sparks and
Sarah Spencer





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Production & design by www.emphasis-publishing.co.uk

ISBN 1 86030 171 1

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ippr Criminal Justice Forum and former Chair, WH Smith

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Acknowledgements

A great many people have been involved in the process that culminates in this report. Our thanks go to all those who attended the various seminars and conferences organised throughout the work of the Criminal Justice Forum, and particularly to those who have written papers for the Forum, published or unpublished: Adam Crawford, Laura Edwards, Rudi Fortson, Jim Handley, Jeremy Hardie, Ben Hobbs, Michael Levi, Peter Neyroud, John Raine, Sue Richards, Andrew Rutherford, Beatrice Stern and Andrew Sanders. Particular thanks to David Faulkner for his input throughout the process and his comments on this report and to Colm O’Cinneide for his comments and advice. During the process of the Forum’s work, we have had research help from a number of people without whom we simply could not have completed our programme of work: Tina Akoto, Helen Evans, Tessa Read, Fran Sainsbury, Will Somerville, Johanna Spinks and Roisin Upcraft. Thanks also go to colleagues at ippr for their support and advice throughout the project: Matt Gill, Lisa Harker, Gavin Kelly and Matthew Taylor. Finally our thanks go to the members of the Forum who have offered significant amounts of time to this project in very busy schedules. We are grateful to them, and particularly to our chair Jeremy Hardie, for their ongoing support.

ippr would like to thank Barclaycard, the Bar Council, the Calouste Gulbenkian Foundation, the Esmee Fairbairn Foundation, Group 4 Falck and the Institute of Legal Executives for their support for this research.

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Sarah Spencer is the Director of the Citizenship and Governance Programme at ippr, and a member of the Criminal Justice Forum. She was a member of the Home Office Task Force on implementation of the Human Rights Act, served on the independent Commission on the Future of Multi-Ethnic Britain and has published widely on policing, migration, human rights and equality issues.

About the forum

ippr's Criminal Justice Forum was established to consider policy proposals on the future of the criminal justice system in England and Wales. Drawing together leading thinkers in the field, the Forum aimed to be a catalyst for cutting-edge research and high level debate on the strategic questions facing the criminal justice system. The Forum commissioned papers and opinion research and held seminars and conferences on a range of criminal justice issues throughout 2000 to 2002.

Foreword

by Jeremy Hardie, Chair, Criminal Justice Forum

ippr's Criminal Justice Forum was brought together to advise on criminal justice issues. Drawing together leading thinkers in the field, academic and practitioner, the objective of the Forum was to be a catalyst for research and high level debate on some of the strategic questions facing the criminal justice system. With the advice of the Forum, ippr commissioned papers and opinion research, held a series of seminars, conferences and a public lecture on a range of criminal justice issues through 2000 and 2002.

Joining me on the Forum were Margaret Carey JP (Inside Out Trust), Rudi Fortson (Barrister), John Harding (then Chief Probation Officer, Inner London Probation Service), Professor Tim Newburn (Goldsmiths College), Peter Neyroud (then Deputy Chief Constable, West Mercia), Tim Newell, (then Governor, Grendon Prison), Professor Sue Richards (University of Birmingham), Sarah Spencer (ippr), Lorna Whyte (the Youth Justice Board) and Dianah Worman (Chartered Institute of Personnel Development).

In preparing this report, we have drawn heavily on the series of papers which we commissioned. The Forum members, who have acted as an advisory group and sounding-board for this work, broadly concur with the conclusions the authors have drawn, although we may not agree with the detail of every recommendation. The conclusions which are reached are thus those of the authors alone.

The Forum began by considering the choices which society must make in deciding how to tackle crime and the values on which such choices are based. We questioned what kinds of behaviour should be considered criminal and identified a number of offences which could more appropriately be dealt with through the civil law.

Recognising that public expectations limit the choices that government can make, we explored the causes and consequences of public attitudes to crime, offenders and the performance of the criminal justice agencies. We found that, unsurprisingly, many of these attitudes were inconsistent and sometimes misinformed. More important, they limit political options and the effectiveness of the police and justice system to deliver.

We asked who should be responsible for tackling crime. If it is not government and the criminal justice agencies alone, what should be the role of members of the public and of private companies? As public participation in the criminal justice process is one way in which civil society can be mobilised to take responsibility for reducing crime, we explored how their contribution can be enhanced, by identifying the necessarily distinct roles of lay and professional, of individuals and the state. This meant looking in particular at individuals who act as independent witnesses, at reform of the lay magistracy and at extending public involvement in policing.

We considered the role of the private sector in preventing crime, exploring the basis of companies' responsibility for crime prevention, at the varied and important role that they could and do play, but also at the limits of the contribution that they should be expected to make. We looked at the role of car manufacturers and mobile phone companies in making cars and phones more difficult to steal, at the role of alcohol producers in cutting alcohol-related crimes and how credit card companies tackle credit card fraud, which more than doubled between 1995 and 1999 to £189.3 million.

Many of the reforms that the government has introduced in the criminal justice agencies mirror its wider public service reform agenda. We believed there was a need to explore the tensions between increased central government control and the need for local autonomy; the contradiction between creating a single 'criminal justice system' and the need for each part of the system to retain its constitutional independence; and the difficulties that the agencies, including prisons, have faced in delivering change in their ethos and culture. In that and other contexts we considered the ways in which we might increase public confidence in their work.

Published papers

Community Justice, Modernising the Magistracy in England and Wales
(2001) Professor Andrew Sanders

Criminal Justice Choices: what is criminal justice for? (2001) Professor
Andrew Rutherford

Public Matters: Reviving Public Participation in Criminal Justice (2001)
Professor Adam Crawford

Public Participation in Policing (2001) DCC Peter Neyroud
Reluctant Witness (2001) Sarah Spencer and Beatrice Stern
Criminal Justice and the The Future of Payment Card Fraud (2002) Michael
Levi and Jim Handley
Partners against Crime: the role of the Corporate Sector in Tackling Crime
(2002) Jeremy Hardie and Ben Hobbs.

Unpublished papers

Tackling Criminality in a 'civil' manner – options for reform Rudi Fortson
Private Lives, Public Policy (2001) Clare Sparks
Time for a Ministry of Justice? (2001) Sarah Spencer
Criminal Justice and the Modernisation Agenda Professors Sue Richards
and John Raine
Still a child inside (2001) Clare Sparks and Johanna Spinks

Conferences

Real community justice – 18 June 2001
Partners against crime – 11 June 2002

Public Lecture

Policing an unsettled society on 8 July 2002: A lecture given by Peter
Neyroud, Chief Constable, Thames Valley Police.

Executive summary

Misuse of the criminal law

More than a third of men in Britain have been convicted of a 'standard list' offence by the age of 40. More have a conviction for one of the myriad of minor offences that also attract criminal penalties. Yet we know that having a conviction makes it more difficult to get a job, and that unemployment increases the risk of re-offending. There are now more than 8,000 separate criminal offences and 5,600 people are sentenced every day. The police and the courts are overwhelmed by the volume of criminal cases that they have to handle.

Anti-social behaviour is a blight on all our lives. It does not follow that the criminal law should be the principal strategy to address it. There are already vast discrepancies between serious offences such as tax evasion that can be dealt with administratively and minor offences such as failing to purchase a TV licence which lead to a conviction. Yet the implications of this choice for the individual's life chances, for social inclusion and for the operation of the criminal justice system are immense.

Government should carry out a review of criminal offences to establish which minor offences could be transferred to a civil law procedure, investigated by agencies other than the police (as parking offences are by local authorities), and attract effective penalties other than a criminal conviction. The decriminalisation of most parking offences in 1991 provides a precedent. An individual who denied responsibility would retain the right to have their case reviewed by an independent tribunal or civil court. Most people do not contest responsibility and would not have to attend a hearing.

Government should agree a set of criteria which must be considered before any new criminal offence is created. They should include the seriousness of the offence, its impact on the victim, and whether a criminal conviction should be retained as a last resort for those who have refused to comply with civil penalties. But the criteria should also include whether designation as a criminal offence would be likely to cause greater social harm – in loss of employment, home, social acceptance or family relationships – than the original behaviour; and

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whether the same outcome – deterrence, punishment and change in offending behaviour – could be achieved using non criminal options. Finally, government must consider whether resort to criminal law may bring the law into disrepute because it is widely ignored, or alternatively whether failure to criminalise conduct would undermine confidence in the administration of justice. It must ensure that the penalty, including the impact of having a criminal conviction, is proportional to the offence.

We do not provide a definitive list of offences that should be transferred to civil procedure. That would be the outcome of the review, on which the public should be consulted. But we suggest that among those offences to be considered should be minor motoring offences, failure to purchase a TV licence, begging and minor public order offences, and minor breaches of health and safety. Removal of these offences from the criminal law would release much needed police and court time to deal with genuine crimes.

In many cases the penalty would be the same: a fine. But we suggest that alternative penalties could be more effective – such as confiscation of the television – and that the Government's review should consider a wider range of penalties, proportional to the offence. It could also consider more effective ways to prevent some offences, such as requiring TV retailers to see proof of licence before purchase. New approaches could be introduced incrementally, and evaluated.

The last decade has also seen the extension of the criminal law to cover more offences committed by children as young as ten. A ten year old is now assumed to be as capable of taking full responsibility for his or her behaviour as an adult, even though the introduction of Parenting Orders was based on recognition that parents bear some responsibility for their children's behaviour up to the age of 18.

The criminal law is not an appropriate response to a child's offences. The vast majority of child offenders have only a short period of offending. The children who are most likely to become persistent offenders are also known to be those most likely to have childhood experiences of victimisation and to have education difficulties. But shortage of resources in social services and education support services means that the threshold before assistance is offered is very high. All too often the child's evident problems are neglected through lack of resources. This is short-sighted when their subsequent offending

behaviour can incur great cost to their victim and to the criminal justice system.

The Government should establish a single system for assessing the nature of intervention needed by child offenders, based on the Scottish Reporter system, with the authority to require that services be provided. If we are serious about tackling children's offending behaviour we must allocate the resources to welfare and education intervention before the pattern of behaviour becomes so ingrained that neither support nor punishment are an effective response. Children of 12 and under should not be subject to criminal penalties.

Addressing public concern

These are radical proposals in today's climate. The Government is under immense pressure to be seen to be tough on crime and has lacked confidence in promoting its alternative, more effective, measures. But the reasoned more thoughtful approach to crime now being pursued by the Conservative opposition provides greater political space than in the past to have a considered debate on new approaches.

The public are ill-informed about crime and the criminal justice system. A majority continued to believe crime was rising in recent years, when it was not, and the possibility of being a victim of crime is far lower than the proportion of people who believe themselves at risk. The public believe that the criminal justice system is too lenient on offenders, but significantly underestimate the severity of sentences handed down by the courts. When questioned on specific cases they favour sentences broadly in line with current practice. When people respond punitively to questions in opinion polls, it has been found that they do so in part because they recall atypical offences reported in the media. Those least well informed about the criminal justice system are the most sceptical. No surprise then that the public lack confidence in the criminal justice agencies. No coincidence that confidence is greatest in the agency with which the public have most contact, the police. Research shows that people respond in a more moderate and thoughtful way to events and issues about which they are well informed or personally involved.

Successive governments have often appeared to endorse populist sentiments and proposed measures to appease them, while refraining from

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endorsing their most extreme demands. But the rhetoric of punishment, of victory and defeat in the 'war against crime', does not help to win public support for the constructive work that is actually being undertaken on crime prevention and rehabilitation of offenders. The Government must have the confidence to lead public opinion. A rational approach to raising public confidence would not be to engage in a spiral of ever tougher policy announcements but to address public misconceptions, while improving the performance of the criminal justice agencies.

Lack of confidence in the criminal justice system can result in people taking the law into their own hands. More often, it compounds a reluctance to make any personal contribution to tackling crime, for instance by coming forward as a witness. ippr's ICM poll found significant numbers of people said that they would not report crimes to the police. Only 14 per cent of those who witness an assault do come forward.

The reasons for this reluctance are complex and include fear of retribution and concern about the way in which they will be treated by the police and the courts. But there is also a clear sense that some crimes, even some crimes of dishonesty (such as shoplifting) and of violence (domestic, and pub brawls) need not be taken too seriously. Moreover, crime is not seen as our responsibility. It can be left to the police. So while the public expect the government and the police to cut crime, there are significant limits on the extent to which we are willing to make any contribution ourselves.

Government thus needs to address public attitudes for four reasons:

- Fear of crime reduces quality of life and corrodes community cohesion
- Lack of confidence undermines willingness to provide the police and the courts with information, and can lead to the public taking the law into their own hands
- The public are equivocal whether some crimes – including crimes of dishonesty and violence – matter and are therefore unwilling to take action to help police
- Public fears, lack of confidence and pressure on government to be tough on crime limit government willingness to explore alternatives to using the criminal law and custodial sentences.

The public could become better informed in two ways: through the provision of information, and through direct involvement in the work of the criminal justice agencies (developed in the next section). Government should explore new ways of ensuring that the public have accurate, balanced and accessible information about crime, offenders and the work of the criminal justice agencies. Each of the agencies, from the police through to prisons, should have its own communications strategy to increase public understanding of its role. Prison governors and probation chief officers should raise their public profile, speaking to the media about their role and the performance and outcomes of their agency. The judiciary should explain what a sentence means and what its effects are intended to be.

Shared responsibility

Despite public concern to see crime reduced, they are more likely to stand back and leave responsibility to the police than to take personal responsibility to provide them with assistance. But the criminal justice agencies cannot address crime effectively without a significant proactive contribution from the public, and from the corporate sector.

Public involvement is one key way in which public expectations will become more realistic, confidence in the agencies be enhanced and attitudes to offenders become less punitive. It can also enhance performance by improving the quality of decision making, transparency and accountability. The Government has failed to recognise the enormous potential contribution the public could make and has no strategy to develop that potential. Criminal justice remains a service delivered by professionals to the public, inviting scant public involvement. The 'customer focus' agenda places greater emphasis on consulting the public than on involving them in the development or implementation of policy and service delivery.

The challenge is to find modes of re-entry for the public that draw on the strengths of lay involvement without prejudicing the professionalism and impartiality of the justice system. It is important to clarify the differing contributions that it is appropriate for lay people and professional staff to play.

In the varied examples of public involvement that we studied – the lay magistracy, independent witnesses and involvement in policing –

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we found an urgent need to change the conditions in which citizens are being asked to contribute if we are to encourage participation and maximise the value of the part they can play.

In relation to the lay magistracy, we found public confidence alarmingly low but also sharply contrasting views on whether it is appropriate for lay people without full legal training to take decisions on guilt and sentencing. In many cities lay magistrates have been replaced by professional judges sitting alone, a development which equally raises concern. It is a matter of chance for defendants whether they are judged by lay or professional. Yet each brings very different qualities and skills to that task.

We suggest that defendants who are contesting their guilt should always face a mixed panel of two lay magistrates and one professional judge, combining the distinct and valuable skills that each brings. Lay magistrates, no longer having to hear cases without a professional on the panel, would need less training and experience, and thus be able to sit in court less often, perhaps one day a month. A far wider cross section of the public could thus make this contribution, ensuring a more diverse bench. The quality of decision making should improve and public knowledge and understanding of the system increase.

In relation to policing we see that the public have become further marginalised as the service has become increasingly managerial and centrally controlled: a tension which the Police Reform Bill does not resolve. Increasing public involvement could enhance performance, accountability, legitimacy and public confidence. But the police service needs to be committed to this approach and provide genuine opportunities for participation. The public need to see outcomes from their involvement or they will not take the trouble to contribute again.

