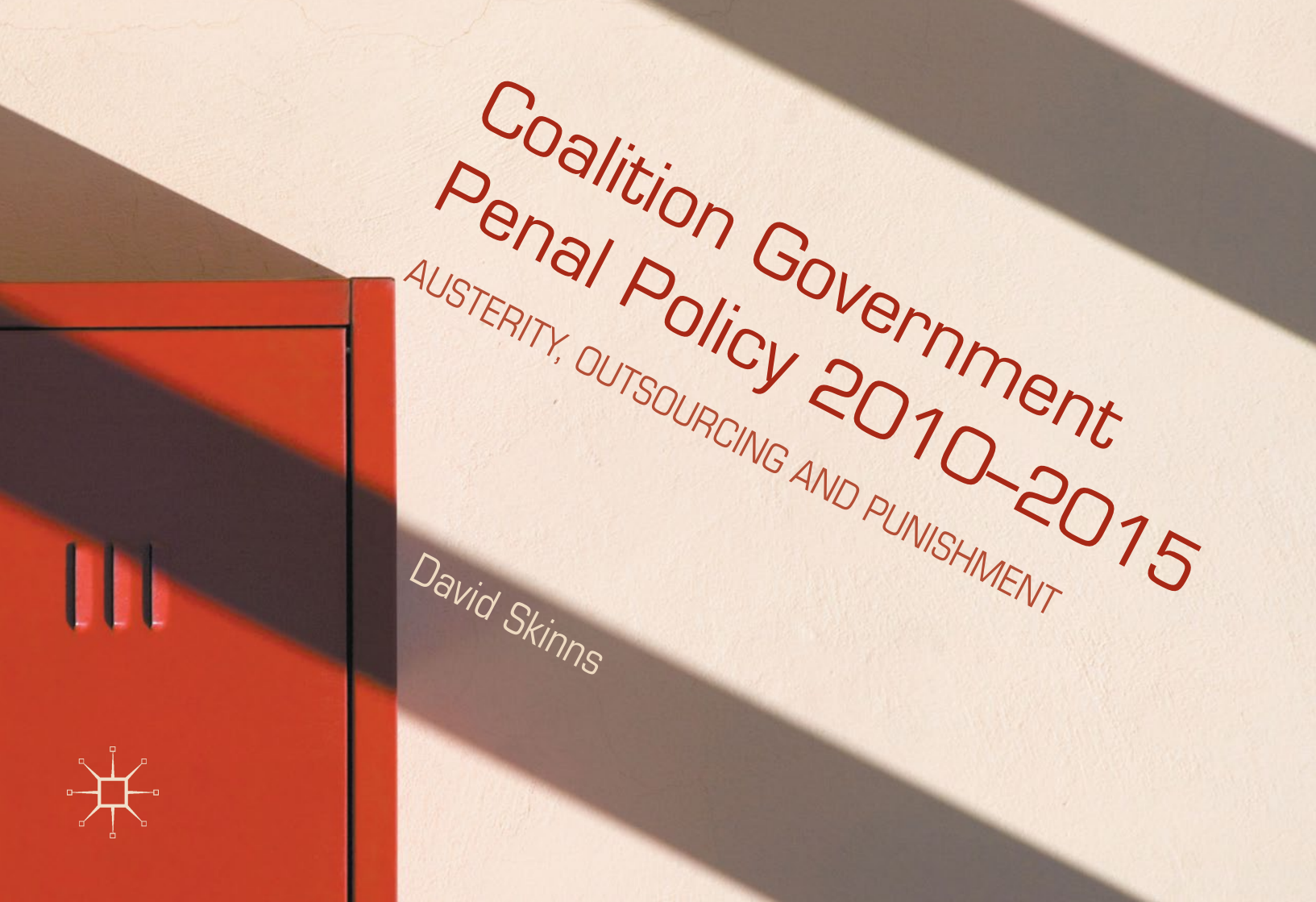

Coalition Government Penal Policy 2010–2015

AUSTERITY, OUTSOURCING AND PUNISHMENT

David Skinns

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For the new generation—Cato, Emile, Zena, Selda and Iris.

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1

Introduction

Both Kenneth Clarke (2010–12) and Chris Grayling (2012–15), as successive secretaries of State for Justice, announced the need for a 'revolution' or 'transformation' in how offenders were dealt with, apparently prioritizing 'rehabilitation'. But what does rehabilitation entail? How did sentencing and custodial and community-based offender services need to change? What debates did the reform agenda stimulate? What did it include and omit? What essential issues remained? What light can the experience of other countries throw on penal reform in England and Wales? Did the two Conservative politicians successfully revolutionize the penal system and, if so, in what direction? Questions of this kind (and many others) are the subject matter of this book, providing as it does a critical examination of the penal policies propounded and penal practices promoted by the UK Coalition Government.

The motivation to write the work derived from my previous background as a criminologist, but also my recent experiences as a member of the Independent Monitoring Board (IMB) for Prisons and particularly from the comments of the chair of my local IMB branch who argued, in 2013, that prisons were not in such a bad state as the press often suggested. But reflecting on this comment led me to want to engage in

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a systematic investigation of the net impact of penal policy change. An intensive and critical examination of the then existing government policies seemed the way forward.

Thus the present work focuses on the actions of the UK Coalition Government which was based on an agreement between the Conservative and Liberal Democrat Parties made on 12 May 2010. Based on an overall majority of 80 (Parliament 2014), the agreement between the two parties survived so that the Coalition was able to go to the polls on the last date set by the Fixed Term Parliament Act 2011, 7 May 2015. In order to note some 'after-effects', the impact of the Coalition Government on penal policy has been tracked to 30 September 2015.

This book deals with penal policy rather than the much broader set of policies associated with the criminal justice system, but this should not be taken to imply that the penal system can be treated in isolation from other aspects of criminal justice, other areas of government activity or broader questions of social justice. Chapter 2 provides a brief exposition of the key institutions within the criminal justice system and elsewhere in the text due regard is taken of broader social and criminal justice processes, but these remain secondary rather than primary matters. Further, this book is about the emergent penal policy of the Coalition Government and the practices of the penal institutions insofar as they are influenced by such policy.

The work is confined to developments in England and Wales and does not detail the penal arrangements in the other two legal jurisdictions (of Scotland and Northern Ireland) which make up the UK, enabling avoidance of the complexity attendant on trying to take account of multiple changes in three diverse legal jurisdictions. However, attention is given to available comparative material where relevant. The book critically examines only that penal policy affecting adult (21 years of age and over) and young adult (18–20 years of age) offenders, thus entirely omitting policies pertinent to children and young people (10–17 years of age) and their labyrinthine complexity.

Central to the present work are the three main areas of the penal system: sentencing, custodial services and community-based offender services. Although governments do not play a direct part in sentencing in a democratic society, they do formally create the general legal and

regulatory framework and exert influence on relevant decision-makers, as well as more informally shape general sentiments about the appropriateness of sentences. We shall have cause to critically assess the Coalition Government's record on promoting sentencing reform. The second main area that the book examines is Coalition Government policy on custodial institutions including prisons (for adult offenders) and young offender institutions (for young adult offenders). Coalition Government policy on community-based offender services is the final main area of the book, covering the supervision of those released on licence from prison and the supervision of those placed on community orders.

The book has been written to be inclusive and it is hoped that it will appeal to a variety of readers, including interested non-specialists as well as students of politics, criminology and criminal justice or those training to work in criminal justice agencies like the police, prisons and probation and other community-based agencies.

There are three reasons why this work is worthy of detailed study. Firstly, it will stimulate the reader to reflect on the questions of why people offend and what can be done to reduce offending. Secondly, readers of this work will gain a detailed and critical grasp of the penal policies promulgated and practices promoted by the Coalition Government including an assessment of whether they achieved their goals and whether their goals were worth achieving. Thirdly, the developments initiated by the Coalition Government will be situated in the broader trajectory of penal policy change in late modern societies.

The central thesis derived from this intensive investigation may be briefly stated—Coalition Government penal policy has moved the penal system in the direction of punitive managerialism, based on punishment and outsourcing undertaken within the leitmotif, austerity. Some real reductions in public expenditure have been achieved, particularly with regard to the closure of some 17 public sector prisons and many courts, workforce restructuring in the remaining public sector prisons and severe cuts in the legal aid bill. But the ideology of austerity, together with the assumption that private enterprise is necessarily best, has been used to also justify a wholesale contracting out of penal services to the private sector. Although during the Coalition Government's term of office only two public sector prisons were privatized and two private prisons built,

there has been an extensive outsourcing of prison services, resettlement services for prisoners and community orders for offenders. Whether such outsourcing will lead to reduced public expenditure or just a change in the recipient of the same level of government funds is a moot question. Although the political rhetoric, in slightly different forms, has been about the rehabilitation of offenders, the reality with regard to the reforms in sentencing, custodial services and community-based services has been a move towards an increasingly punitive and exclusionary penal system. When the actions of the Coalition Government are placed in the broader trajectory of social change it is clear that the reforms instituted are consistent with patterns that became established in many countries in the late twentieth century and are, in turn, clearly associated with significant changes in those countries attendant upon the move to a political economy rooted in neo-liberalism, with the notion of austerity being used as a political strategy to turbocharge neo-liberalism.

Chapter 2 provides an introductory guide to the structure and organization of the criminal justice system, but it may be omitted altogether by those already familiar with the territory. Chapter 3 provides an overview of how we might critically assess penal policy. Chapter 4 examines the sentencing policies of the Coalition Government taking into account the administration of justice and policies affecting custodial and community-based sentences. Chapter 5 offers a critical assessment of Coalition Government policies affecting the provision of custodial services including the drive to make the custodial estate more affordable, the attempt to introduce 'prisons with a purpose', the reconfiguration of prison discipline and the denial of prisoners' voting rights. Chapter 6 examines Coalition Government policies relating to community-based offender services including the drive to outsourcing, the extension of licence arrangements for short sentence prisoners and the attempts to establish 'robust and credible' community orders. Chapter 7 discusses the penal policy trends identified, locates these trends in broader patterns identified by others and attempts to provide a sociologically informed explanation of these patterns. Chapter 8 provides a summary of the key arguments, an indication of some of the limitations of the work, a consideration of some research questions raised and a tentative indication of what should be done to mitigate the regrettable penal policies pursued by the Coalition Government.

2

Crime, Criminal Justice and the Penal System

This chapter sets the scene for an understanding of penal policy in the 2010–15 period by considering two topics: the structure and organization of the criminal justice system and the nature and the extent of, and trends in, crime in England and Wales. The issues are dealt with in this order, reflecting the fact that the amount of crime in a society is a complex product dependent, to a very large degree, on the nature of the criminal justice system, as well as the nature of the broader society.

2.1 The Criminal Justice System 2010

An important function of a nation state is the maintenance of internal social order. Given the importance of stability for social relations and economic activity, it is not hard to see how the maintenance of social order can be perceived as being a primary, perhaps a defining, task of the nation state, especially in a democratic society. This said, it would be a mistake to take the nature of social order for granted. Conceptions of social order differ widely not only contemporaneously from country to country but over time. What are considered to be appropriate socio-economic

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arrangements in terms of income and wealth distributions vary, as do the entitlement to and even the conception of civil and political rights. In turn, such sentiments are crucially influenced by the balance of forces evident in a society at a particular moment including social, political and economic arrangements and sentiments pertaining to matters other than social inequality and civil and political rights such as religious views, family patterns and trade unions.

The institutional framework that has emerged to deal with the task of securing and maintaining internal order and dealing with offenders is referred to as the criminal justice system. Some contemporary institutions of criminal justice can trace their origins back many centuries but for most forms their birth occurred within the complex of social forces linked to the nation state and capitalist economic organization. The term 'system' is used here to denote a series of linked institutions, connected because the output of one institution becomes the input of another. For example, court-sentencing decisions constitute an output affecting the agencies that provide custodial and community-based services. Each institutional structure has its own personnel, rules and regulations, funding and connections to government.

Criminologists, since the 1960s, have tried to develop adequate concepts that capture the complex, ongoing, contingent human process that is criminal justice. One such concept is that of 'career'. In ordinary usage this term means a work history which shows upward progress. Criminologists make use of the concept of career and deploy it to denote not just movement up the 'ladder', but descent down the 'snake'. This concept emphasizes the contingent but influential interaction of the rule breaker and rule enforcers (Becker 1963; Goffman 1961; Young 1971; Cohen 1980).

The contingent character of criminal justice is well-illustrated by looking at the processing of crimes and criminal perpetrators. Only about 38 % of incidents discovered by the British Crime Survey (BCS) in 2010/11 had been reported to the police by the victims (Chaplin et al. 2011:37). The majority of incidents involving BCS (later known as the Crime Survey for England and Wales -CSEW) respondents simply failed to achieve any kind of 'official' existence beyond being recognized by the victim and discovered by the survey. There are numerous reasons for this

including the relative triviality of the offence, lack of insurance and thus no need to report the matter to the police, the fear of reprisals or simply because the police are perceived as ineffective. Furthermore, about 25 % of crimes reported to the police are not recorded by them (Nicholas et al. 2005:36). How they are 'crimed', that is, how the behaviour of the perpetrator is recorded as a specific offence (e.g., whether robbery or theft), is also a matter of discretion but likely to lead to very different consequences. Of those that are reported and recorded by the police about 29 % (Smith et al. 2013:9) are cleared up, that is, attributed to a perpetrator either directly by police investigation or indirectly, through them being 'taken into consideration' when a suspect is dealt with by a court for other offences. The above figures, when taken in conjunction with one another, reveal that of 100 offences reported to the BCS/CSEW, only about 8 are subsequently attributed to a suspect!

If we now move from the career of the offence to the career of the suspect, then it is clear that again another contingent and human process is revealed. Because not all offences inspire an official response (because of not being reported by the public to the police or not being recorded by the police if reported to them by the public), a number of offenders have no proceedings taken against them for their criminal conduct. Some suspects are also deemed by the Crown Prosecution Service (CPS) as not worth proceeding against where there is no reasonable chance of conviction and/or it is not in the public interest to proceed. Some suspects are the subject of out-of-court action. In 2009/10, 22 % of all those proceeded against were dealt with by means of out-of-court action. Of those given an out-of-court disposal 30 % received a penalty notice for disorder, 52 % a caution and 17 % a warning for cannabis possession (Ministry of Justice [MOJ]February 2013:4). Where the suspect is proceeded against in court some suspects find that the case is discontinued or they are found not guilty. In 2009/10 of those proceeded against at court about 17 % were not convicted of offences (MOJ February 2013:4). To follow through the arithmetic of prosecution, then, out of 100 suspects proceeded against in some way 22 will be dealt with by out-of-court action. Of the remaining 78 suspects, some 14 will either have their court case discontinued or be found not guilty. Out of 100 suspects proceeded against, 64 will be convicted.

So far we have discussed criminal justice as if it exists in a social vacuum. The concept of 'life chances' helps us to insert the processural nature of criminal justice into an understanding of social structure. The term life chances was originally developed by Max Weber who wrote that 'a class situation is one in which there is a shared typical probability of procuring goods, gaining a position in life, and finding inner satisfaction' (1978:302). The concept of life chances suggests that an individual's path through life is influenced by a variety of factors. 'Life chances …can cover a range of opportunities that people can experience as they become adults and into their later life. These opportunities include… the likelihood of being in employment over individuals' lifetime, the chances of obtaining educational qualifications and the chances of good physical and mental health' (Johnson and Kossykh 2008:iii). And one might add, given our concerns here, they include the chances of thinking that crime is a way out of difficulty, of being stopped and searched by the police, of being prosecuted by the CPS, of being convicted by a court, of being sentenced to imprisonment and passing through prison relatively unscathed. As the research report quoted above makes clear, a lack of opportunities interact across areas, producing a downward spiral of marginalization both intra- and intergenerationally. For example, 'the life chances of individuals are closely related to the socio-economic characteristics of their families, such as parental income, socio-economic status and parental education' (Johnson and Kossykh 2008:iii). It is clear that this spiral effect is at work in the criminal justice system with non-white prisoners constituting 26 % of the prison population but only 12 % of the general population in England and Wales in 2013 (Berman and Dar 2013:11). Similarly, Muslims represented 13 % of the prison population and 4 % of the general population (Berman and Dar 2013:11).

The influence of social structures on life chances should not be understood as suggesting an overdetermined trap from which no one can escape. On the contrary, firstly, some individuals manage to break out (because of other structural features like the influence of a particular teacher, aspiring parent, chance sponsorship or the importance of particular beliefs about entitlement or virtue). And, secondly, the interlocking impact of life chances is amenable to social change. For example, during the latter part of the twentieth century major alterations were made in educational

provision (particularly the Education Act 1944), which materially widened educational opportunities. Criminal justice provision was also modified by, amongst other things, the Legal Aid and Advice Act 1949, the Police and Criminal Evidence Act 1984 and the various laws outlawing discrimination on the basis of gender, race and religion, making for a more (but still not completely) level playing field in terms of criminal justice. In this sense, as Marx put it, '(people) make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past' (Marx 1983:398). It should be clear from the above that criminal justice is to a large degree linked to social justice.

2.1.1 The Prosecution of Offenders in 2010

The criminal justice system may be seen to be balanced on a fulcrum. On one side is the institutional matrix concerned to prosecute offenders and on the other, the penal system. The criminal law, based on rules created by parliament as well as the precedents established by judges when interpreting cases and law, occupies an important place in the prosecutorial system. Criminal law proscribes some (e.g., dishonestly depriving people of their property) and requires other behaviour (e.g., to provide a breath sample when suspected of drinking excess alcohol when in charge of motor vehicle), setting a range of penalties for infraction.

Criminal law is constantly changing. Though some kinds of behaviour have long been criminalized in some form (theft, burglary), the penalties have varied tremendously. By the beginning of the nineteenth century in England and Wales there were more than 200 capital crimes (Gatrell 1996). There are none now. Many behaviours once considered criminal are now no longer so, at least in some circumstances. For example, sexual acts between consenting adult males aged 21 and over remained illegal until the Sexual Offences Act 1967 and it was not until the 1994 Criminal Justice and Public Order Act that the age of consent was reduced to 18 and not until 2000 (Sexual Offences Amendment Act) that it was harmonized with the heterosexual age of consent at 16. Prior to the Suicide Act of 1961 attempted suicides could be prosecuted and some were impris-

oned. This act removed the threat of prosecution from those attempting suicide. Over the last 200 years a variety of new crimes have been created. Indeed, there is something of a debate about the record of the last four governments in this regard. In particular the New Labour Governments of 1997–2010, arguably, created more than 4000 new offences (Collins 2010).

The context of criminal law enforcement is such that agencies are faced with a host of laws and potentially transgressive behaviours on one side, and on the other side, limited resources. They square this circle by simply exercising discretion with regard to whom they police and prosecute for what offences. In some cases the choices to not prosecute may become an explicit policy leading to the virtual decriminalization of behaviours. In many police forces in England and Wales people found in possession of small amounts of cannabis are routinely not prosecuted. The relevant legislation still exists (Misuse of Drugs Act 1971) but it is simply not routinely enforced.

In England and Wales crime is divided into three categories by venue of trial, reflecting offence seriousness. Indictable offences must be dealt with by the Crown Court which possesses greater sentencing powers. These offences are the more serious crimes and include murder, manslaughter, rape and robbery. Non-indictable or summary offences are less serious offences (including criminal damage under £5000 in value, common assault, assault of a police constable, various public order offences, including drunkenness, stealing and unauthorized vehicle taking) and must be heard in a Magistrates' Court. 'Either way' offences (e.g., theft and handling stolen goods) can be heard at Crown or Magistrates' Courts. When such defendants appear at Magistrates' Court they can elect, with the permission of the bench, for the offence to be dealt with at the Crown Court. The bench can refer a case to the Crown Court for trial as well as remit the case to the Crown Court for sentencing only.

The existence of laws prohibiting or requiring certain types of conduct do not ensure that people simply comply. Criminal law thus requires enforcement agencies and there are three main groups concerned with the prosecution of defendants. Foremost in this group is the uniformed, paid police, a body that can trace its origins back to 1829 (Reiner 2010).

The police occupy a crucial role in the prosecution of offenders, maintenance of order and generally dealing with matters that Bittner (1990:161) usefully describes as situations where 'something-that ought-not-to-be-happening-and-about-which-someone-had-better-do-something-now'. The police share their role with a wide variety of other agencies including MI5, the British Transport Police and private security firms. The police and other agencies play an important gatekeeping role, admitting some and refusing others entry into the criminal justice system, and operate with considerable discretion when exercising this role (Reiner 2010).

The second main agency concerned with the prosecution of offenders is the CPS. The Prosecution of Offences Act 1985 created the basis for the CPS removing both the final decision to prosecute offenders and the actual act of prosecution in courts from the police and awarding it to the new body. The CPS acts as an important gatekeeper, retaining some suspects within the grasp of the criminal justice system by deciding to prosecute, but ejecting others by deciding not to prosecute. The CPS also takes responsibility for prosecuting cases derived from other investigatory bodies.

Successive UK governments have placed an emphasis on equality of access and equality of opportunity and this is nowhere more important than with regard to the law in that a criminal case should not be decided on the ability of the defendant to pay but on the merits of the case. Legal aid in criminal cases does something to achieve this goal. The year 1999 saw, under the newly created Legal Services Commission (LSC) for England and Wales, the establishment of the Criminal Defence Service (CDS), providing advice and legal assistance to those charged with criminal offences.

Finally, the criminal courts of first instance (Magistrates' and Crown Courts) have an important prosecutorial role. The phrase 'first instance' here simply means that they take new criminal cases and in this role do not hear appeals. Magistrates' Courts are restricted to this role alone, whereas Crown Courts, in separate sittings, act as appellate courts also. The essential role of the criminal court of first instance is to determine, with regard to all types of offences, guilt or innocence and, where guilt has been either accepted or proven, convict the defendant(s) of the crime(s) as charged. The conviction rate of all courts of first instance in England

and Wales in 2009 was 83 % (MOJ October 2010). The process of the court may not be lengthy as a significant proportion of defendants in both Magistrates' Courts (68 %) and Crown Courts (73 %) plead guilty, some no doubt encouraged by the discounts on the sentence offered for guilty pleas (CPS statistics for 2009–10, 2010–11 and 2011–12). Crown Courts normally sit with juries; Magistrates' Courts, which deal with the vast majority of criminal cases (in 2009 93 % MOJ October 2010), albeit the less serious offences, do not.

The operations of the institutional frameworks noted above—the police, the CPS, the CDS and the courts—run from the everyday actions at the 'coal face' of the police constable in a town centre on a Saturday night trying to deal with disorder up to the corridors of power in Whitehall. The police are overviewed by the Home Office. Theresa May was Home Secretary, 2010–15, and was appointed in the same role in the new Conservative administration. The Home Office has direct responsibility for a number of institutional structures including immigration and borders and crime prevention. It plays a part in the formulation of new criminal laws and amendments to previous legislation. The CPS is a non-ministerial government department headed by the Director of Public Prosecutions and it operates independently under the superintendence of the Attorney General. The CDS until recently was organized by the LSC although the Home Office keeps oversight of such matters. Responsibility for the courts lies with the Ministry of Justice.

2.1.2 The Penal System in 2009–10

Once the defendant has been convicted (whether by pleading guilty or being found guilty) we move to the other side of the fulcrum of the criminal justice system, to agencies concerned not with prosecuting offenders but their 'disposal'. Here another set of contingencies is evident in the life chances of the now convicted offender.

There are a number of recognized aims which can be expressed through sentencing including deterrence, incapacitation, rehabilitation, restoration or reparation and desert. Actual sentences often combine such aims. All disposals are to an extent exclusionary in that they identify a particular

individual for some kind of intervention which separates them from others not so identified. Some are explicitly 'reductivist' (Walker 1972), that is, the general justification for intervention is that it will reduce crime, whilst others are retributivist, that is, the disposal is intended to ensure that the offender receives her/his just desert. Disposals vary in the value they place on punishment as an aim. Punishment may be understood as the lawful, intended and coercive infliction of pain, harm or suffering on an individual.

Deterrence means imposing a sufficiently 'painful' penalty on the convicted offender so that she/he will not commit the offence again (individual deterrence) or someone like them will not commit the offence at all (general deterrence). In this sense deterrence is a future-orientated penalty and has a central justification in its effects, that is, the reduction of crime. Deterrence theory assumes that offenders are rational (with modern versions allowing for the limiting influence of the three *I*s—insanity, intoxication and infancy), freely choose their actions, breaching the social contract, and are thus justifiably punished. But deterrence-based penalties raise important distributional questions concerning proportionality.

Incapacitation simply means imposing a penalty on the convicted offender that will render her/him unable to perpetrate crimes during the period of the penalty (imprisonment may be seen to act in this way, preventing crimes being committed in society by the incarcerated offender) or never again (e.g., because no longer alive). The central justification for incapacitation inheres in its impact, the reduction of crime. The model of the offender is similar to that in deterrence theory but greater stress is placed here on the aggravation of the offence caused by the incorrigibility of the offender. Like deterrent-based interventions, incapacitative approaches raise questions about the severity of the punishment that is justified—how much incorrigibility for what offences justifies lengthy, even permanent, incarceration?

Rehabilitation is a reductivist aim concerned with changing the offender in some relevant way so as to reduce the possibility of future offending. The change in the individual may be engineered whilst deploying a number of different approaches. Scientific or medical rehabilitation justifies intervention to ameliorate the crime-relevant disease or condition (acting on any relevant mental condition by means of psycho-active chemicals, brain surgery, conditioning, psychotherapy or some form of counselling).

The social deprivation approach justifies intervention by addressing the individual consequences of social inequality. A moral approach bases intervention on religious or moral exhortation and/or moral example. Unlike the other aims of sentencing discussed so far, this overall approach places an emphasis on the needs (medical, psychological, psychiatric, social, moral or religious) of the offender. The model of the offender found in views that emphasize rehabilitation varies—the offender can be conceived much like in deterrence or incapacitation theory, that is, a freely choosing being—but the emphasis here is on his/her change or redemption rather than punishment, although from the point of view of the offender there may not be much difference. In other views the offenders' behaviour is understood to be the result of a web of causal forces that she/he cannot control and probably does not understand. In this model the point of penal intervention is to modify this causal web by operating at a number of different levels, most of which focus on the individual (some kind of medical intervention or therapy) or the society. But a tension is possible in this set of views, between the protection of society and meeting the needs of the offender, illustrated when the issue of the continued incarceration of those serious offenders with severe mental health issues is considered, raising the controversial issue of dangerousness.

On the borderline of being reductivist is the aim of restoration/reparation. This aim stresses the need for the offender to put things right. This may be seen to entail a number of themes including the offender accepting the wrongfulness of her/his actions, in some way making amends for the crime and moving from 'outlaw' to an integrated member of society again. The acceptance of the wrongfulness of criminal action suggests an approach not dissimilar from the moral reform approaches mentioned above, but restoration may be seen as separate from reform in that it prioritizes restoration as a principle in its own right. Restorative justice approaches can take many forms—some placing an emphasis on repairing relational damage like victim/offender mediation and others placing stress on the offender compensating the victim by making reparation. Some sentences require that the offender makes some kind of compensation payment in kind or in money terms, to the particular victim or to the community or society. Perhaps this view comes closest to being able to recognize that offender choice is limited but real and that it is neces-

sary to address both factors that will influence choice (recognition of the damage done to victims) as well as deal with individual problems whilst recognizing the need to address broader social issues.

The last penal aim dealt with here is non-reductivist. 'Desert' means imposing a penalty that expresses a just price for the act committed—this presupposes a punishment tariff, with punishments being imposed that are commensurate with the seriousness of the offence. Impact beyond this is not relevant. Desert-based views do set a moral price for the offence and a limit to the extent of punishment and penal intervention more generally. However, such views are associated with quite different stances on disposals ranging from inflationary Old Testament 'eye for an eye' views which may be seen to support the death penalty, to modern deflationary views which attempt to limit the use of imprisonment. Desert may be combined with deterrence or rehabilitation as long as desert remains the means for setting the limits for the depth of penal intervention. Desert theory is based on the kind of understanding of offenders found in deterrence and incapacitation views. 'Eye for an eye' desert-based views can seem unduly harsh and, even deflationary accounts overwhelmingly negative. Simply sending the offender, as it were, to sit in a penalty box (and not trying to change the conditions of her/his offending behaviour in any way) appears to be—to rephrase, in part, the pro-desert White Paper of 1990 (Home Office 1990:Para 2.7)—a way of neglecting the opportunity to make some 'bad people' stop reoffending.

The first institutional sector of the penal system is provided by the courts, not in their prosecutorial, but in their sentencing role. There are two main sets of judicial actors evident: magistrates can trace their lineage back to the thirteenth century though their current role and composition is more a product of changes in the nineteenth and early twentieth centuries (Skyrme 1991). Crown Courts came into being in 1972, and were created by the amalgamation of the old assize courts and quarter sessions by the Courts Act 1971. In these modern courts magistrates or judges impose sentences on convicted offenders based on a variety of considerations including the nature of the offence(s), the nature of the offender(s), relevant legislation, sentencing guidelines, penal philosophies and local sentencing traditions. Clearly, the decisions that they make have important consequences for other parts of the penal system.

Overall, in 2009, 7 % of the 1,405,900 convicted offenders were sentenced to immediate custody. with the average sentence length being 13.7 months. As might be expected, given the more serious crimes dealt with, the imprisonment rate of Crown Courts (55 %) (MOJ October 2010:20) was higher than that of Magistrates' Courts (4 %) (MOJ October 2010:28). However, Crown Courts contributed 51,901 (52 %) and Magistrates Courts 48,389 (48 %) to the flow of convicted offenders to prison (MOJ October 2010:20).

Incarceration of some sort has been available for a very long period, usually to fulfil the function of what we would now call remand. Modern imprisonment, where being incarcerated is a sentence in its own right, is comparatively new, emerging in the seventeenth century with the Houses of Correction and coming into its own in prisons only in the nineteenth century with the penitentiary movement that stimulated prison building on a grand scale in many countries including England and Wales (Pugh 1968; Ignatieff 1989). In 2010 the prison estate was large, with 143 penal institutions catering for a range of offenders from age 15 to adult. In 2010 there were, on average, 84,725 people in prison (Berman and Dar 2012). Some 81,000 of these were men and 4000 were women. About 1 % were young people aged 15–17 years, 7 % were young adults aged 18–20 and the remaining 92 % were adults aged 21 or over.

The custodial estate, in 2010, was varied and complex. There were different kinds of prisons for male offenders who represented some 95 % of the prison population. For adult males there were high security establishments (used for those of highest risk in terms of escape and danger), closed training prisons (used for those of intermediate risk), open or semi-open prisons (used for those representing a low risk often towards the end of a longer sentence) and local prisons (used to house those remanded in custody by the courts as well those newly sentenced and those given short prison sentences). Some of the prisons were state-run whilst others were run by private contractors. Prisons also varied, not just in level of security, but also in terms of specialization of function. Her Majesty's Prison (HMP) Wakefield was a high security Category 'A' prison for (mainly) serious sex offenders and HMP Grendon was a Category 'B' prison organized as a therapeutic community. Separate young offender

institutions were provided for those convicted of offences in the 18–20 year age group.

There was less variety in relation to prisons for females. Adult female offenders were incarcerated in only 14 establishments (All Party Parliamentary Group on Women in the Penal System 2010), seven of them having mother and baby units. Females below the age of 21 years, as noted above, were allocated to secure children's homes, secure training centres or young offender institutions. Senior young offender institutions for females were not usually distinct from adult prison establishments.

A variety of laws (e.g., the Prison Act 1952) and regulations (the prison service has a formal set of what are called orders and instructions) applied to the daily life of the prisoner, influencing how she/he was treated in terms of categorization, security and escape prevention, time spent unlocked, religious worship, food, purposeful activity including both work and education and skill training, health care, disciplinary action (including being placed in segregation units and both internal and external adjudications), sentence planning, the Incentives and Earned Privileges system and release, including early release and the form of supervision they receive after release, if any.