Local priorities should be set by a Divisional Police Board which would determine strategy, discuss and agree the local policing plan and monitor performance, reporting to the Police Authority. It would be pro-active in holding local commanders to account, while the chief constable would retain operational responsibility. The public can also play an oversight or inspection role, not only as lay visitors to police stations as now but with a role in relation to recruitment, training, policy making and incident management. At beat level, the police should play an enabling role, empowering local residents to identify solutions to some of their own crime problems as well as assisting police to do their job.

In relation to witnesses, we know that frequently a person sees or knows that a crime has taken place but is reluctant to report it or to give evidence in court and that 40 per cent of those who do attend court would not be willing to act as a witness again. But their willingness to do so can be pivotal in the detection and successful prosecution of the offender, or in securing justice for the innocent.

Public policy has only just begun to recognise that we cannot continue to take witness cooperation for granted. Steps have been taken to encourage and support the most vulnerable and intimidated. Publication of ippr's report *Reluctant Witness*, urging more action by government, the police, the CPS and the courts was well received. But no action has yet been taken though we are told witnesses will be at the heart of the proposed criminal justice reforms. For now, witnesses remain a low priority, the 'cannon fodder of the system'.

Government should adopt a Witness Charter setting out the standards of service that a witness is entitled to expect. Police, prosecutors and court staff should recognise that witnesses must be treated with courtesy and their cooperation encouraged and appreciated, not taken for granted. Witnesses should, from the moment they come forward to report what they know, be provided with information, guidance, support and thanks. A national telephone number, and witness.com website should be established to encourage reporting. A single unit in Whitehall should take responsibility for ensuring that this strategy is devised and implemented.

The challenge is thus to engage a broader range of people than currently participate in the criminal justice system by providing opportunities that match the contribution that individuals are willing and able to make. Agencies must be more creative in designing schemes for those who have least time to give. The public must feel that their contribution is valued, by having the information, support and appreciation they need, and being able to see a result.

Corporate sector

The potential role that the corporate sector can play in crime prevention is even less visible than that of the public. But companies already make a diverse and significant contribution: from designing-out crime in their products and services through to schemes to employ ex-offenders, reducing the rate of re-offending.

While government has supported ad hoc initiatives involving companies, it acknowledges it has no coherent strategy to promote their role. Publication of ippr's report *Partners against crime* led to a commitment from Ministers to bring together the disparate units in the Home Office dealing with business crime into a single joined-up initiative later this year. But there is as yet no sign of a step-change in the energy to be devoted to mobilising what could be a significant resource. Companies that manufacture and provide services are not optional partners in crime prevention. Their cooperation is vital as it is they, and they alone, which are in a position to design the crime potential out of the product, whether by making stolen mobile phones unusable or by refusing to sell alcohol to those already losing control of their behaviour. Companies are expert in anticipating shifts in market trends and identifying what products will sell. Anticipating the crime potential of their products is well within their capacity. But they can need guidance, incentives or as a last resort regulation to ensure that they do.

There are, nevertheless, limits to the contribution that a company should be expected to make. It is debatable, for instance, to what extent Eurotunnel should be held responsible for the security of its terminals and penalised if determined migrants succeed in boarding trains to reach England. Government must engage business in a debate on the nature and limits of their responsibility for crime prevention, and the public policy framework that would ensure crime prevention is mainstreamed into design and operation as matter of course.

A champion should be appointed to drive this agenda. Failure to consider crime potential in a product should be seen as a reputational risk and a matter on which companies should be expected to make disclosure. Consumer groups should help to identify products which are, and are not, secure, to create market pressure on companies to build security into their products.

Public sector reform agenda

The Government's failure to develop this partnership approach with business, or with the public, reflects the narrow view that it has inadvertently fostered that it is the state's responsibility to tackle crime. It has taken greater central control of the agencies, reinforcing the perception that outcomes can be driven by the centre, and has marginalised the role

of the public in decision making and service delivery.

There is undoubtedly a need to improve the performance of all of the criminal justice agencies. Government has a role in setting some national standards. But the centrally driven outcomes agenda, with its proliferation of targets and key performance indicators against which the agencies are measured, named and shamed, has limited their autonomy to determine their own priorities or to be innovative in developing new approaches. Moreover, it significantly limits the extent to which the public can be invited to influence local priorities. Consultation can become an opportunity only to explain why the local agency is constrained by national requirements from responding to local demands. The Police Reform Bill may exacerbate this despite the Government's recent promise to cut the number of centrally-driven performance indicators.

The commitment to evidence-based policy making is welcome and government should resist the temptation to depart from its rigours in reacting to short term political pressures. The commitment to overcome agency boundaries to create a more joined up service can enhance efficiency and effectiveness. But Government must be wary, in its enthusiasm to create a single criminal justice 'system', not to overlook the fact that each agency has a distinct role and their separation is part of the necessary checks and balances in a system that exercises power over individuals. The CPS and the police, for instance, have distinct functions and the independence of the CPS decision to prosecute must not be undermined.

The independence of the judiciary from the executive and the legislature is not secured by the current system of judicial appointments, overseen by the Lord Chancellor who is a senior member of the government. An independent Judicial Services Commission should be established to ensure that judicial appointments are seen to be free from political influence. It should adopt procedures that ensure that more women and applicants from diverse racial, religious and social backgrounds are considered for appointment.

Within Whitehall, the division of responsibility for criminal justice policy between the Lord Chancellor's Department and the Home Office inhibits policy development and causes delays. Moreover, there is a tension within the Home Office between justice principles and the relentless pressure to secure greater numbers of convictions. The

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principles of justice could be better served if the criminal law were the responsibility of the department that is responsible for the courts and is not judged on the extent to which it is seen to be tough on offenders. The Lord Chancellor's Department, devolved of its direct control over judicial appointments, should be renamed the Department of Justice and take over responsibility for criminal law reform, allowing the Home Office to focus on crime reduction and enforcement. The Justice Department should ensure adherence to the criteria recommended above before any new criminal offence is created, and take responsibility for the recommended review of criminal offences.

Custody *v* social inclusion

Almost without exception, those sentenced to prison are released back into the community. The opportunities that prisoners are offered to acquire life skills while in prison are thus important to the whole of society. But the evidence suggests that custody is frequently ineffective in reducing offending behavior, the majority re-offending within two years. Former prisoners are estimated to be responsible for 18 per cent of recorded crime. The maxim that 'prison works' is patently untrue. With this record the government's penal policy is failing to protect the public.

At over 71,000, Britain has the highest prison population per capita in Western Europe at a cost of £23,000 per person each year. Custody should be the punishment of last resort to ensure that the damage caused by imprisonment in loss of education, employment, housing and family relationships is only inflicted on those for whom it is absolutely necessary. Government should set itself the goal of reducing the prison population to the European median of 85 per 100,000 population, in which case the number of prisoners would fall to under 49,000, starting with those for whom prison is particularly dangerous or over-used: those with mental health problems and those on short sentences, for whom a more satisfactory alternative should be found in the health care system and in community penalties respectively.

For those for whom there is no alternative but prison, custody regimes must be radically reorganised to meet the following objectives:

- To contribute to reducing offending, central to which is education and skills training and practical assistance on release in obtaining a job and accommodation. Current provision is grossly inadequate

- Focus on managing, not avoiding, risk, including greater use of local community prisons and opportunities to visit family or prospective employers shortly prior to release
- Promote public involvement in prison governance and services
- Humanity, equal treatment and justice for prisoners, including avoidance of violence and degrading treatment

Future prisons would then look very different from today. They would be predominantly small and local, to help maintain the relationships with family that will be vital to reintegration into the community. The prisoner's days would be occupied with education and skills training, often drawing on staff from neighbouring educational establishments and voluntary organisations. Prison staff would be assessed on their ability to provide prisoners with the services and training they need to change their behavior, and to provide an environment in which their security, as well as that of the public, is protected.

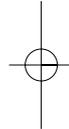
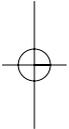
Conclusion

There is a vast gulf between public expectations of the criminal justice system and the outcomes it delivers. Expectations are unrealistic, attitudes ill-informed, fears exaggerated. The system, equally, is under-performing and, in some of its outcomes, counterproductive. It is time to look for alternative strategies. The recommendations set out in this report would go some way to meet that challenge: removing minor 'crimes' from the workload of the police and the courts, drawing in new partners – the public and corporate sector – to share responsibility for tackling crime; and ensuring that in responding to crime we do not simply exacerbate the social exclusion that promotes it. It will require political courage to lead public opinion, and imagination to open up opportunities for public involvement that match the contribution the public are willing to make. But doing nothing is not an option. Crime blights all our lives and tackling it is the responsibility of us all.

Key recommendations

- Government should establish the criteria that must be met before any new criminal offence is created. It should conduct a review of minor offences to establish which could more appropriately be dealt with through civil procedures.
- The age of criminal responsibility should be raised to 12. The Government should establish a new system for assessing the degree and nature of intervention needed by child offenders, based on the Scottish Children's Panel and Reporter system. It would take referrals from police, schools and parents, assess the level of intervention needed by the child and have the authority to require that the necessary welfare or educational support services be provided, and the capacity to monitor outcomes. The Government should review the capacity of the relevant agencies to provide the services that are needed.
- Government should redress public fears and misconceptions about crime, offenders and the criminal justice system and, with the criminal justice agencies, ensure that the public have accurate, balanced and accessible information. Prison governors and probation chief officers should develop a public profile, speaking to the media about their work. There should be more consistency between the Government's media messages and these efforts to raise public awareness about the realities of crime and the criminal justice system.
- Public involvement should be at the heart of the government's criminal justice and public service reform agendas, with a strategy that identifies new opportunities for participation that match the contribution individuals feel able to make and draw on the strengths of lay involvement without prejudicing the professionalism and safeguards needed in a justice system.
- Lay magistrates should always sit with a professional judge when hearing contested cases. Requiring less training and able to sit less often, a far broader range of people would be able to take on this role.
- The public should be encouraged to contribute to local policing by opening up a range of new opportunities for participation. A Divisional Police Board should agree strategy and priorities and monitor performance. At beat level, police should empower local citizens to identify the causes of local crime and to develop their own solutions. Members of the public could play a more extensive inspection role in relation to recruitment, training, policy making and incident management.
- A Witness Charter should be drawn up setting out the level of information, guidance, support and appreciation to which witnesses are entitled if they come forward with information and give evidence at court. A single national number to report offences, and a witness.com site, should be among steps to make it more convenient for witnesses to contribute.

- Companies should mainstream crime prevention into the design of their products and services and government should develop a strategy to encourage and persuade them to do so, including appointing a champion to drive that agenda forward. Failure to consider a product's crime potential should be seen as a reputational risk and a matter on which companies should make disclosure. Consumer groups should help to make the public aware of which products are, and are not, secure.
- Government must deliver on its promise to cut the number of central targets and performance indicators to allow greater local autonomy for innovation and public involvement in setting priorities. In publishing data on performance, government should avoid a 'name and shame' culture which undermines public confidence in their local agencies.
- An independent Judicial Services Commission should be established with responsibility for appointments to the Judiciary. The Lord Chancellor's Department should become a Department of Justice, taking over responsibility for criminal law reform and for promoting standards of justice and good governance across Whitehall.
- Government and the Judiciary should work to reduce the prison population to the European Union median of 85 per 100,000 population, resulting in a prison population of under 49,000, using health care facilities for those who are mentally ill and community penalties for those for whom prison is not absolutely necessary.
- For those remaining in prison, prison regimes should be radically reorganised to provide services that reduce re-offending, involving staff with a broader range of skills and judged on their ability to provide prisoners with the education, training and treatment they need to lead lawful lives. Every prisoner should receive practical assistance in finding a job and a home, if need be, on release.



1. Misuse of the criminal law

One third of men in Britain have been convicted of a standard list offence by the age of 40 (Home Office 1995). There is no record of the greater number who have a conviction for one of the myriad of minor offences that also attract criminal penalties.¹ We know that a criminal conviction can damage an individual's job prospects, family relationships and social acceptance. Yet in all the column inches written about crime and criminal justice, little thought has yet been given to the implications of criminalising so great a proportion of our population.

The criminal justice system is creaking at the seams. The sheer volume of cases that the police and the courts have to deal with makes it difficult to address the procedural inefficiencies that are costing the taxpayer £80 million a year and weaken the capacity of the system to deliver justice and reduce serious crime (Audit Commission 2002).

The criminal law is a blunt weapon to address offending behaviour. There are now more than 8,000 separate criminal offences, 139 of which were created in the 1999-2000 parliamentary session alone. Each day in England and Wales, 5,600 men, women and children are sentenced in the criminal courts, of whom 375 go to prison (Attorney General's Office *et al* 2001). Our instinctive response to those who break society's rules is still to impose the full sanction of the criminal law, not to consider whether there might be more appropriate alternatives.

Crime blights all our lives: there are nine million property offences each year; over 2.5 million crimes of violence; 19 per cent of older women are too afraid to leave their homes after dark (Home Office 2001c); no less than 40,000 crimes are committed each day, corroding the trust and confidence that binds communities and the total economic and social cost of crime to the country is estimated to be almost £60 billion a year (Attorney General's Office *et al* 2001).

Addressing offending behaviour, and fear of crime, is thus necessarily a priority for government. But it does not follow that the criminal law should be its principal tool, nor even that the criminal justice agencies should be at the forefront of its strategy to deliver change.

Yet over 300,000 staff are currently employed running a criminal justice system which costs £13 billion a year. By 2004 an additional £2.7 billion will have made it possible to employ more police,

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prosecutors, and probation officers, to run 7,000 extra Crown Court sittings, to create 2,660 additional prison places for adults and 400 secure training centre places for young offenders (Attorney General's Office *et al* 2001). Now new measures are proposed in the White Paper *Justice for All*, to amend the way criminal trials are run, intended to secure more convictions (Attorney General's Office *et al* 2001). It can seem as though the whole thrust of current policy is to strengthen the criminal law and increase the capacity of the criminal justice agencies to implement it.

The criminal law is, in fact, only one of a range of responses to anti-social behaviour. Government and Parliament decide which kinds of behaviour are to be considered criminal, which should be subject to the non-criminal penalties of the civil law and which, in contrast, demonstrate a need for welfare support and assistance.

There are in practice vast discrepancies in the state's response to those who do offend: between the tax evader relieved to find his failure to pay £40,000 in tax is dealt with administratively and the £112 TV licence evader who receives a criminal conviction. This system has developed piece-meal, with little rationale or reference to broader social objectives. Yet the implications of these choices, for the individual's life chances, for social inclusion, and for the operation of the criminal justice system, are significant. The criminal law is regularly used as a means of securing compliance, for instance with licence requirements. Yet, as Lord Auld concluded in his recent review of the criminal courts 'it is wrong to stigmatise conduct as criminal simply as a means of enforcing a public duty when an average right-thinking person would not so regard it' (Auld 2001).²

Responding to offending behaviour without resort to the criminal law, as Andrew Rutherford argues in his paper for ippr, *Criminal Justice Choices*, has the benefit of avoiding the stigma that comes with a criminal conviction and the damaging consequences that criminal sanctions can have for the individual's life chances. On the other hand, reliance on the civil law or forms of welfare intervention may side-step the safeguards built into the criminal justice process, and may be an inadequate response to a serious offence. So the choice depends on our objectives, and ultimately on the values that under-pin them.