In 2010 there were a number of penalties available to the courts which left the convicted offender in the community but subjected her/him to some kind of ongoing intervention or supervision. A significant proportion of offenders were sentenced to a community penalty which involved some kind of supervision imposed on them. In 2009, 14 % of convicted offenders were given such a community sentence (MOJ October 2010:16). Most community penalties were comparatively new, the product of the twentieth century—the probation order emerged with the 1907 Probation of Offenders Act and the community service order with the Criminal Justice Act of 1972. In 2010 the probation service represented the main organizing body for community sentences and for providing the supervision of prisoners released on licence.

The Criminal Justice Act 2003 replaced the wide variety of community sentences with one generic community order with 12 requirements from which the judiciary could pick and mix according to their view of the offender and the offence. The 12 requirements in force in 2010 were alcohol treatment, activity, attendance centre (restricted to under

25), curfew (enforced by electronic tagging), drug rehabilitation, exclusion, mental health, programme or accredited course, prohibited activity, residence, supervision (previously known as probation) and unpaid work (previously known as a community service).

There was only one semi-custodial penalty in 2010. Some 3 % of offenders were given a suspended sentence order in 2009. Since 2003 suspended sentence orders have made the offender subject to a package of community requirements as deemed appropriate by the judge or magistrate. They also involve a period of imprisonment that is suspended for a specified period. If the person sentenced in this way perpetrates further offences during the period of suspension, then they are required to serve the suspended sentence besides receiving any new sentence for the new offending (MOJ October 2010:16). There were a number of penalties which did not involve the supervision of the offender beyond the completion of the penalty and represent sentences in their own right (as opposed to being part of a community package). Fines only require the offender to make the necessary payment in a specified period. They were widely used, with 67 % of convicted offenders being fined. Fines did have an associated institutional apparatus to receive payments and for the pursuit of those who fail to pay. A further 9 % of offenders in 2009 received other penalties including discharges (absolute or conditional) and compensation orders (MOJ October 2010:16).

All three of the institutional sectors noted above - courts, prisons and community-based offender services - have been included in the purview of the Ministry of Justice since May, 2007. The Secretary of State for Justice (the Minister of Justice) was Kenneth Clarke in 2010–12 and Chris Grayling in 2012–15. Michael Gove was appointed to the role in 2015 by the new Conservative Government. The Minister of Justice also acts as the Lord Chancellor. The Lord Chancellor is responsible for the efficient functioning of the courts though not, any longer, since the Constitution Act 2005, acting as head of the judiciary. Chris Grayling was the first non-lawyer to hold this post (and Michael Gove the second such person). Judges and magistrates profess to maintain 'judicial independence' from competing influences deriving from government, political parties and other policy communities (like defendants). The members of the judiciary are not subject to election. Courts are held accountable by other courts

via appeals and ultimately the Supreme Court of the UK (Supreme Court Website 2014) and the European Court of Human Rights.

Prisons are also under the general aegis of the Minister of Justice and specifically the Undersecretary of State for Prisons, Probation and Rehabilitation (Crispin Blunt in 2010–12, Jeremy Wright in 2012–14 and Andrew Selous in 2014–15, who has continued in the post after the general election). Prisons are subject to managerial control through the National Offender Management Service (NOMS) and scrutiny by the prison inspectorate, who undertakes both unannounced inspections and follow-up visits. Prisons are subject to judicial scrutiny when prisoners bring actions relating to their treatment. Unlike the police, prisons are not held directly democratically accountable, but both the IMB for Prison and Probation Ombudsman (PPO) monitor the operation of prisons, producing regular reports. However, at the time of writing, none of the bodies mentioned above can go further than making recommendations as there are no legally enforceable standards.

Like prisons, most community penalties fall under the general aegis of the Minister of Justice, and specifically the previously mentioned Undersecretary of State for Prisons, Probation and Rehabilitation. As in the case of prisons, some community penalties (probation and unpaid work) fall within the managerial scope of NOMS. Probation has its own inspectorate. Offenders on community penalties can ask courts to review their treatment. Like prisons, community penalties are not subject to direct democratic accountability. There is no equivalent monitoring body like the IMB for Prisons for community penalties, but, like prisons, probation does come within the purview of the PPO. However, the PPO can only make recommendations.

2.2 Crime: Definitions, Extent and Trends

Crime is normally measured in England and Wales using two methods which are intended to triangulate on the object. The first method of measuring crime, and the only one for nearly 130 years, was by using police-recorded crime data. Simply put, these statistics are a selection of the aggregated returns from police stations and police forces. They

depend, in large part, on the public reporting crime to the police in the first place though some offences are observed by the police and some are police-defined offences. They also depend on the police recording the crimes that are reported to them supposedly following standard procedures in terms of whether to record and, if so, how many and what kinds of crime are to be recorded.

Police-recorded crime statistics are normally published annually by the Office for National Statistics (ONS) and relate to 'notifiable offences' and consist of a combination of all indictable (tried at Crown Court) and 'either way' (triable at either Crown or Magistrates' Courts) offences plus a limited number of summary crimes (triable at Magistrates' Court) (e.g., common assault and assault on a police officer). Other summary offences are not included in systematically published statistical returns. Recorded offences include a mixture of 'victim-based crime', that is, crimes with an identifiable victim (theft, burglary, assault) including about 76 % of the total in 2015 and crimes without an identifiable victim (drug offences, carrying weapons, public order offences) (ONS October 2015a:9).

There has been much debate amongst criminologists for a long period as to the validity and reliability of police-recorded crime data. This debate would now seem to have reached official circles with the House of Commons Public Administration Select Committee (April 2014) recently hearing evidence that many police forces in England and Wales have been systematically underrecording criminal offences in order to meet national targets, leading the UK National Statistics Authority to remove 'the National Statistics designation from statistics based on recorded crime data until such time that the ONS, working with the Home Office, Her Majesty's Inspector of Constabulary (HMIC) or other appropriate bodies, is able to demonstrate that the quality of the underlying data, and the robustness of the ongoing audit and quality assurance procedures, are sufficient to support its production of statistics based on recorded crime data to a level of quality that meets users' needs' (National Statistics Authority January 2014:2). This had not been accomplished by 30 September 2015.

The second method of measuring crime relies on the victimization survey. From 1981 the BCS (now known as the Crime Survey for England and Wales [CSEW]) has collected victimization data from relatively large

representative samples of the population (11,000 in 1982 increasing to 47,000 in 2005/6) periodically up to 2001 and continuously from then on (Jansson 2007). This information has not been filtered by the public propensity to report victimization to the police, nor by formal or informal police recording practices. The statistics collected are more complete than police-recorded crime data with reference to victim-based crime. However, CSEW data are not without their own problems. CSEW surveys can claim good response rates (80 %) but not everybody responds to the requests for information. Not all offences are covered by the survey (crimes against businesses, crimes against vulnerable groups like the homeless, sexual offences). Clearly, murder is omitted and the data on domestic violence may have certain limitations given that it is collected in the home, it does not include victimless crimes like drug use and, until 2009, details were not collected about the victimization of those under 16 years (Chaplin et al. 2011). Data on fraud and computer crime were not collected until 2014–15. No doubt there is still an unreported figure even for the CSEW. Data collected by the CSEW tend not to be good indicators for serious violent crime (attempted murder and robbery) as such offences are rare and the violent crime the CSEW does have reported to it tends to be the more frequently occurring, relatively low-level offences.

Taking into account relevant caveats noted above what can we conclude about trends in crime from the available data? Tables 2.1 and 2.2 deal with police recorded crime and Table 2.3 with BCS/CSEW recorded incidents.

Table 2.1 Total police recorded crime from 1951 to 1995

Year	Total notifiable offences recorded by the police
1951	525,000
1961	807,000
1971	1,666,000
1981	2,794,000
1991	5,075,000
1995	5,100,000

Source: Adapted from Home Office (2000) Table 1.1 Page 23 and Chaplin et al. (2011)

Table 2.2 The number of police-recorded crimes by category in 2004–5, 2009–10 and 2014–15 and percentage change 2004–5 compared with 2009–10 and percentage change 2009–10 compared with 2014–15

Offence category	Offences recorded 2004–5	Offences recorded 2009–10	% change 2004–5 compared with 2009–10	Offences recorded 2014–15	% change 2009–10 compared with 2014–15
Violence	1,201,971	1,001,417	–17	976,010	–2.5
Property offences	3,945,629	2,879,526	–27	2,274,292	–21
Other offences	209,853	305,725	46	410,248	34
Total crimes	5,357,453	4,186,668	–22	3,660,550	–13

Note: Violence includes violence against the person, sexual offences and robbery. Property offences include theft and burglary. Fraud is not included. Other offences include drug offences, possession of firearms offences
Source: Adapted from ONS, October (2015b)

The use of police-recorded crime data to assess long-term trends in *total crimes* is fraught with difficulty not only because of the above-mentioned problems associated with informal underreporting practices and the formal changes in the counting rules in 1998/99 and 2002 (Chaplin et al. 2011) but also because of the current pressures to introduce standard practices in order to rehabilitate crime statistics following the criticisms in 2014. Nevertheless, somewhat tentatively, the dominant trends can be set out. As revealed by Table 2.1, total police-recorded crime has increased dramatically in the post-Second World War period. Thus there were just over 0.525 million offences recorded in 1951, which rose to 0.807 million offences in 1961 and then rapidly increased to 1.667 million offences in 1971. Thereafter crime rose considerably, reaching 2.794 million offences in 1981 and 5.075 million by 1991 and peaking at 5.1 million in 1995. Table 2.2 shows more recent trends in police-recorded crime and compares 2014–15 figures with previous figures, but restricted to no earlier than 2004–05 because of the significant formal changes in the counting rules introduced in the late 1990s and early twenty-first century. Thus between the 2004–05 and 2009–10, a 22 % decrease

Table 2.3 The number of incidents reported to the BCS/CSEW by category in 1995, 2009–10 and 2014–15 and percentage change 1995 compared with 2009–10 and percentage change 2009–10 compared with 2014–15

Incident category	Incidents recorded 1995	Incidents recorded 2009–10	% change 1995 compared with 2009–10	Incidents recorded in 2014–15	% change 2009–10 compared with 2014–15
Violence	4,176,000	2,082,000	–50	1,344,000	–35
Property incidents	14,893,000	7,420,000	–50	5,161,000	–30
Total incidents	19,069,000	9,502,000	–50	6,505,000	–31

Note: Violence includes violence against the person and robbery. Property incidents include theft and burglary. Fraud is not included as data on this was only collected for the first time 2014–15

Source: Adapted from ONS, October (2015b)

in total offences is evident. However, more recently, between 2009–10 and 2014–15 a less steep decrease of 13% is evident. Trends in violent crime as recorded by the police show a marked downward trend from 2004–5 to 2009–10 of 17 % and between 2009–10 and 2014–15, of 2.5 %. Property crime shows a more consistent decrease of 27 % between 2004–5 and 2009–10 and 21% between 2009–10 and 2014–15. These trends have been mitigated, to some extent by increases within some categories (for example sexual offences) and in fraud, though here changes in both the methods of counting and the agency responsible for counting, render comparisons difficult. It is not possible to know to what extent the trends in recorded crime reflect a genuine change in actual crime, are due to changes in reporting levels by the public or are the product of changed police recording practices.

Table 2.3 presents BCS/CSEW data. Across the range of incident categories BCS/CSEW data show far more incidents compared with police-recorded crime statistics, as the former takes account of what is known as the 'dark figure', that is, offences that were not reported or recorded by the police. Total incidents decreased by 50 % between 1995 and 2009–10 and 31 % between 2009–10 and 2014-15. Incidents of violence decreased by 50 % between 1995 and 2009–10 and 35 % between

2009–120 and 2014–15. Finally, property related incidents decreased by 50 % between 1995 and 2009–10 and 30 % between 2009–10 and 2014–15. But attempts to understand trends in crime based on CSEW data are complicated by the results of the most recent study which for the first time asked questions about computer crime (under the Computer Misuse Act 1990) and fraud. These questions revealed a significant extent of crime for the 2014–15 period at least for property crime and possibly indicated that had the same questions been asked in previous years similar results would have been obtained, thus raising doubts concerning the decrease in crime thesis. The number of incidents reported to the CSEW was significant. Thus the preliminary estimates showed that some 2.5 million computer crimes and some 5.1 million online frauds were reported. If these were to be added to the total then this would mean not 6.5 million but 14.2 million crimes in 2014–15 (Travis October 2015).

Criminologists vehemently disagree about whether crime has indeed decreased in the 1995–2015 period. Some accept the apparent trend and attempt to explain it in various ways; others dispute the reality of the decrease. It is possible to conclude for our purposes that conventional categories used to measure crime do show some reductions, with the BCS/CSEW pointing to significant, across the board, reductions. The more limited police-recorded crime data show a similar, if less pronounced, downward trend. However, it seems likely that this downward trend in 'official' records has been associated with a growth in crimes including organized crime, computer crime and fraud (which may be reported to banks but not the police) that are not picked up by the conventional methods. There is little reason to suppose that the wholesale migration to the Internet for a variety of activities has not offered a new medium for crime, which has found its way into either the CSEW or police-recorded crime statistics only recently. In this sense it is possible that crime has not significantly decreased so much as changed. Nevertheless, it would seem that there has been a reassessment of the importance of crime as an issue in public consciousness, against the odds, given the extensive media coverage of crime, such that crime was seen as the most important issue facing Britain by only 9 % of the population in 2015, compared with the 38 % high point in 2008 (IPSOS/MORI Website August 2015).

In this chapter, the main subject of this book—the penal system—has been situated in the broader criminal justice system and a critical assessment has been provided of what is known about the trends in the extent of crime in England and Wales. In the next chapter an overview of how we may critically assess penal policy is provided.

3

Assessing Penal Policy

This chapter provides the reader with a firm base from which to assess penal policy. First, some preliminary issues are raised concerning key concepts. Next the penal policy task the Coalition Government set itself is explicated, thereby enabling the development of an internal critique, assessing how they did by their own standards. Finally, with due acknowledgement of the work of Morris and Hawkins (1972) and Reiner (2007), an honest citizen's and politician's guide to penal policy change is offered, thereby enabling an external critique, that is, an assessment of how the Coalition performed by independent standards.

Conceptualizing Penal Policy Change

Two concepts pertinent to grasping penal policy change are considered here—'agenda' and 'careers'. Finally, the penal agenda of the Coalition Government is briefly located in the broader pattern of penal policy change in the post-Second World War period.

A term is needed to capture the style adopted by government which sums up its central policy thrust. Cavadino et al. (2013:6) use the term

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'strategies for criminal justice', as does (Garland 1985), but later Garland and others refer to a particular 'culture of crime control' (Garlan 2001a; Reiner 2007). The term 'agenda' is used here to capture the penal style of a government or governments. The use of this word signals, firstly, that there must be an active effort to articulate what must be done; secondly, that what must be done is usually under conditions which are far from certain or chosen; thirdly, that the agenda may be intended and explicit from the start or emergent as a pattern in a stream of decisions or actions (a view explored and developed by Mintzberg in 1987); fourthly, that the agenda, whether explicit from the start or emergent, has political intent, that is, it is presented in such a way as to maximize appeal to the broadest range of existing policy communities (fellow MPs, the party in the country, voters, participants in penal practice) and achieve a goal or goals which are seen as politically desirable; and, finally, that the self-presentation may be at odds with the reality of the actual practice it apparently inspires.

In the more recent history of penal policy there are a number of clear examples of such agendas: the short-lived move to 'just deserts' associated with Douglas Hurd and effected by the Criminal Justice Act 1991, the startling claim that 'prison works' associated with Michael Howard and the Crime (Sentences) Act 1997, the ambivalent assertion made by the New Labour Governments for much of the 1997–2010 period to be 'tough on crime and the causes of crime' (BBC 1993; Blair 1994; Politics Resources 2014a, b, c) and within the 2010–15 period 'the rehabilitation revolution' associated with Kenneth Clarke and the 'transforming rehabilitation' agenda presented by Chris Grayling . Clearly, such agendas certainly plan for, but do not necessarily entail, actual change. The move to 'just deserts' was very short-lived and achieved little. Whether prison works in the sense that Howard meant is hotly disputed. As this book makes clear, the revolution predicated on a shift towards rehabilitation did not occur between 2010 and 2015.

What happens to a particular agenda is best captured using the concept of career again. On the face of it since UK governments have a mandate to rule and penal policy reform is part of normal government business, the development and implementation of a penal agenda would seem to be a simple matter of wielding the power inherent in government. But as Robbie Burns (Partington 1996:163) puts it,

'The best laid schemes o' mice an' men Gang aft a-gley.' As we have seen in Chap. 2, just as the suspect has a career in the criminal justice system, penal agendas may be seen to have a career subject to various exigencies: some shoot up the 'ladders'; some tumble down the 'snakes'.

The direction of penal policy over a period longer than the term of office of one government is a topic that is explored in Chap. 7. A brief overview is provided here. This moves the discussion in Chap. 2 on from a consideration of penal aims, not to academic schools of thought, but to penal agendas. Thus between 1945 and 1970 penal policy was dominated by one agenda, though not without contradictions and conflicts. Governments of any political hue in the UK favoured what was referred to as scientific rehabilitation in Chap. 2. But this all-party consensus broke down after 1970 (Bottoms 1980; Downes and Morgan 2007) leading to a revival of punitiveness and the growth of 'managerialism'. The emphasis on rehabilitation in this period was based on measures designed to ameliorate 'under the roof' processes (family and psychological issues) rather than social causes. Serious questions were raised about its theoretical inadequacies, systematically discriminatory impact, ineffectiveness and potential for lack of commensurability between the offence and the penal intervention (American Friends Service Committee 1971).

The turn towards punitiveness has provided a forceful agenda for penal change based on the notion that punitive intervention will prevent crime either by acting as a deterrent or by simple incapacitation ('prison works'). This was first promoted by Tory Governments from about 1970, with Labour coming round to this view in the early 1990s. A bidding war ensued with the two then dominant parties vying to show just how tough they could be. The turn to punitiveness may be seen to have few advantages in practice as it has led to negative penal interventions which also lack commensurability between the offence and the penalty and has fed off and strengthened the othering of those deemed superfluous to the new social order rooted in profit and hard work.

From the late 1970s a third penal agenda has emerged based on managerialism. Managerialism is a broad trend within which there is considerable diversity. However, it is rooted in the notion that the problems of the penal system (and the broader problems of the criminal justice system) can be addressed by adopting new administrative procedures, largely

derived from private enterprise, in order to ensure efficiency, effectiveness and economy. Under this approach a policy of quasi-marketization, competition and privatization by means of contracting out or outsourcing has been engaged. It has also been associated with drives to 'modernize' state functions including those within the penal system by means of mission statements and, latterly, performance management. The first manifestations of this approach may be seen to begin with the Thatcher Government in 1979 and end in 1997 with the New Labour victory. This phase took the form of limited marketization of the criminal justice system (court security, prisoner escort, electronic tagging of offenders on curfew orders, prison services and whole prisons) and an increasing emphasis on the individual's responsibility to avoid criminal victimization and offending behaviour. The later manifestation in 1997–2010 has followed what the Blair Government called a 'modernization' agenda, rooted in the need to deal with the new world order. For criminal justice this has meant an entrenchment of performance management leading to the setting of aims and objectives, monitoring and evaluation and a movement to a 'what works' view, which allows mixtures of penal philosophy to exist side by side. The emphasis of New Labour, 1997–2010, rested on a return to rehabilitation albeit in a more pragmatic form, cut through by notions of choice and free will. The privileging of delivery over penal philosophy explains the tendency of the Blair Governments to talk of being 'tough on crime and the causes of crime' and yet pragmatically neglect the second part of the catchphrase. This view may be seen to be responsible for reconfiguring the penal system for the cynic, who in Wilde's trenchant phrase 'knows the price of everything but the value of nothing' and creating a blizzard of paper and a mistaken insistence on process rather than outcomes, which stifles creativity and diversity. However, the emphasis that public services should be run in the most effective, efficient and economic manner is laudable and the championing of the means to accomplish this through research and monitoring to be applauded.

Some authors, perhaps to show that alternatives can be found to the dominant views, for example, Cavadino et al. (2013:6), perceive another penal agenda, a 'human and rights-based' programme based on at least three different conceptions: a modified and more modest rehabilitation

approach rooted in 'something works' and cognitive behavioural interventions, a restorative approach emphasizing reparation and a deflationary desert-based approach. This view 'seeks to protect and uphold the human rights of offenders, victims and potential victims' (2013:6). However, although there has been some movement in this direction in the post-Second World War period, most notably regarding just deserts and the short-lived Criminal Justice Act 1991, the growth of psychologically based cognitive behavioural therapies used for offenders and the spread of restorative justice activities, this view remains relatively uninfluential in penal terms and more a hope than a reality.

Such penal agendas vary in the extent to which they are exclusionary. As noted already, all disposals are to an extent exclusionary. But what really matters is whether the status of 'criminal' is seen as what sociologists have called a master status, that is, one which overrides other statuses (like father or son), is seen to justify the denial of rights normally granted to subjects or citizens (like voting or freedom of movement) and is relatively permanent (where criminality is understood as an expression of the person's nature not merely a temporary aspect of their behaviour). Punitiveness tends to be highly exclusionary, whereas some programmes based on rehabilitation tend towards eventual reinclusion. Managerialism turns exclusion/inclusion into a matter geared to pragmatic economy and effectiveness. The human rights approach noted above is the least exclusionary, putting a particular emphasis on the ability of all offenders to be (re)included in the broader community. Two recent debates illustrate the issue: the first concerns whole life orders and is explored in Chap. 4 and the second concerns the right of prisoners to vote and is taken up in Chap. 5.

The Coalition Government and Penal Policy: Penal Crisis and the Principles of Penal Reform

The key self-articulated principles and goals of the Coalition Government on penal policy are to be found in the Conservative Party 'Green Paper' (2008), the Coalition Agreement Document (May 2010) and the first consultation paper immediately after the Coalition Government came to power (MOJ December 2010). The Conservative Party paper (2008:46–50)

set out four 'goals' of penal policy and four 'principles of (penal) reform'. The first goal of penal policy was to ensure that there was 'restored confidence in the criminal justice system' which required greater 'honesty in sentencing' which would re-establish trust amongst victims and the public. The next goal was rooted in 'a new focus on rehabilitation' which, whilst emphasizing help with drug and alcohol problems and placing a particular emphasis on work, did not rule out 'an element of punishment'. Indeed, the paper elaborated on this matter by stating that the criminal justice system should reflect 'four pillars of sentencing' which were, in order of priority, punishment, reparation, rehabilitation and work. The first sentencing pillar was seen as punishment, where 'sentences should fit the crime by punishing the offender adequately, to satisfy natural justice and to deter them and others.' The second sentencing pillar was reparation where offenders are expected to make amends for their crimes to victims. Rehabilitation was the third pillar, where 'by accepting punishment and making amends an offender should earn the right to support and guidance to address offending behaviour.' The last sentencing pillar was work where 'offenders should be engaged in finding work and remaining in stable, lawful employment to aid their reintegration into society as law-abiding citizens. The third goal was to create 'prisons for the 21st Century' by eliminating overcrowding by providing 'adequate prison capacity,' the fourth goal (ibid.:46–48).

The 2008 paper went on to articulate four 'principles of reform'. It was seen that 'fundamental structural reform' was a need based on creating a 'decentralized system' rooted in local professionals, not NOMS and the Prison Service; 'clear accountability' which was predicated on holding local professionals accountable for reducing reoffending; and 'unlocking' the enthusiasm and expertise of the voluntary and private sectors 'to help deliver rehabilitative services at low cost'. And, finally, the key to much of this was a new incentives scheme based on payment by results. No attempt was made to link penal policy to the need for austerity in this pre-banking crisis document. Indeed, any savings resulting from the reforms were committed to reinvestment in the penal system (ibid.:48–50).

The Coalition Agreement Document (May 2010) was much less explicit on matters of principle but the general flavour of the previous document was maintained and the brand retained. In particular, the Coalition Agreement Document mentioned the need for 'more effective

sentencing policies, as well as overhauling the system of rehabilitation to reduce reoffending and provide greater support and protection for the victims of crime'. The notion of a rehabilitation revolution was clearly linked to paying 'independent providers to reduce reoffending' that would be 'paid for by the savings this new approach will generate within the criminal justice system'. A review of sentencing was proposed to ensure that that punishment and rehabilitation, in that order, are prioritized. Deficit reduction and austerity were given a separate section which indicated that 'we need immediate action to tackle the deficit in a fair and responsible way … (and thus) … we will significantly accelerate the reduction of the structural deficit over the course of a Parliament, with the main burden of deficit reduction borne by reduced spending rather than increased taxes' and this will mean making 'modest cuts of £6 billion to non-front-line services within the financial year 2010/11' (Coalition Agreement Document 2010:5–6), though no specific mention was made concerning cuts in criminal justice budgets.

The MOJ document 'Breaking the Cycle' (December 2010) is much more explicit on principles and articulated four main themes which have a clear affinity with the statements of both the Conservative Party document and the Coalition Agreement Document. The four principles were 'protecting the public; punishing and rehabilitating offenders; transparency and accountability; and decentralization' (MOJ 2010:7). Protecting the public was given much greater prominence than in the Conservative Party document though, as with this document, it was seen largely about reducing reoffending to achieve this aim. But the key penal goal, the provision of adequate prison capacity, was seen as necessary only in order to provide for public safety rather than for reducing overcrowding and making possible a prison system fit for the twenty-first century. The prioritization of the aims of penal intervention, whether with regard to sentencing or in the management of offenders in prison or in the community, still apparently reads as punishment and then rehabilitation, but in the MOJ consultation paper a further penal aim—reparation—was added, demoting rehabilitation to third place. The last two principles set out in the MOJ consultation document provide coverage for the 'principles of reform' set out in 2008, namely, greater accountability created by spinning off responsibility for offenders' services to local providers, many of whom will be drawn from charities and the private sector and rewarded

on a 'payment by results' basis. The December 2010 MOJ consultation paper makes one further principle quite explicit—'The Ministry of Justice is committed to playing its part in reducing spending to return the country to economic growth. Our proposals will achieve this through a greater focus on protecting the public by rehabilitating criminals and turning them away from a life of crime. This should result in few crimes being committed overall, stemming the unsustainable rise in the prison population and ultimately achieving a reduction in the amount of money spent on the criminal justice system' (MOJ December 2010:8–9). Significant spending reduction was set out by the Coalition Government's 'spending review' document (HM Treasury October 2010:10–11), sometimes referred to as 'SR10', which detailed budget cuts for the whole of the MOJ using 2010–11 as the baseline, and requiring accumulative cuts of 50 % in the capital budget (from £0.6 billion to £0.3 billion) and 23 % in programme and administration budgets (from £8.3 billion to £7 billion), over the next four financial years, with an overall accumulative target of 24 % to the year ending 2014–15. Thus under the Coalition Government even the penal system was not exempt from public expenditure cuts, justified by austerity. Subsequent MOJ documents suggest that there has not been a major movement away from the principles set out above.

In summary the Coalition may be seen to have five penal intentions: to protect the public; make penalties, in order of priority, more punitive, reparative and rehabilitative; improve the level of transparency and accountability in criminal justice; move to much greater decentralization; and, finally, achieve these four intentions whilst contributing to austerity.

An Honest Citizen's and Politician's Guide to Penal Policy in England and Wales in the Twenty-first Century

Norval Morris and Gordon Hawkins offered a guide to honest US politicians about crime control in 1972 and Robert Reiner an honest UK citizens' guide to crime and control in 2007. This text does not even hope to emulate such accounts. But these guides do provide an important

stimulus to set down some issues that any well-founded penal policy in the twenty-first century should address.

The first essential point is honesty about the kind of impact penal policy alone can realistically have on crime rates. Two works can help us come to grips with this task. Reiner (2007:80–90) suggests that there are five main factors leading to crime and contemporary crime rates. The first of these is the tendency of late modern societies to resolve disputes by criminalizing one of the parties and the stigmatization that results. The disposition of people to offend constitutes the second factor. Here we can include a variety of biological, psychological, social psychological, cultural and social processes, but we should not lose sight of the fact that just as prisons depend on prisoners to a large degree to maintain order, so too does social order depend on the legitimacy of the overarching social contract. The third set of factors is connected to the means to offend (the 'personal and technical resources' necessary for offending). The next set of factors concerns the opportunities to offend that are available in terms of both the physical (property that is easy to steal) and social (the availability of illegitimate opportunities through organized crime, gang cultures and so on as well as the ease of entry into legitimate social opportunities) environment. The presence or absence of formal and informal social controls constitutes the final factor in the explanation of crime.

Brantingham and Faust (1976) provided a useful three-level conceptual analysis of crime prevention, although the public healthcare analogy it is based on has some limitations, most notably that crime and disease are not synonymous. In their view primary crime prevention is to be understood as social and physical measures targeted at the wider population and the locality addressing what were seen as factors likely to lead to crime. Secondary prevention addresses those who had been identified as being at risk of engaging in criminal behaviour. Tertiary prevention is focused on known offenders, to try to reduce reoffending.

These works place the penal system in context. They suggest the limits of penal policy interventions as well as the need to look at other methods of crime prevention rooted in primary and secondary methods. The penal system can address only some of the factors leading to crime (particularly the movement to criminalization and some of the dispositional factors leading to crime) because it is concerned only with tertiary prevention

(i.e., formal interventions after the crime event). For example, the Prison Reform Trust (2013a:2) asserts that there are fundamental limits to what the criminal justice system alone can achieve to reduce crime and reoffending because 'many of the solutions … lie outside the justice system in housing, employment, family welfare, treatment for drug and alcohol addictions, mental health care and support for people with learning disabilities and difficulties.' In other words, they are part of the fabric of broader society and doing something effective against crime, in part, means addressing fundamental questions of social justice including the processes that lead to economic, cultural and political marginalization. There is a duty on the part of politicians to not engage in false claims about their penal effectiveness. This can best be accomplished by making use of evidence-based policy. Citizens need to be less credulous regarding promises made. To turn round what politicians have variously stated about the need for greater honesty in sentencing, there is a need for politicians to be honest about what they can achieve, and citizens must be realistic in their expectations. But more than this is the recognition that a just penal system is impossible in a fundamentally unjust and unequal society.

The second point is to note that there has been a general politicization of the terms of the debate about crime and criminal justice that has occurred since the mid-1960s (Downes and Morgan 2007). This has had two consequences. Since this time crime and criminal justice have become politically contested terrains on which the political parties compete for electoral advantage, leading to the penal policy equivalent of an arms' race. Furthermore, because of the salience of crime and its immediate presence, governments, as some criminologists have argued, have tried to govern through crime. There is a duty on politicians to not knowingly contribute to moral panics and on the public to evince a degree of scepticism about the claims of both politicians and news media regarding crime waves.

The third point concerns the need to recognize the marginalizing impact of interacting life chances both within and between generations. This means that penal policy should be critically examined in order to reduce unnecessary marginalizing impacts. The consequence of such impacts, at the interface of patterns of social and criminal injustice, pro-

duces the amplification of vulnerability and the overrepresentation of some social groups (ethnic minorities, the mentally ill, the poor) in the criminal justice system, a matter which has stimulated some government action via Section 95 of the Criminal Justice Act 1991, which required the Secretary of State for the Home Office to publish statistics which can be used to avoid discrimination on the basis of 'race or sex or any other improper ground' (S95 (1) (b) Criminal Justice Act 1991) and the Equality Act 2010 (Part 11, Chapter 1 and Schedule 19), which, amongst other things, requires all public authorities to address equality impacts of actions and policies and came into force in April 2011.

This act defined certain 'protected characteristics' to which the act applied. These include race, religion or belief, sex, sexual orientation, disability, gender reassignment, pregnancy or maternity, marriage or civil partnership and age. The act also contained section Part 1(1) which required that a public authority 'must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage'. This provision was subsequently 'scrapped' by the group set up by the Coalition Government to implement the legislation because they wished to avoid 'political correctness, social engineering, form filling and box ticking' (HM Government December 2010:6). What was left was a duty on public authorities including ministers to 'eliminate discrimination, harassment, victimization and any other conduct prohibited under the Act…' and '… advance equality of opportunity and foster good relations across all the protected characteristics with the exception of marriage and civil partnership' (Law Society Website 2015).