Successive governments have placed great faith in the impact that the criminal justice system can have on crime. *Criminal Justice: The Way*

Ahead stated 'an effective, well run criminal justice system can obviously make a significant difference to levels of offending and crime' and public expectations focus on the police and the courts as the agencies with prime responsibility for tackling the problem.

Yet the Government itself recognises that the causes of crime are complex and that criminal justice policy is only one lever needed to prevent it:

there can be little doubt that contributory factors include the collapse of employment opportunities especially for unskilled men, an explosion in hard drug abuse, a great rise in the availability of high value, consumer goods, and widespread changes in social attitudes.

Moreover, in relation to young offenders:

Powerful links have now been proved between high rates of criminality and a range of very specific risk factors including school exclusion; having criminal or delinquent parents, siblings or peers; low levels of parental supervision; high rates of experimentation with illegal drugs; and growing up in local authority care.

As a result:

Confronting these issues and creating a more responsible society is a task beyond the criminal justice system alone. It requires concerted action across government, in local communities, in schools and homes (Attorney General's Office *et al* 2001).

In 1986 The Conservative government's paper *Protecting the Public* similarly argued:

that there are no simple 'solutions' to the problem of crime as such, and that crime cannot be overcome and the needs of the victim cannot adequately be met through the operation of the criminal justice system alone. That system can only react after

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the crime has taken place. Wider social policies, for example in education, housing, employment and support for the family, must also play a part (Home Office 1986).

A subsequent Home Office review of the evidence on ways to address offending behaviour found that only a minority of the most effective strategies identified fell within the criminal justice system (Home Office 1998); a conclusion anticipated by the former head of the Home Office's criminal and research and statistics departments, David Faulkner:

Feasible changes in law enforcement and the criminal justice process, or in criminal law or the treatment of offenders, are by themselves unlikely to have more than a marginal effect on the level of crime (Faulkner 1996).

Andrew Rutherford concluded in *Criminal Justice Choices* that the impact of criminal justice policy on crime reduction is marginal relative to the importance of such policies as access to pre-school education, school attendance, supporting children and parents in difficulty and access to employment.

The Government is thus right to ascribe considerable importance within its crime reduction strategy to the contribution made by the departments tackling the underlying and contributory causes of crime, like the Department for Education and Skills' action to address school truancy and exclusion, and the strategy in the Office of the Deputy Prime Minister to regenerate deprived neighbourhoods (Attorney General's Office *et al* 2001).

Alternatives to the criminal law

So criminal justice is marginal to crime prevention strategies. It does not of course follow that, once a crime has been committed, the full force of the criminal law should not be used to address the offending behavior. Whatever the underlying causes of an individual's law breaking, they remain personally responsible for their own behaviour. Nevertheless, there are two significant grounds for considering transferring less serious offences to a civil law procedure, attracting effective penalties but not a criminal conviction.

First, enforcement of the civil law can be, and usually is, undertaken not by the police but by other state agencies such as Customs and Excise and local authorities. Shifting minor criminal offences into civil procedure would thus release police officers to deal with more serious matters. It could also relieve some of the pressure on magistrates' courts. It is true that some criminal offences, such as failing to purchase a TV license, are already pursued by an agency other than the police. But, as criminal offences, they are prosecuted through magistrates courts and shifting the huge volume of these offences into a civil procedure would be helpful in reducing the volume of cases, and thus delays.

The decriminalisation of parking offences by the 1991 Road Traffic Act provides a precedent for such a transfer from a criminal to civil procedure. Local authorities were given the option of establishing an administrative system to enforce parking regulations, as a result of which they secure income from the fines rather than that money being recouped by the courts. All London boroughs took up that option, as did the majority outside the capital.

In civil law, the individual's responsibility is decided by a single District Judge and on a lower test than in criminal trials (on the 'balance of probabilities' not 'beyond reasonable doubt') which is why it should not be used for serious offences. Nevertheless, if a civil penalty is comparable to that imposed for a criminal offence, then the requirements of fairness that are necessary for criminal trials will have to apply, including access to an impartial appeal process. An individual who denied responsibility would, thus, always have the right to apply to an independent tribunal or civil court to have their case reviewed. For the most part, however, the individual would learn of their penalty through the post and not have to attend a hearing.

Social exclusion

Further grounds for transferring minor offences to civil procedures are that the outcome of criminal penalties can conflict with wider social inclusion objectives. A populist, authoritarian approach would of course suggest that the very purpose of the criminal justice system is to identify, and then exclude, those who offend against society's rules. There are tones of this in the language that some politicians and the tabloid press

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use when addressing 'the war against crime'. This is the language of victory and defeat, of enemy and rejection.

Criminals, particularly repeat offenders, are portrayed as a class apart, personally responsible for choosing a life of crime. A clear line is drawn between 'them' and 'us': those who obey the law and belong to society, and those who offend, who have failed in their duty to society, and have thus lost their right to be a member.

Yet criminal justice policy does not entirely reflect that approach. The system is not designed narrowly simply to punish and exclude. Greater effort is made now than in the past to employ restorative justice approaches in sentencing. The aim is to address the causes of offending behaviour, and to rehabilitate ex-offenders back into society with the skills they need to lead productive and lawful lives. This approach recognises the reality that for 60 per cent of male offenders their offending career lasts less than one year.

Little thought has yet been given, however, to the need to avoid the damaging consequences of the criminal conviction itself and whether alternative responses to offending behaviour could be more effective in changing behaviour. On the contrary, successive governments have shown little hesitation in creating new criminal offences. Politicians, pressure groups and journalists talk:

as if the creation of a new criminal offence is the natural, or the only appropriate, response to a particular event or series of events giving rise to social concern (Ashworth 2000).

There is an inherent contradiction between the drive for social inclusion and the relentless extension of the scope of the criminal law. Employment is the most significant factor in the avoidance of social exclusion and, for former prisoners, in not re-offending. Having a criminal conviction, however, is a significant impediment to obtaining work. New measures extending employers' right of access to information on the criminal records of job applicants and employees, through the new Criminal Records Bureau, are expected to exacerbate this. When an employer sees that a job applicant has a criminal conviction, the individual may never get the opportunity to explain that it was for a minor incident of damage to property or drunken behaviour.

Consequences of a criminal conviction

Recent research for the Department of Work and Pensions (Metcalf *et al* 2001) on barriers to work for ex-offenders found employers sought information on criminal records when filling 63 per cent of vacancies. This figure is estimated to rise to 71–78 per cent after the new disclosure provisions are in force. While employers argued that the information was necessary to protect customers, clients, employees and the organisation's reputation, the researchers concluded that employers often acted on the information with little realistic assessment of the actual danger which the applicant's past behaviour would pose.

Any criminal record resulted in rejection of an applicant for 17 per cent of applicants and, for many kinds of offences, rejection was probable for around 50 per cent. The evidence suggested that criminal records are currently often successfully concealed, a practice that the new disclosure provisions are designed to prevent. It can therefore only be expected that the number of people refused employment on the grounds that they have a criminal conviction will increase.³

Having a criminal record does not only make it difficult to get a job. While the high street banks have no policy of excluding ex-offenders from opening bank accounts or taking out mortgages or loans – except in cases of fraud – ex-offenders do in practice frequently have difficulty accessing financial services because having a criminal record affects their credit rating. This can in turn affect ability to secure housing. Having a conviction or even a caution can also result in refusal of household insurance.

If an individual has committed a criminal offence, only a caution, reprimand, final warning (and usually a conditional discharge) do not count as a 'criminal conviction'. All fines – including those for the most minor offences – remain on the record for at least five years (under the Rehabilitation of Offenders Act 1974).

Criminal or civil?

Yet no guiding principles are followed by government before new criminal offences are created, although Ministers have indicated in a parliamentary answer that the criteria would be:

- whether the behaviour was sufficiently serious to warrant a criminal penalty

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- whether it could be dealt with using alternative measures (such as the civil law)
- the enforceability of the law, and
- the cost of enforcement.⁴

Significantly, there was no suggestion of taking into account the *social* cost of criminalising behaviour, despite the evident damage to an individual's life chances, and their social acceptability, of having a criminal conviction.

Given the evidence of the damaging consequences of a conviction, one might expect criminalisation to be a measure of last resort. The common perception is that the criminal law is the necessary means by which society expresses its disapproval of anti-social behaviour. In practice we know that it is not an effective communications tool. It is evident from the 50,000 people who are estimated to use ecstasy each weekend, the percentage of teenagers who have sex before they are 16, and the prevalence of domestic violence that the criminal law is not necessarily an effective way to change human behaviour.

What, then, should be the criteria for determining whether a measure ought to be criminal or administrative?

- *Seriousness*: the first criteria must be the seriousness of the offence. The penalty, should the person be found guilty, must be proportional. It may include a sentence of imprisonment. A criminal trial, with the procedural safeguards it entails, is thus appropriate.
- *Sanction of last resort*: where the force of the criminal law is needed as a final sanction, even if the offence is not serious, if the individual has consistently refused to comply with the law or statutory obligations (as in the case of the Banbury mother who failed to ensure that her two daughters stopped playing truant).
- *Impact on a victim*: the need for the victim to feel that the offence and the impact on their life has been taken seriously.
- *Social harm*: on the other hand, legislators need to consider whether designation as a criminal offence would be likely to cause greater

social harm – in loss of employment, education, home, social acceptance, family relationships – than the original behaviour.

- *Outcome*: whether the same outcome – deterrence, punishment and change in offending behaviour – can be achieved by using non-criminal law options. Is it necessary to prosecute a factory that allowed a glove to end up in a chicken pie, or would a hard-hitting financial civil penalty be as effective?
- *Enforceability*: whether enforcement of the criminal law by the police is impractical and where enforcement of the civil law by agencies using civil powers – fines, attachment of earnings, confiscation of assets – may be more feasible and effective in practice.
- *Public confidence in the administration of justice*: whether resort to the criminal law brings the law into disrepute because it is so trivial that it is widely ignored by the police; or alternatively whether failure to criminalise that conduct would undermine confidence that the behaviour would be dealt with effectively.
- *Human rights*: whether the penalty is proportional to the offence. For less serious offences the impact of a criminal conviction is disproportionate. Moreover, if most of those who commit that offence only receive a small fine or conditional discharge, is it proportional to add what, for first offenders at least, would be the greater penalty of a conviction?

Recommendation

The Government should establish the criteria which must be considered before any new criminal offence is created. The criteria should take into account the seriousness of the offence and impact on the victim but also the social and individual cost of the individual having a criminal conviction and the implications for the workload of the police and the courts.

Which offences?

Of the existing 8,000 offences, how many could in practice be dealt with by alternative means? This could include civil penalties with reference to a civil court, with resort to a criminal court only if the offender failed to comply with the civil penalty imposed. Alternatively

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the prosecutor could decide whether a particular offence, for example criminal damage, should be pursued as a civil or criminal action depending on the seriousness of the individual incident.

Offences dealt with through civil procedure would not result in a criminal conviction, hence an individual's job prospects would not be damaged. The civil process need not make the individual an 'offender' – just as parking offences do not now – but a 'defaulter'.

To start with, there are a whole series of minor offences for which there are few prosecutions and for which a criminal conviction would seem unnecessary: starting with the 126 people who received a conviction for playing in the street in 1999, 2,000 people who were convicted of begging and 3,500 for simply being drunk. More significantly, 160,000 people were prosecuted last year for failing to buy a TV licence. Lord Justice Auld, who considered this issue in his review of the criminal courts, said 'it is the perception of many that this is an inappropriate use for criminal proceedings and a great waste of magistrates' courts' time (Auld 2001).

Looking at the workload of the police, in 2000 the police dealt with over 500,000 vehicle insurance offences and 400,000 vehicle licence offences of which only a tiny proportion were contested at court. They had to find time to deal with a further 50,000 lighting offences (again, only two trials), 6,000 noise offences relating to vehicles and 19,000 relating to loading (Home Office 2000a). It seems hard to justify police and court time spent on these offences, or the criminal conviction that is the regular outcome, when the individual is almost never – in any of these cases – committed for trial.

In practice, pressure on police resources encourages them to disregard minor offences because of the disproportionate time that would be required to process them, as in the common practice of ignoring criminal damage if the damage caused can be deemed (often with some stretching of the imagination) to be worth less than £20. It would be far better to have an alternative procedure to sanction such misdemeanours, recognising that minor anti-social behaviour can develop into more significant offences if left unchecked.

Some motoring offences should, on the criteria we have set out, undoubtedly remain criminal offences because of their serious impact – potential or actual – on a victim: causing death or serious injury (542 cases in 2000), dangerous driving and driving under the

influence of alcohol or drugs (96,000), for instance. However, it should be possible to decriminalise those offences related to licences, insurance and record keeping, MOTs, minor speeding offences, obstruction, loading and seat belts. To do so would remove many hundreds of thousands of offences from the police and criminal courts administration each year.

Of the 5,300 defendants sentenced each day in a magistrates court: 3,960 are fined. If some of their offences had been decriminalised and the resulting civil penalty was a fine, the outcome would thus be same for the vast majority of offenders except that no criminal conviction would be attached (Attorney General's Office *et al* 2001).

Those who operate television sets without a licence, however, might find that the confiscation of their sets is a greater reason for compliance than conviction resulting in a fine. Moreover, there may be additional ways to prevent this offence. Gun retailers are required to check that the purchaser has a licence before selling the gun. Might TV retailers be required to do likewise?

Administrative measures must themselves be used in a proportionate way. As Rutherford argues, if that simple principle is neglected, the law will appear to be too draconian and the measure will not be accepted by the public. An administrative measure might be preferable to prosecution, but the measure must also be just. Compliance with the Human Rights Act ensures that. Civil sanctions could not be imposed without the individual having the right to be heard, should they choose to contest the case, and a right of appeal.

Recommendation

The Government should conduct a review of minor offences to establish which could more appropriately be dealt with through civil procedures, administered by public authorities, with an appeal to a civil court, in order to avoid the damaging individual and social consequences of a criminal conviction and to remove from the criminal courts large numbers of unnecessary cases.

The Government should explore alternative civil penalties, such as the confiscation of television sets for those who do not purchase a licence, and innovative means of crime prevention, such as requiring TV retailers to see proof of the licence, to minimise the need to rely on law enforcement. New approaches could be introduced incrementally, and evaluated, to monitor their effectiveness.

Children

The last decade has also seen an increase in the reach of the criminal law to cover a greater number of offences committed by children, bringing more young people within the embrace of the criminal justice system.

While the introduction of Parenting Orders affirmed that parents retain some responsibility for the behaviour of their child up to the age of 18, the current government simultaneously changed the law on *doli incapax* so that a ten year old is now assumed to be as capable of taking full responsibility for their behaviour as an adult. Previously, the law had required the prosecution to establish that a child under 14 fully understood that their behaviour was wrong.

Many support that development, arguing that children of ten know the difference between right and wrong, and that action is needed to address the violent and dishonest behaviour perpetrated by children of that age. They argue that the public would be outraged if serious offences were seen to go unpunished.

Others argue that there is no other legal or social arena in which we give children complete responsibility for their behaviour as young as ten. They may know the difference between right and wrong, but cannot yet understand the full consequences of their behaviour, not least the impact that it has on the lives of their victims. The median age of criminal responsibility in Europe is 14 and, with Switzerland, Cyprus and Ireland all raising their age threshold, England and Wales will soon be firmly placed at the bottom of the age range.

The European Court of Human Rights requires that a child must be old enough to participate in their own defence. For younger defendants, the court process can be too confusing and intimidating for the outcome to be considered just. The press exposure of a criminal trial can add the further punishment of public abuse and threat of retribution.

Drawing on Rob Allen's earlier report for ippr, *Children and Crime: Taking responsibility*, we suggest that children cannot be deemed fully responsible for their behaviour. They have not attained the maturity to understand the full consequences of their actions nor yet the insight into their behaviour that would enable them to overcome the external influences on it. The criminal law is therefore not an appropriate response. Nor, given adolescent reconviction rates, can it be said to be effective. The Scottish Parliament is currently considering whether to

raise the age of criminal responsibility for Scottish children to 12. Westminster should do likewise.

We know that the children who are most likely to become persistent offenders are those that start offending early. We also know that these children are more likely to have parents with criminal or anti-social backgrounds and to have childhood experiences of victimisation and poor educational attainment and attendance. There is a very much larger group of children who will not become persistent offenders but who have a short offending period of anti-social and criminal behaviour.

Where a child's anti-social behaviour falls short of a criminal offence, or police consider welfare support more appropriate than criminal penalties, they can be referred to children's social services. There is no clarity, however, over whether those who misbehave are offenders or victims (because they are usually both) and thus whether they should be punished or supported.

In practice, moreover, the shortage of welfare staff resources – in social services and in education support services – means that the threshold for intervention is very high and support regularly comes too little, too late. There is a need both to rationalise the services available for children in need and at risk, and to assess their capacity to provide the kind and level of intervention that these children require. There is also a need to ensure capacity to provide more guidance to parents. The extent to which parents have welcomed the guidance provided under Parenting Orders, and their success in reducing re-offending by their children, should encourage an extension of this mode of intervention.

In many cases, young offenders are also victims and in Scotland the child's needs as well as his or her deeds are considered by the same tribunal, the Children's Panel. Because its main ethos is a welfare one, it is able to address the wider needs of the child and his or her family, not just their offending behaviour. Children in difficulty, including young offenders, are referred in the first instance by the police, social services, teachers and others to a Reporter, an independent official, who determines the level and nature of intervention needed to secure the best overall interests of the child.

This Scottish system has two distinct advantages which should be replicated in England and Wales: it provides a multi-disciplinary assessment of the child which looks beyond their offending behaviour to assess the nature of intervention needed; and, crucially, has the

authority to require that the necessary services are provided. If a system of this kind is introduced in England and Wales, it is essential to ensure that that vital feature is included. Modes of intervention should include restorative approaches which bring home to youngsters the consequences of their behaviour. For the most difficult children the options of secure accommodation and intensive supervision must necessarily also be available.

This proposal has resource implications. Social services and, for instance, the educational psychology services, currently do not have the resources to provide the assistance many children need. As a result, the reasons behind their offending behaviour are not always addressed. If we are serious about tackling children's offending behaviour we must allocate resources to welfare intervention before the pattern of offending behaviour has become so ingrained that neither support nor punishment are an effective response. The Government not only needs to review the system for assessing children at risk, but the capacity of welfare and educational services to provide those services.

Recommendation

The age of criminal responsibility should be raised to 12.

The Government should establish a new system for assessing the degree and nature of intervention needed by child offenders, based on the Scottish Children's Panel and Reporter system. It would take referrals from police, schools and parents, assess the level of intervention needed by the child and have the authority to require that the necessary welfare or educational support services be provided, and the capacity to monitor outcomes. The Government should review the capacity of the relevant agencies to provide the services that are needed.

2. Addressing public concern

These are radical proposals in today's climate. While the Government would welcome the resulting reduction in pressure on the police and the courts, it would fear public and media criticism that it was being soft on crime. The pressure it has faced to be seen to be tough on crime has been immense and the recent rise in crime, after years of decline, can only enhance that pressure.

Nevertheless, the shift in Conservative policy on crime, apparent in the Shadow Home Secretary's speech in January 2002, opens a political space for debate on options to move forward, as the PM recently acknowledged. Oliver Letwin, opening what he called 'a new chapter in the Conservative approach to fighting crime', shifted the emphasis from policing and punishment to rebuilding a 'neighbourly society' and supporting families as the context in which crime could be addressed:

The choice before our young people is between crime and participation in the neighbourly society. It is this participation that keeps our young people off the conveyor belt to criminality or gets them off if their earlier choices were destructive ones... At each stage the individual has the option of stepping off the conveyor belt. But it cannot be expected that this choice will be made unless society finds ways of providing for the individual not only easily accessible exit points off the conveyor belt to crime, but also a hand helping him to take those exits.⁵

The Government cannot afford to ignore public opinion. 28 per cent of the population cited crime as the most important issue facing the country prior to the election in 1997 and 29 per cent said the same in 2001. Becoming 'the party of law and order' was key to Labour's election victory in 1997. Prior to the 1992 election 40 per cent thought the Conservatives were the best party on law and order while only 20 per cent thought that of Labour. This had reversed by the 1997 election when only 18 per cent of the country thought the Conservatives the best party for law and order, and 37 per cent thought that of Labour (MORI poll archive, www.mori.com).

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Misinformed

Crime has been falling but the public believed it was rising. One quarter of those questioned for the 2001 British Crime Survey thought crime had risen 'a lot' over the past two years and a further third believed it had risen a little (Kershaw *et al* 2001).

Fears about victimisation are similarly exaggerated: 16 per cent are 'very worried' that they will be the victim of burglary, 15 per cent fear mugging and 17 per cent are concerned about physical attack (Home Office 2000c). The risks of victimisation are far lower than the proportion of people who believe themselves at risk.

Nevertheless, the public's fear of victimisation may influence their perception that the criminal justice system is too lenient on offenders: 70 per cent think criminals deserve tougher sentences. But we know that the public significantly underestimates the severity of sentences handed down by the courts, believing judges and magistrates too lenient (Home Office 2002b). When questioned on specific cases, they favour sentences broadly in line with current practice.

Research has shown that when people respond to such polls, they respond punitively in part because they have the worst offenders in mind and because they recall atypical sentences reported in the media. The British Crime Survey found those least well informed about the juvenile system were the most sceptical (Home Office 2000b).

Lack of confidence

This sense that the criminal justice system is 'too lenient' nevertheless is one factor that contributes to a lack of public confidence in the criminal justice agencies. While 61 per cent think the police do a 'good job', only 29 per cent were prepared to say that of magistrates, 26 per cent of the probation service and 32 per cent in relation to prisons. Different sections of the community have differing levels of confidence. Men tend to be less confident in the criminal justice system than women, and the middle-aged less confident than the young and old. People from ethnic minority communities are particularly concerned as regards the fair treatment of victims and witnesses (Home Office 2000b).

Public expectations of the criminal justice agencies, coupled with low confidence, clearly in part reflects the fact that the public are poorly informed. This in turn is because many have little contact with the agencies. It may be no coincidence that confidence is highest historically in the agency with which the public have greatest contact, the police.

In contrast, the vast majority of the public have little direct knowledge of the Crown Prosecution Service, the courts, probation service or prisons and their perceptions are thus necessarily formed from what they read and see in the media, from fiction, or hear from others. Inevitably, the media focuses on exceptional cases and statistics, often repeating the details of a shocking case at each stage in its passage through the criminal justice system.

Moreover, we are given far greater information about the consequences of crime for the victims than about any of the factors which contributed to the offending behaviour. Our knowledge and understanding of the immense suffering of the family of James Bulger is considerably greater than our knowledge or understanding of the reasons why the two boys killed him.

The public reaction to the death of Sarah Payne, and to the release of the two young men responsible for the death of James Bulger, demonstrated a level of disdain for the justice system among a section of the population that even the statistics could not convey. Political leaders have at times bowed to that pressure, as Home Secretary Michael Howard did to the *Sun's* campaign for a long sentence for Thompson and Venables.

Successive governments have often appeared to endorse populist sentiments and proposed measures to appease them, while refraining from endorsing the most extreme demands, like capital punishment or 'Sarah's law' (to make public the whereabouts of paedophile offenders). Nevertheless, using the rhetoric of punishment ('Three strikes and you're out' mandatory sentences), cannot help to win public support for the more constructive work that is actually being undertaken to tackle the causes of offending behaviour. The Government needs to take steps to win public support for its 'what works' programme. It cannot in the long run succeed with liberalism by stealth.

Where the public do feel strongly about crime, their lack of confidence in the criminal justice system can, at the extreme, result in people taking the law into their own hands, as we saw in the vigilante action following the murder of Sarah Payne. For those close to a

victim, there may understandably be little scope for rational discussion about the causes of crime or 'what works' options for offenders. Research suggests, however, that when provided with more information about offenders and the circumstances under which they offend, the public is more tolerant and less punitive. People tend to respond in a more moderate and thoughtful way to events and issues about which they are well informed or personally involved than to those to which they are more abstractly connected (Hough 1996)

So, if public pessimism about current sentencing practice, for instance, decreases with increasing knowledge, a rational approach to raising public confidence would not be to engage in a spiral of 'tougher' policy changes, but to address public misconceptions.

Lack of confidence also contributes to people's reluctance to report offences to the police and to provide information that could lead to the detection and conviction of the offender. Among businesses, we know that 48 per cent of companies that are the victim of a crime do not report the offence to the police because of a lack of confidence in the police response (British Chambers of Commerce 2001). For the public, we know that four times as many crimes occur than are reported to the police and that individuals are extraordinarily reluctant to report what they know.

Evidence from ippr's focus groups and ICM poll identified that 45 per cent would not report vandalism at a bus stop, 42 per cent would not report shoplifting and 41 per cent would not report screaming and shouting from a neighbour's house. Only 14 per cent of those who witness an assault do indeed report it (Edwards 2001).

In *Reluctant Witness*, ippr showed that the reasons why people are reluctant to come forward are complex. Fear of retribution and lack of confidence in the criminal justice system both contribute. But there is also a clear sense that some crimes matter less than others, and that crime is not our responsibility and can be left to the police, or to the security staff in business premises. A sense of public responsibility to others leads some to contribute despite those reservations. For many, their sense of responsibility is outweighed by their fear, disinterest or distrust.

Not our responsibility

So people fear crime and lack confidence in the ability of the criminal justice agencies to address it. But delve deeper and we find that public opposition to crime is equivocal, and that the majority are currently reluctant to take action to address it.

In ippr's research for *Reluctant Witness* we found significant disparities in public attitudes to different kinds of offence, affecting their willingness to cooperate with the police. While they fear certain kinds of crime, particularly violence by a stranger, they are tolerant of others such as shop-lifting (seen as the shop's responsibility) and benefit fraud (seen by some, but not others, as unimportant or justified).

Some are more tolerant if those witnessed fighting are 'evenly matched' than if there is a victim who appears to be vulnerable. And they are more tolerant of domestic violence than of an assault where the assailant and victim do not appear related, feeling particularly on this occasion that they should not interfere.

Thus we were told by a group of over 50s:

I wouldn't bother about benefit fraud...let's get other stuff cleared up before we bother about something like that

I'd ignore shoplifting because the thing is if they're doing it they must really need to do it...then again, how do you separate who does need to do it and who don't?

And by young black men in London:

If it's 15 year olds on 15 year olds, to me that's a gang thing. When I was that age, that crap happened to me.

With men and all that, you tend to think that they can take care of themselves.

And by a middle aged person in Reading:

If there was no obvious victim who was being put upon...if it was like two people who have had too much to drink and

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they are having a go at each other and they both want it then
I wouldn't get involved.

Our focus groups found still greater reluctance to report a domestic incident. Respondents suggested they would wait to see whether it escalated into serious violence before taking action.

It depends how far it gets....if it was violent

It would depend if there were children involved...it's more than two adults having a go at each other.

Each of which suggests that there is a societal tolerance of a level violence, within the home and in public, which is undermining police efforts to address it.

The Government thus needs to address public attitudes for four reasons:

- Fear of crime reduces quality of life and corrodes community cohesion because of the distrust that it fosters and limitations it imposes on people's willingness to go out
- Lack of confidence in the criminal justice agencies undermines public willingness to provide the police and the courts with information, thus limiting the ability of the agencies to tackle crime and deliver justice; and can lead to the public taking the law into their own hands
- Leaving aside issues about confidence in whether the police will take a crime seriously, the public are equivocal whether some crimes matter at all – including some crimes of violence – and as a result are unwilling to report them to the police
- Public fears, lack of confidence and pressure on government to be 'tough on crime' limit government's willingness to explore alternatives to the criminal law and custodial sentences.

The public could become better informed in two ways: through the provision of information and education, which we address here, and through direct involvement and participation in the work of the criminal justice agencies, the subject of the next chapter.

Public right to know

The agencies of the criminal justice system now have a joint performance target to deliver an improvement, by 2004, in the level of public confidence in the criminal justice system, including that of ethnic minority communities. The criminal justice White Paper *Justice for All* reasserts the commitment to raising confidence – such a focus is welcome but there is much work to be done (Attorney General's Office *et al* 2002).

The Government should explore new ways of ensuring that the public have accurate, balanced and accessible information about crime, offenders and the work of the criminal justice agencies. Efforts are being made, for example through the Home Office's recent report on the impact of information on public attitudes and the materials developed from that (Home Office 2002b). But there remains significant room for improvement. The government needs to identify those issues on which the public are least informed, and misinformed, and in which their lack of knowledge is of most concern (as in sentencing) and devise an information strategy to address it. Information needs to be presented in different formats for different audiences, including provision for children and young people through the education system.

Each of the agencies – from the police through to prisons – should have its own strategy to increase understanding of its role, developed as one part of the broader strategy for government and the agencies as a whole. There is a particular need to increase understanding of the agencies which currently have little public profile nor leaders who speak on their behalf. Prison governors and probation chief officers for instance should develop a public profile, speaking to public audiences and the media about their work. We welcome the recommendation of the Halliday report which makes the judiciary more accountable for explaining what sentences mean in reality and what the effects of those sentences are expected to be (Home Office 2001b).

Some important non-governmental initiatives have also been established in recent years to attempt to raise the profile of criminal justice agencies with the public. Work carried out by Payback and the Esmee Fairbairn Foundation's *Rethinking Crime and Punishment* initiative is also making a significant contribution to thinking in this area.

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Recommendations

The Government should explore new ways of ensuring that the public have accurate, balanced and accessible information about crime, offenders and the work of the criminal justice agencies. Each of the agencies, from the police through to prisons, should have its own communications strategy to increase public understanding of its role. Prison governors and probation chief officers should raise their public profile, speaking to the media about their role and the performance and outcomes of their agency. The judiciary should ensure that implementation of the Halliday sentencing reforms leads to greater clarity on what a sentence means and what its effects are intended to be.

3. Shared responsibility

Despite their concern to see crime reduced, the public are more likely to stand back and leave responsibility to the police than to take personal responsibility to provide them with assistance. Yet government and the criminal justice agencies alone cannot address crime effectively without a significant, proactive contribution from the public and, indeed, from the corporate sector.

Public involvement is one key way in which public expectations will become more realistic, confidence enhanced and attitudes to offenders less punitive. Most of the public's contribution to crime prevention is of course unconnected to the criminal justice agencies, whether as parents, teachers, social workers, youth leaders, or through the work of other voluntary and public agencies. Our focus is on the direct contribution that the public make to crime prevention, detection and the rehabilitation of offenders.

While the Government recognises a role for partners in civil society, it has singularly failed to recognise the enormous potential of the contribution the public could make; nor has it yet a strategy to develop that potential. A 'customer' focus has not yet been a priority, although there are new initiatives, like lay participation in the National Policing Forum and in the boards overseeing the Public Protection Panels monitoring offenders in the community; and the commitment to extend restorative justice schemes in the White Paper *Justice for All* (Attorney General's Office *et al* 2002). Nevertheless, criminal justice very much remains a service delivered by professionals to the public, inviting scant public involvement.