An important policy milestone with regard to this issue in general and women offenders in particular was an enquiry commissioned by the then Home Office in 2006 to examine what could be done to avoid women with particular vulnerabilities ending up in prison and resulted in the Corston Report (2007). This report argued that because of entrenched gendered inequalities, women offenders require a very different approach to male offenders. The report is dealt with here not only because it is important in its own right but also because it provides a blueprint for how the marginalization of women and other groups can be tackled.

The report usefully identified three 'categories of vulnerability' which included domestic circumstances (including domestic violence, childcare matters and single parenthood), personal circumstances (including mental illness, low self-esteem, eating disorders and substance misuse) and socio-economic factors (including poverty, isolation and employment/unemployment).

The Corston Report went on to make a number of recommendations relevant to sentencing and custodial and community-based offender services. In terms of the administration of justice it recommended improvements to governance at the ministerial level by the establishment of an Inter-ministerial group to guide and respond to a new commission for women who offend or who are at risk of offending. The report went on to recommend the reservation of custodial sentences and remand for serious and violent women offenders only and that community sentences be used as the norm. If women needed to be incarcerated then the report recommended the use of small local custodial centres within 10 years of the publication of the report, that is, by 2017. The report also recommended improvements in prison conditions, including sanitation arrangements and a reduction of strip-searching in women's prisons. The report recommended the development of a wider network of one-stop-shop community provision for women offenders and those at risk of offending together with improvements in health services and support for women offenders.

The impact of criminal justice in general and the penal system in particular needs to be scrutinized to reduce or eliminate surplus or excessive marginalizing effects on a variety of vulnerable groups, based on personal or socio-economic factors, minority ethnic communities, the mentally ill and the learning disabled. Similarly, penal policy change, whether it be about the administration of justice (e.g., legal aid reform), sentencing (e.g., the imposition of at least one punitive requirement on all community orders), custodial services (the application of new Incentives and Earned Privilege Schemes across the prison estate) and community-based offender services (e.g., with their greater emphasis on work), needs to take account of differential impact and the potential for worsening unnecessary marginalization. Citizens need to recognize that their vengeful sentiments need to be allowed expression, but on principle and in their own

interests, limited to not so stacking the odds against some groups as to make rehabilitation impossible.

The fourth point concerns the generally held view that there is and has been for some time a penal and probably a criminal justice crisis. This view is frequently alluded to by the media. It is a view widely espoused by some politicians (Conservative Party 2008), though their opinions seem to change somewhat when they are in office. Chris Grayling continually denied the existence of a prison crisis whilst in office (BBC News August 2014). Adopting a new brush approach, Michael Gove, the newly appointed Minister of Justice, in a recent speech, made it clear that despite his predecessors' efforts, prisons were in crisis (Gove July 2015). It is also an issue for many criminologists (e.g., Bottoms 1980) and as to why there is 'something rotten in the state of Denmark' (Shakespeare 1980:1036), and what can be done about it. The fact that this matter has been written about for so long and so continuously shows that this is not about a temporary eruption but a set of endemic difficulties. Bottoms' seminal paper published in 1980 can help us cast some light on these difficulties. He made two essential points. Firstly, the sense of unease was not peculiar to prisons but affected other aspects of the penal system too (courts, probation service). Many others have argued that the crisis extends beyond the penal system to the whole of the criminal justice system, if not society as a whole. Secondly, the nature of the crisis was not based on shortages of material resource alone, but was also a matter concerning the legitimacy of the penal system for the public, staff and offenders.

The 'crisis of material resources', as Bottoms termed it, covered a number of prison-based and community-based services including the ever-growing offender populations, overcrowding in prisons, stretched caseloads in probation as well as a tense balancing of prison and probation resources. It was a significant factor but not the only factor. Bottoms went on to suggest that the penal system was not only in dire material circumstances, but that it had lost its raison d'etre with the collapse of what he called 'the rehabilitative ideal', the central justification for penal intervention of any kind rooted in what we have called scientific rehabilitation (see Chap. 2 and the text above). The net result of this was that not only did it precipitate a desire to find a new rationale but it raised fundamental questions about what has subsequently become known as legitimacy

(Sparks and Bottoms 1995; Sparks et al. 1996) amongst offenders, staff in the penal system and the public. The notion of legitimacy is important—power that lacks legitimacy does not obtain public consent or staff cooperation and has to rely on inefficient, ineffective and inhumane naked force on its key subjects, offenders. Legitimacy may be seen to rely for all three groups on notions of fairness and effectiveness which produce cooperation. Such a notion of fairness may be seen as related to what Woolf and Tumin see as justice which 'refers to the obligation … to treat prisoners with humanity and fairness' (1991:Para 9.20).

Conventional accounts of prison disturbances stress little more than the impact of a crisis of material resources. The shell of the prison is filled with explosive by too many prisoners in too little accommodation leading to poor conditions (cell sharing with unscreened toilets, dining in cells, limited purposeful activity, an indiscriminate and problematic mix of prisoners plus, perhaps, a touch of 'spice') and reduced prisoner/staff ratios and staff anger, finally triggered by some comparatively trivial disagreement (e.g., over being ordered back to a cell) leading to a detonation or riot. The terms shell, explosive and detonation have all been used consciously not only to imitate the type of account very often offered by officials of prison 'riots' but also to emphasize the underlying, unsatisfactory, because incomplete, nature of the explanation at work here, namely, a simple material causation that takes no account of the way social actors define the situation and thus mediate such causes. Michael Gove recently offered (July 2015) such an account, suggesting that the solution to prison disturbances required little beyond a combination of more resources (or ways found to stretch these resources like privatization) and enhanced security (to prevent escapes) and internal control procedures for tackling prisoner disruption by internal disciplinary measures and physical riot control. And indeed such measures are needed and this is why in their now famous analysis of the disturbances at HMP Strangeways, Woolf and Tumin (1991) advocated just such measures. But then they went further—much further—to include the need for a sense of justice.

Most of the time, most staff and most prisoners go about their routines—even though staff may increasingly feel that they are being unfairly treated by government with regard to their pay and conditions and prisoners may have reservations about how they were treated by the courts

and the prison—and the prison remains more or less quiet, more or less seething. To say that prisoners consent to the regime probably goes too far but they do probably routinely go along with it. But what bridges the gap between acquiescence and mass refusal and disorder is not just the experience of even heightened everyday deprivation and not even the external reality of whether prisoners are treated fairly, but the fact that the prison fails to persuade prisoners that this is the case, thus stoking up a situated and immediate sense of injustice. It follows from this that any effective attempt to address the penal crisis in England and Wales must deal with material deficits (or at least not act to make them worse), as well as fundamental issues connected to legitimacy.

In this chapter attention has been given to two essential concepts (agenda and career), a brief indication of the trajectory of penal change since 1945 has been provided and the basis for an internal and external critique of Coalition Government penal policy has been set out. The next chapter goes on to critically consider the sentencing policies of the Coalition Government, 2010–15.

4

The Coalition Government and Sentencing, 2010–15

This chapter provides a critical examination of the Coalition Government's sentencing policy in England and Wales for adults and young adults, looking at the emerging agenda, the actions actually undertaken as well as the justifications offered, the reactions they provoked and the impact they had, where known. Comparative material is used where appropriate. The chapter ends with an internal and external assessment of the government sentencing policy.

This chapter reveals that the Coalition Government's emergent sentencing policy agenda was firmly rooted in two key elements, one much publicized and the other rather more inexplicit. The first element of the emergent agenda was a reduction in expenditure associated with the explicit drive to austerity, emphatically demonstrated with regard to the reform of legal aid and courts. The second element was a movement towards punishment despite the ostensible emphasis on rehabilitation.

The policy agenda set out below is developed from a reading of key consultation documents. However, sometimes government policy has been reactive rather than proactive. There are three main fields to be considered: the administration of justice, custodial sentences and community sentences.

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Administration of Justice

Five main intentions were expressed by the Coalition Government regarding the reform of the administration of justice: the creation of a simpler sentencing framework; the imposition of a limit on the number of new criminal offences created; the introduction of further sentencing discounts for guilty pleas and the reform of legal aid and courts to reduce costs.

The Creation of a Simpler Sentencing Framework that Is Easier for Courts to Operate and for Victims and the Public to Understand (MOJ, December 2010:49)

The creation of a simpler sentencing framework was seen as necessary because of the complexity and restricted judicial discretion resulting from new laws created by the last parliament. The consultation paper identified three separate aspects related to this general proposal including moving all offenders to a single sentencing framework, reducing the fetters on judicial discretion and publishing judicial data to assist public understanding.

Move All Offenders to a Single Sentencing Framework (MOJ, December 2010:49)

This broad intention gained the support of the Howard League for Penal Reform (2011:21), which noted that 'a more coherent unitary approach would be welcome to avoid judicial confusion'. For the government, moving all offenders to a single sentencing framework entailed three reforms. Firstly, there was a need to 'simplify the law so that only one sentencing framework applies to offenders' (MOJ, December 2010:50). It is suggested that though the court is the only proper body to determine sentencing, there is a need for consistency which can be achieved by the operation of the Sentencing Council and not by the government being 'overly prescriptive'. To accomplish the task of simplifying the law, three specific reforms were proposed here. The first reform concerned Schedule

21 of the Criminal Justice Act 2003 which governed the much criticized (by, e.g., the Homicide Review Advisory Group Report, December 2011) sentencing framework for murder. Although the Coalition proposed being less prescriptive here, they made it clear that this did not extend as far as questioning mandatory life sentences. 'No substantive simplification or reform of the murder sentencing framework has so far followed, nor has there been any indication that this will be happening in the near future' (Lipscombe 2012:1), despite the opportunity to do so. The second reform proposed that 'we should replace the specific requirements for courts to explain how they reached a particular decision with a more general duty that the courts can apply' which was largely accomplished by Section 64 of Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012. The third reform concerned the intention to 'create a simpler way to calculate the impact of time spent remanded in custody on the time that should be served as part of a prison sentence'. Changes were made to this calculation as a result of Sections 108–110 of LASPO 2012, which came into force in December 2012.

The second aspect of the intention to introduce a single sentencing framework was the removal of unimplemented legislation. Some limited progress was made on this matter when Section 89 of the LASPO Act 2012 abolished two forms of custody which had been provided by the Criminal Justice Act 2003 (intermittent custody and custody plus) but were never implemented.

The final aspect of the intention to introduce a single sentencing framework was concerned with improving communications with the sentencing council. This was crucial because the newly created single authority, the Sentencing Council, was, from April 2010, in a position to issue guidelines which sentencers were required to follow (rather than take regard of) unless contrary to the interests of justice (when they were required to give their reasons for not following the guidelines). The Coroners' and Justice Act 2009, which came into force in April 2010, set down a process by which the guidelines would be created which depended, to a crucial extent, on consultation (there have been 13 consultations in 2010–15 covering assault, burglary, robbery and sexual, health and safety, environmental, fraud and bribery offences) with a variety of groups including the Minister of Justice and parliament before finalization, thereby opening

the way for a populist influence to be exerted; thus, to a large degree the Coalition Government, making use of this Labour Government-initiated change, did not have to introduce further innovations in order to 'improve' communications.

Removing Elements of the Law that Unhelpfully Fetter the Courts' Discretion

This was the second main item intended to simplify the sentencing framework. On the one hand, some movement was made in this direction—Section 85 of LASPO Act 2012 allowed magistrates greater discretion over fines by removing the restriction on fines up to £5000. But, on the other hand, the Coalition did not increase the power of magistrates to pass longer prison sentences, despite the fact that this had been mooted since 2003. And it went on to limit sentencing discretion by creating two more semi-mandatory sentences including a new minimum sentence of 6 months for making threats with a knife or other weapon (LASPO Act 2012, Section142) and a new 'two strikes and you're out' sentence of life for adult offenders convicted of specified serious offences (LASPO Act 2012, Section 122). Furthermore, Section 65 of the same act further limited discretion by imposing a requirement to consider the use of compensation orders on courts.

Publishing Judicial Data to Assist Public Understanding

The need to publish more local judicial data to increase the accountability of the justice system was the third main item intended to create a simpler and more transparent sentencing framework. In the MOJ consultation paper it is noted that such judicial data were published for the first time in October 2010 (MOJ, December 2010:49). However, the later paper 'Publicising Sentencing Outcomes' (MOJ, June 2011d) seemed to suggest that though desirable the end was a long way off and even that it has become somewhat bogged down in concerns about the release of confidential information. A more upbeat slant was put on the matter by the government response to the 'Breaking the Cycle' consultation document (MOJ, June 2011b) where, in a discussion of transpar-

ency, action was seen to be needed on four fronts including providing the public with more accessible information on the penal system as well as improving community access to local services and promoting greater involvement of communities in the court process. But, a later entry on the MOJ website, which though it neatly expressed the reasons for the policy—listed as to reassure the public, increase trust and confidence in the criminal justice system, improve the effectiveness of the criminal justice system and discourage offending and/or reoffending—added little except a reference to the government response document of June 2011b (MOJ Website, February 2012). The government response paper and the note on the website go some way in reducing concerns about the limited nature of the accountability proposed, which offers ex post facto information without enforceable obligations, set in the context of a strong version of judicial independence. A low baseline for public knowledge about sentencing and courts was established by Ipsos Mori (2009) with 85 % of people admitting that they were uninformed about sentencing in England and Wales, with many people underestimating the severity of sentences and with 'most people know(ing) little about the statutory framework of sentencing, the nature of sentencers in England and Wales, the range of sentencing options or actual sentencing practices (Hough et al. 2013:16). There is little evidence that public knowledge of sentencing has been significantly improved in the 2010–15 period.

Limiting the Creation of New Offences

The second main intention expressed by the Coalition Government to reform the administration of justice was concerned with limiting the creation of new offences. Here a contradiction is immediately evident. On the one hand, the government expressed an early wish to 'introduce a new mechanism to prevent the proliferation of unnecessary new criminal offences' (Coalition Agreement Document, May 2010:11) in order to prevent repeating the alleged poor performance of the previous government. On the other hand, the Coalition Government exhibited a tendency, common to governments of the period, to follow through ideologically driven campaigns with yet more legislation creating new forms of criminal behaviour.

The Coalition Government did indeed set up the Criminal Offences Gateway in June 2010, charged with the duty to scrutinize proposals and count and publish figures on any new criminal offences created (MOJ, December 2011). But the effectiveness of this body, to prevent the proliferation of unnecessary new criminal offences as opposed to merely count and publish the results, was placed in immediate doubt when its first publication suggested that 'within the normal constraints of collective Cabinet responsibility, individual Government departments have sole responsibility for the development of their own policies and legislation' (MOJ, December 2011:2). Doubts may also be expressed concerning the lack of comparability of the counting methods used when assessing the Labour and Coalition performance as well as different periods during the Coalition Government.

The first MOJ paper (December 2011) on the matter found that in the first year of office (1 June 2010 to 31 May 2011) the Coalition Government created 174 new criminal offences compared with 712 in the last year of the Labour Government (in 2009–10), a 75 % reduction, although this may be more apparent than real, given that the whole matter depends on how new offences are counted. However, in 2011–12, using the same definition some 292 new criminal offences were created (a 68 % rise on 2010–11); in 2012–13, the third year of office, 327 new offences were created (a 12 % rise on 2011–12); and in 2013–14, the fourth year of office (and the last for which official statistics are available within the cut-off date mentioned in Chap. 1), some 280 new offences were added (a 14 % decrease on the previous year) (MOJ, April 2014). In total new Labour created 4289 new offences over 13 years, an average of 329 offences per year. By the end of May 2014 the Coalition Government had created 1073, an average of 268 per year, not a remarkably different performance, especially when definitional slippage is taken into account. (Collins, January 2010; MOJ, April 2014).

The Introduction of Further Sentencing Discounts for Guilty Pleas

The third reform of the administration of justice proposed in the 'Breaking the Cycle' consultation paper was ostensibly part of the more general aim to ensure better support for 'our aims of rehabilitation and

increased reparation to victims and society' (MOJ, December 2010:57) and it was concerned with making more efficient and effective use of courts by increasing the sentencing discount on immediate guilty pleas from a third to a half (MOJ, December 2010:63). The proposed change was justified on the grounds that this would save resources (in particular within the penal system in court time) and markedly reduce the prison population, reduce the trauma of witnesses and victims and fit in with existing practice (MOJ, December 2010:63–65). However, because of a particularly inept presentation of the issue on BBC 5 Live on 18 May 2011 by the then Minister of Justice, Kenneth Clarke, when he used the example of the discount applying to sentencing for rape (BBC News In Full, May 2011), the proposal was soon scrapped, arguably from a direct order by Prime Minister David Cameron (Wintour et al., June 2011).

The arguments against seemed to derive from a number of disparate sources and were based on political calculation rooted in punitive populism (from the Conservatives, Liberal Democrats and Labour) and Families Fighting for Justice (that such a discount would not allow for appropriate retribution and was out of touch with ordinary people). Those in favour tended to emphasize the inflation in custodial sentencing that had already occurred and the likely deeper cuts in legal aid, courts, probation and prisons that would now be necessary unless the prison population could be significantly reduced (Travis et al., June 2014). Many refused to be transfixed by the apparent 'either-or' argument, suggesting that a discount for early guilty pleas particularly in rape cases would not only spare the victim(s) 'a second' rape' but also usefully allow the perpetrator to take responsibility for his illegal act (McGlynn, May 2011). Furthermore, it was argued, that with regard to the specific crime of rape the issue could not be reduced to a debate about the number of discounts for guilty pleas and the length of the prison sentence imposed, but must be considered in the context of the whole way in which rape cases were handled (Government Equalities Office and Home Office 2011).

The short-lived proposal was rejected out of hand for a number of reasons. The tactics used by Clarke allowed the matter to get caught on the prongs of the issue of the way in which rape is handled in the criminal justice system and, in turn, the broader question of social inequality

rooted in gender. But also the Coalition Government did not dare to face down its own projection of the punitive obsession of the general public, even with crime apparently falling and have to potentially relinquish the licence that ruling through crime conveyed. Furthermore, perhaps, the very existence of a pragmatic sentence reduction for guilty pleas cuts across and through notions of justice and to formally acknowledge this and give it too much of an airing may have raised more general doubts about the extent to which criminal justice was compromised by other pragmatic considerations, for example, how criminal injustice reflects social injustice.

A sentencing discount applied to most (if not all) offences would seem to be necessary to save victims and witnesses, but only if proper legal advice/representation is made available so that informed choices can be made by the defendant. As for the apparent motive, to save criminal justice costs, in particular, those associated with locking people up for longer—what was needed here was a clear debate about the sentencing tariff and the tendency over the last few years (see Chap. 2) for prison sentences to be used more often and for the average length of prison sentences to increase. There can be little doubt that even in 2015 the way that rape cases are handled is in need of substantial overhaul.

Cuts in Legal Aid

Reform of legal aid was the penultimate item on the Coalition's agenda to reform the administration of justice. The term legal aid refers to state-funded legal advice, assistance and advocacy services provided to defendants unable to pay at all or unable to cover the full costs involved. The discussion here focuses only on criminal legal aid provided for defendants in the criminal prosecution process though it is recognized that cuts in legal aid for inmates in relation to prison law matters were also introduced.

Legal aid is pertinent to sentencing simply because it has a material bearing on the outcomes of the criminal justice process affecting the defendant, court and broader society. Assistance, advice and advocacy provided by legal aid potentially influence the career of the individual

defendant at a number of determining junctures in the penal process. Legal aid has the potential to contribute to the efficient operation of the courts. It also fulfils a social purpose by supporting the right to defend oneself from accusations in court (as articulated in European Convention on Human Rights [ECHR], Article 6). Without this basic safeguard the very notion of justice is in doubt, miscarriages of justice are likely to arise more frequently and thus the legitimacy of the criminal justice system would be undermined. A criminal justice process without legal aid could be seen to unpick not only the legitimacy of the court and the prison, but to raise significant questions, together with other changes, about the very basis of the post-World War II social contract that contributes to order in late modern societies.

In 2010 for all those held for questioning and for unrepresented appearances at court, where the offences involved approached the custody threshold, advice and assistance was provided by the Criminal Defence Service. For all other circumstances relating to criminal charges legal aid was based on two tests, one concerned with the means of the applicant and the other, the interests of justice test (MOJ, November 2010). Under this system all legal aid fees paid to lawyers were fixed administratively rather than competitively. Fixed fees were paid for advice at the police station beyond which hourly rates applied, subject to Legal Agency adjustment with different standard fees depending on the type of cases (e.g., guilty pleas and trials) and on the geographical location of the court. In Crown Courts fees were paid on the basis of the nature of the alleged offence, the type of case (e.g., trial or guilty plea), the length of the trial, the complexity of the case and the amount of served prosecution evidence. Special arrangements were in place for fees for 'Very High Cost Cases' (VHCC), in practice defined as 'lengthy' trials.

The proposals for legal aid reform by the Coalition Government were the subject of treatment in the Coalition Agreement Document (2010), and later detailed treatment in five MOJ papers in the 2010–14 period with the first two documents (MOJ, November 2010, June 2011c) being mainly, but not exclusively, concerned with civil legal aid culminating in the LASPO Act 2012 and the last three (MOJ, April 2013, September 2013a, February 2014b), mainly, but not exclusively, concerned with criminal legal and culminating in various secondary legislations.

The Coalition Government proposed a comprehensive reform of both civil and criminal legal aid over the 2010–15 period deploying essentially four interlinked arguments to justify their approach. Firstly, that the cost of legal aid funding was simply too high and that the legal aid budget in England and Wales was greater than in other comparable countries in Europe with this claim supported by the work of Bowles and Perry (2009) (MOJ, November 2010:30). It was also argued that, specifically, criminal legal aid made disproportionate demands on the budget in part because of inefficiencies within the legal profession. Later consultation documents affirmed this view, with Chris Grayling suggesting that the costs of the legal aid system in England and Wales had 'spiralled out of control' and such services had become 'one of the most costly in the world' (MOJ Foreword, April 2013:3).

In 2010 was criminal legal aid disproportionately expensive compared with other similar jurisdictions and has it become any less so now? International comparisons are dogged by problems because they contain an assumption, namely, that other things are equal or held constant, which is rarely the case. At the very least the data collected needs to refer to the same time or a very similar period, comparisons with other common law jurisdictions is the only valid method (eliminating many other European countries) and allowance needs to be made for membership of supranational entities like the EU and its human rights legislation.

There is little evidence that the costs of criminal legal aid were 'spiralling out of control' and the costs of criminal legal aid were disproportionate. Table 4.1 shows legal aid expenditure in 2000–14. It shows that between 2000–01 and 2009–10 there was a significant increase in civil legal aid expenditure by 41 %, criminal legal aid costs by 28 % and overall costs by 36 %, even if they were not exactly 'spiralling out of control'. Was expenditure of criminal legal aid disproportionate? Clearly, such an assertion begs the question 'disproportionate to what?' The slice of the total legal aid budget dedicated to criminal legal aid did not grow significantly in the 2000–01 to 2009–10 period. It was 50 % in 2000–01 and 48 % in 2009–10, though some increase did occur, peaking at 57 % in 2007–08. Another way to measure this might be to compare the proportionate contribution of criminal legal aid to all acts of assistance supported by legal aid with the proportion of the budget consumed—in 2000–01, 67 % of acts of assistance were attributed to

Table 4.1 Net cost of Community Legal Service (CLS) and Criminal Defence Service (CDS). Total net cost, the proportion of acts of assistance attributable to the Criminal Defence Service and the proportion of total net budget cost attributable to Criminal Defence Service, 2000–1 to 2014–15.

Year	Net cost of CLS in millions	Net cost of CDS in millions	Total net cost including LAA/LSC administration costs millions	Proportion of acts of assistance attributable to CDS, %	Proportion of total net legal aid costs spent on CDS, %
2013–14	801	909	1939	73	47
2012–13	941	975	2027	59	48
2011–12	978	1101	2161	44	51
2010–11	985	1130	2214	46	51
2009–10	1116	1120	2357	52	48
2008–09	887	1175	2186	54	54
2007–08	772	1173	2059	55	57
2006–07	809	1171	2094	55	56
2005–06	831	1197	2125	62	56
2004–05	845	1090	2038	63	53
2003–04	898	1179	2166	60	54
2002–03	812	1095	1981	57	55
2001–02	735	982	1789	64	55
2001–01	792	872	1736	67	50
2014–15	622	919	1695	NA	54

Source: Legal Services Commission 2000-01 to 2009-10; Legal Services Commission (2011; 2012 and 2013); Legal Aid Agency (2014 and 2015).

criminal legal aid (when only 50 % of the legal aid budget was dedicated to it); in 2009–10, 52 % of acts of assistance were attributed to criminal legal aid when only 48 % of the budget was dedicated to it. So though the contribution of criminal legal aid on this measure has changed, criminal legal aid still contributes a greater proportion of acts of assistance than the proportion of the budget it uses. Both of these measures suggest that criminal legal aid was not making use of disproportionate amount of resources to achieve disproportionately less.

The second argument used to justify reform was that the scope of legal aid had simply become too wide in two senses: firstly, the scope of legal aid had become extended beyond the original intentions of its founders into areas not originally covered by the scheme and not legitimately included (MOJ, November 2010); and, secondly, it was used in circumstances where it is unjustified specifically where the defendant can realistically afford to pay all or some of the costs, in cases which lack

merit, in cases that can be better dealt with outside court and, finally, in cases which could be resolved by the defendant representing themselves or being represented by others not incurring legal aid costs. As a consequence, as Chris Grayling asserted, the criminal legal aid system was losing credibility with taxpayers because it 'has been used to pay for frivolous claims, to foot the legal bills of wealthy criminals, and to cover cases which run on and on racking up large fees for a small number of lawyers' (MOJ Foreword, April 2014:3). There was a need to reserve legal aid 'for serious issues which have sufficient priority to justify the use of public funds, subject to people's means and the merits of the case' (MOJ, November 2010:3).

Whether legal aid in general had become too wide is a moot point—however, no real attempt was made to apply this to criminal legal aid, except to suggest that more stringent means testing was necessary for Crown Court cases. Such a change, subject to safeguards, is not unreasonable.

The third argument connected legal aid reform to the overriding leitmotif of the Coalition Government: austerity. There was, in times of austerity, a need for the MOJ to 'play its part in fulfilling the Government's commitment to reducing the fiscal deficit and returning this country's economy to stability and growth' (MOJ, November 2010:3; MOJ Foreword, April 2013:3). Legal aid reform would enable this. Later the need to tackle legal aid (again) is seen as part of the general drive for austerity 'after years of reckless borrowing and financial crisis under the previous administration'. Indeed, Grayling almost expressed regret about this saying 'I do recognize that a package of changes driven by harsh economic reality is tough, but I cannot change the financial reality I am dealing with. Between 2010 and the end of 2016 the Ministry of Justice is required to reduce its budget by around a third. That has meant, and will continue to mean, tough decisions. But this is not something that is being directed at legal aid alone' (MOJ Website, September 2014).

The view that there was a need to reduce criminal legal aid in order to contribute to general austerity, in turn, seen as necessary because of the high national debt largely created by the previous government's mismanagement of the economy, contains a myriad of assumptions. National debt reached a low of 25 % of GDP in 1992 and thereafter fluctuated

between 30 % and 40 % until 2008. After 2008 national debt increased as a percentage of GDP reaching about 50 % in 2010 (in absolute terms national debt increased from £0.53 trillion in 2008 to £0.62 trillion in 2009 and £0.76 trillion in 2010) (UK Public Spending Website, January 2014). But in large part such debt was not the result of the incompetence of the Labour Government, but conditioned by the need to bail out the failing banks in 2008. The banking crisis was not due to the economic incompetence of the Labour Governments but the deregulation of the banks, a responsibility that the Labour Governments of 1997–2010 shared with the Thatcher (starting in 1986 with the deregulation of the London Stock Exchange) and Major Governments. Next is the question whether there was and is a need for general austerity or so much austerity so quickly. It is difficult to separate out reality here from politically charged viewpoints. Insofar as austerity is concerned regarding the optimum use of public money it is a legitimate concern of government.

Nevertheless, the overwhelming impetus to speedy, across-the-board austerity measures raises a number of issues. Firstly, it is not clear to what extent the desire for austerity was little more than a rationalization of the ideologically driven desire to roll back the state and outsource or privatize services rather than actually reduce costs. Such a stance is not the mere product of the chancellor's 'to do' list for the next parliament, as announced in the 2014 Autumn Statement, or even the 2013 one made by David Cameron when he referred to 'the need to do more with less … not just now, but permanently' (Blyth, November 2013), but harks back to the desires of the Thatcher Governments of the 1980s. Blyth in 2013 dubbed this perma-austerity whereas more recently Danny Alexander saw it as 'austerity for ever' (Wintour, December 2014). Given this, a further question concerns whether, other things being equal, the changes constitute an alteration in the recipient of public funding rather than a real reduction. Secondly, the notion of austerity, based as it is on constructions about living beyond our means rather than deregulation and unchecked speculation, may be understood as an audacious attempt both to rehabilitate and to turbocharge the neo-liberal agenda by turning its consequences (the banking crisis) into an opportunity for yet further neo-liberalism. Thirdly, with specific regard to the penal policy, it is clear that there are many other considerations (justice, decency, humanity,

safety, respect and reducing reoffending) when influencing sentencing decisions, and running prisons and community-based sanctions other than how much they cost and whether the costs can be reduced.

The final argument deployed in favour of legal aid reform was that the process could be managed without impacting on access to justice by careful targeting of resources and with the recognition that difficult decisions had to be made in straitened circumstances, but will simply 'ensure that those who can afford to pay do so; to make certain that legal aid is not funding cases which lack merit or which are better dealt with outside court; and to encourage greater efficiency in the criminal justice system to reduce costs' (MOJ Foreword, April 2013:3). The essential question here is whether the reforms could be introduced without affecting access to justice. A host of groups, as we will see below, dispute this.

The first aspect of the Coalition Government agenda for legal aid reform was the abolition of the Legal Services Commission (LSC), making the organization of legal aid an executive agency of the Ministry of Justice (MOJ, November 2010) and thereby reducing its independence from the MOJ. The main arguments in favour of the reform were that it would enable the MOJ to tighten 'its stewardship of the legal aid fund, establish … clear lines of ministerial accountability and ensure … that the Ministry of Justice ha(d) strict controls in place to manage the cost of the scheme' (MOJ, November 2010:138). It was also seen to address the concerns of the Magee Report (2010) because it created 'one policy voice and one set of priorities for legal aid; … improved financial management and performance; shared priorities and improved collaboration with other criminal and civil justice bodies; and opportunities for administrative efficiencies through greater use of shared services across the MOJ and wider government' (MOJ, November 2010:139). The Legal Aid Agency (LAA), an executive agency of the Ministry of Justice, came into existence on 1 April 2013 following the abolition of the LSC as a result of the LASPO Act 2012. The change seems to have inspired little comment.

The second aspect of the government agenda was a reduction in the scope of civil and criminal legal aid both by limiting the areas of legal practice legitimately able to be funded and by tightening the eligibility criteria in terms of the merits of the case and the means of the applicant. Reductions would also be achieved by trying to ensure that clients represent themselves where possible, that they seek alternatives to legal resolu-

tions, that they gain alternative sources of funding and seek alternative non-court resolutions.

For criminal legal aid the first document (MOJ, November 2010) did little except note that means testing for Crown Court cases had been already reintroduced, leaving a system in place in the Crown Court where legal aid is granted on the basis that it is deemed in the interests of justice to do so, due to the seriousness of the proceedings and gravity of the potential penalty, with a means test then being applied to determine whether the defendant is subject to a contribution from income or capital, or both, with contributions being payable and collected in instalments. This meant that defendants with high disposable incomes received legal aid, with the LSC/LAA collecting any contributions over time.

The consultation paper of April 2013 (MOJ, April 2013) proposed the introduction of a means test for Crown Court cases with a new absolute cut-off for legal aid if the income of the defendant exceeded £37,500 per year, bringing practice in Crown Courts into line with that of Magistrates' Courts, though at a higher cut-off point for income. The later paper (MOJ, September 2013) affirmed the intent to implement this proposal. It did so by the Criminal Legal Aid (General) (Amendment) Regulations 2013 which came into force in January 2014.