The Government supports the existing contributions made, for instance, by the lay magistracy, lay members of the Parole Board and lay visitors to police stations. It has provided support to the Neighbourhood Watch movement (now some 160,000 separate schemes involving over six million households) and to Victim Support and its Witness Service. There is considerable scope to extend this contribution.

Why public involvement matters

In *Public Matters*, Adam Crawford set out the reasons why such public involvement is vital, not only as witnesses but as volunteers, community

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representatives and lay participants in the criminal justice process itself.

Each plays a different role but together their involvement has a significant impact:

- on performance: improving the quality of decision making, transparency and accountability
- on public confidence: by creating more realistic expectations of the criminal justice agencies and greater understanding of the challenges they face
- on crime prevention and detection: by encouraging a stronger sense of ownership, civic responsibility and strengthening of communal bonds.

The impact of public involvement on performance is a key theme in the second phase of the public service reform agenda which identifies 'customer focus' as key to effective delivery. Policy makers and service deliverers are expected to ensure that they meet the needs of all those affected and take into account the impact that changes in policy and service delivery will have, an objective they should achieve in part by involving the public in decision making. That said, the customer focus agenda puts greater emphasis on consulting the public than on involving them in the development or implementation of policy and services.

The recent report from ippr, *New Democratic Processes* (Clarke 2002) argues that public dissatisfaction with politics and with public services reflects their exclusion from the decisions that affect them. It argues for a commitment across all public organisations to experiment with 'deepening the democratic relationship', expanding public involvement initiatives in order to achieve two objectives: to ensure that its priorities more closely reflect those of the public; and to rebuild trust in the democratic system and the services it delivers.

Public involvement in decision making is not a new idea. The emphasis on the role of the active citizen as part of a community rather than as a self-interested individual, can be traced back to Aristotle. In relation to the delivery of justice it is easy to see how that involvement was less complex in an era when the investigation of crime was neither reliant on the technical expertise of forensic science, nor too concerned about the protection provided by an independent judiciary.

Today, delivery of criminal justice is largely in the hands of professionals and divorced from the communities it serves and that are profoundly affected by it. The focus in decision making is on the delivery of more efficient and effective services, not on reflecting the values and priorities of the public. By excluding the public, services can fail to develop realistic public expectations of the service or consensus on the objectives towards which it should work.

The challenge is to find modes of re-entry for the public that draw on the strengths of lay involvement without prejudicing the safeguards in a justice system. Modern public involvement techniques have demonstrated that the public can become involved in technical and contentious issues of policy.

Challenges of public involvement

Concepts of shared responsibility and partnership are not unproblematic to implement in practice. For instance there may be tensions between central control of police priorities and local flexibility to respond to the public's concerns. There may also be disagreement and a fine balance to be sought in determining the appropriate contribution made by professional and lay participants.

In the varied examples of involvement in the criminal justice system that we studied – the lay magistracy, involvement in policing, and independent witnesses - we found barriers to public involvement. We concluded that there is a need to change the conditions in which citizens are being asked to contribute if we are to encourage participation and maximise the value of the contribution they can make.

Within our research, we also found it important to clarify the differing roles of lay people and professionals to identify the different skills and qualities each brings, the differing responsibilities each should have and the appropriate limits of public involvement.

Adam Crawford makes a clear distinction between a reliance on *public opinion*, on the one hand, and on a more considered *public judgement* formed through discussion of the facts or direct knowledge of the system. Whereas public opinion is impromptu, not informed by weighing the facts and arguments of others nor followed by taking responsibility for the argued-for position, public judgement incorporates all of those characteristics.

There is a strong argument for greater public involvement in criminal justice as a cultural and political impediment to more punitive responses. Failing to involve the public exacerbates crises of confidence and legitimacy deficits. In contrast, informed public debate and dialogue as a central aspect of criminal justice allows for regulated ways in which people can deliberate upon and search for ways of resolving conflicting views.

A benefit of increasing public understanding and ownership of these issues might, for example, be greater acceptance of the need to place resettlement centres for prisoners or young offenders in local communities, combatting the current sense of 'not in my backyard'.

While arguing that the public should play a greater role in delivering criminal justice, we are not suggesting that members of the public should be given responsibility for enforcing the law, determining sentences (indeed we suggest lay magistrates alone should not do this) or curtail the authority of prison governors. In a representative democracy, government and parliament have a responsibility to ensure that the basic rights of individuals are protected, regardless of the concern that a particular crime may evoke, and to ensure that the enforcement of the law and judicial decisions are free from bias and corruption.

Such safeguards and the legitimacy of the system depend on achieving the right mix of independence and accountability, legal, democratic and managerial. We are suggesting that the imbalance against democratic accountability needs be addressed, not that the public should exercise direct control over the criminal justice process.

Lay magistrates

Andrew Sander's ippr paper *Community Justice* argues that the magistracy is at a turning point. No less than 95 per cent of criminal cases are now heard in magistrates courts, not by a judge and jury. The vast majority of cases result in conviction, 90 per cent of those following a guilty plea. It is the Government's view that magistrates should be able to deal with even more cases and send offenders to prison for up to 12 months (Attorney General's Office *et al* 2002). But public confidence in the lower courts is alarmingly low – only 29 per cent think that they do a good job – and the majority think that magistrates are 'out of touch'.

The pressure to make the courts more efficient has led to a rapid increase in the number of professional magistrates – District Judges – who sit alone. In most large cities, around one third of cases are now heard by stipendiaries, a development that has taken place largely without public debate. For the defendant, it is a matter of chance whether the case is heard by a panel of lay magistrates, or by a legally trained professional. Yet the skills and experience which they bring to the job are very different. If lay magistrates do make a distinct and valuable contribution, should the barriers to their doing so effectively be overcome rather than they be replaced by professionals?

England and Wales currently has a two-tier criminal court system, with magistrates' courts forming the lower, and the Crown Court the upper, tier. The lay magistracy is more representative of the wider community than in the past, but remains disproportionately middle-class and middle-aged and disproportionately white in many areas. England and Wales is unusual in staffing the lower courts predominantly with lightly trained lay people. In the Crown Court, trial is by judge and jury. The public consistently has more confidence in jury trial than any other system.

Lay versus professional

Sanders compares the skills and experience which lay and professional magistrates bring to the bench. Lay magistrates bring an important element of citizen involvement in judicial decision-making, of trial by one's peers. They bring local knowledge, a broad range of social experience, a freshness in hearing evidence and pleas of mitigation and they are paid only their expenses.

But their strengths are also their weaknesses. They lack legal expertise; their local knowledge and sympathies may make them less impartial and can lead to significant variations in patterns of decision making around the country. Their freshness can be naivety; their lack of professional confidence make them more easily misled by offenders and defence lawyers.

Professional stipendiaries, on the other hand, bring legal expertise. They can deal with cases more quickly, do not need the back up of a legally trained clerk and they have the confidence to deal swiftly with time wasters. But they may become case hardened, are more likely to send offenders to prison and need to be paid a good salary.

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Public ignorance

In a MORI poll carried out for ippr, it became clear that the role of the magistracy is not visible to the public and that they have inconsistent views on the skills they think magistrates should have: 49 per cent found it unacceptable that lay magistrates do not undergo full legal training. However, they also wanted a magistracy that better reflects the full profile of the community.

Obviously a lay magistrate has got more idea about the community than a professional magistrate.

If I ended up in a magistrates court for a speeding offence or something I'd prefer to know that someone professional was dealing with the case.

If the people are not trained as lawyers or in the legal system, I don't think that I would have that respect for them and confidence in them.

Not surprisingly, the MORI poll found that a majority would prefer to see a panel of two lay and one professional magistrate to a panel of three lay magistrates or a single stipendiary judge, a view also reflected in the focus groups.

They should have something like two lay magistrates and one professional.

There should still be someone professional with them who they're actually talking to and maybe he's the one at the end of the day that's given the decision.

Community Justice argues that there are considerable advantages in decisions made by a panel, rather than an individual professional sitting alone. Panels provide a constant reminder that in every situation there is more than one viewpoint. Mixed panels, comprising both lay and professional members, bring a broad range of social, legal and administrative skills to decision-making. The more complex a case, the

greater the need for the variety of skills that a mixed panel brings.

The roles of lay and professional magistrates are complementary. Where the case is not complex and requires legal rather than social skills, a professional judge can sit alone. Where social decision making skills are needed, but legal skills will also be required, a mixed panel of lay and professional should preside.

With the exception of the serious cases that must continue to go before a judge and jury, lay magistrates and professional judges should sit together to hear all contested cases (where the defendant pleads not guilty). Judges alone could hear uncontested cases or bail hearings. In contrast to the proposals from Sir Robin Auld (Auld 2001), we propose that lay magistrates should never sit alone. Nor do we envisage any cut back in jury trials for the most serious cases.

Lay magistrates would thus no longer have to hear cases without a professional lawyer on the panel. They would need some – but less – legal expertise, less training and less experience in the courts in order to do the job well. Each magistrate would need to sit in court less often. They would be more genuinely ‘lay’, more outsider than insider. A far wider cross section of the public could therefore make this contribution. Service in the magistracy could thus become a duty which rotated more frequently. There would be an expectation that many people would, at some time in their lives, make that contribution, as there is with jury service. It could be for a limited period, perhaps two or four years, as with other public appointments. Magistrates could sit for perhaps half or a whole day once a month.

The system would be more truly participative. The quality of decision making should improve. The public, for whom a mixed panel of lay and professional is the preferred option after a judge and jury, would have greater confidence in the system than in either of the two current options of an entirely lay panel, or a professional sitting alone. Increased community involvement in the administration of justice would increase public knowledge and understanding of the system, and the legitimacy of the decisions taken.

Recommendation

Lay magistrates should always sit as a panel with a district judge when hearing contested cases. This would mean that they would need less training and could be required to sit less often, enabling a far broader range of people to become lay magistrates for a period during their lives and would increase public confidence in the courts.

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Involvement in policing

In his paper for ippr, *Public Participation in Policing*, Peter Neyroud argues from his own experience as a senior police officer that policing cannot succeed without significant input from the public at a number of levels. Yet, as the police have become more professional, increasingly managerial and centrally controlled in recent years, the public have been excluded and public confidence declined.

Neyroud argues that participation is essential to develop public confidence, to enhance the legitimacy of the police and inclusiveness of policing (by reaching all groups in society) and to increase effectiveness. It has, he suggests, the potential to steer change inside the organisation and to provide a way to balance the needs of diverse communities.

His argument finds support in the HMI Inspectorate report *Open all Hours* (2001):

the virtuous circle whereby public confidence in the police and active support for them leads to greater success in reducing crime and disorder locally, which in turn further reassures people and encourages them to raise matters with the police.

Policing, Neyroud argues, needs to be both independent from partisan politics and perceived as encompassing the needs of diverse groups. It is key that the voices of ethnic minorities, young people and the socially excluded are heard if public confidence is to be maintained and raised. Participation in policing, by enhancing transparency and accountability, is a key part of 'ethical policing'.

There is, however, an unresolved tension between the mission that the Government expects the police to pursue and public priorities. With 130 key performance indicators set by central government, the ability of the public to influence the local policing agenda has been eroded. In practice the myriad of national indicators:

have crowded out local objectives to the extent that local consultation forums are often dominated by police managers explaining what they cannot do because of the constraints of the national agenda.

Yet the public need to see outcomes from their involvement, or they will not take the trouble to contribute again.

Local priorities

Drawing on the Patten report on policing in Northern Ireland, Neyroud argues that the detail of local policing should be determined by a Divisional Police Board, in partnership with the local commander. Reporting to the Police Authority, it would determine strategy, discuss and agree the local policing plan, ensure broader public consultation and monitor performance. The Board, comprised of elected and appointed members, would not be a passive receiver of information, but pro-active in holding local commanders to account. The chief constable would retain operational responsibility.

The public should also be involved at beat level, meeting with beat officers to discuss local problems and how they can be part of the solution. Neyroud thus sees the police as playing an enabling role, empowering local residents to find solutions to their own crime problems as well as assisting the police to do so.

As David Blunkett recently argued in relation to public services as a whole:

we must continue the transition towards an enabling system, rather than simply providing on people's behalf or leaving them to fend for themselves' (Blunkett 2001).

As Neyroud puts it:

The challenge is to create informed and active networks and give them the tools to develop safer local parishes or wards themselves with the help of the police.

The public must take ownership of their own crime and disorder problems, with the police increasingly giving them the tools to do the job, including some training alongside beat officers. For beat officers to play this role, however, they need greater autonomy and flexibility in determining their day by day priorities.

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Neyroud is, however, critical of the myriad of 'complementary' policing schemes that fail to be complementary because they operate in isolation from local police. Their role could be valuable, so long as carefully distinct from that of the police which, as an accountable public body, should retain the sole right to detain.

Public oversight

Some members of the public have played an oversight role, for instance as lay visitors to police stations, paying unannounced visits to check that suspects are being treated appropriately. Neyroud suggests that this role could be significantly extended to involve the public in oversight of recruitment, training, policy making and incident management. The Divisional Police Board should receive and commission reports from the advisors or community inspectorate.

Panels should include critics of police practice, who pose difficult questions and challenge assessments. The police, he argues, must shift from a 'decide and defend' approach to one of dialogue. But once the talking is over, the police alone must make operational decisions and be held accountable for them.

Recommendation

The structure of public involvement in decisions on police plans and priorities should be reformed to establish a Divisional Police Board which would discuss and agree the local policing plan and monitor performance.

Efforts should be made at Beat level to have regular meetings between community members and Beat officers to discuss local problems and empower the public to develop their own solutions, for instance the provision of local leisure facilities for young people.

Members of the public could play a more extensive 'inspection' role in relation to recruitment, training, policy-making and incident management complimenting their existing role as lay visitors to police stations.

Witnesses

In *Reluctant Witness*, Spencer and Stern argue that crime is rarely entirely hidden from the public eye. Someone frequently sees or knows that the offence is taking place. Their willingness to report the offence

and later to give evidence in court can be pivotal in the detection and successful prosecution of the offender. Equally, the willingness of a witness to give evidence for the defence can be the determining factor in securing justice for the innocent.

But witnesses, as we have seen, are reluctant to come forward: only 34 per cent of those who witness an act of vandalism and 61 per cent of those who have evidence of breaking into premises report what they have seen to the police. In addition, 40 per cent of those who attend court say they would be unwilling to act as a witness again.

Over the past decade, considerable priority has been given to understanding the needs of victims. In contrast, public policy has only more recently begun to recognise the importance of independent witnesses. Their participation has largely been taken for granted and responsibility for witnesses remains fragmented. With the exception of those who are particularly vulnerable and those who are intimidated, we know little about witnesses' experiences, why many fail to come forward or the actual difference it would make if they did.

What we do know is that the existence of an independent witness can be vital in the decision to prosecute, in the suspect's decision whether to plead guilty and in satisfying a jury on guilt 'beyond reasonable doubt', particularly where there is no other corroborative evidence.

Low priority

Witnesses are a low priority for all of the criminal justice agencies. The problem begins at the scene of the crime when the police have more urgent priorities than identifying witnesses and taking statements. At the police station, witnesses are not provided with standard information on the process they have entered nor any statement on their rights and responsibilities. Some are encouraged to give a statement on the grounds that it is unlikely that they will have to give evidence in court, only to find that they later receive a summons.