The third aspect criminal legal aid reform was concerned with was the reduction of fees paid to solicitors and barristers. A blanket reduction in criminal legal aid fees was not suggested until April 2013 when a reduction of 17.5 % was proposed together with fee reductions for triable 'either way' offences dealt with at a Crown Court and for Very High Cost Cases (VHCC). This change regarding VHCC was introduced from 2 Feb 2013, solicitors and barristers fees being cut by up to 30 %. The September 2013 paper, after giving consideration to the largely negative responses received, indicated that the government would not press ahead with the immediate 17.5 % fee cut, but indicated that it would develop new proposals.

The new proposals expressed the intention to 'implement an initial 8.75 per cent reduction in all (criminal legal aid) fees' under the current 2010 contract with limited exceptions together with a second 8.75 % reduction with the start of the new contracts. The first reduction was effected on 20 March 2014 for new cases by secondary legislation and implemented by means of the Criminal Legal Aid (Remuneration)

(Amendment) Regulations 2014 (SI 2014 No. 415), whilst the second reduction was to have been implemented in early summer 2015, but was postponed. The attempt to have the second round of fee reductions quashed by the High Court of Justice failed when Hon Mr Justice Burnett on 19 September 2014 refused the application (High Court of Justice Queen's Bench Division Administrative Court ruling, 19 September 2014).

The fourth aspect of the government's legal aid reform agenda was the reduction of costs by enforcing greater economy and efficiency in legal practice. For solicitors this was mooted in November 2010 and developed further in April 2013 and essentially took the form of a move to 'price competitive tendering (PCT), where solicitors firms must compete to offer the best price they can for work in their local area. This will mean successful firms expanding or joining together, to achieve economies of scale which can be passed on to the taxpayer in savings to the public purse' (MOJ Foreword, April 2013:3). The PCT model would mean 'suppliers would be able to bid a price for a volume of work that suited their business model and which would allow them to deliver services innovatively and profitably. They would also have the opportunity to expand should they wish to do so' (MOJ, November 2010:113). The government claimed that such an arrangement would result in a sustainable supply at the right price whilst also achieving value for money. The impact of the planned changes would reduce the number and diversity of firms involved in duty work. However, in September 2013, the government decided to not proceed with the proposals for PCT, but to develop new proposals with the Law Society. But the negotiations with the Law Society were not sufficient to avoid a crisis in confidence amongst some solicitors in the Law Society (Ames 2013) or prevent three mass walkouts by solicitors and barristers in 2014 (BBC News, January 2014, March 2014a, b, c).

One area of concern that remained was the proposed dual contract arrangement which included both Duty Provider Contracts and Own Client Works. Duty Provider Contracts provide for advisory work in police stations and associated work. This was precipitated when the MOJ announced that the 1600 firms of solicitors undertaking duty solicitor work in police stations and Magistrates' Courts in England and Wales would be reduced to relying on 525 contracts providing fixed fees for covering all criminal legal aid advice, litigation and Magistrates' Court

advocacy services provided to clients who choose the Duty Provider at the first point of request (High Court of Queens Bench Approved Judgement 19 September 2014:Para 1). Whereas the number of Duty Provider Contracts was to be limited, the number of Own Client Works, that is, cases where the client chooses to use a particular firm, would be unlimited. But the proposal caused consternation amongst solicitors in terms of both limiting access to justice and their own commercial viability under such a scheme given that Own Client Work is dependent upon duty solicitor work and Own Client Work alone would not be sufficient for commercial survival which would then mean that Duty Provider Work would not be possible. On 19 September 2014 in the case of London Criminal Courts Solicitors Association (LCCSA) v Lord Chancellor, Hon Mr Justice Burnett ruled that 'I grant permission to apply for judicial review. This claim succeeds. The decision of 27 February 2014 that 525 Duty Provider Work contracts would be available under the new arrangements being put in place for criminal legal aid will be quashed' (High Court of Queen's Bench Division Administrative Court Ruling 2014: Para 56).

The MOJ in the consultation paper in April 2013 tentatively decided to not make Crown Court advocacy (including VHCC) subject to competitive tendering, subject to further negotiations with the Bar Association. The reasons given for this decision were that it would not be appropriate given that Crown Court advocacy services were delivered largely by self-employed barristers from within chambers, most of whom were not in a position to contract as a legal entity, and that to push ahead on this basis would mean that the contractor would be the solicitor who would decide how much to pay the advocate, possibly affecting the long-term sustainability of the Bar as an independent referral profession. 'Instead for criminal advocacy, we intend to reform the fee structure, to ensure that cases are resolved as quickly as possible, which will mean less time required of lawyers, and lower costs to the legal aid bill' (MOJ Foreword, April 2013:3). Indeed, the same paper suggests that 'we propose to restructure the Crown Court advocacy fee scheme, by paying the same rate whether there is an early or a late guilty plea or a short trial, and by reducing and tapering the daily trial attendance rates in longer trials. We also propose to reduce the use of more than one counsel for each defendant' (MOJ, April 2013:15).

To effect the changes, the MOJ paper published in September 2013 suggested two options for Crown Court advocacy fees and the February 2014 paper indicated that the favoured scheme was that suggested by the Bar Council which would be the scheme for the benefit of both advocates and the LAA and expressed an intention to implement this scheme by June 2015, after the general election, which probably explains why barristers discontinued their walkouts in March 2014, even though they were subject to the 'across the board' fee reductions.

The fifth aspect of the MOJ 'to do' list was to ensure that criminal legal aid made an appropriate contribution to general austerity. It was suggested in 2013 (MOJ, April 2013:16) that the proposals would save £220 million out of a total annual bill for criminal legal aid of £1 billion by 2018–19 (presumably allowed to run on beyond the SR10 fourth year, 2014–15, because the changes to criminal legal aid had been mostly postponed to after 2013). This was in the context of the Justice Secretary saying (BBC News, May 2013) 'if it's a choice between spending more on the health service, or spending more on the legal system, I think most people would say I want the health service.' It will not be clear as to whether the government has achieved this target until 2019. However, Table 4.1 shows that the government was well on target in 2010–11 (the baseline year set by HM Treasury in October 2010) and in 2013–14 some £211 million has been taken off the criminal legal aid cost, the cost reducing from £1120 million to £909 million although a slight increase is shown for 2014–15. Of course, it is possible to question the political priorities (why not ring fence both legal aid and health), the truth of the implicit assertion about the National Health Service (NHS) (that they really are spending more on the health service) and, of course, the whole need for austerity at all or at least its introduction so suddenly.

The proposals caused an immediate, passionate and sustained response. The reader will have to separate genuine arguments here from the legal equivalent of 'shroud-waving'. There were 5000 replies received by the MOJ to the first consultation paper, with most of them opposed to the reforms (MOJ, June 2011c). The main sources of criticism may be seen to derive from a variety of sources. The main arguments used against the proposed reforms, added to those discussed above, concerned the impact of the changes on clients, individual lawyers, law firms, the health of the legal profession (including both barristers and solicitors) and justice.

They covered objections to the method chosen by the government to effect much of the change associated with criminal legal aid, namely, secondary legislation.

It was argued that the proposals concerning tendering for contracts will mean that clients will no longer get their choice of solicitor but be allocated a lawyer from a rota of contracted firms. This was seen to undermine one of the key principles of the British justice system. Clients may also find it harder to obtain legal advice and representation and, if they do so, may have to endure assistance being provided by less experienced and/or qualified staff. The net result cast doubt on the central justifications used by the government especially the notion that the scope of criminal legal aid work can be significantly reduced without interfering with the right to fair trial. Furthermore, it has been argued, that like other reforms associated with the Coalition austerity drive (e.g., in welfare benefits, health, education) the burden of the change falls on those who are already poor and dispossessed.

The reductions in fee income, it has been argued, will affect individual solicitors and barristers greatly, reducing their income and making the practice of law and particularly criminal law a far less attractive proposition, especially when taken together with increases in higher education fees.

A number of disadvantageous consequences are seen to follow from the move to fee reduction and competitive tendering and contracting not the least that there will be a general shrinkage in the number of firms offering criminal legal work because many such firms are already operating at the margins of profitability. Furthermore, the broader impact of the reduction on individual lawyers' income, noted above, will be to limit the recruitment of talented individuals to legal practice. Both these issues will have a major impact on the quality of justice and lead to more miscarriages of justice. More miscarriages of justice, it has been argued, will inevitably lead to great personal and public costs. Finally, it was argued that the race to the bottom that competitive tendering would produce would draw in new players who may put profit before justice (BBC News, May 2013) and, in the light of recent failures to fulfil contracts by private 'for profit' firms in other areas within criminal justice, fail to deliver on the contract, for example, A4E (Gentleman, 14 August 2014).

As noted above, concern over the reforms to the previously mentioned Duty Provider Contracts led a number of parties to seek a judicial review

of the Lord Chancellor's decision to implement the proposed cuts in the number of contracts. The Hon Mr Justice Burnett ruled in the matter of LCSA v Lord Chancellor that the claimants would be granted a judicial review and the reform of Duty Provider Contracts was quashed (High Court of Justice Queen's Bench Division Administrative Court ruling 19 September 2014).

The Criminal Justice Alliance website (September 2014) also criticized the methods by which the government has proceeded to the reforms, that is, by means of secondary legislation. 'This means that there will not be detailed debate in parliament.' Finally, the changes are seen to impact significantly and extensively on justice, throwing into jeopardy the right to a fair trial as ensured by Article 6.1 of the ECHR and raising the possibility of further miscarriages of justice. This concern was supported from an unexpected source when Michael Gove, the newly appointed Minister for Justice, suggested, seemingly without recognizing that the situation had been caused by his immediate predecessors (Falconer, September 2015), that 'legal aid is a vital element in any fair justice system' and that there is a need to monitor the changes undertaken to ensure that 'we protect access to justice for everyone accused of a crime, and safeguard and *improve* the quality of the legal advice and advocacy in our criminal courts' (Michael Gove, June 2015).

Court Reforms

As noted in Chap. 2 the Lord Chancellor (and Minister for Justice) is responsible for the efficient functioning of the courts, though not the appointment of judges. Since the MOJ was committed to austerity, courts were expected to bear their share of cuts. This process started in earnest when court administration was brought under the HM Courts & Tribunals Service in April 2011, operating as an agency of the MOJ, bringing together the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals (HM Courts and Tribunals, June 2013a).

The ostensible purpose of the reforms had been 'to deliver a justice system which is more effective, less costly, and more responsive to the public' (HM Courts and Tribunals Service 2012:7). It was envisaged that this would take a number of forms including estate rationalization (including

closures and better courtroom utilization), changes to management and administration (including staff reductions and increasing the workloads of court personnel), together with a cheaper, faster enforcement system for fines and flexible court sittings in the Magistrates' Courts, measures to increase efficiency in the Magistrates' Courts including proportionate handling of uncontested, high-volume and low-level offences, simplifying summary trials by allowing one justice to decide cases, streamlining forensic reporting and fast-tracking cases. Increasing revenue streams was also proposed not only by improving enforcement of fines but also by introducing what has become known as the criminal courts charge, a variable charge (higher for guilty pleas, more serious charges and appearances at Crown Court rather than Magistrates' Courts) that courts are required to impose on all cases, irrelevant of means, where the defendant is over 18 years of age (Sentencing Council Website, August 2015; MOJ, February 2014b).

Rationalization of court premises has meant closures of many local Magistrates' Courts, with Bowcott (April 2011) estimating that 142 courts were due to be closed by 2012. The moves have led to considerable protest and three judicial reviews. The arguments used against closures were practical. Defendants, witnesses and victims often do not have cars and travelling to the regional courts would impose a time and cost burden. It was also argued that having to travel to the new courts would mean that many more defendants would not appear and thus be subject to warrants, a time-consuming and expensive process. Finally, it was suggested that courts should be local as 'justice should be delivered so that the public can see it being done' (John Thornhill, chair of the Magistrates Association quoted by Bowcott, April 2011). The move to a 'single justice procedure' whereby single justices, sitting with legal advisers, are enabled to deal with the more routine, low-level regulatory offences like motoring and TV licence offences was also part of the planned changes. It is undoubtedly a cost-cutting measure which is estimated to save about £50 million over 10 years (Transform Justice Website, August 2015). Section 48 of the Criminal Justice and Courts Act 2015 made provision for a single justice procedure allowing magistrates, sitting with a legal adviser, to deal with adults (aged 18 and over) 'charged with summary-only, non-imprisonable offences' (including TV licence evasion, failure to register a new vehicle keeper, driving without insurance and depositing litter) 'without the attendance of either prosecutor or the defendant and

the defendant will instead be able to engage with the court in writing and the case will not need to be heard in a traditional courtroom' (MOJ, March 2015b:25). It is also clear that this move represents a further step towards the 'civilization' of criminal offences.

The criminal courts charge, also part of the same package of measures, was introduced by Section 54 of the Criminal Justice and Courts Act 2015, with the charge being levied for the first time in April 2015. It is too early to assess the financial and other impact of this measure. However, the measure has been criticized on a number of counts. High criminal courts charges were only mooted late on in the reform process, limiting parliamentary scrutiny. The charges are not means tested and thus will affect low-income defendants disproportionately. They represent an additional and 'significant mandatory penalty on defendants' (Hyde, March 2015; Dugan, September 2015). Their existence will have implications for further criminalizing low-income political protesters charged with minor offences (NetPol Website, April 2015). Many magistrates see the charge as 'callous and destructive' (Magistrates Blog, August 2015).

Nevertheless, the Annual Reports and Accounts of HM Courts and Tribunals Service (July 2012, June 2013, 2014, 2015) indicates a year-on-year reduction in comprehensive expenditure between 2011–12 and 2014–15, amounting to a 40 % cumulative reduction on the baseline of 2010–11, and the MOJ (June 2015) Annual Report and Accounts envisaged this situation continuing in 2015–16 with savings of some £200 million. It is not yet possible to assess the impact of the income generation measures (changes in fine enforcement and the criminal courts charges) on the balance sheet.

Custodial Sentences

The next field, custodial sentences, consists of four separate items. The first two items all fit under the same umbrella, namely, making 'better use of prison … to punish serious and dangerous offenders' and include reforming the custodial sentencing framework to make it more transparent and reforming indeterminate sentences of Imprisonment for Public Protection. The attempt to abolish the specific sentence of cus-

tody for young adult offenders derived from a desperate desire to reduce acute overcrowding in the prison estate and the debate over whole-life orders (W-LOs) was precipitated by repeated ECtHR (European Court of Human Rights) rulings on the matter.

Reforming the Custodial Sentencing Framework to Make it More Transparent

This aim clearly related to the widely expressed desire for greater honesty in sentencing, in particular dealing with the difference between the headline sentence imposed by the court and the sentence actually served and creating a closer connection between early release and good behaviour in prison. In 2010 many determinate, headline sentences were routinely reduced by the operation of early release by up to 50 % and, if applicable, up to a further 135 days by release under Home Detention Curfew (HDC). For example, a prisoner serving a determinate sentence of 3 years would, other things being equal, actually serve 36 months less 18 months (50 %) and 135 days (4.5 months) if eligible for HDC. Thus the net sentence would be about 13.5 months.

The Coalition Government did restrict the availability of early release for a small number of prisoners during the five years of office, but did little to make the relationship between headline sentence and sentence served more explicit or make a clearer connection between early release and good behaviour in prison. HDC was abolished for longer term determinate sentence prisoners (serving up to 4 years or more), although in practice such prisoners were already considered unsuitable for this measure and thus the change had little practical impact. HDC was also abolished for those serving longer determinate sentences who had already been released early but had breached the conditions of their licence or committed further offences (Section 112 LASPO Act 2012). Part 1, Schedule 1 of the Criminal Justice and Courts Act 2015 changed the arrangements for longer term determinate sentence prisoners serving time for certain child sex and terrorist offences, making release no longer automatic but discretionary, subject to Parole Board approval, again affecting relatively few prisoners.

For the small number of extended determinate sentence (EDS) prisoners the Coalition Government progressively restricted early release, with it eventually becoming entirely at the discretion of the Parole Board. Thus Section 125 of LASPO Act 2012 imposed conditions preventing EDS prisoners from obtaining automatic release at all if they were serving a sentence of 10 years or more and had been convicted of certain specified serious offences and instead, made their release discretionary, subject to Parole Board approval. Section 125 of the LASPO Act 2012 also raised the release point of those EDS prisoners who did still qualify for automatic release from one half to two-thirds of the 'appropriate custodial term.' Section 4 of the Criminal Justice and Courts Act 2015 changed the release arrangements for those EDS prisoners still able to obtain automatic early release (at the two-thirds point of their sentence) by making their release discretionary subject to the Parole Board determining that they were safe to release.

But the impact of these changes was minimal and the overall effect of the Coalition Government on early release for determinate prisoners has been limited. Furthermore, the other related aim here, to better explain early release from prison to the public, seems to have been ineffective. The Coalition offered no new initiatives dealing with the release of those serving indeterminate sentences, suggesting that the current multi-agency public protection arrangements (MAPPA) were 'working well' (MOJ, December 2010:54).

Make Better Use of Prison to Punish Serious and Dangerous Offenders: Reform the Sentence of Imprisonment for Public Protection (IPP)

The second item relating to prison sentences was to generally deal with dangerous offenders more effectively and in particular it involved the need to 'reform indeterminate sentences of Imprisonment for Public Protection (IPP)' (MOJ, December 2010:52). The MOJ consultation paper of 2010 and research and official commentary on IPPs demonstrated their problematic character (Jacobson and Hough 2010; Criminal Justice Joint Inspection 2010). The key objections were that the relevant legislation had been too widely drawn and as a result it had been used

too often; release from an IPP required the proof of a negative, that is, that no further offences would be committed; that the logic of the IPP depended on opportunities to show that progress was being made and that such opportunities had been severely restricted leaving many IPP prisoners stuck in the system; and the impact of IPPs had undermined confidence in the courts and the criminal justice system. The consultation document proposed restricting the use of IPPs to those offenders who would otherwise have merited a determinate sentence of more than 10 years' imprisonment but who did not qualify for a life sentence (MOJ, December 2010:52–56), retaining the extended determinate sentence for those of some, but less, risk.

In the event LASPO, Section 123, abolished new IPP sentences, coming into effect from 3 December 2012 (Strickland and Garton Grimwood 2012). It also amended the extended determinate sentence, raising the threshold affecting early release on licence from the half-way point to the two-third point of the sentence providing that such prisoners were serving less than 10 years and had not been convicted of certain offences. The more serious offenders under this provision would be referred to the Parole Board. But it also introduced a new 'two strikes and you're out' sentence mandatory for adult offenders convicted for a second time of one of 45 offences with the condition that previous offences warranted at least 10 years' imprisonment and the current offence did too (Section 122).

It is not clear that the changes effectively address the central issues here. It is commendable that the problematic addition to indeterminate sentences, the IPP, has been abolished. But at the cost of another reversion to mandatory sentencing, whilst failing to address the matter of the mandatory life sentence for murder. It also neglects the matter of the small number of determinate sentence prisoners who, at the end of their sentence, are seen as representing a danger to others.

Nor does it deal with the injustices that have arisen connected to the treatment of existing IPP prisoners—despite the ban passing into law in May 2012 and coming into force in December of 2012; up to the year ending March 2013 some 613 people were sentenced to IPP. In June 2013 there were 5620 people serving IPP sentences (Prison Reform Trust Bromley Briefing, Autumn 2013:21). An attempt to obtain the release of about 650 IPP prisoners on short-term tariffs of 12 months

or less, but incarcerated still well after the expiry of their tariff period, was made by Lord Lloyd of Berwick (BBC News, October 2014) in the House of Lords during the debate on the Crime and Courts Bill, on the grounds that their continued detention was unjust. However, the move was defeated when Lord Faulks argued for the government that retrospective alteration of lawfully imposed sentences was not justified and that many of the IPP prisoners continued to represent a danger to the public. Perhaps the Prison Reform Trust was right here when they argued that not only should the IPP be abolished, but for those serving existing IPP sentences detained beyond their tariff date the state should have to prove that they continue to present a significant danger (Prison Reform Trust, March 2011:5).

The Abolition of Detention in a Young Offender Institution for Young Adult Offenders

The third item here surfaced as a pragmatic attempt to deal with an acute problem, a burgeoning prison population. The situation in 2013 was that young adults could not be sentenced to imprisonment or committed to prison for any reason, but instead, where necessary, were to be held in young offender institutions (YOIs) subject to the criminal sentence of Detention in a Young Offender Institution. But in 2013 the government faced a dilemma—adult male prisons were bursting at the seams (see Chap. 6), and YOI accommodation was underutilized. The MOJ (November 2013) proposed to abolish the statutory distinction between young adult (aged 18–20 years old) and adult offenders (aged 21 or over) and this would have meant that male, 'young adult' prisoners would have become part of the general prison population, allowing the underutilized YOI facilities to be used as accommodation for all offenders aged 18 and over. The proposal would have, in effect, driven the age of full criminal responsibility down to 18. The government policy proposal was published in November 2013 proffering a short consultation in the dead zone leading up to Christmas 2013 (consultation period 07 November 2013 to 19 December 2013).

The main government arguments in favour of the change were that it would enable the extension of the rehabilitation revolution to the 18–20-year-old age group (it was not clear why this could not be extended to existing YOIs), it would reduce the particular difficulties of managing this age group though the paper failed to evidence such claims in a convincing manner and it would allow better use to be made of existing resources by merging the custodial provision and would contribute to reducing costs consistent with the general pattern of austerity. It is also presented as a fait accompli largely because it has already been abandoned in practice for at least 20 years for females and, in some cases, had been 'experimentally' put to one side for males.

Reaction was swift and critical. The Prison Reform Trust (December 2013) argued that young adults have distinct needs and vulnerabilities, something well-evidenced and recognized by a variety of groups including previous governments and NOMs and that to ignore this could lead to tragedy and that, further, to 'to rush to a conclusion' (p2) would be inappropriate given that the matter clearly needed further research and consideration before action. The Prison Reform Trust document concluded, 'we are concerned that the Ministry of Justice is actively considering dismantling the one legislative safeguard that helps to delineate and protect 18-20 year olds in the criminal justice system. The Prison Reform Trust asks that Ministers think again before taking such a retrograde step' (p11).

The Howard League for Penal Reform's response (December 2013) to the consultation on transforming the management of young adults in custody started by recognizing the scale of the proposed change that it amounts to a major alteration in the legal framework which will result in 'young adults (becoming) legally indistinguishable from adult prisoners' (p1) and went on to develop the view, in contradistinction to the government document, that young adults in this age group both male and female have clearly established vulnerabilities and that to ignore this is to run the risk of placing young adults in jeopardy in terms of their safety and perhaps their lives. The paper sombrely noted that 'three young adults have taken their own lives in adult jails since this consultation was launched, two 18 year olds and a 19 year old' and adds 'it seems likely that the death toll of teenagers will increase if the special protections

are demolished' (p 1). The paper went on to argue that this view was backed by the accretion of much evidence and that to make the changes proposed raises questions about whether the rights of the young adults concerned are being properly protected. They advised caution in making such changes and that 'at the moment, the evidence base is simply not sufficient to justify the proposed changes' (p 1) and that the changes should not be made until those reforms associated with Transforming Rehabilitation have been introduced' and the outcome of various reviews on violence, self-harm, suicide and safety by the Ministry are known.

A number of other bodies including the National Association for the Care and Resettlement of offenders NACRO and the Youth Justice Board responded. Their comments were overwhelmingly critical and many made reference to the research done by the Transition to Adulthood Alliance (2011). This paper notes that European countries in 2010 varied in how 18–20-year-old offenders are treated, most made some legal concession based on youth and many allowed for flexibility to deal with a particular offender as a juvenile or as an adult. Many maintained separate prison accommodation for those falling into this age group.

The government response was reported to be a U-turn (Puffet, February 2014). Certainly, by early February 2014 a written response by Chris Grayling suggested that a decision on this matter would be postponed until the findings of the Independent Advisory Panel on Deaths in Custody (Harris Review), appointed in early February 2014, reported on self-inflicted deaths of 18- to 24-year-olds in custody. In the meantime in the written reply by Chris Grayling he reserved the right to continue to make operational changes to custody for young adult offenders. The report was submitted to the MOJ in April 2015 but by this time purdah applied and thus no action was taken on this matter by September 2015 (Independent Advisory Panel on Deaths in Custody Website, September 2015).

The move by the Coalition Government to merge adult and young adult custodial populations must be seen as nothing more than a poorly thought out panic measure, not so much to save money as to solve the emerging crisis in the prison population, by allowing the pragmatic utilization of YOI accommodation for all prisoners. But this move ignored the strong evidence that 18–20-year-olds have special needs (emotional,

educational) and are vulnerable (because of age, limited offence history and experience of the criminal justice system, as well as having had problematic childhoods) and that sentencing policy and the provision of custody needs to reflect this fact. This said, it seems that a flexible system allowing courts to assess maturity (putting a premium on accuracy of maturity assessments) and allowing sentencers to tailor their disposals accordingly is advisable. The provision of separate accommodation for those deemed as less mature is necessary in order to cater for special needs, protect the vulnerable as well as reduce any 'either way' University of Crime effect, including learning new, possibly more destructive patterns of drug use. This might not mean keeping such separate institutions for 18–20-year-olds only but allowing use for all aged 18–24. One such institution— HMP and YOI Isis—does exist at the moment; it was built in 2010, though its track record is not good so far mainly due to low staff levels and high staff turnover (Independent Monitoring Board Annual Report 2013 HMP and YOI Isis; Fiddler 2014; HMIP, February 2014).

The Retention of Whole-Life Orders (W-LOs)

The final item, also a matter put on the agenda by events rather than government intention, concerns W-LOs. In 2010 there were two fully indeterminate prison sentences available to the courts: the life sentence and the sentence of IPP. In 2013, 19 % of the prison population were serving indeterminate sentences. In March 2014, 59 % of the total of indeterminate prisoners were serving life and 41 % sentences of IPP (Prison Reform Trust Bromley Briefings, Summer 2014:2). In December 2014 there were 52 mandatory life sentence prisoners subject to the W-LOs in England and Wales (Prison Reform Trust Bromley Briefings, Summer 2015:3). The only hope of release for W-LO prisoners is to convince the Minister of Justice that exceptional circumstances apply which would justify their release on compassionate grounds. The guidance on this matter specifies that for this provision to apply the prisoner should be suffering from a terminal illness and that death is imminent. 13 life sentence prisoners not serving whole-life terms had been released on compassionate grounds up to 2009 (ECtHR 2013: Para 44).

Life sentences can be either mandatory or discretionary; both are imposed with a minimum term fixed (the tariff), after which the prisoner can have her/his sentence reviewed by the Parole Board and seek release. Whether prisoners are released depends on Parole Board decisions as to their continuing danger to the public. A life sentence can mean in practice life imprisonment but is usually less than this. The average period of imprisonment for those a serving mandatory life sentence in 2013 was 17 years (having increased from 13 years in 2001) (Prison Reform Trust Bromley Briefings, Summer 2014:2). If a life sentence prisoner is released into the community they continue to be subject to supervision for life and can be recalled for committing criminal offences or for other breaches of the conditions of their licence.

Under Schedule 21 of the Criminal Justice Act 2003 at the time when responsibility for the setting of the minimum term for life sentences was transferred from the Home Secretary to the trial judge, the newly empowered trial judges' discretion was regulated by the imposition of sentencing tariff starting points. The reason for the basis of the move from the Home Secretary to the trial judge needs to be noted. The Grand Chamber of the ECtHR (2002) in the case Stafford v United Kingdom ruled that, firstly, since continued detention after the expiry date of the tariff depended on the assessment of risk and danger and since these would change over the course of the sentence, a review was required under Article 5(1) of the ECHR. Further, any review needed to be consistent with Article 5(4) of the ECHR, which required that the continuing lawfulness of the detention had to be found by an independent and impartial tribunal, with the power to order release following judicial safeguards which included the possibility of an oral hearing. The House of Lords declared that if such decisions continued to be made by the Home Secretary they would indeed be incompatible with the ECHR. The relevant sections of the Criminal Justice Act 2003 were a response to this situation, transferring the responsibility for setting the tariff to the trial judge.

Schedule 21 of the Criminal Justice Act 2003 made statutory provision for W-LOs, although whole-life tariffs had been imposed occasionally in practice in the past by asserting that if the court considered that the seriousness of the offence (or the current offence and one or more offences associated with it) was 'exceptionally high' and that the offender

was an adult then 'the appropriate starting point' should be a W-LO. The Schedule went on to indicate the cases that would normally fall within the criteria for a W-LO. They are as follows:

(a) *The murder of two or more persons, where each murder involves any of the following—*
  (i) *A substantial degree of premeditation or planning,*
  (ii) *The abduction of the victim, or*
  (iii) *Sexual or sadistic conduct,*
(b) *The murder of a child if involving the abduction of the child or sexual or sadistic motivation,*
(c) *A murder done for the purpose of advancing a political, religious, racial or ideological cause, or*
(d) *A murder by an offender previously convicted of murder.*

Making a ruling in the case of Vintner and Others v the United Kingdom, the Grand Chamber of the ECtHR challenged W-LOs and the practice of whole-life incarceration with the only review being dependent on compassionate grounds (BBC News, July 2013). The matter turned on whether the ECtHR considered the possibility of release on compassionate grounds as sufficient to satisfy the requirement for review under existing legislation. The ECtHR decided that it did not as it was not clear whether the Minister of Justice would apply the policy. If the Minister of Justice did apply the policy the ECtHR found that release purely to die in a hospice or at home was not sufficient to represent a prospect of release, and so represented a breach of Article 3 of the ECHR as imposing 'inhuman or degrading treatment or punishment'.

The Prime Minister was reported to have responded to the ruling by being resolutely anti-ECtHR on the grounds that the UK did not need outside interference in its legal affairs (Watt and Travis, July 2013), that W-LOs reflected the seriousness of the pattern of offences and such sentences reflected public opinion on the matter (Bowcott, January 2014). A counterargument to the W-LO was put forward by Simon Creighton, solicitor for Douglas Vinter (BBC News, February 2014). He is reported to have said that 'it was fundamental that prison sentences had some form of rehabilitation and redemption built in', in order to give

such prisoners a goal to work towards. This argument needs to be treated seriously for two reasons. The humanitarian argument suggests the need to raise hope in the prisoner of possible release, rendering participation in activities more meaningful, the prospect of long years of imprisonment a fraction less daunting and rehabilitation possible. The pragmatic argument operates at the level of both the prison and society—W-LO prisoners are placed in a position where they have nothing to lose, making their everyday management difficult and their potential for harm to society if they ever escape great.

However, immediate government action on the matter was prevented by a Court of Appeal decision. The Court of Appeal upheld the right to impose W-LOs on the most serious offenders in England and Wales. As a result, the Court of Appeal increased a 40-year tariff imposed on Ian McLoughlin and dismissed an appeal by Lee Newell that his W-LO had been excessive. The Court of Appeal disagreed with the ECtHR arguing that the Justice Secretary cannot be restrictive in applying the compassionate grounds provision, when doing so must take into account all exceptional circumstances relevant to the release of the prisoner and must interpret compassionate grounds in accordance with human rights law. The Court of Appeal concluded that this meant that the law in England and Wales was clear and did offer both hope and the possibility of release and was not in conflict with either the Human Rights Act 1998 or the ECtHR ruling. The Court of Appeal defended the sentence on desert grounds based on the heinousness of some crimes (Court of Appeal, February 2014).

Later in 2014, the Conservative Party and van Zyl Smit et al. (2014) had come to the same conclusion—that the then current position was untenable, but differed markedly in its resolution. Van Zyl Smit et al. (2014) argued that there is no doubt that a review of W-LO cases should be instituted because it otherwise conflicts with the Human Rights Act 1998 and because it is necessary for humanitarian reasons. The substance of such reviews, it was suggested by the ECtHR, is outside the terms of reference of the Parole Board. This places responsibility for the review on the Minister of Justice. But, van Zyl Smit et al. (2014) argued, the Minister of Justice cannot meet the standards exacted by Article 5(4) of the ECHR, namely, that the continuing lawfulness of the detention be

determined by an independent and impartial tribunal, with the power to order release following judicial safeguards which include the possibility of an oral hearing. They propose the setting up of what they call Vintner Reviews to meet the ECHR standard. Such reviews would consider 'all the penological justifications for the original sentence—including the seriousness of the offence— … to determine whether the balance between them has changed and continued detention is justified' (van Zyl Smit et al. 2014).