Lack of information is one of the most significant causes of witness dissatisfaction. Having turned up at court, witnesses can find that the case is adjourned and that they are expected to reappear on one or more occasions. Court administration, like the trial itself, is not designed to be convenient for witnesses. Witnesses, ippr was told by one senior police

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officer, are 'the cannon fodder of the system'. No one is responsible for keeping them updated on the progress of a case.

The Government recognises that witnesses ought to be kept informed, and that it is unacceptable that 40 per cent had to find out the verdict for themselves. To date its commitment has been limited to requiring the police and CPS to keep *victims* informed of progress on a case, not the 1,000 independent witnesses who attend court each day. The White Paper *Justice for All* now promises a national strategy on witnesses later this year and ippr has been invited to participate in an inter-departmental working group to contribute to that development (Attorney General's Office *et al* 2002).

Witnesses need to understand their role. Prosecution lawyers are not able to discuss their strategy with witnesses who can be confused and unhappy with the way in which their evidence is used. The witness can feel that it is they who are on trial as their integrity or capacity to recall events is challenged. The witness can feel that they have failed the victim, or defendant, if they buckle under intense questioning, a one-off experience for which they felt ill equipped.

Reluctant to come forward

ICM's poll for ippr and focus groups found that the witness may be reluctant to report what they know, to give a statement and evidence in court for a variety of reasons. They may

- fear retribution from the suspect or their associates
- be anxious about the experience they will have in the criminal justice system
- distrust the police and the way they may handle the case
- be unwilling through lack of interest or disinclination to allocate the time, or reluctant for practical reasons such as loss of pay while attending court (Edwards 2001).

The individual who witnesses an offence, or has information that an offence has taken place, may not know how to report it. There is no national '999' number to use, except in emergency when the offence is still occurring. Making a statement, and going to court, can be a

considerable inconvenience for which the witness generally receives little thanks or compensation.

A number of factors about the offence itself influence the witness' decision whether to come forward. They are more likely to do so if the offence is serious or the victim evidently vulnerable. They may be less likely to speak up if they know the offender.

Information, guidance and reassurance

Some of the reasons for witness reluctance to come forward are beyond the immediate control of the criminal justice system. Strategies for civic renewal – for rebuilding the community bonds and sense of civic responsibility – lie beyond its remit, although they are a central concern of a separate ippr project (Nash 2002).

Reluctant Witness did identify many steps that could be taken without delay or substantial resource allocation. Designed to increase the information, advice, encouragement and consideration given to witnesses, they could ensure that a greater number of people feel able to report what they know, to make a statement and, if necessary, later attend court to give evidence. In so doing, they could reduce the number of cases that collapse through lack of evidence and miscarriages of justice. We are encouraged that West Mercia police has agreed to pilot these recommendations and evaluate the outcome.

Recommendation

The Government, police, CPS and court service should support witnesses including: provision of a Witness Charter setting out the service that they can expect; guidance and management supervision across the agencies to raise awareness of the crucial role that witnesses play and that their co-operation cannot be taken for granted; publicity and a www.witness.com site to encourage people to report offences and a single, unforgettable national telephone number.

Significantly more information should be available to witnesses from the point at which they consider reporting an offence through to after any subsequent trial. A pack of information should be prepared providing detailed guidance on their rights and responsibilities in the process.

A single unit in Whitehall should be responsible for witness policy and strategy on service delivery and the police and CPS should have a statutory responsibility to keep independent witnesses informed. Training for judges and magistrates should reinforce their right to intervene if questioning of witnesses is oppressive.

Witnesses should be thanked for reporting an offence and for their willingness to come to court. In exceptional cases a public acknowledgement of their contribution could be marked by a citizen's award. The opportunity should be taken, when the national citizenship curriculum is introduced in 2002, to ensure that young people are aware of the vital role that witnesses make to the delivery of justice, and to tell them what is entailed.

Developing public involvement

There is enormous potential for increasing public participation in the work of the criminal justice agencies. Public involvement not only raises performance but can increase public confidence by providing individuals with greater understanding of the complexities of the system. It enhances legitimacy, transparency and accountability and can stimulate organisational change. Public involvement in the criminal justice system should be central to the Government's public service reform and civic renewal agendas.

The public provide a unique understanding of the experiences of their local communities. But it is equally important to differentiate the appropriate boundaries of responsibility of lay people and professionals in order to make proper use of the different skills that they bring. While the role of the public must be increased, there must also be appropriate limits. We suggest in relation to lay and stipendiary magistrates that these limits should be redrawn; while in relation to lay oversight of policing the public contribution could be extended. There are certain aspects of criminal justice in which it would be inappropriate for lay members to have a role.

The challenge is to involve a broader range of people than currently participate. Criminal justice agencies must make the tasks accessible to the all sections of the public, creating roles that members of the public want to carry out and at times that they can do so. As we saw with witnesses, agencies must ensure that the public feel that their contribution is valued and that they have the information, support, reassurance and thanks that they need.

Those tasks which require a commitment of a day a week rule out the involvement of anyone who works full time, and attract those people who are already more commonly involved, part time workers and those who have retired. Agencies must be more creative in their approaches and design schemes for those who have less time to give.

The public needs to be able to see the outcomes of their time and

involvement to feel that they are contributing to a worthwhile task. For professional staff too, it is important that the public have a clearly defined role and purpose. There are different levels of public involvement. Both agencies and their staff and the general public need to be clear about what is being asked of them. Staff must be committed to genuine participation.

Public involvement should not always be in a supportive or supervisory role. They can be encouraged and enabled to learn from the police how to take greater responsibility for their own community's crime and disorder problems, as in the examples of involvement at beat level that we cited.

One implication of public involvement is local inconsistency. The benefit of involving local people is their knowledge and understanding of their local area. They can contribute to criminal justice agencies tailoring their services much more effectively for the communities that they serve. But an intervention that might be appropriate in one local area may not be appropriate in another, which in turn leads to local inconsistency. So public involvement means a move away from tight central control towards a broad national framework within which local priorities can be developed.

The public should not directly determine the parameters of the system. In a representative democracy, the government and Parliament have a responsibility to ensure that the basic rights of individuals and minorities are protected, regardless of the public concern that a particular crime might evoke. The government must thus avoid measures which would be counter to that objective, even if vociferous sections of the public disagree.

Recommendation

The Government should build public involvement in criminal justice into the heart of its criminal justice and public service reform agendas, identifying new roles that draw on the strengths of lay involvement and match the contribution individuals are willing and able to make, without prejudicing the safeguards needed in a justice system.

Corporate responsibility

The varied contribution that individuals can make to a range of crime prevention initiatives as well as having a part to play in the delivery of services in prisons and on community sentences is thus clear. The contribution which the corporate sector makes is less familiar. In *Partners Against Crime*, Jeremy Hardie and Ben Hobbs show that

companies already play a significant role in preventing and detecting crime. This role stretches from designing-out crime from products and services to schemes to employing ex-offenders, contributing to their reintegration into society.

While government has encouraged particular initiatives, it has as yet no co-ordinated strategy for developing this role. Responsibility for the differing contributions by the corporate sector role is currently allocated to separate units in the Home Office and has not yet been linked to the broader corporate social responsibility agenda (CSR) being developed in the Department of Trade and Industry (DTI). Only in the recent White Paper on policing (Home Office 2001a) does the Government begin to acknowledge the need to develop a clear framework for partnership with business to tackle business related crime. Home Office Minister John Denham speaking at the launch of *Partners Against Crime* made a commitment that the disparate units in the Home Office dealing with business crime issues would be brought together by the end of the year.

Hardie and Hobbs look in detail at the role that car manufacturers have played in making motor vehicles more difficult to steal; at the role of credit card companies not only in developing card technology to make fraud more difficult but also in tracking down offenders; at the role of self regulation among alcohol producers to reduce alcohol abuse and thus the anti-social behaviour to which it gives rise; and finally at the contribution which local retail partnerships have made towards cutting retail crime in town centres.

Addressing the issue within the broader corporate social responsibility debate, *Partners Against Crime* asks why companies should invest the resources needed to make this contribution and concludes that their responsibility derives from the fact that they alone are in a position to do so. If companies do not consider the potential of their product or service to facilitate crime, and take steps to reduce that potential, society will be left to pay the price. Companies are expert in anticipating shifts in market trends and in identifying what products will sell. Anticipating the crime potential of those products is well within their capability.

However, it does not follow that all of the cost should fall to the company: for instance that Eurotunnel should pay the full cost of protecting its property from people determined to use it to enter the UK illegally. Nor can a company be held fully or even largely

responsible for the misuse of its product, the primary responsibility for which must be that of the offender.

If companies are to assist in reducing the opportunities for crime, however, the *quid pro quo* is that the state should provide them with assistance when they are engaged in crime prevention and when they are themselves the victims of crime. Crimes against business should not be neglected on the grounds that the offence is 'victimless' or that businesses are rich enough to look after themselves.

Past success in designing out crime has been achieved through cooperation between companies within a sector, and by ad hoc, opportunistic co-operation between companies and government on particular initiatives. Often this only happens after a particular kind of crime, such as mobile phone thefts, have become a serious concern.

Yet, on a case by case basis, the Government has expected companies to do more. It has used the law to force Eurotunnel to invest even more in security measures; and it has criticised mobile phone operators for failing to do more to make phones less attractive to steal.

This raises two questions. First, what are the limits of a company's responsibility to prevent the criminal misuse of its products and services? Where does its responsibility end and that of the state begin? How much should it be expected to invest, and at what cost in its competitive position in the market place, to prevent crime which may be of no direct detriment to itself?

Second, what public policy framework – law, regulations, incentives, and guidance – should government set in place to encourage and persuade companies to mainstream crime prevention thinking at the design stage of their products and services *and* to redesign them if the crime potential emerges after the product or service is already on sale?

Companies' responsibility for tackling crime is a CSR issue that can, but does not always fit within the business case. That is, it may not be in the direct financial interests of the company to contribute. Companies, and their staff in particular, can be motivated by more than profit. However, companies may not always be sufficiently strongly motivated to act on crime, where the benefits may be less for the company than for society.

It does not follow that government should primarily seek to enforce compliance through legislation. First, because the nature of the responsibility to act is not clear cut. It will differ in relation to different companies and each product and service and the nature of their

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responsibility would not be easy to define. Second, government should hesitate to legislate because it will be more likely to achieve its objective through partnership: secured through a blend of voluntarism, perhaps backed by permissive legislation, with enforcement only as a last resort.

Where the nature of the responsibility to act is clear, and it is accepted by most companies in the sector, they will welcome legislation to regulate the cowboys who undercut them by failing to sign up to voluntary rules.

The case for a company to act is strongest the greater the role their product or service plays in causing crime, and the greater the contribution that the company *could* play in reducing the opportunity for crime, compared to the contribution of other players.

There are a range of pressures on companies that influence their motivation, including pressure groups, reputation, and the pressure from investors to manage risk and for socially responsible investments. Companies may also fear regulation if they fail to act or simply be motivated to 'do the right thing'. Legislation currently plays a small part in requiring companies to act. Encouragement by government has played a larger part and partnership is a prerequisite of success. No solution is permanent. Technology moves on and companies must embed crime prevention into their design and planning as a matter of course, not because of fear of litigation if they do not.

Recommendation

The Government should agree with business a statement of principles setting out a new basis of partnership: that where it is possible for a company to make a material difference to crime and it is practicable technically and financially to do so, the company will make appropriate changes to the design of the product or service. In return, the state will deal with crimes against business effectively.

A champion should be appointed to drive this agenda with the aim of mainstreaming crime prevention in all goods and services. The Crime and Disorder Act 1998 should be amended to make clear reference to business as among the parties that should be consulted by police and local authorities in devising local crime reduction strategies. Companies should show-case the contribution that they are making in their Annual Report.

Failure to consider crime should be seen as a reputational risk. The Association of British Insurers should include failure to prevent crime among the environmental and ethical matters on which companies should make disclosure. Consumer groups could help to identify opportunities for companies to design crime out of particular products and services. There should be greater public recognition by government of business leaders who make a significant contribution to crime prevention.

4. Public sector reform agenda

The Government's failure to develop this partnership approach with business, or with the public, reflects the narrow view which it has inadvertently fostered that the responsibility for tackling crime is that of the state. Under pressure to drive up performance, and to prove to the electorate that it can deliver on crime, the Government has taken firmer control of the criminal justice agencies. This has reinforced the view that outcomes can be driven from the centre and has marginalised the role of the public in local decision making.

Poor performance by criminal justice agencies does of course contribute to low levels of public confidence. There is no doubt that improvements in outcomes are necessary if public confidence is to be restored. For particular sections of the community, such as ethnic minorities, confidence will increase only if they perceive that they are receiving the same standard of service as the rest of the community.

Unrealistic expectations of the system may nevertheless have been reinforced by government insistence that crime can be reduced if only the police, crown prosecution system, courts and probation service can be made more efficient. The publication of league tables on police performance, intended to motivate performance, nurtured the assumption that the criminal justice process can make a significant difference to levels of crime and that the solution is to be found in making adjustments to that process.

Moreover, the performance culture, while undoubtedly driving improvements in some areas, is nevertheless a blame culture. If the public are constantly told by government that the police are failing, as they were in the weeks preceding the policing White Paper in December 2001, they may conclude that it is true. For the residents of Greater Manchester, London and Staffordshire, informed by media reading of the league tables that they have 'the worst police forces in the country', the process of naming and shaming may ironically have done little to raise their confidence in the service.⁶

Sue Richards and John Raine explore the implications of the public service reform agenda in their paper, *Modernisation and the Criminal Justice System*. Arguing that the agenda signified a step-change in expectations of how the services would be run, they defined the familiar elements of modernisation as:

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- *The shift from a focus on outputs to outcomes:* from which necessarily followed changes in structure, procedures and culture, not least the adoption of a cross-cutting Public Service Agreement for the criminal justice system as a whole, and new performance management systems.
- *Flexibility in means of delivery,* including some transfer of responsibility for delivery to the private sector although to a lesser extent than in other parts of the public sector.
- *Partnership* structures and processes to create horizontal connections between Whitehall departments and agencies, to facilitate joined-up policy and outcomes, not least the realignment of CPS boundaries to match those of the police and the creation of local crime and disorder partnerships.
- *Evidence-based policy:* a commitment to implement 'what works', an approach requiring greater emphasis on research, evaluation, piloting, measurement and accountability.
- *Cost effectiveness:* requiring flexibility in budget accounting to enable costs in one budget, for instance for prevention measures, to be repaid by outcomes elsewhere.
- *Engagement with the public:* both direct engagement in the work of the criminal justice agencies but also fostering personal and community commitment to address crime.
- *Information and communication technology* developments.

Focus on outcomes

The outcomes-driven agenda has meant outcomes largely determined by central government. As in education and health, the criminal justice agencies have found their autonomy to determine their own priorities curtailed by an ever increasing raft of central targets and performance indicators, designed to ensure that the number of vehicle thefts declines or that prisoners spend a greater proportion of time in 'purposeful activity'.

A focus on outcomes (such as a fall in crime) rather than solely on outputs (such as number of case disposals), has required the development of an evidence-base for policy in order to be able to

identify 'what works'. Thus the Government's Crime Reduction Strategy was based on the 1998 Home Office research study *Reducing Offending* that had evaluated the impact of existing means of dealing with offending behaviour (the first time a government strategy to reduce crime had been so clearly based on evaluated evidence (Wiles 2000)). Prison and probation offending behaviour programmes are now independently evaluated and accredited so that only those that 'work' receive government funding.

There is, however, often a lack of data to answer even the most basic questions, such as the likelihood of re-offending following different sentences. As David Faulkner says:

the range of factors which may affect a person's future offending is so wide and various, and many of them are so difficult to control, that the search for what works may be as uncertain as the search for the causes of crime (Faulkner 2001).

The system, moreover, relies on measurable outcomes, yet much of the work of the criminal justice agencies is not readily open to measurement, either because outcomes such as 'justice' are difficult to measure or because there are too many variables, as in the impact of a particular career guidance programme on the job prospects of young offenders.

The intention, nevertheless, is that resources should follow the evidence; that a pilot or programme that is evaluated and found to be successful will be extended. Partial knowledge can thus distort the programmes which are then introduced. Because we have scant evidence that strengthening family ties is a factor in not re-offending, for instance, but do have evidence that having a job and a home is a significant factor, assistance in achieving those objectives before a prisoner leaves custody takes priority.

There is thus a danger, Richards and Raine conclude:

that, in the current political climate of impatience for results, the measures chosen and the assessments made prove inadequate and too short-termist, failing properly to reflect and capture the full policy objectives and their longer term implications.

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The government is itself unabashed in departing from its evidence-based approach when it conflicts with the demands of the populist agenda or its need for 'quick wins', most notable in Ministers' endorsement of rising prison numbers during the 1997-2001 parliament. Its own research had found that it would cost £380m a year to imprison enough people to reduce crime by 0.6 per cent; whereas a similar reduction could be achieved at one tenth of the cost with targeted anti-burglary crime prevention programmes (Home Office 1998).

There is, moreover, a tendency to be selective in the evidence that is used, or to be slack in the way it is interpreted. 'It is striking', Andrew Rutherford points out, for instance, that in *Criminal Justice: The Way Ahead* there is no reference to the huge body of reports produced by HM Inspectorate of Prisons:

Ambitious, rehabilitative opportunities are set forth for penal institutions, including those holding young offenders, without addressing the catalogue of perennial failure to provide for such basic needs as personal safety (Rutherford 2001).

Wiles, Director of the Home Office Research and Statistics Directorate, rightly observes:

anybody who has been involved in criminal policy will recognise the constant danger that politicians, no matter how committed they are to acting on the basis of evidence, are subject to short-term political pressures of a contrary nature. There are no guarantees that this will not happen.

However, the commitment to an evidence-based policy now exists as an ever present counterweight to those other pressures (Wiles 2000).

The evidence-based agenda itself has a centralised feel to it, not least because of funding decisions. Most new projects or initiatives depend heavily on government support, with a consequent danger, Richards and Raine argue, that central government's management of this learning and dissemination process will be over-directive and reduce the quality of professional input. Whatever the benefits of centralisation in terms of overall consistency and relief from individualised whim and idiosyncrasy, the diversity and local character of criminal justice (as in

education and other professional practice) is being suppressed, and with it may go the creativity and innovation that comes from local ownership.

Central targets

As elsewhere in the public sector, the desire for measurable outcomes was built into the entire planning and resourcing of the sector, the Comprehensive Spending Reviews in 1998 and 2000 linking accountability for resource use to delivery of specified policy outputs. That PSA system is complemented by a series of other, overlapping, performance measures, not least the Best Value indicators to which the police are subject.

In setting out the revised terms of the public service reform agenda, following the 2001 election, the Prime Minister spoke of a central framework of *minimum* standards, with devolved responsibility to service providers; as had the earlier criminal justice White Paper:

The centre should set standards and direction; local managers should have the freedom to deliver targets in the best way locally. Intervention from the centre should be in inverse proportion to success. Areas that perform well against shared targets should have the flexibility to set additional local targets reflecting local problems or priorities (Attorney General's Office *et al* 2001a).

This is an approach that nevertheless still assumes that central direction via target setting is the most effective way to enhance 'success'.

The prolific number of targets and performance indicators set down by central government has served to focus the agencies on the need to deliver outcomes. But the level of detail in the targets set to date has assumed one-size fits all, overlooking the reality that the policing or probation priorities in inner-city Liverpool may need to be very different from those in rural Wiltshire. For that reason, there has been tension between centrally controlled performance requirements and securing effective public involvement in determining local priorities.

The Policing White Paper (Home Office 2001a) acknowledged that the number of performance indicators is 'excessive' and should be cut

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back to the key priorities: 'Instead of valuing the things which can be easily measured, we should make sure we can measure the things which we really value'. Yet it seems that central control could in practice be enhanced by the Police Reform Bill which extends the Home Secretary's powers inspections and reports, to require remedial action if a force is 'inefficient or ineffective', and to set out strategic priorities in a National Policing Plan which:

will set out the Government's priorities for policing...
National priorities will be reflected in local plans for individual forces and for BCUs within those force areas' (Home Office 2001a).

The National Plan will be enforced through regulations, binding in law; through codes of practice, to which a chief officer will be expected to have regard; and through guidance which is advisory. The local Police Authority, in this process, is transformed into a body overseeing police effectiveness, not one determining priorities and accountability to them.

Recommendation

The Government must deliver on its promise to cut the number of central targets and performance indicators in order to allow greater local agency autonomy for innovation and public involvement in setting priorities. In publishing information on agencies' performance the Government should ensure that the media understand that the indicators chosen only measure aspects of performance; and take care to avoid a name and shame culture that undermines public confidence in the agencies concerned.

Partnership or one system?

At the local level, the 376 Crime and Disorder Reduction Partnerships introduced under the Crime and Disorder Act 1998 have been significant as a vehicle for joint action. They bring together local authorities, police and a wide range of other local agencies sharing a common statutory duty to create and implement a crime reduction strategy in their area.

Richards and Raine note that a further significant and relatively unremarked achievement in the criminal justice system, and one which lays down the foundation for future partnership working, is the alignment of the 42 police boundaries with those of the CPS, courts and

probation service, and the grouping of those agencies into clusters that relate to the economic regions and sub-regions of the Government Office of the Regions system.

Criminal justice stakeholders in those partnerships, however, have to cope with the demands of a largely centrally determined policy agenda, and it is not always possible to do justice to both national and local agendas. A relaxation of central control would provide greater scope for local partnerships to flourish.

Centralisation of the police, probation and police services are at least partially explained by the desire to create a criminal justice system that actually is a system. Progress has been made here at national level through the setting of common strategic aims and objectives between the three criminal justice departments in Whitehall, the creation of joint accountability to Parliament for the achievement of those aims, and new processes for joint working in terms of both planning and problem-solving at a variety of levels.

There is closer conjunction between the probation and prison services and many front-line CPS prosecutors are now being relocated into police stations to work alongside the officers investigating and preparing the cases. All such initiatives are helping to break down inter-organisational barriers and to build more of a sense of common purpose and shared responsibility.

Andrew Rutherford, however, in his paper *Criminal Justice Choices*, argues that this desire to create a single system, with a common set of Aims, holds dangers. Quoting with alarm the phrase in the Home Office Criminal Justice Report 1999-2000 that there is 'still more to be done before we can be satisfied that we have a totally integrated Criminal Justice System that operates as quickly and effectively as possible', he argues:

the reality is that individual criminal justice agencies, such as the police and the prison service, have purposes which are distinct and different from each other. Attempts to establish all-embracing goals for the criminal justice process are all too likely to descend into vacuity since these will say almost nothing when applied to any one of the stages. Indeed, this sort of endeavour...serves only to obscure the need to acknowledge the tensions and choices which are inherent in the criminal justice process.

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In broad terms, the agencies can share the objectives set down in the criminal justice PSA: 'to reduce crime and the fear of crime' and 'to dispense justice fairly and efficiently and to promote confidence in the rule of law'. But beneath that generality it is important to recognise that the agencies have distinct roles which are necessary to a just outcome in individual cases.

The CPS, for instance, performs the vital safeguard of checking the evidence that the police have gathered to see whether it is sufficient to proceed to trial, and whether it is in the public interest to do so, a role for which their independence from the police was reinforced in 1985 after a series of miscarriages of justice. While there are good reasons on grounds of efficiency to improve the communication and working relationship between the police and the CPS – not least in their care of witnesses, those arrangements should not become so cosy that the distinct and independent role of the CPS is overlooked.

Recommendation

The Government must ensure that in joining up the criminal justice agencies and breaking down inter-organisational boundaries it does not overlook the distinct role of those agencies and the importance of the independence of the CPS in particular.

Independence of the judiciary

The independence of the judiciary likewise is essential to ensure that the political pressure to be tough on offenders, or on a particular offender, does not over-ride the responsibility of the courts to deliver justice. To that end, we argued in *Time for a Ministry of Justice?* that the Lord Chancellor's dual role as a senior member of the Executive and head of the Judiciary, responsible for judicial appointments, is inappropriate.

As head of the judiciary the Lord Chancellor is responsible for the appointment of the judges who interpret the law, on occasion in cases against the government itself. He is also responsible for the appointment of magistrates and for barristers' promotion to Queen's Counsel. Moreover, as a Law Lord he can sit in judgement in such cases, albeit he may choose not to do so if he perceives a conflict of interest.

The Lord Chancellor's involvement in party fundraising among lawyers prior to the last election illustrated the difficulties of his overlapping roles. Criticised for soliciting funds from people who need

his patronage to obtain preferment to Queen's Counsel or the Bench, Lord Irvine told the Lords 'It is not the case that the Lord Chancellor is not party political'.

It is not known whether the appointment of judges by a Member of the Cabinet, and the secrecy of the procedure, have an impact on public confidence in the judiciary. What is clear is that confidence is alarmingly low. Only 21 per cent of the public think judges do 'a good or excellent job' while 41 per cent think they are 'very out of touch' (Home Office 2000b). Establishing an independent mechanism, with a commitment both to transparency and to training, would be one way in which the government could be seen to respond to that concern.

The overlapping roles of the Lord Chancellor do have their defenders who see the role not as the absence of separation of powers but as a constitutional buffer. Hailsham argued in 1971 that:

the separation of powers is the primary function of the Lord Chancellor, a task which he can only fulfil if he sits somewhere near the apex of the constitutional pyramid armed with a long barge pole to keep of marauding craft from any quarter.

And there are some who would still argue, as a senior judge did in 1987, that the Lord Chancellor provides a flexible and efficient means to transmit the needs of the legal system to the Executive and to Parliament (Browne-Wilkinson 1987). The role that the current Lord Chancellor played in ensuring that the Human Rights Act was a mechanism that would work in the courts could be said to illustrate that point. Nevertheless, the perception that the independence of the judiciary and the rule of law have their champion within the Cabinet is undermined if the champion is perceived as a party-political figure who also plays a leading role within the Executive.

Following the argument first put forward by ippr in *A Written Constitution for the UK*, we propose that an independent Judicial Services Commission should be established to ensure that appointments to the judiciary are, and are seen to be, free from political influence. The Commission should be charged 'to adopt procedures which will ensure that adequate numbers of candidates of both sexes and from diverse racial, religious and social backgrounds are considered for appointment' (ippr 1991).

Recommendation

An independent Judicial Services Commission should be established with responsibility for appointments to the Queen's Counsel and Judiciary. It should be required to ensure that there is equality of opportunity for women and members of racial minorities in the appointments process.

Whitehall

Time for a Ministry of Justice? also examined the overlapping responsibility of the Lord Chancellor's Department (LCD), and Home Office for the criminal justice system. It argued that the shared responsibility between the LCD and Home Office for criminal justice policy is problematic, not least because it results in delay in securing agreement on policy and on budgets; while decisions on which no agreement can be reached hang between the departments unresolved.

The system also lacks transparency. Whereas at the local level it is increasingly clear which agency is responsible for which service, that clarity is not apparent in Whitehall. There is no reason to think that the proposed cross-cutting National Criminal Justice Board will rectify these deficiencies (Attorney General's Office *et al* 2002).

The division of responsibility for the magistracy between a Home Office covering policy and procedure and the LCD administration of the courts, is but one example of split functions that are apparently too significant to be resolved through inter-departmental discussion. The need to secure agreement – through the tripartite structure – absorbs excessive time from officials and is the cause of much frustration. Delay in securing agreement on the 1998 juvenile justice reforms, and the failure to reach agreement on the need for research on juries are, we are told, two examples.

The disparate responsibility for violence within the family, highlighted in Clare Sparks' *Private Lives, Public Policy*, further illustrates the need to reconsider departmental responsibilities. The failure at a policy level to recognise the connections between domestic violence (focus on adults), child abuse and elder abuse reflects the fact that the former is primarily a Home Office responsibility, while abuse of children and elders come under the Department of Health. An inter-departmental forum to co-ordinate policy has not overcome the divisions which are mirrored at the level of service provision.

A Government strategy on *family* violence could attract the political support that work on domestic violence has long failed to secure; while that focus on the ground could recognise connections between abuse of children and adults within a home, enabling services to provide a more holistic response.

Returning to the Home Office-LCD divide, while some argue that criminal law and procedure should in future be housed in the LCD alongside responsibility for the civil law and the courts, others insist that criminal law reform must remain with the police in the Home Office. The Crime and Disorder Act 1998, they suggest, is a prime example of law reform to tackle crime; reform of the criminal law was an essential arm of that strategy.

That, their critics say, is indeed the problem. The criminal law should not simply be used as a tool of law enforcement but to protect the innocent. It serves no ones interests if the guilty go free and the innocent are convicted. The principles of justice would be better served if the criminal law were the responsibility of a department charged with finding that balance – a department grounded in principles of justice, fairness and proportionality – not a department judged on the extent to which it is seen to be tough on offenders.

From an LCD perspective, it can be argued that responsibility for the courts and for criminal procedure could more effectively be managed together – that the review of the criminal courts, conducted for the LCD by Sir Robin Auld, for instance, was affected by its separation from Home Office reviews such as that by John Halliday on sentencing (Home Office 2001b).

It is possible to make a case for housing probation and prisons with the courts in future because of the ongoing responsibility that the courts will have for those whom they sentence, when the sentencing reforms are implemented. The intention is that the progress made during a sentence should be reported back to the magistrates or Judge responsible for that sentence and adjustments made if necessary. Sentencing would thus become an ongoing process, not a single decision that discharges the court's responsibility.

However, the probation service works closely with the police. The police have, in recent years, increasingly moved beyond a narrow law enforcement perception of their role to a problem-solving approach, working in partnership with the other criminal justice agencies. To move

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probation and prisons out of the Home Office could jeopardise that relationship. Probation and prisons should remain in the Home Office.

A Department of Justice

We conclude that the Lord Chancellor's Department, devolved of its direct control over judicial appointments, should not simply be given responsibility for criminal justice policy but become a department that is capable of developing a coherent strategy on justice and good governance principles for Whitehall as a whole. While these principles are expected to be reflected in the work of all government departments, they would be more effectively so if championed by a single department with a cross-cutting mandate.

The Secretary of State for the LCD – perhaps renamed the Department of Justice – should, in due course, be an elected Member of Parliament. That department should take responsibility for criminal justice policy, allowing the Home Office to focus on crime reduction and enforcement.

Recommendation

Responsibility for criminal law reform should be transferred from the Home Office to the Lord Chancellor's Department – renamed the Department of Justice – which, over time, should have an elected Secretary of State. The Department, reflecting the responsibility it already has for promoting human rights standards across Whitehall, should have a mandate to promote good governance and justice principles across government.

5. Custody v social inclusion

Prison is the 'hard end' of criminal justice with 23 per cent of those sentenced for indictable offences being sentenced to immediate custody (Home Office 2000). Despite the fact that society views prisons as closed institutions, however, the reality is that almost all those who are sentenced to custody will be released.