For the Conservative Party, the solution, as set out by David Cameron at the Tory Party conference in October 2014, was to repeal the Human Rights Act of 1998. This announcement was followed up a few days later by a strategy paper from Chris Grayling ironically entitled 'Protecting Human Rights in the UK' in which he argues, on the grounds that England and Wales have a common law tradition anyway invested in the protection of human rights on to which the European convention was clumsily grafted by the Labour Government, that the recent practice of the ECtHR has undermined public confidence (by demonstrating mission creep, undermining the decisions of domestic courts and the sovereignty of parliament), for the repeal of the Human Rights Act 1998 and its replacement with a Bill of Rights, which will consist of a selection of some of the rights protected by the previous legislation, a move to a position where ECtHR decisions will no longer be binding for the UK Supreme Court and the ECtHR court will no longer be able to order change in UK law. The proposed broader change would presumably preserve the existing status quo regarding W-LO, that is, allowing W-LOs mitigated only by release on compassionate grounds controlled by the Minister of Justice.

In Europe practice differs on life sentences. There are nine countries that do not make provision for life sentences. Instead, such countries have determinate sentences, the lowest and highest maximum terms for which are 21 years (Norway) and 45 years (Bosnia and Herzegovina). Some 32 countries do make provision for life sentences, but have a dedicated mechanism for reviewing such sentences after the prisoner has served the minimum term, with minimum terms ranging from 10 years (Sweden) to 30 years (Estonia and Moldova). In Scotland, courts are required to set minimum terms even if the minimum term exceeds the prisoner's natu-

ral life. Five countries in Europe make no provision for parole for lifers, although one of them, Iceland, makes no actual use of life sentences at all. All of the five make provision for a process by which life sentences can be commutated (ECtHR 2013:Para 68).

In February 2015 the case of Arthur Hutchinson was heard by the ECtHR. His case rested on whether the Justice Secretary's ability to free prisoners on compassionate grounds is sufficient to ensure the UK is obeying Article 3 of the ECHR (Benge, February 2015). Hutchinson was sentenced to life with a minimum of 18 years although the Lord Chief Justice recommended that he serve a whole-life sentence, a decision later confirmed by the then Home Secretary, Leon Brittan. The ECtHR ruling clearly indicated that the Justice Secretary's ability to release prisoners on compassionate grounds was sufficient to make the practice consistent with Article 3 of the ECHR (Travis, February 2015).

England and Wales, despite the 2015 ECtHR ruling, seem out of step with many of their European neighbours as Lord Phillips of Worth Matravers, then Lord Chief Justice, indicated in 2008 when he said in the Court of Appeal in R v Bieber that 'there seems to be a tide in Europe that is setting against the imposition of very lengthy terms of imprisonment that are irreducible' (quoted by van Zyl Smit et al. 2014).

Both the USA and, now, Canada (Fine, March 2015) seem to be moving away from European practice. The W-LO is the equivalent of what in the USA is known as life without the possibility of parole (LWPOP). The Sentencing Project (2012:1) found that there had been a 12 % increase between 2008 and 2012 in the lifer population and that in 2012 there were nearly 160,000 life prisoners. Furthermore, in the same period there had been a 22 % increase in LWPOP prisoners and in 2012 of the 160,000 life sentence prisoners nearly one-third (50,000 prisoners) were serving life without parole. The Sentencing Project also found that African-Americans (by about 50 %) and Latinos (by about 16 %) were overrepresented in the lifer population and that a significant, if small, proportion of those on LWPOP sentences, some 7 % (American Civil Liberties Union 2013), had been convicted of non-violent offences.

England and Wales seem poised on a knife's edge on this matter—they retain W-LOs in opposition to many of their European neighbours though not ECtHR rulings. But unlike the USA, they make much more

targeted though relatively limited use of the orders. W-LO prisoners represented only 0.01 % of the mandatory life sentence prisoners and only 0.39 % of the indeterminate prisoner population (including all life and IPP prisoners) in 2013 according to van Zyl Smit et al. (2014; see particularly note 28 of this work), though there has been a large growth in the prison population subject to indeterminate sentences from 3000 in 1992 to 4000 in 1998 to 13,186 in June 2013 (Prison Reform Trust Bromley Prison Factfile 2013:2). Perhaps the solution is for England and Wales to edge away from the USA model for humanitarian and pragmatic reasons and move towards reviewable life sentences which are not merely relegated to exceptional circumstances, together with a policy of clear desert-based tariffs which express the unambiguous condemnation of the acts committed combined with a fully independent review.

Community Sentences

The final field to be considered, community sentences, has five separate items. Government statements on community penalties very often reference the need to create greater public confidence in the measures but it is clear that many of the reforms are driven by not just an ideological commitment to punish and outsource; they also inspire courts to have sufficient confidence to make more frequent use of them, a strategy which has not been notably successful in the past. Another form of community supervision is also dealt with here and concerns the supervision in the community of prisoners released from prison on licence. Although licence is part of a custodial sentence, the actual supervision is undertaken by agencies in the community and this area of work is included here rather than in the previous section.

The five items are the retention of licence arrangements for those serving 12 months or more; the movement to more robust community penalties; encouragement for the greater use of financial penalties; the simplification of out-of-court disposals (OOCDs), including the greater use of OOCDs for foreign national offenders; and the simplification of anti-social behaviour (ASB) provisions.

The Retention of Licence Arrangements for Those Serving 12 Months or More

The first item, part of a more general brief to 'make better use of community sentences to punish offenders and improve public safety' (for serious and dangers offenders), was to 'retain supervision in the community on licence as part of a custodial sentences of more than 12 months, but ensure such sentences are better explained, with a more proportionate and flexible approach to recall' (MOJ, December 2010:49). The proposal never seriously questioned whether supervision of released prisoners in this category should not occur and amounted to a desire to tighten up recall procedures (something which no doubt would get Tory votes), whilst ensuring greater flexibility to promote, except in certain circumstances, release of those previously recalled (MOJ, December 2010:53), a proposal rather less popular in Tory heartlands and not made a flagship of Coalition policy. LASPO Act 2012 (Section 114) made provision for the release of those recalled.

The Movement to More Robust Community Penalties in Order to Appeal to the Courts and the Public

The second item concerns the reshaping of community sentences in order to fulfil the key penal purposes articulated in the various consultation papers, that is, to punish and rehabilitate more effectively, enable reparation both in kind and by direct payment and appeal to courts and more generally the public. Effective punishment is seen to require making community penalties more 'robust and intensive' (MOJ, June 2011b:1). The robustness is expressed in more demanding work in terms of the number of hours required and the arrangements for dealing with breach and poor behaviour. It is also expressed in terms of new onerous sentencing options—particularly the prohibition on foreign travel (MOJ, June 2011b:9). Greater intensiveness is to be achieved by longer and tougher curfews (MOJ, June 2012:14) as well as by utilizing new technologies to track offenders during their sentence to protect the public and help prevent offenders committing further offences (MOJ, March 2012a:6).

Though technically not a community sentence (to impose such a sentence the court had to determine that the offence passed the custody threshold test and then determine that they would suspend the sentence rather than impose immediate custody), reference to the suspended sentence order (SSO) will be made here. In line with the changes noted so far, the Coalition Government pushed the already punitive SSO (the Criminal Justice Act 2003 had already been pushed towards punitiveness by obliging the court to impose community order requirements on those receiving SSOs as well as allowing the courts to monitor the progress of the order, and, if not satisfied, intervene) further by suggesting the possibility of a lengthier period of suspension of the order (MOJ, December 2010:58).

The move to punitiveness was seen as justified because it would restore public and court confidence in the measures and because 'the inclusion of a punitive requirement in community sentences, alongside supervision, has also been shown to be more effective in reducing reoffending than supervision alone' (MOJ Website Press Release, October 2012). Evidence for the latter assertion is quoted in the form of a study undertaken by Helen Bewley (2012). Presumably as a result of these considerations the MOJ moved towards making it a sentencing requirement that there is at least one punitive element included in any community penalty package (MOJ, March 2012a:1) that is at least one of unpaid work, curfew or fine. Community sentences are also seen to need to develop their reparative thrust in kind both by beefing up Community Payback in ways noted above and by developing actual payments either to the community in general (fines) or to victims via compensation orders, both these forms being dealt with below.

The flexible, creative use of community penalties is seen to contribute to the reform of the offender. Curfews and monitoring are seen to institute the beginning of a settled lifestyle, by ensuring that offenders are home at a reasonable time which will enable them to keep appointments to access drug and other treatments. Punishment has a role too, the punished coming to realize the error of their ways. Reparation, as well as being recognized as an important aim in its own right, is also seen to contribute to reform. Generally, a more creative use of all community penalties is urged connected to the movement to payment by results

and the outsourcing of through the gate and community-based services. 'Those who commit crime should expect to face a real sanction, and one that helps make good the wrong they have done' (MOJ, March 2012a:1).

Reform was also to be promoted by enabling offenders to 'tackle the problems which underlie their criminal activity' (MOJ, December 2010:10), namely, 'drugs, alcohol, accommodation or employment issues' (MOJ, December 2010:26). Here, the role of community sentences is to be enhanced by, amongst other measures, an alcohol abstinence order. Mental health issues are seen as another factor leading to crime and the MOJ notes that, nevertheless, 'there has been a disappointing level of use of current mental health treatment requirements despite the high prevalence of mental health problems among offenders.' They attribute this to the need for a full psychiatric report before a mental health requirement could be included as part of a community sentence. They urge the need therefore for 'a more flexible approach to assessment' as being more effective (MOJ, December 2010:60).

LASPO 2012 (Section 71) did attempt to realize some of the above proposals by raising the daily limit on the curfew length from 12 to 16 hours and the maximum period from 6 to 12 months and this act also introduced two new community requirements: one distinctively punitive prohibiting foreign travel for up to 12 months (Section 72), and one, associated with efforts to deal with alcohol misuse (Section 76), an alcohol abstinence and monitoring requirement which orders the offender not to drink alcohol for up to 120 days during which time alcohol levels are monitored. With regard to the SSO, the LASPO Act 2012 once again allowed for SSOs to be made without any community requirements, extended the period of imprisonment that could be suspended from 28 to 51 weeks, to 14 days to 2 years (Section 68) but did not increase the period of maximum suspension.

Section 44 of the Crime and Courts Act 2013 gave effect to Part 1 of Schedule 16 of the same act, making it a duty of the court where a community order was made either to include in the order at least one requirement imposed for the purpose of punishment or to impose a fine for the offence of which the community order is made or impose both such provisions, unless exceptional circumstances apply to the offence or the offender or the imposition would be contrary to justice. Part 4 of

Schedule 16 of the Crime and Courts Act 2013 made provision for the use of new technology to track offenders during their sentence to protect the public and help prevent offenders committing further offences.

The movement towards more flexible community sentences widened the potential appeal of these sentences and was appropriate given the multiple needs of many offenders and opened out the possibility for courts to design a community penalty package to better meet these needs and better facilitate rehabilitation. However, the requirement on courts to introduce at least one community requirement for the purpose of punishment or to impose a fine seems to be out of character with the emphasis on flexibility and could easily lead to community orders moving towards becoming punitive rather than rehabilitative, a problem acknowledged by the government (MOJ, January 2012). Bewley's study (2012) suggests that of the various combinations of community requirements investigated, only four had statistically significant results in terms of the reduction of either the number of offences committed or the reconviction rate. The significance levels noted below simply mean that at the 10 % level there is a one in nine probability that the results are a matter of chance; similarly for the 5 % level there is a 19 to 1 probability that the results are a matter of chance; and for a 1 % level, the most rigorous, there is a 99 to 1 probability that the results are a matter of chance.

Those combinations of the community sentence options that occurred frequently enough to be tested and were found to have a significant impact were a punishment added to a supervision requirement which had no significant effect on reoffending but a significant impact, at the 5 % level, on the number of offences committed in year 1 (reduced by 8.1 %) and year 2 (overall reduction 7.5 %); adding a supervision to a punitive requirement which had a significant impact at the 1 % level on reoffending (reducing it by 11.5 % in year 1 and overall 6.8 % by year 2) and on the number of offences committed in year 1 (reduced by 12.7 %) and year 2 (overall reduction 8.7 %); adding a programme to both a supervision and punitive requirement which had a significant impact at the 1 % level on reoffending (reducing it by 9 % in year 1 and 7.1 % by year 2) and on the number of offences committed in year 1 (reduced by 14.1 %) and year 2 (overall reduction 14.9 %); and adding a curfew to a supervision requirement which had a significant impact at the 10 % level

on reoffending in year 1 only of 5.2 % and on the number of offences committed in year 1 (reduced by 12.1% at the 1 % level) and year 2 (overall reduction 8.5 % at the 5 % level).

A number of observations may be made about this study and the claims made for it on the MOJ website. Firstly, given that adding a punitive to a supervision requirement and a supervision to a punitive requirement both produce some impact on reoffending and the number of offences committed, with the stronger relationship being that of supervision being added to punitive requirement, it is hard to disentangle the relative contribution. Secondly, as Bewley makes clear, the impact of adding a punitive element to a supervision requirement was 'largely driven by the impact of curfew requirements, rather than unpaid work' (2012:iii). In other words, the impact on the number of offences committed in the time period was more a product of the curfew impositions (presumably due to reduction in opportunity to commit offences because of being subject to a curfew) than the punitive consequences of unpaid work (i.e., any individual deterrent impact). Finally, it is worthy of note that the rates of reoffending remained high—about 50 % of those on community orders reoffended over a 2-year period (Bewley 2012 Appendix pages 75–77).

The Prison Reform Trust was critical of the retention of the generic community order and argued that this should be replaced by 'a number of substantive orders (an unpaid work order, curfew order, drug treatment and testing order, attendance centre order and a probation order as before 2003). This would allow the various disposals to be properly evaluated and 'potentially lengthen the path to custody for a number of offenders, allowing the courts to consider matching different community penalties to particular offences and circumstances, rather than yielding to the temptation to consider that, because one experience of a community order has ended in failure, a custodial sentence is inevitable'. The Prison Reform Trust also quotes the Magistrates Association advocating the attendance centre as 'constructive, relatively cheap community penalties' (Prison Reform Trust 2012a:3).

Finally, residual doubts may be expressed about the escalation potential of the generic community order. If, as in the pre-2003 period, the different options within the generic order were separate community sentences in their own right, then this provides the court with the possibility

of moving through them with a persistent offender before resorting to custody. Whereas, with one community order, once it has been tried and failed, the only resort may appear to be a custodial sentence.

Encourage the Greater Use of Financial Penalties, with a Renewed Focus on Reparation (MOJ, December 2010:57)

This third item was proposed as part of the broader intention to 'better support our aims of improved rehabilitation and increased reparation to victims and society' (MOJ, December 2010:49). The MOJ urged a 'more creative use of financial penalties alongside community orders' (March 2012a:2). The MOJ suggested that financial penalties were appropriate because they provide for 'deterrence and punishment' whilst having 'the advantage that they do not affect opportunities for employment or impact on family responsibilities and so prevent the further acceleration into a criminal lifestyle' (MOJ, December 2010:61). They are also seen to have either an indirect (fine) or a direct (compensation order) reparative effect.

To pursue its end the MOJ expressed the wish generally to encourage courts to use financial penalties more by working through the Sentencing Council, indicated that they intended to require courts to consider the use of compensation orders, make allowance for such penalties to be used as substitutes for the more punitive conditions of community sentences and to engage in 'renewed efforts to improve enforcement' (MOJ, December 2010:61–63). In order to allow courts more flexibility with regard to financial payments, the June 2011 paper proposed to remove the upper limit of £5000 for fines for offences that are triable summarily or 'either way' and remove the £5000 cap on compensation orders(MOJ, December 2010, June 2011b:35). Improvement in enforcement is tied to enabling bailiffs to seize the property of those offenders who refuse to pay fines as well as improvements in fine assessment (MOJ, June 2012:17 and 24). Addressing the issue of the level of fine assessment, at that time based on the offenders' own declaration of income, the MOJ proposed systematic data sharing between courts and Her Majesty's Revenue and Customs (HMRC).

In December 2010 (p22) the MOJ stated that 'we are committed to increasing the range and availability of restorative justice approaches to support reparation' where 'restorative justice is the name given to processes which provide victims with the opportunity to play a personal role in determining how an offender makes amends'. Clearly, this was in part carried through by their reform of fines and compensations orders. But the government sees that the process is broader than this and includes 'a substantial minority of victims … meeting their offender' (December 2010:22). Three proposals followed. Firstly, as an alternative to formal criminal justice action for low-level offenders where the offender and victim agree on the outcome (e.g., apologizing, replacing stolen items, or making good any damage caused). The MOJ suggests that this would constitute 'a more effective punishment than a simple caution and build on existing "neighbourhood resolution" schemes'. Secondly, restorative justice as an out of court process for those offences likely to lead to a fine or a community penalty where the agreement could be built into a conditional caution. Thirdly, the results of restorative justice conferences being indicated to the court as part of a pre-sentence report influencing sentencing outcomes.

LASPO Act 2012 (Sections 63 and 85, respectively) gave the court the duty to consider making a compensation order where a victim has suffered loss or harm and removed the £5000 restriction on fines in Magistrates' Courts. A number of changes with regard to fines were made by the Crime and Courts Act 2013—Part 3, Schedule 16, of the Act allowed for the removal of the £5000 restriction on compensation orders; as noted above, Part 1, Schedule 16 of the Act made provision for fines to be used as substitutes for the more punitive conditions of community sentences; and a number of provisions were made to try to improve enforcement including allowing courts to take into account offenders' belongings as well as their income when setting financial penalties, the seizure of property in lieu of unpaid financial penalties (Section 25, Crime and Courts Act 2013) and giving courts improved access to benefits and tax information from Department of Work and Pensions and HMRC enabling financial penalties to be set at a level that will be punitive, but payable (Section 27, Crime and Courts Act 2013). Sentencing statistics (MOJ, May 2015, Table 5.1) suggest that whereas the proportion of all offenders awarded fines has increased between 2010 and 2014 (from 65.2 %

to 70.2 %), the proportional use of compensations orders as sole sentences has remained very low. However, compensation orders are used as additional parts of a sentence—they are of greater proportional significance than sole sentences, but have declined slightly over the same period (from 0.58 % in 2010 to 0.51 % in 2014) (MOJ, May 2015, Table 1.1).

Part 2 of Schedule 16 of the Crime and Courts Act 2013 made provision for giving powers to courts to defer sentencing so that restorative justice can take place between victims and offenders, in order to encourage offenders to face up to the consequences of their actions.

The movement towards greater use of financial penalties and higher fines and compensation orders raises the important question of balancing the seriousness of the offending and the harm done to victims with the ability of the offender to pay. This is a matter which is highly discretionary since the abandonment of the unit fine system in 1993. Another issue arising from these reforms concerned not just the need for fine enforcement measures, but how to prevent non-payment of fines becoming a short-cut to imprisonment. The move towards restorative justice processes as an alternative to court appearance and as part of the pre-sentence report is useful, though it is noticeable that despite the emphasis on the later consultation papers (MOJ, January 2013a, May 2013) on flexibility, very little mention is made of restorative justice.

The Simplification of Out of Court Disposals (OOCDs)

The fourth item deals with simplifying OOCDs (including simple cautions, conditional cautions, penalty notices for disorder, fixed penalty notices, cannabis warnings and community resolutions). The inclusion of OOCDs in this book is justified on the grounds that though they are not court disposals, they, nevertheless, are ways of imposing penalties on offenders and thus part of the penal system albeit operated by the police. The government proposed that greater use should be made of OOCDs to cover 'low level misdemeanours' (MOJ, December 2010:63). Their reasoning was that such acts required a firm response but one that was 'swift, effective and cheap' (ibid:62–65).

Schedule 23 of the LASPO Act 2012 admitted 'a chief officer of police to establish an educational course scheme and offer a person a penalty notice with an education option; …, removes the requirement that a constable must be authorized by the chief officer of police to give a PND [penalty notice for disorder]' and 'removes the requirement that a constable must be in uniform to give a PND'.

OOCDs may be 'swift … and cheap' but questions may be raised as to whether they are effective, proportionate and accountable. Despite the new legislation it is clear that the problems had not been reduced or eliminated and as a result a further consultation was launched in 2013 with a government response paper appearing in 2014 (MOJ and the College of Policing, November 2014) and a House of Commons Home Affairs Select Committee (HCHASC) Report in March 2015. Both reports were critical of then current practice. Both papers revealed that the reforms had not been successful. The MOJ/College of Policing (November 2014) consultation response concluded that 'the current adult disposal framework is unnecessarily complicated, both for the public to understand and have faith in, and for practitioners to operate' (Mike Penning in MOJ and the College of Policing 2014:3). Little success is evident with regard to the aim of simplification of the measures. The same paper goes on to propose a reorganization of adult cautions and proposed to pilot these in two areas, the results of the pilots not being available until well after the end of the term of the Coalition Government (MOJ/College of Policing 2014:12).

The HCHASC report provided an 'up to date', well-evidenced commentary of the government reforms of OOCDs. It concluded that the government aim to encourage proper selective use of OOCDs had not been achieved. It found that the use of OOCDs peaked in March 2008 (reaching 660,965 in that year) and decreased, by some 52 %, to 318,500 in March 2014. The downward trend in use had affected all forms of OOCDs.

The HCHASC found that OOCDs probably saved police time by cutting the paperwork associated with the prosecution as opposed to the cautioning of an offender and that, theoretically at least, made officer time available for other duties (HCHASC 2015:Para 3). But the HCHASC also noted that OOCDs were being used for the wrong kind of offences: 20–30 % of OOCDs were used for too serious offences

(HCHASC 2015:Para 8) and for the wrong type of offender, notably persistent offenders (HCHASC 2015:Para 8), raising the issue of proportionality. Furthermore, they found that, contrary to justice, obtaining an OOCD (as opposed to a prosecution) was down to a post-code lottery with wide variations evident in usage rates: with 26 % of offences were being dealt with by OOCDs in West Yorkshire and 49 % in London (HCHASC 2015:Para 14). They also found that police officer knowledge of OOCDs was 'patchy' and that police record keeping in relation to OOCDs was problematic (HCHASC 2015:Para 18). OOCDs do not seem to be subject to proper channels of accountability, despite the existence of so-called scrutiny panels. Scrutiny panels were not provided at all in some forces. Where they did exist their scope, membership and number of meetings varied from force to force (HCHASC 2015:Para 32).

Some of the criticisms concerning proportionality may be reduced when Section 17 of the Criminal Justice and Courts Act 2015, comes into force. These provisions place restrictions on the circumstances in which cautions may be used in relation to the seriousness of the offence. For indictable offences a police officer will not be able to give a caution except in exceptional circumstances relating to the person or the offence, and with the consent of the Director of Public Prosecutions (DPP). For 'either way' offences a police officer will be able to only give a caution in exceptional circumstances relating to the person or the offence, but would not need the permission of the DPP. And for repeat offenders, where a person has been convicted of, or cautioned for, an offence in the previous 2 years, restrictions will also apply, depending on the type of offence. But another criticism of lack of proportionality underlies the points made so far. If cautions are being underused overall and overused for serious offences and repeat offenders, as noted above, then this must mean that the proper target group, those committing low-level acts of crime and disorder, has been neglected, a point implied by the evidence given by NACRO to the HCHASC.

Part of the reform agenda in relation to OOCDs concerned their use for foreign national offenders and purported to fit into government aims to encourage rehabilitation and reparation (MOJ, December 2010:57). The purpose was to significantly reduce the number of foreign national

offenders by extending conditional cautions to those agreeing to leave the UK. LASPO Act 2012, Section 134, allowed for conditional cautions for those foreign nationals agreeing to leave the UK and not return within 5 years, and was implemented from April 2013 (Law Society Website 2014).

Foreign national offenders are a diverse group. The return of foreign national offenders to their countries of origin raises questions about the need to safeguard their rights under UK international obligations. Furthermore, conditional cautions raise a further issue—namely, undue influence being exerted to obtain an admission of guilt and providing a caution with a view to agreeing to leave the UK. Following a parliamentary question in October 2013 it was revealed by Mark Harper (2013) that to that date, after 6 months of availability of the measure, only six conditional cautions had been issued to foreign national offenders. In the 2013–14 period there were 17 such cautions issued (NAO 2014:4). Such cautions have been seldom used though this leaves the issues raised by these measures largely unexplored.

There is undoubtedly a role for OOCDs as they have the potential to prevent problematic behaviour being amplified by formal intervention, but only if proper recognition is given to making them effective, proportionate and accountable. The development of reparative measures within the purview of OOCDs has been neglected. The use of OOCDs for foreign national offenders is again appropriate but to be undertaken with even greater care.

The Simplification of Anti-social Behaviour Provisions

The final item of sentencing policy in relation to community penalties about which the Coalition Government expressed reform intentions was anti-social behaviour. The main thrust of the White Paper (Home Office, May 2012) following the consultation paper (Home Office, February 2011) was to simplify existing powers reducing '19 complex existing powers (to) six simple new ones'. Of these planned new powers two affect the decisions/sentencing of county and criminal courts. They include 'a new court order (criminal behaviour order) available on criminal conviction (and in addition to that criminal conviction) that will stop

the behaviour of the most destructive individuals and will address the underlying causes of that behaviour, addressing one of the main failings of the ASBO' [anti-social behaviour orders] and 'a new civil injunction that agencies can use immediately to protect victims and communities' (Home Office Foreword, May 2012:3).

Sections 22–25 of the Anti-social Behaviour, Policing and Crime Act (ASBPC) 2014 did make provision for criminal behaviour order (CBO). This gave the court the power to impose, after convicting an offender of a criminal offence and as well as any other disposal including conditional discharge, on application by the prosecution, a CBO consisting of various prohibitions and/or requirements intended not to interfere with work of the offender or the requirements of other sentences imposed by the court. The exact nature of the prohibitions and requirements was not specified by the act. The CBO has a minimum period of 2 years duration or could be indefinite. Breach of the order could lead to imprisonment or a fine or both.

Sections 1–4 of the ASBPC Act 2014 also made provision for a civil injunction to prevent nuisance and annoyance (IPNA). For adults and young adults this injunction is available to county courts and can be imposed for an indefinite period and may consist of prohibitions as well as requirements. The exact nature of the prohibitions and requirements was not specified by the act. Breach of the injunction would place the offender in contempt of court and thus liable to be imprisoned or fined.

Although the changes did make provision for more timely intervention and did make possible positive requirements that could address at least some of the immediate causes of persistent anti-social behaviour (though not the impacted problems associated with dispossession), the new Act did not deal with some of the fundamental problems of the law in relation to ASB. The first problem is that there is a clear blurring of civil law and criminal law lines. IPNAs are to be imposed by county courts operating with a civil burden of proof ('on the balance of probabilities'). But if the injunction is breached the penalty could be imprisonment, and though for imprisonment to be imposed the higher burden of proof ('beyond reasonable doubt') would apply, it is still the case that the result of a relatively minor offence, albeit aggravated by breach, has led to the ultimate criminal sanction.

The second problem is that the new CBO did nothing to clarify the nature of ASB using the same wide definition of 'causing harassment, alarm and distress'. The IPNA provision not only did nothing to clarify the definition of ASB but expanded the interventional scope by providing that to make an IPNA the court had to satisfy itself that the plaintiff had showed either ASB or 'conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises' (Section 2.1 (a), ASBPC Act 2014).

The third problem is that for adults and young adults, both the CBO and the IPNA can be imposed for indefinite periods and the exact nature of the positive requirements and the negative prohibitions have not been specified, leaving the matter open to the judge and the 'flexible' provider. Even with an appointed 'supervisor' such flexibility raises questions about the enforceability of some requirements as well as the possibility that the exercise of unfettered discretion could lead to disproportionate or inappropriate conditions (House of Commons Home Affairs Select Committee Report 2005:Para 220).

Finally, the movement to CBOs allows for a significant escalation in the level of intervention with relatively minor offenders not only having a penalty imposed by the court for the offence, but also being made the subject of a CBO which could be indefinite in time period and have various prohibitions and requirements as long as they are compatible with her/his employment and the criminal sanction imposed.

It is not clear what the move to ASBOs and related measures actually addressed. Insofar as they addressed the lack of effective action taken against offenders perpetrating repeated, low-level but, nevertheless, troubling and concerning crimes, the lack of effective action did not require new legislation so much as a change in police priorities and possibly the nature of sanctions associated with such low-level offences.

Conclusion

Finally, an assessment of the record of the government with regard to sentencing reform will be made entailing a consideration whether the Coalition Government was successful by its own principles (as set out in Chap. 3) and by reference to the considerations set out in Chap. 3.

In summary the Coalition may be seen to have articulated five penal intentions: to protect the public; to make penalties both more punitive and rehabilitative; to improve the level of transparency and accountability in criminal justice; to move to much greater decentralization; and, finally, to achieve these four intentions whilst contributing to austerity.

Overall, the Coalition Government's sentencing policy contained, as we have seen, some 14 separate items falling into three areas, namely, the administration of justice (5), custodial sentences (4) and community sentences (5). With regard to the administration of justice one policy was abandoned entirely by 2011 (sentencing discounts on guilty pleas), two policies were driven through with gusto and considerable impact (reduction in legal aid and court reforms) but with likely difficult consequences in terms of fairness and the remaining two (the introduction of a simpler more transparent sentencing framework and limiting the creation of new offences) had limited impact. The track record on custodial sentences was also mixed—of the four items greater transparency regarding prison sentences was not achieved by reducing early release, IPPs were abolished but not retrospectively, leading to many people continuing to languish in prison indefinitely. The attempt to abolish the sentence of Youth Custody for young adults was postponed, but the ECtHR rulings about the W-LOs was successfully ignored until the ECtHR changed its position allowing England and Wales to retain this measure, despite the limitation on review it provides and questions about whether a minister can provide such reviews free of political considerations. Finally, regarding community sentences the track record was also mixed. The government did make allowance for more flexible recall of prisoners on licence. But the move to more flexibility in community sentencing was undermined by the introduction of various requirements (for a punitive element in community orders, compensation orders) including the greater use of financial penalties. Court use of fines increased, but the use of compensation orders remained static. The changes to OOCDs seem to have not led to simplification or encouraged more use generally or with foreign national offenders. Similarly, ASB provision, though simplified, has not avoided some of the evident key issues.

Did the Coalition sentencing policy follow its own principles? Austerity was certainly achieved by changes in the provision of legal aid and cuts in

court services. Few advances can be seen here regarding greater transparency and accountability. The rehabilitation revolution was stillborn, with punishment becoming the fallback position. The ambition to protect the public was thrown in doubt since the fulfilment of this ambition primarily turned on actually reducing reoffending.

Furthermore, despite the fall in the official crime rate over the last 20 years, the Coalition Government did little to depoliticize the debate about crime and criminal justice and has continued to participate in the penal policy equivalent of an arms' race. The Coalition Government with its increasingly punitive stance (even in the 2015 general election the Conservative manifesto talked about an emphasis on short deterrent custody, a policy that has failed three times before) has failed to recognize the limits of penal policy and the marginalizing impact of interacting life chances both within and between generations. Indeed, it has contributed to the exclusionary impact of such processes on certain types of offenders and has done little in practice to mitigate policy impacts that are disadvantaging to particular groups. Indeed, the provision of the 2010 Equality Act which indicated that it was desirable to exercise its functions by having due regard for the reduction of 'the inequalities of outcome which result from socio-economic disadvantage' was 'scrapped' by the Coalition Government on doubtful grounds.

Coalition sentencing policy reform has not taken sufficient regard of the Corston Report particularly with regard to the general argument that because of entrenched gendered inequalities, women offenders require a very different approach to male offenders because of their (women offenders') vulnerabilities which include domestic circumstances (domestic violence, childcare matters and single parenthood), personal circumstances (mental illness, low self-esteem, eating disorders and substance misuse) and socio-economic factors (including poverty, isolation and employment/unemployment). The Corston Report went on to make a number of recommendations relevant to sentencing. In terms of the administration of justice it recommended an improvement to governance at the ministerial level by the establishment of an inter-ministerial group to guide and respond to a new commission for women who offend or who are at risk of offending (the Coalition Government has been responsible for seriously limiting the operation of this group) . The report went on to recommend the reservation of custodial sentences and remand for

Table 4.2 Trends in public confidence in the criminal justice system as revealed by CSEW data

Year	Confidence that the CJS is on the whole fair	Confidence that the CJS is on the whole effective
2010–11	61	42
2011–12	63	44
2012–13	63	45
2013-14	64	48
2014–15	66	51

Source: ONS (2015b): Supplementary tables Table 25

serious and violent women offenders only and that community sentences be used as the norm, neither recommendations being reflected in the sentencing reforms.

Finally, has Coalition Government sentencing policy reform addressed the key elements of the endemic penal crisis, that is, a shortage of material resources combined with the declining legitimacy of the whole penal system for the public, staff and offenders? Sentencing reform has added to the resource crisis by not discouraging the use of imprisonment and limiting the resources available to this part of the penal system by closing courts and reducing legal aid. Furthermore, the reforms of community sentences did not limit , but expanded their potential use, in the context of a drive to austerity, exacerbating the resource crisis. Finally, the headline agenda of a rehabilitation revolution (or even a transformed rehabilitation) did little to provide a broadly accepted and effective rationale which could go some way to provide legitimacy for the system with staff, the public and offenders. CSEW data on public confidence in the criminal justice system provides a wealth of information covering the whole of the 2010–15 period. This material reveals that though in the period there has been a general increase in the proportion of respondents expressing confidence that the criminal justice system as a whole is both fair and effective (see Table 4.2), and that between 2012–13 and 2013–14 there has been some increase in confidence that courts are effective at giving punishment that fits the crime, only 31 % of the public saw the situation in this way in 2013–14 (Jansson 2015). And, some changes, most notably the legal aid reforms, contributed to a reduced sense of justice for defendants and prisoners.

In Chap. 5 we consider Coalition policy on custodial services.

5

Custodial Services

The purpose of Chap. 5 is to examine the Coalition Government's policies on custodial services for adults and young adults in England and Wales by considering the emergent policy agenda, the actions actually undertaken as well as justifications offered, the reactions they provoked and the impact they had, where known. Comparative material is used where appropriate. An overall assessment of the record of the government with regard to custodial services is also provided.

The direction taken by the emergent policy agenda of the Coalition Government becomes clearer at this point based on a shift to outsourcing and punishment in the context of austerity. Each of the four main reforms of custodial services reviewed in this chapter also pushes towards this agenda. Thus the attempt to make the custodial estate more affordable fits entirely within the austerity agenda; the introduction of 'prisons with a purpose' would have countered the drive to punishment, but it was stillborn; the reconfiguration of prison discipline was rooted firmly within a punitive agenda; and the continuation of the ban on prisoners' voting rights was both punitive and exclusionist. Three of the issues identified derived directly from government aspirations and one was reactive, deriving from repeated decisions by the ECtHR.

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Making the Custodial Estate More Affordable

The pre-banking crisis Conservative Party ambitions for prisons as stated in 2008, to reduce reoffending and the prison population, were soon abandoned. Instead, by 2010 the intention was to make the custodial estate more affordable, thereby contributing to austerity and effecting some reductions in the prison population (MOJ December 2010). However, by 2011, the imposition of affordability became not only a way of contributing to the ambitious austerity plan detailed by the 2010 Spending Review, which aimed to save £894 million (24% of budget) by the end of 2014–15 (NAO 2013), but also a way of doing this whilst expanding the number of custodial places (MOJ June 2011b, July 2011). This position was neatly summed up by the then new Minister of Justice, Chris Grayling, in a speech given in November 2012 when he said:

> So we have a simple choice. We either have fewer people in our prisons. Or we can bring down the cost of each prison place. It will be no surprise which option I have chosen. I want us to strain every sinew to make our prison system more cost effective, to bring those costs down. We have to focus on making the prison system cheaper not smaller.

Four policies have emerged to drive down prison costs and are explored here: prison closures, mergers and enlargements including the revival of the previously contentious 'Titan' jails, a strategy based on reducing unit costs by building very large new jails; the contracting out of prisons and prison services; workforce restructuring; and the NOMS income-generation initiative, Just Solutions International (JSi).

Prison Closures, Mergers and the Expansion of the Size of Prisons

The first 'modernization' (MOJ Website Press Release September 2013) device used by the MOJ to create greater affordability had two elements: the closure of uneconomic prisons and increasing the size of existing and new prisons.

The Closure of 'Uneconomic' Prisons

The closure of what were deemed 'uneconomic' prisons was rapidly effected. Six public sector institutions were closed in 2011 (Ashwell, Brockenhurst, Lancaster Castle, Latchmere House, Morton Hall, Wellinborough prisons), followed by a further 11 public sector prisons in 2013 (early in 2013: Bulwood Hall, Camp Hill, Canterbury, Gloucester, Kingston, Shrewsbury and Shepton Mallet prisons; late in 2013 Blundeston, Dorchester, Northallerton and Reading prisons), with parts of two other prisons, HMPs Chelmsford and Hull, closed in the same year (Prison Reform Trust Bromley Briefing Autumn 2014).

Increasing the Size of Existing and New Prisons

Four strategies were at play here, including mergers, opening larger new prisons, expanding existing prisons by constructing new wings and reverting to the 'Titan' prison strategy, all contributing to increasing the size of prisons and supposedly gaining the advantage of economies of scale. The size of existing prisons was expanded by mergers. One such merger was accomplished between Acklington and Castington prisons in 2011, creating HMP Northumberland. A further merger, of HMPs The Wolds and Everthorpe, became operational in April, 2015, after a secure corridor was built linking the two prisons (HMIP September 2015:5). The size of new prisons was increased. Two new prisons were opened in 2012— HMP Thameside in March and HMP Oakwood in April. They were both large prisons with the capacity of 900 and 1650 prisoners, respectively, though Oakwood had been part of the Labour Government's 'Titan' prison strategy, which, when the strategy was cancelled, had been reduced in size from 2500 to 1650 prisoners. They were both built under the Private Finance Initiatives (PFI), by Serco and Keir Build, respectively, though the running of Oakwood was awarded to G4S on a 15-year contract. PFI arrangements keep such capital expenditure conveniently off the books of the MOJ as well as offer other possible advantages related to cost reduction supposedly associated with privatization and economies of scale. The size of existing prison facilities was also increased by adding new house

blocks or wings to four prisons (HMPs Thameside, The Mount, Parc and Peterborough), with opening dates in 2015.

The changes noted above effected an increase in the average size of prisons. Whereas in 2004 only 12 prisons housed more than 1000 prisoners, by 2014, there were 29 such prisons (Prison Reform Trust Bromley Briefing Summer 2014) and by March 2015, 43% of prisoners were held in prisons providing 1000 places or more (Prison Reform Trust Bromley Briefing Summer 2015).

The fourth strategy was to revive Labour's much-reviled and twice-dropped 'Titan' prisons project. The Coalition Government laid down plans to build two 'Titan' prisons, one near Wrexham (planning permission being granted in May 2014 to 'Lend Lease', for a 2100-prisoner facility with an opening date of 2017 at a cost of £250 million) and one in the south-east near London, probably on the site occupied by Feltham YOI (plans for which have not progressed significantly to date) (BBC News May 2014, Travis February 2015). Such prisons were seen by the government to maximize the apparent advantages of economies of scale whilst keeping the capital costs off the MOJ books.

Reactions to Prison Closures and Increased Prison Size

The 'modernization' of the prison estate under the Coalition Government has led to a number of criticisms which relate to the methodologies used to determine prison closures, the issues associated with larger prisons and in particular the 'Titan' prisons and the overall net impact of rapid closures and slow new build. The National Audit Office (NAO) Report (2013) did praise the process for being part of a longer-term plan, being carried out efficiently and achieving cost reductions which were estimated to reach £71 million by April 2014 (2013:5–6).

But the NAO Report noted clear limitations with the methodology used to consider prisons for closure. NOMS 'excluded from consideration new prisons … several of which are the most expensive to run', because such prisons operated on 25-year contracts that could not be cancelled. NOMS 'has chosen to exclude assessments of prison performance … from decision-making about prison closures'. NOMS also failed to take account of unique facilities when making closure decisions—thus 'when HMP Shepton Mallet closed in March 2013, the Agency lost 34 places

on sex offender treatment programmes, which were not re-provided elsewhere,' and the impact of closures has 'sometimes traded good quality and performance for greater savings' (NAO 2013:6–8).

A number of criticisms have been made of the new, larger prisons. Firstly, overcrowding seems to have been built into them as 'in some new accommodation prisoners routinely share cells, some of them in overcrowded conditions'. Secondly, new capacity has been built with inadequate facilities for purposeful activity largely to cut costs (e.g., HMP Oakwood) (NAO 2013:6).

Another aspect of the prison-modernization agenda that has been the subject of concerted criticism is the move to Titan prisons. The NAO commented that the management of the prison-modernization agenda generally seems to suggest that NOMS had 'focused on the number of places and their cost' only (NAO 2013:7) and ignored other considerations with regard to large prison facilities. The Prison Reform Trust suggested that smaller prisons are safer and more effective because of better staff prisoner ratios and because more prisons located round the country are more likely to be closer to prisoners' homes encouraging family links which are vital to effective rehabilitation. The Prison Reform Trust cites in evidence 'the recent disastrous HM Inspectorate Report into G4S run Oakwood prison, housing 1,600 people at one third of the average cost per prisoner place' (Bromley Briefing Autumn 2013:3). It is also worthy of note that the move to Titan prisons on the part of the Coalition Government is a significant policy U-turn given that prior to the general election in 2010 the Conservative Party opposed Titan prisons (Conservative Party 2008) and, indeed, in 2009, David Cameron, as leader of the opposition, was instrumental in forcing the Labour Government to shelve their plans for three such prisons (The Economist 11 January 2013).

But by far the most potent criticism has centred on the rapid closure of existing prisons and the slow commissioning of new prisons, in the context of no real reduction in the propensity to imprison. By 2013 the NAO (2013) estimated that some 2700 prison places were added in the period May 2010–September 2013. But the BBC estimated (BBC News September 2013) that the closure of prisons including all those noted above had removed 5128 places. And although the four new house blocks (1260 new places) and HMP Wrexham (2100 with new places) would add 3360 places, these initiatives would only take effect in the 2015–17 period.

Prison closures were rendered problematic by a number of factors. Little or no effective action was taken to reduce the flow of those imprisoned by the courts as the Coalition specifically rejected restricting the use of short prison sentences. On the contrary, the flow of people into prison was increased by the political rhetoric of the period, the creation of new offences, for example, under LASPO Act 2012, increasing the time spent in prison by making minor changes to early release and providing for a new 'two strikes and you're out' mandatory sentence for adult offenders (see Chap. 4 for details).

The only real attempt to reduce the residence time of people in prison and the prison population came when the Coalition Government committed itself to the more effective and timely removal of non-UK passport holding foreign national prisoners, who represented some 13 % of the prison population in 2010 (MOJ December 2010:63), by means of a scheme for the removal of foreign national tariff-expired, indeterminate prisoners (effected by Section 119 of LASPO Act 2012 which set up the Tariff-Expired Removal Scheme) and improvements in the prisoner transfer arrangements for EU nationals which came into force in December 2011, these measures being added to the two existing removal methods for foreign national offenders (the facilitated return scheme and the early removal scheme for determinate sentence prisoners) (NAO 2014).

Significant doubts may be raised about the proposals in that they traded on the 'otherness' of foreign national prisoners whilst ignoring issues associated with the schemes, notably the vulnerability of many of the prisoners. In December 2014, 13 % of foreign nationals held in prisons were women, many of whom had been coerced or entrapped into offending (Prison Reform Trust Bromley Briefing Autumn 2015:5). A further issue was that such arrangements minimized or ignored the responsibility of the UK Government for releasing such prisoners without making any assessment of the risk they posed to the receiving nation. But in any case the impact of these initiatives on the size of the prison population was small with the two new initiatives accounting for only 3 % of all those foreign national prisoners removed (NAO 2014:34, Table 13). Thus little significant change has been effected at a total cost of some £850 million for all measures (NAO 2014:4).

In the 2013–15 period, given that there was no decline in the prison population, there was a significant shortfall of places and institutionalization of prison overcrowding, in a manner that duplicated the conditions

under the previous Labour Government which, when in opposition, the Conservative Party (2008) had specifically deplored, seeing it as inimical to positive work with prisoners. Closing prisons was a reckless gamble that did not pay off. HMIP Annual Reports reveal that about 60 % of the prisons in England and Wales subjected to inspections in the 5 years between 2010 and 2015 were overcrowded (HMIP Annual Reports 2011, 2012, 2013, 2014, 2015). Prison population pressures became particularly intense from autumn 2013. By March 2014 the prison system was 1 % from 'bust level', that is, when the number of prisoners exceeds the number of places as calculated by the most generous method, usable operational capacity (UOC). Although later there was a slight improvement, the prison population has remained high and in May 2015 was 85,669, 97 % of the UOC of 87,930 and 111 % of in use certified normal accommodation (MOJ Prison Statistics, December 2012, January 2013c, January 2014, January 2015b), recent concerns about the fudging of such calculations notwithstanding (Fullfact Website June 2015).

In 2013–14 Chris Grayling refused to revert to a version of Operation Safeguard (whereby prisoners were located in police cells), largely on cost grounds and refused to invent another pragmatic 'get out of jail card' like End of Custody Licence. Instead, he allowed incentivized private prisons to take more prisoners, institutionalizing overcrowding in such establishments. Indeed, 'private prisons have held a higher percentage of their prisoners in overcrowded accommodation than public sector prisons every year for the past 16 years' (Prison Reform Trust Bromley Briefing Summer 2015:10). But pragmatism was not completely avoided, when, as noted in Chap. 4, Grayling unsuccessfully proposed merging senior YOIs with adult jails, freeing up unused custodial capacity.

The Conservative Party recognized in 2008 that overcrowding has a pernicious influence on many aspects of prison life. HMIP Annual Reports between 2012 and 2015 have confirmed this—overcrowding is not just about how many prisoners are crammed into a cell for one but the impact that it has on the daily functioning of the prison and the daily lives of prisoners affecting access to purposeful activities and the time spent in a shared cell with an unscreened toilet. In other words, overcrowding maximizes prisoner dissatisfaction and minimizes prisoner safety, a sense of prisoners being respected and the likelihood of

rehabilitation by limiting the opportunities for purposeful activity. It also makes the job of the prison officer much more difficult. Such conditions subvert efforts to introduce initiatives to bring about rehabilitation.

The Contracting Out of Prisons and Prison Services

The second major device to reduce the costs of the prison estate was based on the strategy of contracting out. Contracting out or outsourcing may be understood to be a form of privatization. It does not entail the total, permanent and systematic transfer of government functions to the private sector. In the 1980s this was undertaken for a variety of public utilities. However, though it was possible to, for example, sell off prisons in this way, in practice what has been done is to adopt a more limited form of privatization based on outsourcing whereby a private body enters into an agreement with the government to run the prison or service for a period at a price. Such contracting out could take various forms including whole prisons (and here there are a number of variations dependent on how deep the contracting out is in terms of designing, constructing, financing and, subsequently, managing the prison) or ancillary services (e.g., catering or prison maintenance). Clearly, such developments may be seen as part of a more general drive towards managerialism (affecting police custody suites, for example—see Skinns et al. (2015), that is, as noted in Chap. 3, a general concern with efficiency, effectiveness and economy rooted in the assumption that the private sector more easily achieve these goals.

The Coalition Government inherited 11 contracted out prisons from Labour in 2010, 10 of the 11 prisons under 25-year 'design, construct, manage and finance' (DCMF) deals. By 2010 clear inroads had also been made into the privatization of prison services including prison education, healthcare and catering services. The Coalition continued with the Labour Government tactic of no longer funding the building of new prisons but obtaining them through PFI contracts under DCMF arrangements. Similarly, under Labour any private prisons not on 25-year PFI contracts and all public sector-run prisons had been subjected to a process of market testing based on the assumption that a functioning market existed, that NOMS could adopt a 'provider-neutral' stance and contracts could be awarded to 'whoever can most effectively and efficiently meet public demand' (MOJ July 2011:4).

Under Prison Competition 1 (PC1), running from November 2009 to March 2011, and thus spanning the transition from Labour to the Coalition, HMP Birmingham moved from the public to private sector (in 2011), the first public sector prison to do so in the years of market testing. Two new PFI contracted out establishments were opened in 2012, Oakwood and Thameside prisons.

When PC1 came to an end, the Coalition Government appeared to adopt the same method, announcing, in October 2011, PC2, which nominated one private and seven public sector prisons for market testing. The MOJ 'Competition Strategy for Offender Services' paper (July 2011) argued that a functioning prisons market had been created and that NOMS had built up good experience in managing this process over the years. The paper also set out the overwhelming advantages to be gained from market testing including that it was 'the means to secure new services, improve existing service delivery, encourage innovation and drive value for money' as well as to be effective at 'encouraging the management and workforces of existing and future providers to improve outcomes, drive efficiency and deliver more innovative models of service delivery'. Indeed, NOMS was so successful that there was a need to extend the model out of the prison sector to incorporate a broader range of services including provision of legal aid, prisoner resettlement and the supervision of non-custodial penalties (MOJ July 2011:4).

But then in November 2012, an apparent volte-face was announced. The remaining business from the prematurely concluded PC2 was dealt with by announcing that on expiry of its contract in 2013, the one private prison under review, The Wolds, would move to public sector management. The remaining public sector prisons were to continue to be market tested, but, in November 2013, this process was terminated with the remaining prisons left in the public sector but with the contract for HMP Northumberland being awarded to Sodexo, making it the second public sector prison to be privatized after market testing (Prison Service Pay Review Body March 2014).

Chris Grayling announced (MOJ Press Release November 2012) that there was to be an abandonment of market testing for whole public sector prisons and a move to cost reduction (and privatization) by other means. The MOJ press release suggests that the reason for this change was because 'further and faster ways of securing future cost reductions' had been iden-

tified including workforce restructuring ensuring efficiency savings and 'competing ancillary services, such as maintenance and resettlement services'. The MOJ press release estimated that the changes planned would cut £450 million from the budget 2012–18. And this 'new approach to how we compete prison services and reduce unit costs across the prison estate … will lead to better value for the tax-payer, linked to more effective services to reduce reoffending.' Within 2 months of this announcement the plans for 'Transforming Rehabilitation' (MOJ January 2013a) were put forward (see Chap. 6).

This significant and unexpected change in policy was, if not exactly welcomed by the Prison Officers' Association (POA), at least seen as an opportunity although one 'not without risks' (POA Circular 150, 16 November 2012). It was vehemently opposed by others including the neo-liberal free market organization 'Reform' on the grounds that it was premature to abandon market testing of whole prisons because market testing of whole prisons had been allowed to have only a limited impact (by February 2013, only one prison had been transferred from the public to the private sector under the process), the outsourcing of whole prisons enabled many advantages in terms of resource management, decent treatment of prisoners and reducing reoffending and market testing exerted a positive influence on public sector prisons (Tanner 2013).

A push towards the outsourcing of a number of prison services (including healthcare and prison maintenance) followed. Only the privatization of prison maintenance is considered here. Though signalled as early as November 2012, it was not until some 13 months later, in December 2013, that Chris Grayling went ahead with plans to outsource prison maintenance, including works and building projects, management of prison stores, waste disposal and collection, energy and environmental management and the cleaning and escorting of contractors and their vehicles. Bids were sought from firms for the estimated £100 million a year 5-year contracts (Financial Times 12 December 2013). The contracts were awarded to Amey (for the north of England, the Midlands and Wales) and Carillion (for the east of England and south of England) in November 2014 and became operational in the early summer of 2015.

Reactions to the Contracting Out of Prisons and Prison Services

By 2012 the private sector was responsible for running 14 prisons (for women Bronzefield and for men Altcourse, Ashfield, Birmingham, Doncaster, Dovegate, Forest Bank, Lowdham Grange, Northumberland, Oakwood, Parc, Peterborough (containing male and females facilities), Rye Hill and Thameside), with HMP Wrexham due to become operational in 2017. The proportion of prisoners detained in private jails increased from 11.3 % in 2010 to 13 % in 2012, to 16 % in 2013 and 18 % in 2014 (Prison Reform Trust Bromley Briefings 2010, 2011, 2013, 2014) due to a combination of new jails and expansion of existing private facilities together with the closure of many public sector prisons. Approximately two-thirds of the privately run prisons are DCMF facilities, though four (Birmingham, Doncaster, Northumberland and Oakwood prisons) are contracted out, on longer 15-year contracts. The 14 prisons are run by only three companies—Sodexo (3), G4S (5) and Serco (6). All the prisons have either been refurbished (2) or been operated in recently built premises (12), though one such facility (HMP Doncaster) is now nearly 20 years old.

The advantages claimed for private prisons are not restricted to costs. They operate in generally modern facilities as noted above. They can bring to bear new thinking on how to manage the imprisoned and the prison facility and the treatment of prisoners in some private sector prisons is 'more benign and respectful than in most public sector prisons' (Crewe et al. 2014:313). It is claimed that they are able to imprison for less, in terms of both unit costs and staffing levels. They can also claim, rightly, that they are significantly better in many respects than many public sector prisons, whose track record had been poor.

Although by late 2014 contracted out services accounted for 40 % (£1.4 bn) of the NOMS budget (Prison Reform Trust Bromley Briefing Summer 2015:10), the jury is still out on the matter of reduced costs largely because of the claims to commercial confidentiality that the companies make and the governments of the day sustain. The notion that there is a free market and that this somehow guarantees value for money and good service is a myth—neither the demand side (the number of prisoners) nor the supply side (the companies supplying prison places) con-

forms in any respects to any normal conception of a free market; instead, there is a monopoly of demand (the state) and an oligopoly of supply (the big three companies, many of which have global reach). The Commons Public Accounts Committee found that 'quasi-monopoly suppliers are emerging who squeeze out competition, often from smaller companies with specific experience' (Grice December 2014).

As for the argument that somehow private prisons have a 'natural' advantage over public sector provision is a myth, based on comparing a purposely run down public sector with an idealized private sector (not unlike the position in 1993 when British Rail was privatized after years of 'preparation', though it has to be admitted that perhaps some union practices and entrenched staff attitudes and procedures did play a negative part to the detriment of passengers and prisoners alike). But it also has to be noted that there is considerable variation within both sectors (Crewe et al. 2014), suggesting that the problems at work in prisons transcend the public/private split, and leave unanswered essential questions about the morality of transferring the incarceration of its citizens to private, profit making companies which because of their 'too big to fail status' may come to develop a stake in making an economic case for imprisonment which ignores or sidelines the more fundamental moral case.

What is clear is that private prisons—given that 80% of the costs of a prison are attributable to staffing costs (NAO 2003:33)—in order to be competitive had to target both unit costs and staffing levels. This meant reducing the number of staff (Prison Reform Trust 2005; Prison Reform Trust Bromley Briefing 2015) as well as the costs of most staff (the exception being senior staff) in terms of pay, holidays and pension contributions whilst increasing the working hours (MCG Consulting 2006; Income Data Services 2015). It has also meant high staff turnover in private prisons (Prison Reform Trust 2005; MCG Consulting 2006; Garton Grimwood 2014; Income Data Services March 2015).

The outsourcing of custodial services is seen to carry advantages—that the private sector will be able to harness new knowledge and expertise and be 'nimbler' in providing the service because subjected to more stringent cost checks and even, in some circumstances, payment by results. However, a number of arguments have been articulated against outsourc-

ing. The moral question which hinges on whether it is possible to transfer state duties of this kind remains, but is much reduced when issues about, for example, prison maintenance are considered.

The outsourcing of prison maintenance has been criticized on a number of grounds. Some arguments have been concerned with the process, taking the government to task for the slow pace, the lack of publicly available information about the terms of the contracts and the whole rationale for the change. Despite doubts being expressed about whether the transfer of contracts to the private sector would be achieved in a timely fashion given the record here regarding the maintenance contracts for the northeast cluster of prisons (Union of Construction, Allied Trades and Technicians November 2014), the process has now been accomplished. However, a number of issues have been raised concerning the impact of the outsourcing as to whether it will really save money, lead to lower quality work and raise security problems if the new contractors bring in their own staff. It has been argued that the impact of outsourcing will almost certainly lead to job losses amongst existing maintenance staff and/or the erosion of their employment terms and conditions. Finally, it has become evident that the privatization of prison maintenance can have a detrimental impact on that part of purposeful activity for prisoners associated the maintenance of the external fabric and grounds of the prison.

Prison Workforce Restructuring

Workforce restructuring, as part of the drive to make prisons more affordable, has taken two overlapping forms. The 'Fair and Sustainable' (F&S) (Prison Officers' Association (POA) 2011; MOJ August 2012) scheme began in late 2011 and went on to April 2013, with the aim of 'massive work and pay restructuring' (Prison Reform Trust Bromley Briefing 2014:3). 'Competition benchmarking' (CB) started in early 2013, thus overlapping with F&S, and was due to be completed during 2015. The logic of both is clear—equalizing the unit costs of public sector and private custodial establishments, by reducing public sector costs.

'Fair and Sustainable'

F&S was introduced in 2011 and was intended to create a new working structure for the prison service covering all grades affecting pay, pay progression, pensions and holiday entitlements. It was eventually accepted by the staff involved. NOMS justified the introduction of F&S as a way of maintaining the long-term effectiveness and competitiveness of the prison service. But because the scheme allowed for current staff to be given the choice of keeping their existing terms and conditions or opting into the new arrangements, and given that it was recognized that many existing staff would choose to stay on their current terms (because the new terms were less favourable), it was calculated that any savings from the new structure could take up to 15 years to have a full impact (Prison Service Pay Review Body 2012: viii).

Competition Benchmarking (CB)

CB was announced by Chris Grayling in November 2012 as part of the package that would drive down the costs of the prison estate, after the suspension of whole prison market testing. It was designed to act as 'the means to accelerate cost reductions'. It operated by setting 'a new benchmark for running prisons' which will be applied to all public sector prisons in order 'to maximize savings over the next two spending review periods'. CB is based on a form of zero-based budgeting which is, according to Bain and Company (2015), 'a broad-reaching cost transformation effort that takes a "blank sheet of paper" approach to resource planning'. The website goes on to argue that the use of this approach pushes managers to examine all spending and provide adequate justifications and enables companies to 'radically redesign their cost structures and boost competitiveness'. Its purpose is to analyse 'which activities should be performed at what levels and frequency and examines how they could be better performed—potentially through streamlining, standardization, outsourcing, offshoring or automation'. Essentially such benchmarks seem to have been derived from the operation of prisons in the private sector.

Chris Grayling went on to assert that the application of benchmarking (together with 'competing ancillary and through-the-gate resettlement

services across all public sector prisons') would generate 'an additional £450 million of savings … over the next six years'. He stated, somewhat ominously, that 'this is a challenge the public sector must rise to' and accompanied this with the clear threat that 'further prison-by-prison competitions in the future had not been ruled out' (Grayling November 2012). It was expected that the process would be completed by 2015.

Reactions to Workforce Restructuring

Both the POA and the Prison Governors' Association were reluctant participants in F&S. But the disadvantage to austerity-inclined government was that the full impact expected from the changes would be delayed for up to 15 years. Similarly, the POA (Circular 166, December 2012) saw CB as a means to 'achieve efficiency savings' and marginally preferred it to 'the wholesale privatization of further prisons'. The POA went on to raise concerns that CB could pose questions about health and safety and the preservation of safety, security and decency.

NOMS Income Generation

The introduction of criminal courts charge (see Chap. 4) in 2015 provided an alternative strategy to run the MOJ whilst conforming with austerity policies—by generating income which could be used to defray penal system costs or contribute directly to the Treasury. However, the introduction of criminal court charges, discussed above, was preceded by another income-generation initiative, this time on the part of NOMS, Just Solutions International (JSi). JSi was set up in 2012 as the 'commercial brand of the MOJ' and was intended to 'enhance UK bilateral relations with countries it would engage with, *whilst generating earnings for the HM Treasury*' (Lanktree August 2015) (author's emphasis). This 'social enterprise' (JSi Website August 2015) body was allowed to bid for contracts from foreign countries offering such services as training programmes for prison and community-based offender services staff, assessment and risk management, public–private partnerships, specification, benchmarking and costing, accredited learning programmes, reducing reoffending and the design of prisons and other rehabilitation establish-

ments (NOMS August 2015). In a response to a parliamentary question by Sadiq Khan on 10 February 2015 the MOJ indicated that JSi had contracts with the governments of Pakistan, Libya, Oman, The Seychelles, Nigeria, Macedonia, Bermuda, The Cayman Islands, China and Turkey (JackofKent Blog August 2015a).

Reactions to JSi

JSi has been criticized on four counts: firstly, the minister, it is argued, had no power to operate such a function, in effect selling state services; secondly, MOJ civil servants should not be deployed to be subcontracted to work for foreign powers but get on with dealing with UK courts, prisons and probation; thirdly, selling MOJ state services raises questions about whether the body responsible for courts and justice services, and ultimately the rule of law in the UK, should have any kind of relationship with other bodies that might have a vested interest in undermining the UK rule of law (e.g., the Saudi Arabian Government and BAE Systems) (Lords of Appeal 2008); and, finally, working for certain countries might violate the UK Government's international human rights obligations given the nature of the their judicial systems (e.g., the Saudi criminal justice system as described by the British Embassy Riyadh, July 2015). A judicial review of the company is currently in progress, though the Conservative Government has recently applied to delay the High Court decision on the matter. No accounts of the revenues of the 'social enterprise' have appeared in the NOMS Annual Reports and accounts for the financial years between its apparent inception in 2012 and the present, so it is difficult to assess the overall financial impact of the body on NOMS and the MOJ more generally. As part of his new broom approach, Michael Gove decided in September 2015 that JSi would cease operations, after 'honouring' the contract with Saudi Arabia (Rozenberg September 2015). However, the UK Government has now withdrawn from the bidding process altogether for this contract on the orders of the Prime Minister (Watt and Travis October 2015).

Overall Assessment of the Policy to Make Prisons More Affordable

The Coalition has been successful in at least one regard, austerity. The NAO (2013:23 and Figure 11, page 24) found that despite new capacity costing £372 million to 2013 and allowing for the running of the new prison places (albeit at a reduced rate) NOMS has still been able to make savings of £71 million between 2010–11 and 2013–14 due to reduced costs associated with prison closures. Furthermore, the NAO argues 'by the end of 2015–16, the total savings from actions taken under the estate strategy to date will be £211 million' and further savings are anticipated from closures and new-build projects started after 2013. Thus, at least as far as projections are concerned, the policy has saved money and further reductions in cost may accrue from workforce restructuring. Such a view is supported by UK Public Spending, which suggests that spending on prisons which started at £4.7 billion in 2010 has since decreased to £4.1 billion in 2014 and is projected to remain at this level in 2015 (effecting a 13 % reduction) (UK Public Spending Website June 2015).

However, the consequences for other aspects of the life of custodial institutions can be summed up in the words of the Chief Inspector of Prisons, Nick Hardwick, when he suggested that between 2010 and 2014 there has been a 'political and policy failure in jails' (Hardwick December 2014, quoted by Alan Travis). The policy failure may be seen to refer to a number of areas including little evidence of reduced reoffending, serious overcrowding, service restrictions, reduced staffing, raised levels of unrest, and violence in prisons.