Prisons receive people from the community and release people back into the community every day. Their experience of custody and the opportunities to change that are offered to them are, therefore, of importance to the whole of society. But the evidence suggests that custody is frequently not effective in reducing offending behaviour nor in the broader rehabilitation of offenders. We know that 58 per cent of adult offenders and 72 per cent of young offenders re-offend within two years of release from custody (Social Exclusion Unit 2002). Now government research suggests that ex-prisoners are responsible for 18 per cent of recorded crime – 900,000 offences a year.⁶ The government's penal policy is patently failing to protect the public. The £2.1 billion spent annually on the Prison Service is not cost effective.

Until recently, the public's faith in custody as a means of dealing with criminal behaviour was echoed by Ministers, notably Michael Howard in his famous 'prison works' speech as Home Secretary to the 1993 Conservative Party Conference. When New Labour came to power in 1997 reformers were disappointed to hear the new Home Secretary Jack Straw denying that the rising prison population was a matter of concern.

The prison population rose 43 per cent between 1993 and 1998, reaching a then all time high of 65,300 (Home Office 2001). Despite the view of the current Home Secretary, David Blunkett, that prison is ineffective for the majority who are serving short sentences, the number in custody has continued to rise. It now stands at more than 70,000 – with projections of 83,500 by 2008 (Home Office 2001). We imprison 125 people per 100,000 of the population (Home Office 2002), the highest rate in Western Europe at an average cost of £37,500 cost per year (Attorney General's Office *et al* 2002).

Dramatic reduction in prison population

We shall argue below for reform of prison regimes so that they are geared to equipping prisoners to lead lawful lives on release. But some of that effort will simply be seeking to rectify the harm caused by prison itself: a third lose their home while in prison, two-thirds lose their job, over a fifth face increased financial problems and over two-fifths lose contact with their family (Social Exclusion Unit 2002). Meanwhile nothing can rectify the harm done to the children of prisoners, separated from their father or mother: the unseen victims of Britain's penal policy.

Custody should be the punishment of last resort, to ensure that the negative impacts of imprisonment are only inflicted on those for whom it is absolutely necessary. A continuing increase in the use of custody – as Ministers themselves now realise – will undermine the government's own objectives for social inclusion.

Both Home Secretary David Blunkett and the previous minister for Prisons and Probation Beverly Hughes have expressed their concern about the rising prison population. Martin Narey, the Director General of the Prison Service, has repeatedly stated that prisons are simply not able to do anything constructive with those people serving very short sentences in custody. Lord Warner, chair of the Youth Justice Board, wrote to Magistrates in October 2001 urging them to desist from sending young people to custody. While there are some welcome recommendations in the white paper *Justice for All* it remains to be seen what impact they might have on the prison population (Attorney General's Office *et al* 2002).

But it is no longer enough to make changes at the margins of the prison population. Serious political and judicial efforts are needed to reduce substantially the use of custody to the European median – 85 per 100,000 population – which would result in a prison population of under 49,000 (Home Office 2002). The prison cut-back should start with individuals for whom prison is particularly dangerous or over-used – for example those on remand, those with mental health problems, and those on short sentences – for whom a satisfactory alternative could be found in community penalties. As the Home Secretary and Lord Chancellor said recently:

Short prison sentences for lesser offences provide little opportunity to tackle re-offending and indeed can often make

things worse – disrupting family and work life while putting offenders who have committed relatively minor crimes in the company of more serious criminals.⁸

Recommendation

The Government should seek to reduce the prison population to the European median of 85 per 100,000 population, resulting in a population in custody of under 49,000, by strongly discouraging the Judiciary from using custodial sentences except when absolutely necessary; by providing effective alternatives in community penalties or mental health facilities as appropriate; and by amendments to the criminal law to remove provision for short custodial sentences – sentences which remove the offender from the three factors that are key to not re-offending – work, home and family.

Making prisons work

Even with the radical reduction in the use of custody that we propose, imprisonment will have an important part to play as the last resort of the criminal justice system. Those people who are detained will be those most in need of intervention to reduce the likelihood of re-offending on release. To ensure that their incarceration leads to positive social outcomes, and protects the rights of the prisoners and staff, we suggest that prisons should be reorganised to meet the following objectives.

1. To contribute to reducing offending

Custody alone will never be successful at reducing offending. Even the best, most humane custodial institution will not reduce offending by itself nor will it help every person that experiences it. Many other interventions and policies are part of the package. But it is important that secure facilities see themselves as part of the range of policies aimed at crime prevention. Contributing to a positive goal like this can only be beneficial for staff and the prisoners in their care.

Over the years, research has identified those factors which can contribute to a reduction in offending behaviour. Central is education and skills training, especially for the significant number of young people in custody. The need is immense: the Social Exclusion Unit found that 80 per cent of prisoners have writing skills, 65 per cent numeracy skills

and 50 per cent reading skills at or below the level of an 11-year old child (Social Exclusion Unit 2002).

Prison is an opportunity to provide education and training for employment. In recent years the Prison Service has endeavoured to make provision for basic levels of numeracy and literacy, and some skills training. But resources are limited and education budgets constantly being squeezed. Recent research by the Home Office demonstrated that only half of prisoners had attended education classes and 38 per cent had been instructed in prison workshops. Just over one fifth had gained a qualification while in prison (Home Office 2002a).

It is astonishing that the vast majority of prisoners are released back into the community without any assistance in securing future education or work. This is despite the fact that many offenders say themselves that having a job is the one factor that might encourage them to stop offending on release from custody. Yet only a quarter of prisoners have jobs arranged on release and one third have no accommodation to go to (Home Office 2002a).

In addition to providing opportunities to improve job prospects, prisons are expected to encourage prisoners to address the reasons for their offending behaviour through a range of courses such as sex offender treatment programmes. By addressing those 'risk factors' linked to offending – such as drug or alcohol use – the aim is to reduce re-offending on release.

But only a tiny minority of prisoners actually complete offending behaviour courses during their time in custody. Only 5,986 prisoners of the 129,000 who passed through prison service custody in 2000 did so. This is not only due to resources but to the fact that approved courses can take longer than the very short sentences that most prisoner serve.

2. To manage risk rather than be risk averse

Management of risk has become a key term for any staff member working in custodial establishments. But risk aversion has had a devastating effect on prisons, young offender institutions and other secure facilities, placing significant limitations on staff to manage creatively the reintegration of people back into the community. Key to preventing re-offending is finding a successful placement at home, in

education or work after release. This is not achieved by releasing prisoners from custody without providing opportunities for visits back to the local community in which they live, to make appointments at college, or attend interviews for work placements.

In practice, as Lord Woolf highlighted in 1991, a key priority must be to encourage the maintenance and development of good quality relationships with family and friends outside (Woolf 1991). Prisoners are six times less likely to re-offend if they maintain strong family ties while in prison (Federation of Prisoner's Families Support Groups 2000). For the 125,000 children in England and Wales with a parent in prison, it is particularly crucial that this relationship is maintained and developed. If prisoners were housed more locally in community prisons, their families and friends would be able to visit with much greater regularity. They would also be able to become more involved with other activities within the prison, rather than only attending formal visits.

3. To promote public involvement

As we argued above, involving the public and voluntary organisations in the criminal justice system is one way of increasing public confidence and ensuring realistic expectations, as well as raising the standards of service. As the Shadow Home Secretary has noted, 'Even at the far end of the conveyor belt to crime – in prison – there is an opportunity for civil society to provide exit points through rehabilitation'; describing the results of one programme run by a charity as striking: 'the transformation in the way prisoners think about themselves, the prison authorities and their social responsibilities is profound'⁹. Involving lay people in the governance of the institution, wherever that is practicable, and in the provision of services will increase also transparency and help to promote the wider cultural change within these closed institutions that is needed.

4. To promote humanity, equal treatment and justice

From October 2000, when the Human Rights Act came into force, all public authorities have had a duty to ensure that the rights in the European Convention on Human Rights are upheld. The most

significant right in this context is the right not to be subject to degrading treatment. Staff and managers in custodial settings should be firmly committed to an ethos which does not tolerate any incident of racism and bullying. It takes commitment from staff at all levels to create an ethos where such behaviour is unacceptable. Central to the creation of a positive environment in which both staff and prisoners feel valued and listened to, is an ethos of respect. Recent years have seen the prosecution of a number of staff for assaulting prisoners in their care. A change of ethos is necessary to ensure that such a situation does not arise again, and that such staff are not protected from being called to account.

This means changes at all levels. The opportunity to challenge inappropriate language or lack of respect should be open to all, and should be dealt with promptly. Wherever possible prisoners should be given an opportunity to feed into, or be consulted about, the direction and running of the facility. Complaints and grievances should, wherever possible, be dealt with through restorative justice methods as discussed earlier. The specific needs of women and prisoners with mental health problems should be given particular attention.

The Prison Service, along with other criminal justice agencies, must pay real attention to the implications for their practices of the Human Rights Act 1998 and the Race Relations (Amendment) Act 2000. Compliance should not be seen as a tick-box task but an opportunity to think creatively about good practice approaches that will deliver a better quality of service.

For children and young people, there is an additional principle:

5. To promote the best interests of the child

Both the Children Act 1989 and the UN Convention on the Rights of the Child state that the guiding principle of all decisions concerning children must be that the welfare of the child is paramount. This is an overarching principle that should be used in the development of secure facilities for children and young people. Young people are an entirely different 'client group' to adults, and they respond differently to custody. Establishments should not be a small version of prison, with some concessions made to the fact that they house children and not adults. All

work – be it educational, or offence focused – should start from a basis of needs assessment.

Future prisons

For those for whom custody is necessary to protect the public, the very structure of custody and its position in the community should be revised and reconsidered. Prisons should not be seen as closed institutions but, in the true spirit of Woolf's community prisons, be at the centre of communities both physically and intellectually.

Wherever possible prisoners should be placed in a prison located within their own community for the full duration of their imprisonment, and their links to that community – particularly their families and friends – maintained and further developed. They should be entitled to the same standard of health and education services that they would be entitled to in the community. Education and training for work should be key, and relationships built with educational establishments, businesses, the public sector and voluntary organisations to ensure their input during custody and to create opportunities for work on release.

Recommendations

For those offenders for whom imprisonment remains necessary, prisons should be reorganised to promote crime prevention, risk management, public involvement, humanity, equal treatment and justice; and for young offenders, the best interests of the child.

The Prison Service should have staff with a broader range of skills, and sufficient resources, to ensure that each prisoner receives the education, training and treatment they need to lead lawful lives. Every prisoner should receive practical assistance in finding a job and a home, if need be, on release. The fall in prison numbers will release resources to facilitate this transformation.

6. Conclusion

There is a vast gulf between public expectations of the criminal justice system and the outcomes it delivers. Expectations are unrealistic; attitudes ill-informed; fears exaggerated. But the criminal justice system, equally, is under-performing and – in some of its outcomes – counterproductive.

There is an inherent contradiction between the relentless extension of the criminal law and social inclusion. No society should be criminalising one third of adult men, nor children as young as ten. We know that the factors leading to crime, and the factors deterring offending behavior, bear little relation to the impact of the criminal law. It is time to look for alternative strategies.

We argued that many existing, minor criminal offences could be transferred to civil law, leading to penalties that would deter but not damage future job prospects. We suggested some innovative new penalties that could be more effective; and provided a yardstick government could use in deciding whether to create new criminal offences in future. Children under 12 who offend should be subject to welfare intervention, not the full force of the criminal law. The long delays in magistrates courts would benefit from the considerable reduction in the number of cases.

We looked at public fears, ignorance of crime and the operation of the criminal justice system, and lack of confidence that it will deliver. And we considered the consequences: the dangers of vigilantism on the one hand; but also the public's extraordinary degree of reluctance to help the police and the courts, not least to come forward as a witnesses. We argued that Government must address public opinion head on: providing accessible information and redressing misinformation; and refraining from rhetoric that reinforces punitive attitudes that are counter to the Government's own efforts to implement 'what works'.

The state alone cannot tackle crime. It is a shared responsibility: between the state, the public and the corporate sector. We explored the importance of public involvement – in raising confidence, legitimacy and standards; and looked at the barriers and opportunities, particularly in relation to witnesses, the lay magistracy and policing. We considered the significant contribution that companies can make to crime prevention – designing crime out of their products and services – and the

need for a national strategy to mobilise that potential and a champion to drive it.

The Government has itself reinforced the perception that crime is the state's sole responsibility by taking greater control of the police and other criminal justice agencies and directing their work through central targets and performance indicators. We explored the downside of that public service reform agenda, mirroring concerns in other parts of the public sector, and ways in which they could be addressed. We made the case for some reorganisation in government departments, for a Department of Justice that would combine responsibility for law reform with a mandate to promote good governance principles across Whitehall; and for the Judiciary to be appointed by an independent body seen to be free from political influence.

Finally, we looked at the contradiction between the rapid escalation in the prison population and the need to curb re-offending and promote social inclusion. We called for a dramatic reduction in the prison population from over 70,000 to under 49,000; and set out principles for running the prison and young offender institutions for those who remain in custody (until their release back into the community).

This agenda would be challenging. It would require political courage to face down the criticism that shared responsibility with the public and business implies that the police cannot deliver; or that exchanging the criminal law for civil penalties means the Government is going soft on crime. It would require imagination to open up opportunities for involvement that make the public want to contribute; and incentives that encourage companies to follow suit. But doing nothing is not an option; nor is more of the same. Crime is a blight on all our lives and tackling it is the responsibility of us all.

Endnotes

- 1 The statistic refers to those born in 1953 who have been convicted of a 'standard offence', largely, but not exclusively, those which can attract a prison sentence. Thus the figure does not include those convicted of the many lesser offences which nevertheless attract a criminal conviction and penalty.
- 2 Lord Auld's report was however limited to considering the impact on the criminal courts, not the impact of a conviction on the offender. In that context he recommended greater use of fixed penalties rather than decriminalisation.
- 3 An earlier study by the National Association for the Care and Resettlement of Offenders of 190 unemployed ex-offenders (NACRO 1997, *Offenders and Employment*) found that 30 per cent attributed their unemployment at least in part to their criminal record and that 42 per cent said that they had knowingly been refused employment on the basis of their record in the past. Having a criminal record exacerbates existing barriers to employment experienced by many offenders such as poor literacy and numeracy, lack of qualifications, and work experience only in shrinking sections of the labour market. Details of criminal records are currently most likely to be sought for health and social work, personal and protective services, education and sales, and least likely to be sought in construction. After the new disclosure provisions are in force, the DWP research estimated that the largest increase in vacancies for which disclosure is sought are expected to be in plant and machine operatives and in retail. Only 18 per cent of jobs were filled by recruiters who had a knowledge of how to apply the Rehabilitation of Offenders Act, suggesting that offences considered 'spent' under that Act may nevertheless be taken into account.
- 4 In a Parliamentary Question on 18 June 1999, Lord Dholakia asked the government 'what principles they observe, and what considerations they take into account, when proposing the creation of new criminal offences and the maximum penalties which they should attract'.
- 5 'Beyond the Causes of Crime' Lecture by Oliver Letwin to the Centre for Policy Studies, 8 January 2002
- 6 *The Observer* 2 December 2001
- 7 'Former prisoners blamed for a fifth of rising crime' *The Guardian* 18 June 2002

- 8 Joint message on sentencing, LCD press release, 14 June 2002
- 9 'Beyond the Causes of Crime' Lecture by Oliver Letwin to the Centre for Policy Studies, 8 January 2002

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