An overview can be obtained by looking at estimates of prison performance by HMIP. The HMIP assess prisons against four healthy prison tests—safety ('prisoners, particularly the most vulnerable, are held safely'), respect ('prisoners are treated with respect for their human dignity'), purposeful activity ('prisoners are able, and expected, to engage in activity that is likely to benefit them') and resettlement ('prisoners are prepared for their release into the community and helped to reduce the likelihood of reoffending') (HMIP October 2014:1). The results of the assessments made are summarized in Table 5.1, showing the proportion of establish-

Table 5.1 The total number of adult prisons and young adult YOIs inspected and the percentage of those establishments deemed to be 'not sufficiently good' and 'poor' against the healthy prison tests by year

Test	2009–10	2010–11	2011–12	2012–13	2013–14	2014–15
Safety: %'not sufficiently good' and 'poor'	22	16	17	20	31	48
Respect: % 'not sufficiently good' and 'poor'	24	26	26	27	33	36
Purposeful activity: % 'not sufficiently good' and 'poor'	32	31	28	50	39	64
Resettlement: % 'not sufficiently good' and 'poor'	24	29	15	36	25	43
Total number of adult prisons and young adult YOIs inspected in specified years	NA	56 (53 male/3 female)	53 (46 male/7 female)	49 (45 male/4 female)	46 (42 male/4 female)	51 (44 male and 7 female)

Source: HMIP Annual Reports 2009/1–2014/15

ments deemed as 'not sufficiently good' (NSG) and 'poor' against the healthy prison test.

Table 5.1 reveals that although there is some variation, there is an upward movement in the proportion of establishments deemed 'not sufficiently good' and 'poor' from 2011 to 2012 on all four tests, culminating in 2014–15 when nearly one in two prisons were deemed 'not sufficiently good' and 'poor' for safety and resettlement, one in three deemed 'not sufficiently good' and 'poor' for respect and nearly two out of every three deemed 'not sufficiently good' and 'poor' for purposeful activity, with the last situation being seen as 'dismal' by the HMIP Report (2015:13).

How can the deterioration in prison performance be explained? It is clearly the result of overcrowding (for details see above), on the one hand, and, on the other, the move to workforce restructuring. A clear consequence of the move to austerity in prisons mediated through various measures has been a significant reduction in staff. This has happened in public sector prisons, but was built into the contract process for private prisons. It is estimated that between 31 March 2010 and 30 June 2014

the number of full-time staff in the public sector prisons fell by 29 %, a loss of 12,980 staff (Prison Reform Trust Bromley Briefing Summer 2015:1). Furthermore, the situation, possibly as a result of the deterioration in industrial relations and levels of stress in prisons, is exacerbated by chronically high sickness rates with public sector prison staff in 2013–14, losing on average 11 working days per worker due to sickness absence compared to an average of 4.4 days per worker in the labour market as a whole (Prison Reform Trust Bromley Briefing Summer 2015:11).

Reduced staffing levels combined with high prison populations leading to overcrowding have important consequences for many aspects of prison life. Fewer staff have meant that service restrictions have become routine aspects of prison life; for example, the suspension of the core day means that prisoners are locked in their cells for long periods with little to do (HMIP Annual Report 2015). It also means that the personal officer scheme has been withdrawn as a required duty, and become an extra unpaid duty foisted on an already hard-pressed and not necessarily cooperative staff probably accounting for the decreasing number of prisoners reporting to have been allocated to a personal office in the prisoners surveys (decreasing from 67 % reporting allocation to a personal officer in 2010–11 to 50 % in 2014–15) (HMIP Annual Reports 2011, 2012, 2013, 2014, 2015). The various forms of workforce restructuring have done little to convince public sector staff that they are valued and much to convince them that forces are organized against the retention of their current pay and conditions (Kinman et al. 2014). Lack of officers also means less provision for some forms of purposeful activity, and probably even the opportunity to access such activity. Reduced prison officer staffing levels provide more opportunities for bullying and unrest (HMIP 2015).

Fewer officers also mean that, although prisoner safety remains a high official priority, the same attention cannot be given to prisoners. This probably accounts for the significant growth in suicide levels amongst prisoners in the 2010–15 period. Suicide numbers in prisons declined from a peak of 87 per year in 2005 reaching 59 in 2010 and thereafter 54 in 2011, but then increased again to 67 in 2012, down to 52 in 2013 and 88 in 2014, the trend between 2013 and 2014 revealing a 69 % increase. A related phenomenon is self-harm. Incidents of self-harm measured by self-harming individuals per 1000 of prison population show a steady increase for

males from 58 per 1000 in 2005 to 71 per 1000 in 2010 and after 2 years of decreasing, an increase to 74 per 1000 in 2014. Rates for females start at a much higher base (312 per 1000 in 2005) but show a steady decline to 265 per 1000 by 2012 (MOJ Safety in Custody Statistics July 2014).

Assaults on staff measured by incidents per 1000 prisoners showed a steady decline between 2005 and 2013 (from 44 per 1000 to 35 per 1000) but then an increase to 40 in 2014. Incidents of assaults on prisoners reveal an increase from 2005 peaking at 180 per 1000 in 2012, then a decrease to 164 per 1000 in 2013 and an increase to 178 per 1000 by early 2014 (MOJ Safety in Custody Statistics July 2014).

Finally, another sign that prisons are encountering difficulties is unrest. The MOJ considers unrest to be 'acts of concerted indiscipline' and defines this term as 'an incident in which two or more prisoners act together in defiance of a lawful instruction or against the requirements of the regime of the establishment' (House of Commons Justice Select Committee 2015:Para 68). The Justice Select Committee concluded with regard to acts of concerted indiscipline that 'the number … has doubled since 2012, and the average number of incidents per month has gone from 11 in the year before benchmarking … (was) … introduced to 16 in the year after. There was a notable rise in incidents in the last three months for which figures are available' (House of Commons Justice Committee 2015:Para 68).

A further measure of unrest is the number of call-outs of the National Tactical Response Group (NTRG). The NTRG is a specialist national unit which was created to help public and private prisons resolve only the more serious incidents of unrest and provide support for the Tornado response teams from nearby jails. Such statistics give an indication of only the more serious of such incidents, though call-out does not necessarily entail deployment. Jeremy Wright's response to the parliamentary question by Sadiq Khan on 25 November 2013 revealed that the NTRG had been called out 118 times in 2010, 139 times in 2011, 129 times in 2012 and 151 times in the first 9 months of 2013 (Theyworkforyou Website 02 June 2015). The figures suggest a rise in the rate at which prison governors have called out the NTRG to deal with disturbances up to 2013. Figures for 2014 indicate a yet further increase to 223 call-outs in 2014, a 89% increase comparing 2014 with 2010 (Prison Reform Trust Bromley Briefing Summer 2015:10; Doward March 2015).

It is clear that the process of rapid prison closure, combined with the maintenance of demand for prison places and the slowness of opening new wings or new prisons, exacerbated the crisis in prisons and caused a deterioration in prison conditions, making attempts to rehabilitate prisoners impossible. However, as per figures for 2014 and projections for 2015, some success has been achieved in cutting the cost of prisons, at least in the short-term.

Prisons with a Purpose

The MOJ consultation paper (December 2010) built on the Conservative Party 'Green Paper' (2008) targeting Labour failure with regard to purposeful activity and aimed to provide 'prisons with a purpose'. It argued that the right way to reduce reoffending was to break the cycle of reoffending, by redesigning prisons for the twenty-first century. This would entail prisons placing a new emphasis on work and education thereby enhancing employment opportunities on release. This section of Chap. 5 critically examines the two related initiatives, working prisons and the associated plan to transform prison education, against a backdrop of the 'rehabilitation revolution'. It also provides a critical assessment of the later initiative, the introduction of resettlement prisons, connected to the movement to the outsourcing of resettlement services dealt with in Chap. 6.

The distinction between prison work and education is not absolute. Prison-provided work activities are not externally funded and usually perform some useful service to the prison (e.g., wing cleaners) or engage prisoners in externally sourced employment (e.g., work in a call centre). Prison education, or to give its more usual title, learning and skills, consists of workshop and classroom-based activities usually aimed at vocational and other qualifications and funded externally by the Skills Funding Agency under 'Offenders' Learning and Skills Service' (OLASS) income stream. Prison work and education coincide at particular points—for example, prisoners working in the prison kitchens may undertake National Vocational Qualifications (NVQ) fully or partly assessed by education provider staff.

The Working Prison Initiative

The 2010 consultation paper asserted that 'we are developing a new type of prison—the working prison' making prisons more positive and aiding rehabilitation thereby reducing crime and its costs (MOJ December 2010:15). Both the regime and the core day were to be determined by this strategy. Prisoners would be expected to learn useful vocational skills in environments that replicate real working conditions. Work for them would be full-time, challenging and meaningful. Work opportunities would be created by outsourcing utilizing 'the expertize and innovation of the private, voluntary and community sectors. Prison education would be closely geared to this new purpose providing skills to perform work effectively and …giving prisoners skills which will increase their ability to get a job on release' (December 2010:14–15). In this vision 'prisons will become places of hard work and industry' (December 2010:3). Although it is recognized that the initiative would probably work differently for different types of prisoners, little practical modification of the scheme was made for women prisoners (MOJ December 2010:30).

Crispin Blunt, the then Prisons Minister, confirmed that the response to the first proposals had been positive (Independent Monitoring Board Conference, February 2012). He insisted that although work in prisons would be demanding and tough, it would not be punitive and would prioritize rehabilitation. He saw the policy being rolled out so that a maximum number of prisoners were engaged in full-time work in as many prisons as possible. He insisted that the primary beneficiary of the policy would be the offender who would gain soft and hard work-related skills, relevant work experience, enhanced job prospects on release, enhanced wages and a real opportunity to 'kick the crime habit'. Prisoners would be 'expected', even incentivized, rather than compelled, to work. The then Prisons Minister also argued that many others would benefit including employers (by being provided with a viable alternative to 'offshoring', a market-responsive workforce, good quality products and a profit); taxpayers (because of reduced prison costs and reduced crime); prisons (by acquiring a new sense of purpose and by sharing the profits) and victims (by receiving financial compensation paid to them from offenders' wages).

The period between 2010 and Clarke's departure from the MOJ in early September 2012 saw a number of changes introduced supportive

of the working prisons initiative. The much-criticized Prison Industries (PIRT 2003) was put to one side and a new body, One3One Solutions, created, which came into being in May 2012 and placed an emphasis on prison labour being harnessed to private industry for profit. Considerable progress was claimed by One3One Solutions—their September 2012 prospectus (One3One Website September 2012) claimed that already prison work provided a variety of goods and services.

Reactions to the Working Prisons Initiative

No wonder that the proposals on working prisons were on the whole well received by various bodies in the penal affairs field (Prison Reform Trust July 2010; Howard League for Penal Reform 2011). For example, the Prison Reform Trust welcomed 'the broad thrust of the ….paper, which seeks to find more humane and effective ways of preventing and reducing crime'.

But the development of the policy and practice was not without criticisms. The Prison Reform Trust (2010) urged the need for an equitable distribution of work between types of prisoner and types of prison and that 'the working week should be met with a working wage'. The Prison Reform Trust also argued that the change would 'require a significant change in culture and targeting of resources' in prisons and that the move to prison work would require effective coordination within the prison between sentence planning, work and education. The Howard League (2011:12) felt that the consultation document gave insufficient recognition to how far imprisonment was inimical to rehabilitation and too little recognition to community orders as ways of reducing reoffending and was thus concerned that the paper overused 'the word "rehabilitation" as an umbrella term for its various component parts'.

As time went on further criticisms emerged. Too little was achieved too late. Even by the end of September 2012 the One3One Solutions website (September 2012) documented that only 2614 work places were available. The document does not state whether these are full-time. This was a promising start but far short of supplying even a tiny proportion of prisoners with work. Even when this is added to the 24,000 other places already provided by the then Prison Industries noted by Geoghegan and

Boyd (2011) in 2010 this is still far short of minister expectations that most prisoners will be working full-time, given that the prison population was 87,000 by June 2012 (Prison Population Statistics 2012). Furthermore, a conflict became evident between providing profitable and providing meaningful work which tended to be resolved in favour of humdrum profitable work. Also, the working prisons agenda created a zero sum situation between work and education, with education being driven to the margins of the prison day or the prisoners' career, a problem experienced in the nineteenth century (see Grey Report 1863).

Again, as in the late nineteenth century (Radcinowicz and Hood 1990), a clear conflict also became apparent between prisoner labour and the non-prison workforce. These concerns were not alleviated by claims that the work provided would only affect workforces overseas. Malik (August 2012) reported that the MOJ had plans to set up call centres inside prisons and that 12–17 prisoners (15% of the call centre staff) from HMP Prescoed were being allowed out to work for £3 a day in the 'Becoming Green' call centre in Cardiff from which non-inmate staff had been sacked. Further, if work is low skill and unlikely to lead to qualifications (like cable-stripping or tea-bag packing) but more easily provided and profitable, prisoners may come to experience their labour, beyond a honeymoon period, as compulsory drudgery which adds to the pains of confinement and to their sense of injustice, exacerbated by arbitrary and inconsistent allocation procedures. This sense of drudgery will be added too if the rate of productivity is set too high (to maximize profits) and the discipline system deployed too easily to defend, not the order of the prison, but the rate of exploitation of labour as was revealed about the East Germany prison system (Connelly November 2012).

Perhaps the most significant comment on Clarke's scheme was from his subsequent colleagues who left his plans to the 'gnawing criticism' of the MOJ mice. HMIP noted in their annual report 2012–13:

> Only a few years ago we heard a lot about 'working prisons' and making prisons places of productive activity. More recently there has been a deafening silence on this topic and prisons might be excused if they believe this is no longer a priority. (HMIP October 2013:10)

But the emphasis on prison work was not completely lost, simply relegated and transformed. In October 2012 the new Minister for Justice, Chris Grayling, offered his conception of prisons at the Conservative Party Conference in October 2012 (with the support of David Cameron, [Cameron, October 2012]) and proposed, even when the rhetoric appropriate to such gatherings is taken into account, not meaningful prison labour but a much greater emphasis on punishment as a means to reform and an emphasis on the role that 'nimble private sector providers' could play in making prison work available (BBCiPlayer October 2012). This new model of hard work in prisons seems to move from the humanistic model espoused by Clarke and Blunt towards a punitive model complemented by a market solution to the problem of the provision of work in prisons.

Although Chris Grayling later repeated the mantra that prison work would become more punitive labour than skill-enhancing work (MOJ January 2013a, May 2013) and even that the work provided would contribute to deficit reduction by being contracted at the national level with an emphasis on the revenue stream it provided (BBC News February 2015), all of this became lost in the rush to issue contracts to the new providers of resettlement services for prisoners (such contracts providing contact both inside the prison and in the community) and the supervision of offenders on community orders, despite the fact that the working prison agenda was far from completed. The lure of the systematic outsourcing community-based offender services was great given that it 'rolled back the state', promised to reduce reoffending and was seen to be best placed to make a significant contribution to deficit reduction (MOJ January 2013a:9).

By April 2015 Chris Grayling had been in office for 32 months. In February 2015 the Community Rehabilitation Companies started throughout England and Wales, less than 2 years after they were first proposed (see Chap. 6 for details). Whatever the subsequent outcome, the infrastructure had been put in place. But the same cannot be said for the working prisons initiative. A few clues can be gleaned about the state of this initiative from the One3One Solution Annual Report for 2012/13. It notes that 'progress over the past 12 months has been pleasing, with around 9,700 (up from 9000 prisoners 2011/12) prisoners working over

13.1 (up from 11.4 million hours in 2011/12) million hours in public sector prisons' (pages 2 and 6). It is also noted that private sector prisons add 1.5 million prisoner working hours and 1200 working prisoners to the totals (page 6). In 2012/13, 10,900 prisoners were working and achieved a total of 14.6 million hours in the year. But assuming a 48-week year (allowing for bank holidays), this means that each prisoner does, at most, a 28-hour week, far short of the target of 40 hours a week. Given that the prison population was about 84,000 in 2013, and assuming that One3One Solutions includes all prisoners working for private companies in England and Wales, this means that about 13 % were working in 2012/13.

Further, a 'recent report to Parliament' (Charley February 2015) throws further light on the matter, suggesting that the proportion of prisoners working has risen only by 1 % between 2010 and 2014. It also noted that in 30 public sector prisons the proportion of prisoners working had actually fallen (including HMPs Stafford, reduced from 38 % to 25 %; Guys Marsh reduced from 30 % to 19 %; and Cardiff reduced from 13 % to 9 %), with reductions also in HMPs Rochester, Bristol, Dartmoor, Liverpool, Leeds, Pentonville, Wormwood Scrubs and Ford. The NOMS Annual Report 2014–15 (2015:27) indicates that between 2010–11 and 2013–14 the number of hours worked in public sector prisons had increased from 8600 to 9900 (15 %) and the number of hours worked has increased from 10.6 million to 14.2 million in the same period (34 %). But once again if the prisoners in 2013–14 work a 48-week year then they are working only 31 hours per week, far short of the target of full-time work.

In response to this, Andrew Selous, newly appointed Parliamentary Undersecretary of State for Justice, rightly commented that for-profit work in prisons was not the sole source of purposeful activity for prisoners. However, his comment raises the question of the general state of such activity. To answer this question we must turn to the HMIP Annual Report for 2014–15 published in July 2015. It has already been noted that this report found that there had been a significant deterioration in purposeful activity such that one-third of male prisons were deemed to have provision in this area that was 'not sufficiently good' or 'poor' in 2010–11, rising to two-thirds in 2014–15. The section dedicated to purposeful activity paints a 'dismal' picture of male prisons summed as 'more time locked up and less purposeful activity' (HMIP 2015:50). The report indicates that

the outcomes for purposeful activity were at their lowest level since records began in 2005/06, that plans to introduce a more work-friendly core day and to increased activity had been 'thwarted by staff shortages', that prisoners were spending too much of their time locked in their cells and that insufficient activity places were made available and all of these were not used because of 'not being supported by staff' (HMIP 2015:50).

Although the situation regarding purposeful activity in women's prisons is not quite so dismal (with 'only' 29 % rated as 'not sufficiently good' or 'poor' in 2014–15), the overwhelming conclusion reached when examining the HMIP Reports between 2010 and 2015 with regard to the state of health of purposeful activity in male and female prisons in England and Wales is that rather than showing improvement (as you would have expected given the working prisons initiative) in purposeful activity, the reverse is evident, that is there has been a deterioration in the amount and quality of purposeful activity available in male prisons.

The working prisons initiative was a flawed but worthwhile idea that was thwarted by changed political will and the consequences of the high prison population being maintained in the context of a decrease in the prison estate and combined with the practical consequences of measures designed to enforce austerity. This does not detract from the fact that prison work in particular is central to a positive role for prisons but it needs to be energetically pushed through, pay the living wage to prisoners, provide meaningful tasks that involve training and the possibility of qualifications and be effectively administered. Furthermore, progress with regard to purposeful activity is tied to progress with regard to reducing the amount of time that prisoners are locked up in their cells.

Prison Education: Offender Learning and Skills Service (OLASS4) Contracts

The seeds for the reorganization of offender learning (also referred to as learning and skills) were sown by the Conservative Party 'Green Paper' and the first green shoot was the announcement of the joint offender learning review and call for evidence (involving the Department of Business, Innovation and Skills and the MOJ in July 2010). Some 5 months later the first MOJ consultation paper was published insisting

that in order to 'break the cycle', 'we are developing a new type of prison (where) education will be geared primarily to providing skills to perform work effectively and as far as possible giving prisoners skills which will increase their ability to get a job on release' (December 2010:15).

A key document was, in turn, produced based on government interpretations of the responses to the call for evidence launched in July 2010 (Department of Business, Innovation and Skills, May 2011). The document suggests that a strong consensus on learning and skills priorities was evident based on a number of principles including a greater emphasis on provision that would enable prisoners to better compete in the local job market and the establishment of effective partnership working, particularly with local employers. More attention needed to be given to the quality of offender learning, the flexibility of delivery and the rollout of the virtual campus (VC) across all prisons to encourage continuous learning. There also needed to be a focus on mentoring for prisoners and the early testing of all prisoners to identify prisoners with learning difficulties and disabilities and meet their needs. The document also recognized the need to make special provision for the needs of women offenders, because 'although employment is important to women offenders, there are a number of steps they may need to take before they are job ready, and this means that the emphasis needs to be placed on flexible provision offering life skills and based on individual assessment of need together with a range of special provisions' (e.g., 'motivational activities') (Department of Business, Innovation and Skills, May 2011:20). It also entailed a shift in the way resources are to be allocated based on new OLASS contracts geared to the new outcomes.

'Making Prisons Work' (Department of Business, Innovation and Skills, May 2011:3), unusually for the Coalition Government, did acknowledge that reforms carried through by the Labour administration had brought about improvements in learning and skills including increased investment and increased prisoner participation. But the report found clear faults with the system particularly inflexibility and education not sufficiently aligned with employers' needs. Change was needed to enhance prisoners' skills thereby making them more likely to get a job on release and less likely to reoffend. In turn, this will alleviate the 'blight' on individual victims and their communities which in money terms amounted to a cost of 'between £9.5 billion and

£13 billion a year' (Department of Business, Innovation and Skills, May 2011:5).

OLASS Phase 4 was introduced in August 2012, coming live between September 2012 and early 2013. The contracts were awarded on a regional basis to only four providers and, though some alterations were made, generally the process resulted in the reappointment of many of the existing providers: The Manchester College retained four contracts for the North West, the North East, Kent and Sussex, Yorkshire and Humber regions, but lost the contract for the East Midlands region; Milton Keynes College was contracted for three regions, the East, and West Midlands, and South Central: A4E retained the contract for the East of England region, was awarded the contract for the Greater London region in preference to Kensington and Chelsea College but lost the contract for the south-west region; and Weston College gained the contract for the south-west region replacing A4E. Thus the OLASS4 contracts involved three Further Education Colleges and one private contractor, though the nature of Further Education Colleges, following the Further and Higher Education Act 1992, was ambivalent with regard to the public/private divide. A4E subsequently prematurely terminated the contract for the 12 London prisons in the summer of 2014, with the contract being awarded to Manchester College (Gentleman, August 2014; Skills Funding Agency December 2013, February 2014, updated in August 2015). In September 2015 the prison education work of the Manchester College Group was reconfigured into a 'standalone organisation' and given the name of NOVUS (NOVUS Website September 2015).

OLASS4 contracts were written so as to fundamentally lead to a reorganization of learning and skills in prison along the lines noted above. The new contracts generally focused learning and skills more on developing locally needed vocational and employability skills. In doing so they targeted delivery at the start of the prisoners' sentence (based on needs assessment and courses offering functional skills) and within the last 2 years of the sentence (focusing on vocational and employability skills). This should have meant strengthening links with employers. For prisoners on short sentences (under 1 year in duration) provision was supposed to be made to assess needs and offer functional skills together with other programmes related to vocational and employability needs.

The Virtual Campus (VC) was seen to be a priority for all contractors. Under the new arrangements lead governors working with the OLASS providers are able to determine the most appropriate provision to meet the needs of learners in custody thereby affirming the local emphasis in terms of decision-making. Quality was to be guaranteed and providers held accountable as 'the new contracts placed an emphasis on payment by results in terms of gaining enrolments, prisoners completing courses that they enrolled on and gaining qualifications' (Skills Funding Agency October 2012), though not in terms of gaining employment. The new payment system was designed to engineer the needed shift in the allocation of resources. The promise that 'we will … measure the impact of this review's changes, including the impact of the virtual campus' was to be fulfilled by subjecting the changes to repeated review through Ofsted (and the Welsh equivalent body Estyn) in conjunction with HMIP.

Reactions to the New OLASS4 Contracts

As might be expected, the new emphasis on the role of education as part of rehabilitation and the efforts to improve the education provided in prisons were met with an overwhelmingly positive response though there were criticisms of the retendering process which, it was suggested, was leading to cost cutting in order to boost profits, unrealistic in terms of its ambitions for apprenticeships, undermined by the fact that prisoners engaging in work receive higher wages than those in education and likely to lead to the marginalization of non-vocational and higher education (Williams January 2012). But the most telling criticisms must come from those who have monitored what has actually happened.

Given the start-up for OLASS4 was in late 2012 and early 2013, there have been only two reviews of provision by HMIP/Ofsted/Estyn in 2014 and 2015. The 2014 report noted that for men 'the new contractual arrangements for the provision of learning and skills (are) now well established' but that the HMIP 'have not yet seen any evidence of improved prisoner outcomes as a result, and the providers are not required to measure the number of prisoners going into employment, training or education on release' (HMIP 2014:44).

Ofsted/HMIP in England assessed the learning and skills and work by reference to three areas using four levels of assessment ('outstanding', 'good', 'requires improvement' and 'inadequate'). In 2014–15, 41 prisons for men were assessed. It was found that regarding the first function, 'achievements of prisoners engaged in learning and skills and work', 27 of the 41 (66 %) were assessed as either requiring improvement or being inadequate; similarly, with regard to the second area, 'the quality of learning and skills and work provision', 24 of the 41 (58 %) were assessed as either requiring improvement or being inadequate and regarding the third area, 'leadership and management of learning and skills and work', 31 of the 41 (76 %) were assessed as either requiring improvement or being inadequate. In contrast, the assessments undertaken by Estyn in Wales of only one prison for men using four grades (excellent, good, adequate and unsatisfactory) found it to be 'adequate' across all areas used (HMIP 2015).

In the small number of women's prisons inspected ($n = 7$) HMIP/Ofsted found that regarding the first function, 'achievements of prisoners engaged in learning and skills and work', two of the seven (29 %) were assessed as requiring improvement; similarly, with regard to the second area, 'the quality of learning and skills and work provision', two of the seven (29 %) were assessed as requiring improvement and regarding the third area, 'leadership and management of L&S and work', two of the seven (29 %) were assessed as either requiring improvement or being inadequate (adapted from Figure 21, Page 73). Finally, the HMIP/Ofsted (2015:61) Report indicated that 'We rarely saw the virtual campus … fully operational.' The conclusion of the HMIP Report (2015:53) for England was that 'the overall standard of teaching and learning was rated as good in fewer than one third of the English prisons inspected.'

A survey of prisoners undertaken by Prisoners' Educational Trust (PET) in September 2013 ($n = 343$ 92 % male, 7 % female and 1 % transgender) found that learning and skills in prison failed to offer appropriate opportunities for progression and 'most respondents felt that access and support for the VC was poor; 83 per cent said the VC is not easily accessible within their prison and 87 per cent said that prison staff did not support and encourage prisoners to use the VC.' In qualitative responses, some respondents said they had never heard of, seen or used

the VC. Some learners mentioned problems with using the VC for open university and distance learning courses as well as for vocational learning (PET September 2014:3).

The effective rolling out of the kind of learning and skills designed to complement the working prisons initiative has not been achieved. When looking for the reasons it is difficult to deny that this is not related in part at least to prison staff shortages. As Rod Clark, Chief Executive of Prisoners' Education Trust, stated, 'over 20 prisons are running restricted regimes as a result of staff shortages. That means that prison Governors can't get prisoners to class, workshops or careers advisors and charities like ours can't help as many people as we would like to. That is storing up a huge problem when we know education reduces reoffending' (Prisoners' Education Trust Website November 2014). This view was confirmed by an unexpected source in July 2015, when the new Minister for Justice acknowledged that prisons were in crisis and they were failing to rehabilitate in part because prisons were overcrowded but also because prison education was in need of overhaul (Michael Gove, July 2015). Michael Gove went on to set up an inquiry into prison education (Travis, September 2015). But the failure of prison education cannot be solely attributed to external conditions. Note has also to be taken of a number of other factors, including the lack of clear purpose and rationale (especially as the drive for working prisons prioritized prisoners working over those engaging in education except at very basic levels), lack of clarity about the curriculum, the creaming off of resources from prison education to support the Further Education presence of the college providers and a lack of integration with the prison regime through the sentence planning process.

Resettlement Prisons

The Coalition sought to improve rehabilitation not only by introducing working prisons and reforming prison education, but also by establishing resettlement prisons, drug recovery wings in some prisons and improved mental health services, all in line with the move to breaking the cycle of reoffending. This section examines resettlement prisons regarding what was intended, what was done and to what effect.

The resettlement prisons policy was announced in 2013 (MOJ May 2013) and became live in 2014. The notion of such prisons was not new having been favoured, but not developed, by the previous government. In 2009 there were only three such prisons acting to ease transition back to the community (Whatdotheyknow Website June 2015). The Coalition Government policy on resettlement prisons went much further in a number of respects. Under it most prisoners (80 %, MOJ September 2013, b:29) were to be allocated to local resettlement prisons for some part of their sentence. It was expected that most short sentence prisoners (of less than 1 year) would probably spend the whole sentence at such prisons, whereas those on longer sentences would be moved to resettlement prisons in the last 3–6 months of their sentence. This would enable work to be undertaken in preparation for release into local areas and allow a joined up service, with service providers working inside the prison and in the community. In this vision, the resettlement providers would be contracted on a payment by results basis to provide services for offenders inside the prison and outside in the community. The outsourcing of such services is dealt with in Chap. 6. Here a consideration of the impact of the changes on the prison estate is provided. By August 2014 a list of some 80 establishments was announced by the MOJ (August 2014) including men's and women's prisons.

Reactions to Resettlement Prisons

Reactions to the establishment of resettlement prisons and the underlying apparent logic of rehabilitation were generally favourable (Prison Reform Trust February 2013a; Howard League July 2013). However, enormous practical difficulties were envisaged regarding how the spare capacity that was needed to relocate prisoners under the scheme would be found in an overcrowded prison system suffering from austerity and staff cuts. The Ministry of Justice's internal risk register was leaked to newspapers and it showed that there were serious concerns about the implementation of the overall 'Transforming Rehabilitation' agenda, indicating that there was an 80 % risk that there would be a drop in operational performance attendant on the changes associated with the whole reform programme (Travis June 2013).

Furthermore, the way in which the process was organized was criticized, especially the shoehorning of 'overcrowded jails into arbitrarily-drawn and oversized contract areas simply to ease the privatization process' by the Howard League (July 2013). The Howard League (ibid.) also expressed the view that the current parlous state of the prisons was responsible for the movement of prisoners around the country and that, in turn, this resulted from the overuse of short prison sentences by courts and, of course, the failure of the Coalition Government to deal with this matter.

By September 2015 resettlement prisons had been in existence for about 1 year. Their reality may not live up to the positive image provided. The key factor here is 'churn' which may be defined as the continual movement of prisoners in and out of the prison, with any one prisoner having a fairly short residence time. Churn has been a significant issue with regard to the functioning of local prisons (i.e., prisons used for remand and for those awaiting allocation and for those serving short sentences) for some time. The creation of resettlement prisons housing most short-sentence prisoners and longer-term prisoners sent there within a few months of their release seem to create this churn effect, which will have a negative impact on education and work programmes, as well as contribute to a more volatile atmosphere generally. In evidence, the Howard League (House of Commons Justice Select Committee 2015: Para 53) indicated that the policy on resettlement prisons was not compatible with the previously much voiced policy on working prisons on the grounds that working prisons require a stable prison population of medium- to long-term prisoners, rather than such prisoners being moved around from longer stay to resettlement prisons near the end of their sentence and all short-term prisoners being housed in such establishments throughout their sentence.

Finally, in all of this prison reorganization little heed has been taken of the recommendation of the Corston Report in favour of creating small custodial units for women prisoners (House of Commons Justice Select Committee July 2013), although some effort has been made to create strategic hubs to provide better geographically distributed prison places, and on piloting small open units (with two such establishments opening in HMP Styal, January 2015; and HMP Drake Hall, February 2015), pending the decision to close existing capacity for females in open prisons. However, the tendency to assume bigger is better, works against this process as does the

assumption about prison places that 'one size fits all' (House of Commons Justice Select Justice Committee March 2015: Para 40).

Overall Assessment of Prisons with a Purpose

The House of Commons Justice Select Committee concluded its deliberations on the working prison initiative by stating that 'the majority of our witnesses were of the view that the working prisons initiative had stalled, if not failed' (2015:47). The reform of prison education seems to have suffered a similar fate. This joint failure can be accounted for by the operation of two factors. Firstly, the negative impact of the policy to make prisons more affordable on the day-to-day conditions of prisons, including material conditions (enough prison officers to escort prisoners to work or education), as well as the impact of staff and prisoner morale. Secondly, the failure was due to the prisons with a purpose policy being given less priority by the MOJ, as a new revolutionary zeal began in 2012, centred on reducing reoffending, not by rehabilitating prisoners whilst in prison, but concentrating on outsourcing attempts to provide 'through the gate' services. Finally, the move to resettlement prisons is yet to really establish itself but clearly has effects which act in opposition to the reform of both work and learning and skills in the earlier period.

The last word on the matter must go to the Justice Select Committee Report (2015:39) which stated that:

> We believe that the key explanatory factor for the obvious deterioration in standards over the last year is that a significant number of prisons have been operating at staffing levels below what is necessary to maintain reasonable, safe and rehabilitative regimes.

Reconfiguring the Prison Discipline System

The third area of Coalition Government policy on custodial services concerns its attempts to reconfigure the prison discipline system. Three aspects will be considered: the new incentives and earned privileges

scheme (IEPS), the smoking ban and new economic sanctions applied to prisoners.

Incentives and Earned Privileges Scheme

During the first 2 years of office of the Coalition Government little was done to change the IEPS inherited from Labour in 2010 beyond a review in 2011 which made no substantive changes and an audit by NOMS in 2011/12 (Theyworkforyou Website November 2014). By 2011 all prisons, under Rule 8 of the Prison (Amendment) Rules 2007, were required to have an IEPS in place. The scheme assigned prisoners to one of three levels. The least privileged level was basic—on this level prisoners could participate in normal activities but had minimum entitlement to visits, letters, phone calls and canteen allowances. This level was used for those who had showed lack of cooperation with the regime or disruptive behaviour. The intermediate level, standard, had all the privileges of basic plus more frequent visits, more time in association, access to in-cell TVs, higher rates of pay. All new receptions were placed on this level. The final level was referred to as enhanced—on this level prisoners had all the privileges of basic and standard as well as more visits, more time in association, priority for the higher-paying jobs and the opportunity to wear their own as opposed to prison clothes.

The scheme was supposed to be operated fairly and consistently with at least two staff members involved in decision-making and assessments for the scheme based on patterns of behaviour rather than single incidents. Prisoners could challenge their IEPS placement internally by written representation to the governor and externally by judicial review. The operation of the IEPS was not supposed to be punitive, nor was it supposed to prevent the prisoner from undertaking activities that might contribute to her/his rehabilitation and, as noted above, even basic prisoners were entitled to participation in normal activities.

However, in 2012, soon after taking office, Chris Grayling set up a review of the IEPS on the grounds that there had not been a ‘full’ review ‘for 10 years’ (a claim that was not entirely correct depending on your definition of ‘full’ as noted above), and because he perceived a need to

'toughen up' the scheme, tune it into the emphasis on reducing reoffending set in train by the reforms from 2010 and restore public confidence in it (MOJ Press Release November 2013). None of the three justifications hold water: toughening up the scheme may be inimical to the second justification of encouraging rehabilitation; and the third argument takes the public voice, a type of argument often deployed by politicians, but it raises as many questions as it answers (notably the basis of his claim that the public do not have confidence in then existent IEPS, the basis of his claim that what he proposes will increase public confidence, aside from such matters as to whether public confidence is relevant here).

The review reported in April 2013 (the report was not made public) and the MOJ in late April 2013 indicated that it intended to change the IEPS so that 'prisoners actively have to work towards their own rehabilitation and help others if they are to earn privileges.' They also proposed a new, 2-week-long entry level grade to be added to the existing three levels, with, at the end of the 2-week period, those prisoners who engage with the regime being moved to standard and those who did not to basic. The website also noted that being engaged in some kind of purposeful activity during normal working hours (with the length of the working day also extended) would become the norm and prisoners should not be able to 'languish' in their cells watching TV when the rest of the country was out at work. It also proposed that certificate 18 DVDs would be banned, subscription channels removed from private prisons and additional gym access made conditional on engagement with rehabilitation. It was also envisaged that there would be a change in the prison rules in order to recover money from prisoners who damaged prison property (MOJ Website April 2013).

The new IEPS was introduced by Prison Service Instruction (PSI) 30/2013 which came into force from 01 November 2013. The associated MOJ press release justified the changes by indicating that they would address reoffending and inspire public confidence. The new scheme would no longer allow advancement in the IEPS simply by the prisoner avoiding bad behaviour. From 01 November 2013 they would have to 'actively work towards their own rehabilitation' (MOJ Website Press November 2013) by demonstrating a commitment towards their rehabilitation, by engaging in purposeful activity and by helping others.

The new IEPS applied to all convicted and unconvicted 'adult prisoners (aged 18 or over)' received into custody on or after 01 November 2013 (HM Prison Service Instruction 30/2013:Para 1.2) and existing prisoners after their next review, or if unconvicted, on conviction. The revised scheme introduced a new entry level grade to the three existing grades, each grade having its own set of 'Behavioural Expectations' as specified in Annex B of PSI 30/2013.

Under PSI 30/2013 the entry level grade has a fixed duration of 14 days and during this time privileges are restricted and prisoners are required to wear prison-issued clothing. Unconvicted prisoners, that is, those held on remand, would, on conviction, unless they were on basic, revert to entry level for the full 14 days (PSI 30/2013:Para 4.8). During the 14-day period prisoners are expected to participate fully in induction, offender management screening, sentence planning, drug and alcohol assessment and purposeful activity and cooperate by wearing prison-issued clothing.

Thereafter prisoners would be on one of the existing grades. Basic level 'is for those prisoners who have demonstrated insufficient commitment to rehabilitation and purposeful activity, or behaved badly and or who have not engaged sufficiently with the regime' (PSI 30/2013:Para 4.4). To progress from basic prisoners must satisfy the appropriate 'behavioural expectations' and complete induction, attend and engage with purposeful activity, drug/alcohol assessment and treatment and wear prison-issued clothing. Standard level 'is for all prisoners who have successfully completed entry level requirements and those who are considered to be meeting rehabilitation expectations, participating in the regime and behaving well' (PSI 30/2013:Para 4.12). As well as meeting the Behavioural Expectations for the level prisoners on standard needed to demonstrate that they engaged with their sentence plans, showed willingness to attend and engage with purposeful activity, engaged with drug/alcohol treatments and continued to wear prison-issued clothing unless specifically permitted not to do so. Enhanced level 'is reserved for those prisoners who have demonstrated, for a minimum period of three months, that they are fully committed to their rehabilitation, seeking to reduce their risk of offending, complying with and meeting Behavioural Expectations' (PSI 30/2013:Para 4.14). In addition, enhanced prisoners 'must demonstrate that they have helped prisoners or staff' (PSI 30/2013:Para 4.15)

and show a commitment to their rehabilitation, sentence plan, purposeful activities, drug/alcohol treatment and help other prisoners or staff.

In addition a prison system-wide ban on 18 certificate DVDs and subscription channel TV was introduced. A national standardized list of items was produced for each level which, amongst other things, banned the receipt of parcels sent by friends and family for all sentenced prisoners except for one-off parcels at the start of the sentence and in exceptional circumstances. This ban affected all the content of such parcels including books, pens, stamps, underwear and clothes. Appendix D of Annex F also introduced an across the system restriction, limiting the number of books that prisoners could keep in their cell to 12 (PSI 30/2013).

Prison-defined difficult behaviour in the new scheme would automatically trigger an IEPS review which would operate with a presumption of downgrading. Prisoners who misbehaved (if not already on basic) would have their allocated in-cell TVs confiscated. There would be a presumption that prisoners would not be able to watch TV when they should be engaged in purposeful activities. Additional gym access was restricted for the basic and entry level grades. IEPS reviews, previously conducted by a minimum of two staff, 'will now require only one member of staff' (PSI 30/2013:Para 1.9). Such reviews should be 'open, fair and consistent' (PSI 30/2013:Para 6.2). Assessments should be based on broad range of material and refer to the prisoners' efforts to meet expectations. All prisoners should be given two warnings that a review is likely. It is stressed that the IEPS and the adjudication scheme are two separate areas, though overlap was acknowledged.

Reactions to the New IEPS

The reformed IEPS was seen as unevenly applied and that 'the regime for prisoners on the basic level of the scheme was sometimes very poor and over-punitive' (HMIP 2015:36) impacting on a number of aspects of prison life including shorter visit times, reduced association and time out of cell, lower pay, fewer activities (hobbies, television) and reduced numbers of personal property (books, clothing and writing materials). In particular prisoners were permitted a single package when they first

entered prison. This subsequently led to private individuals being unable to send parcels to prisoners, including books. A further restriction, as noted above, was that prisoners could not keep more than 12 books in their prison cell at any one time.

The policy did not ban prisoners from being sent books or keeping them in their cells. Prisoners could still use prison libraries and buy books themselves from approved suppliers. But it did restrict prisoner access to books—they could have fewer books in their cells at a time when they were locked up for longer, they could not receive book parcels purchased for them by third parties, library access and facilities were reduced due to staff shortages and prisoners had only limited funds to purchase books from the approved suppliers.

The MOJ justified the ban on parcels in a number of ways including for security reasons (which was refuted by the POA which states that all parcels are checked and drugs or other contraband are rarely discovered in parcels), and that the ban on parcels and indeed the restriction on the number of books prisoners can keep in their cells at any one time to 12 was linked to the drive to rehabilitation which, in part, depended on making privileges (like books) dependent on good behaviour. But the rejoinder to this was provided by the Howard League for Penal Reform (Press Release March 2014)—that there is no evidence that restricting reading will lead to reduced reoffending; in fact, the evidence shows the reverse.

Any support for the IEPS that the Prison Reform Trust expressed concerning the existing scheme (April 2013) was notably removed by the time it reported on the early days of the new scheme (April 2014). The Prison Reform Trust concluded that as a direct result of the new IEPS 'the legitimacy of prison regimes risk being undermined by… new mean and petty restrictions and a developing culture of punishment without a purpose' (Prison Reform Trust April 2014:1) which also 'puts at risk the purpose of prison as a place of effective rehabilitation and resettlement' (ibid.:3) and compromises the effectiveness of the scheme because it undermines both fairness and justice. They make this claim on the basis of the increasing number of letters and phone calls from prisoners confused about the new rules. In their view the faults of the new scheme go beyond particular items like the ban on

books but extend to questioning the prison as a fair and decent place which encourages rehabilitation.

They go on to detail a number of criticisms: firstly, the ban on parcels is seen to clearly limit family contact when it is known that maintaining family contacts represents a significant way of reducing reoffending, contradicting the purpose of the new scheme as set out by Chris Grayling. Because the ban on parcels limits the supply of underwear, warm clothes, stamps and pens to prisoners, this limits their ability to communicate with the outside and has a differential impact on some prisoners, especially those who cannot work (the disabled and elderly) who cannot afford to pay for such items out of the very meagre wages paid or those prisoners on basic who also earn less. The policy also limits the supply of suitable clothes for those prisoners due to be released on temporary licence to work in the community, imposing limits on their rehabilitation and integration into life outside the prison.

The second criticism of the new IEPS made by the Prison Reform Trust concerns fairness in that it is easier to go down the 'snake' than up a 'ladder'. Furthermore, the opportunities to demonstrate the behaviour required to move up the levels are not always available—thus there are limits on the number of Listener posts (Listener roles are performed by prisoners and assist other prisoners and were seen as significant ways by the new IEPS to demonstrate that a prisoner was working with the prison authorities) in a prison needed at any one time. Contributing to purposeful activity is easier for some than others, disadvantaging the disabled, the elderly and non-English speakers and those in overcrowded and 'underprovided for' prisons. Changes to organization of the IEP review also contribute to unfairness—including the movement to automatic review for 'bad behaviour' and the review being conducted by only one, not two, people. The Prison Reform Trust also raised the possibility of continuing racial bias—with more black prisoners on basic being evident in the past and no provision to deal with this matter in the current system. With regard to fairness the Prison Reform Trust argued for a much clearer separation between the operation of the IEPS and prison discipline and adjudication. The final criticism by the Prison Reform Trust of the new IEPS was that the basic regime undermines standards of decency and increases the risk of mental distress, suicide and self-harm.

Many other groups agreed with all or some of the above criticisms. Sadiq Khan, Shadow Minister of Justice, asked for a review of the IEPS (Prison Reform Trust, April 2014), and Eoin McLennan-Murray, the President of the Prison Governors' Association (quoted by Dunt 07/05/2014), warned that the new IEPS is leading to a 'tipping point' of instability because some of the recent changes to the IEPS 'have undermined trust and threaten the legitimacy of decisions made by staff'.

The Howard League for Penal Reform was so incensed by both the ban on prisoners receiving books by parcel from their families and the limit on the number of books that prisoners could keep in their cells that they started the 'Books for prisoners campaign' in conjunction with the English PEN (standing originally for 'Poets, Essayists and Novelists'). Frances Crook (March 2014) argued that both the book parcel ban and the restriction on book numbers was part of 'an increasingly irrational punishment regime … that grabs headlines but restricts education or rehabilitation'. Both measures are across the board and therefore not part of any reward/punishment and penalize all prisoners. Furthermore, they are not applied consistently by different prisons. The Howard League and English PEN have engaged in campaign on the issue presenting a letter to Downing Street on 27 June 2014 arguing that 'reading goes hand in hand with education and rehabilitation'. The Prison Reform Trust saw the parcel ban as undermining the rehabilitative purpose of imprisonment because it limits contact with families who send the parcels and forces prisoners to purchase the items from meagre prison wages. David Cameron replied to the petition arguing in favour of continuing the restriction on the number of books held by prisoners because of 'space restrictions' (David Cameron letter, 29 June 2014, to Prison Reform Trust). The Chief Inspector of Prisons, Nigel Necomen, considered the ban on parcels 'a mistake' (Robinson 2014).

On 5 December 2014 (Travis December 2014), the blanket ban on sending books to prisoners in England and Wales was declared unlawful by the high court and the Justice Secretary was ordered to amend the policy accordingly. The judicial review decision was made on two grounds: that books should not be considered a privilege and that books assist greatly in rehabilitation. As a result the judge concluded, 'I see no good reason, in the light of the importance of books for prisoners, to

restrict beyond what is required by volumetric control … and reasonable measures relating to frequency of parcels and security considerations.' The MOJ response expressed surprise about the judgement, indicated that 'the restrictions on parcels have been in existence across most of the prison estate for many years' but not of course a blanket ban and went on to claim that the ban on parcels had been largely about security issues (an interpretation that is not supported by considering the justifications offered in the lead up to the new IEPS in November 2013). Though changes were made in February 2015 by Chris Grayling, in accord with the court ruling, it was not until Michael Gove took action in July 2015 that the issue was completely revamped, allowing prisoners' families to send books directly to prisoners (as opposed to using one of four approved retailers) and allowing prisoners to keep more than 12 books in their cells at any one time (Travis July 2015).

Financial Impositions on Prisoners

Two such impositions were attempted.

The Prisoners' Earnings Act 1996

The Prisoners' Earnings Act 1996 was passed by the Major Government and was intended to make reparation to victims but was not implemented. But political interest in the provisions was revived in the Coalition Agreement Document (but confined to prisoners engaged in work outside of the prison) and in the first main consultation paper (MOJ December 2010) when it was proposed that together with the move to prison work, the Act should be put into effect enabling prisoners to share the benefit of their earnings with their victims. The consultation paper proposed not only to implement the Act in its original form, that is, to claim some of the wages of prisoners working outside the prison to compensate victims by payments being made to victim support services, but also to find ways of attaching the earnings of those prisoners undertaking work within the prison, not covered by the Act (a position affirmed in the later response paper MOJ June 2011b:5).

The first main consultation paper estimated that the total collected from prisoners engaged in work outside the prison would be £1 million per year (MOJ December 2010:16). The Act was brought into force in September 2011 and PSI 48/2011 was produced to effect its operation. This HMPSI (2011:Annex A page 5) levied a charge, payable to Victim Support, of 40 % of prisoners' net earnings above £20 per week. In 2012–13, the first full year of operation, this generated £837,000 of income for the charity (Victim Support 2013:61). Section 129 of LASPO 2012 made provision for levies to be imposed on prisoners' earnings by prison governors.

Prisoner Payments for Damaging Prison Property

The idea that prisoners should pay for malicious damage was first proposed in September 2013 on the grounds that 'it is not right that prisoners should cause damage to prison property and not be held financially accountable.' The same press release went to suggest that the proposal was justified because presently the hardworking taxpayer foots the bill and that in the future 'if you wilfully break it you will pay for it' should apply (MOJ Website 30 September 2013). The change was effected by a Statutory Instrument laid before Parliament on 30 September 2013 and came into force on 1 November 2013 (HM PSI 31/2013).

The relevant regulations state that if found guilty of an offence of malicious damage on or after 01 November 2013 the adjudicator must impose an award to recover money from the prisoner for the damage caused, using a standardized list of replacement costs. The awards made would aim to leave a minimum amount (£5 per week) in prisoners' accounts to cover costs to purchase necessary items and maintain contact with their families. The debts incurred would last for 2 years or up to sentence expiry date. Prisoners facing such charges could make requests for legal representation under the Tarrant Principles. The Tarrant Principles (see HM Prison Service Instruction 47/2011) indicate that at adjudications the governor must consider requests for legal representation and decide whether to grant such requests (and adjourn proceedings if she/he does) on the basis of the seriousness of the charge and potential penalty,

whether points of law are likely to arise, the capacity of the prisoner to present their own case, whether there will be procedural difficulties, and speed and fairness.

Reactions to the Impositions of Payments on Prisoners to Victims and for Damaging Prison Property

Though the attachment of the earnings of those prisoners working outside the prison has continued, the move to the attachment of the earnings of those working inside the prison was quietly shelved, probably because the working prisons initiative stalled so that relatively few prisoners were actually working, and, anyway, those who were working received such limited wages (see below) the attachment of their earnings was not realistic.

Unlike the changes in the IEPS as a whole and the ban on parcels and the restriction on the number of books that prisoners could have in their cells, the movement to fine prisoners committing malicious damage to prison property inspired little comment, beyond the Howard League for Penal Reform (October 2014) arguing that the movement to punishing young offenders by fines for damage to property 'is contrary to the aims' of the reorganized youth justice system. A similar argument could be mounted for adult prisoners, especially in the light of the supposed emphasis on rehabilitation in the adult system. But it was not, probably because of the need to keep the powder dry for other issues and the overwhelming flavour of debate here which does not see fining prisoners in this way as problematic as the compensation payments made to prisoners for the prison service loss of their property. Adjudication panels though, like courts, are faced with a clear dilemma of scaling the cost of the damage done to the ability of the prisoner to pay in the time period of her/his incarceration. However, the low rates of pay (set at £2.50 per week in HM Prison Service Order [PSO] 4460, and now in practice for about £7.50 per week), especially for the 'unemployed' prisoner (and many prisoners are unemployed because of the limitations on purposeful activity places as noted above), combined with the requirement to leave a minimum amount in the prisoners' account (£5 a week HMPSI

31/2013), mean that the imposition of a fine to pay for damage to prison property is little more than a symbolic gesture, reproducing, inside the prison, the economic marginalization that many prisoners will have experienced outside the prison.

The Ban on Prisoners Smoking

A ban on smoking in workplaces (employing more than one person) and enclosed public spaces came into effect in England in July 2007 as a result of the Health Act 2006. Section 3 (2) of the Health Act of 2006 set out the exemptions to the smoke-free policy and they included 'any premises where a person has his home, or is living whether permanently or temporarily (including hotels, care homes, and prisons and other places where a person may be detained)'.

The legislation was interpreted by the MOJ and the prison service (HMPSI 09/2007:1) to mean that 'broadly the regulations will require all indoor areas to be smoke free, with the exception of cells occupied solely by smokers aged 18 and over, and for arrangements to be in place to minimize the dangers of passive smoking.' Thus the ban on smoking in prisons was partial—it prevented smoking in certain areas (in workshops, education classes and on the wings) but allowed it in other areas (prisoners' cells, exercise yards) and did not ban tobacco. In England and Wales prison staff were prohibited from smoking in prisons (as it is a place of work for them). However, the desirability of attaining a fully smoke-free prison estate in England and Wales was acknowledged by the HM PSI (09/2007:1).

Studies reveal that about 80% of male prisoners and 85% of female prisoners smoke compared to about 22% of the UK population as a whole (NoSmokingDay Website 2011). The smoking policy for prisons outlined above remained in force until 2013 when three bodies—Public Health England, NHS England and the NOMS (2013:19)—published a joint commitment to support the development of smoke-free prisons and 'developed a strategy for supporting the creation of smoke free prisons in *England*' by April 2014. Although the document does not mention it, smoke-free seems to also mean tobacco-free.

It was reported by Brown (September 2013) that prison governors had been told by NOMS that a decision had been made to adopt a tobacco- and smoke-free policy for prisons. The policy was to be implemented during 2014–15, but beginning with pilot projects in the south-west region involving HMPs Exeter and Eastwood Park in early 2014. The main arguments in favour of the ban seem to have been the risks to prison staff of passive smoking expressed by the POA and fears that NOMS could face compensation claims from prison staff and non-smoking prisoners who claimed that their health had been damaged by passive smoking.

It is not clear whether this change came from the minister or was the result of decision-making at the NOMS level, though such a blanket ban with so many possible repercussions almost certainly came from the ministerial level. It was not heralded by any of the policy documents of the period, though it might be seen to be consistent with the 'a stricter prison regimes' Grayling talked about at the Conservative Party conference in 2013.

Reactions to the Proposed Prison Smoking Ban

There are a number of arguments against the smoking/tobacco ban being introduced across prisons. A ban would detrimentally affect a large proportion of the prison population by removing the contribution that smoking makes to reducing boredom and getting through prison time; the smoking ban would probably lead to unrest in prisons; it would be very difficult to introduce, especially in the current context of staff reductions and general reduction in resources; it would add to the list of contraband items in prison and probably not prevent access to tobacco as prisons experience ongoing problems controlling the influx of contraband; a ban would take responsibility away from prisoners to make this important decision for themselves; the ban concealed a punitive intent shrouded with a health argument especially if introduced without significant preparation as in the USA; and a ban is unlikely to lead to long-term abstinence.

Various arguments have been articulated in favour of a smoking ban in prisons. The campaigning group Action on Smoking and Health (ASH)

suggests that a ban would accomplish a number of desirable ends including protecting staff and prisoners from passive smoking, improving prisoner health, minimizing the risk of legal challenges by prisoners or prison staff, reducing the risk of fires, reducing maintenance costs and insurance rates and making it easier for prisoners to stop smoking (ASH, November 2014:1). To this list it could be added a ban would provide encouragement for prisoners to be less drug dependent generally. On the whole the advocates of a smoking ban suggest that total bans are also easier to achieve than partial bans (Jakeman et al. 2014).

However, in response to a parliamentary question in April 2014, Jeremy Wright, MP, then Parliamentary Undersecretary of State for Justice, indicated that whilst the long-term aim of a smoke-free prison estate remained, rather than carrying on with the pilot bans a risk assessment was to be conducted and the results of this risk assessment would be taken into account before the introduction of a pilot or full ban (House of Commons Hansard Parliamentary Questions, 28 April 2014). The planned pilot smoking ban at HMP Exeter and other jails in the south-west region was suspended. Richard Ford (May 2014) indicated that the reason given by his source was that to go ahead with the pilot ban was 'too risky' in the present circumstances and that given the 'prison closures, the review of the incentives and earnings scheme and the threat to remove Sky television from some jails' the ban could be 'the last straw'.

Comparative evidence suggests that though Northern Ireland, Scotland and Wales have similar policies regarding smoking in prisons to those of the present position in England and Wales, there are some variations within the UK. From January 2013 the use of all tobacco products was prohibited at Guernsey's only prison (Ash, November 2014). In addition, the Isle of Man's only prison went smoke-free in 2008 (ASH 2014).

There are four countries that impose a complete ban on smoking and are tobacco-free in some part of their jurisdictions. In the USA rapid change has occurred so that, by 2014, 20 out of 50 states had made prisons smoke- and tobacco-free largely without smoking-reduction campaigns and nicotine-replacement therapy (ASH 2014:2). Canada went one step closer to a ban than England and Wales when 'federal prisons adopted a smoke free policy in indoor areas in 2006' (ASH 2014:2). In New Zealand prisons have been smoke-free since July 2011. Moves have

been made in some states in Australia to make their prisons smoke-/tobacco-free. The first state (The Northern Territory) introduced a ban on tobacco in July 2013. Queensland introduced a similar ban in May 2014. Similar policies were likely to be implemented in Queensland, New South Wales and Tasmania during 2015 (MacKensie November 2014; ASH November 2014).

Overall once again England and Wales up to April 2014 seemed to be moving towards a policy adopted by the USA and a few other countries (New Zealand, Canada, Australia). But this has now been sidelined by the April 2014 announcement and will not be progressed until after the general election. As Ros Mackensie (November 2014) noted, 'The ban is being promoted as a public health measure, to improve the health of this population group. But it's difficult to overlook the punitive nature of this move and the removal of prisoners' rights to make this decision for themselves. It's also unclear whether such a scheme could actually rid prisons of tobacco.'

Perhaps the solution, given that many smokers wish to stop smoking, presumably including prisoners, would be in English and Welsh prisons to further restrict the areas where smoking happens and make such areas outdoors, protecting prison staff. Investment should be made in cessation programmes, all with a medium-term aim of introducing a full ban in the future. Only by so doing could the punitive element of the ban be diminished, appropriate opportunities to stop smoking be provided (giving prisoners a chance to exercise responsibility) and possible unrest be avoided. Furthermore, as Jakeman et al. (2014:4) suggest, 'The successful implementation of a total smoking ban appears to be associated with several factors including thorough planning; clear communication between staff and prisoners; effective staff training and support; comprehensive support and advice for prisoners; and the availability of effective smoking cessation programmes.'

However, the position has been muddied considerably by the availability of e-cigarettes. Like broader public authorities, the prisons authorities seem as confused on the issue as to whether e-cigarettes should be banned too or encouraged. Thus one prisoner's appeal to be allowed to smoke e-cigarettes in jail was rejected by the Manx Government on health and safety grounds (BBC 02 November 2013), but in Guernsey's Les Nicolles

prison the relevant authorities decided to allow prisoners to use e-cigarettes (ASH 2014). The confusion extends to other countries, with states in the USA adopting contrary policies on the matter. More recently the smoking ban in UK prisons issue has been raised again as a result of a court ruling in June 2015 (Doward July 2015).

The Ban on Prisoners Voting

This final section of Chap. 5 explores an apparent anomaly—on the one hand the Coalition Government has ostensibly attempted to encourage prisoners to take more responsibility, and on the other hand it has continued to deny the franchise to prisoners, by sidelining the 2011 ECtHR ruling on the matter. The particular topic raises the much broader issue of the extent to which criminal sanctions should exclude offenders from possessing the rights of ordinary citizens either temporarily or permanently. It also reveals a decade of all-party prevarication.

In 2010, serving prisoners and those convicted but not sentenced (not those remanded in custody) were excluded from voting in Council, Parliamentary and European elections under Section 3 of the Representation of the People Act 1983 as amended by the Representation of the People Act 1985. The disenfranchisement of prisoners can be traced back to the Forfeiture Act of 1870 though between 1948 and 1969 some partial re-enfranchisement of prisoners did occur (MOJ April 2009).

However, in the 2005 case of Hirst v UK (ECtHR 2005), this ban was ruled to be in contravention of Article 3 of Protocol 1 of the ECHR which states that 'the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which ensure the free expression of the opinion of the people in the choice of the legislature.' Like other previous governments, the then Labour Government held the view that 'prisoners convicted of serious crimes which have warranted imprisonment have lost the moral authority to vote,' articulated by Baroness Scotland of Asthal when Lord Leicester raised questions about the policy during questions to the Home Office Minister in the House of Lords in 2003 (Parliament Website, House of Lords, September 2014), though this was a view not shared at the time by all political par-

ties. During election debates in 2005 Charles Kennedy, then Leader of the Liberal Democrats, argued for 'imprisoned criminals to be allowed the right to vote' (quoted by Horne and White February 2015:8).

The Labour Government announced a consultation on prisoners' voting rights in February 2006 and it began in December 2006, but even by May 2008 matters had not progressed very far. A second consultation document was published in April 2009. It would seem that a politically unpopular matter had been kicked into the long grass where the Labour Government hoped it would stay although this was becoming more and more uncomfortable given the criticisms of the Council of Europe Committee of Ministers (Interim Resolution CM/ResDH [2009] 1601) repeated more forcefully in March 2010 by the Council of Europe, though no UK Government action on the matter followed.

Reactions to the Ban on Prisoners Voting

Some opposition to the ban was evident outside Liberal Democrat circles. The Prison Reform Trust has long campaigned on the topic. In 2010 the Prison Reform Trust and Unlock (February 2010) argued that lifting the ban on prisoners' voting rights would support the view that voting is a human right, not a privilege that can be taken away by government whim. Voting would decrease the political exclusion of prisoners, promote their rehabilitation and sense of civic responsibility and remove an unjust additional punishment. Their position did gain some support from other groups as shown in the letter to *The Guardian* newspaper from politicians and penal reformers (Guardian Letters Don't deny the vote, 2 March 2004) and as the long list of supporters articulated in the above-named 2010 document attests.

The Coalition Government started and maintained a consistent attempt to 'responsibilize' offenders. The Conservative Party 'Green Paper' in 2008 placed an emphasis on offenders being rehabilitated to become responsible citizens (Conservative Party 2008:52). Furthermore, the changes to the IEPS introduced in 1995 were seen to be part of a similar project, in that they would 'encourage responsible behaviour and participation in hard work and constructive activity in prison' (ibid.:90). The early consultation

papers (MOJ December 2010, June 2011) are also firmly rooted in the espousal of a rehabilitation revolution based on helping offenders in prison to overcome the limits to rational and responsible conduct created by dependence on alcohol or other drugs and/or mental health problems and thereafter acting as responsible citizens, in particular making reparation for the debts they owe to both society in general and their victims in particular. This message is, if anything, strengthened in the subsequent papers after Clarke left office (MOJ, January 2013a, April 2013).

In December 2010, probably influenced by a yet further resolution for the UK Government to lift the blanket ban the Coalition Government did attempt to deal with the matter by announcing its intention to bring forward legislation to allow those offenders sentenced to a custodial sentence of less than 4 years the right to vote in UK Parliamentary and European Parliament elections, unless the sentencing judge considered this inappropriate. However, 1 month before this, in response to a question in the House of Commons, David Cameron remarked, 'It makes me physically ill even to contemplate having to give the vote to anyone who is in prison. Frankly, when people commit a crime and go to prison, they should lose their rights, including the right to vote' (Theyworkforyou Website, September 2014). The compulsion he mentioned came from the possibility of damages awarded to prisoners who had taken cases to court on the matter. He repeated a similar message some 2 years later again in response to a question when he said, 'No one should be in any doubt; prisoners are not going to be getting the vote under this government,' making it abundantly clear that exclusion was the order of the day (Horne and White 2015:41).

Not surprisingly then, the government did not publish a timetable for the proposed legislation and a Westminster Hall Debate in January 2011 supported the continuation of the current ban, by 234 votes to 22. Those who supported the ban argued that to lift the ban was going soft on crime and Europe. Those who opposed it suggested that lifting the ban would treat prisoners with respect, provide them with a useful way of reintegrating into society and an opportunity for rehabilitation and that the whole basis of the ban was an unjustified limitation on citizenship not warranted by a criminal conviction (Theyworkforyou Website October 2014).

Events then intervened in the form of a further ECtHR ruling (1 March 2011) in the case of Greens and M.T., which gave the Coalition Government 6 months to introduce legislation to lift the blanket ban. The Coalition Government appealed against this decision but was informed on 11 April 2011 that the request for an appeal hearing was dismissed and the court gave the UK Government a deadline of 6 months from this date to introduce legislative proposals to lift the blanket ban.

The Coalition Government subsequently requested an extension of the deadline in order to take account of a ruling that was to be made in another case (Scoppola v Italy) and was granted a 6-month extension from when the Scoppola case led to a judgement. On 22 May 2012 the ECtHR ruled in the Scoppola case confirming that a general and automatic disenfranchisement was not compatible with ECHR, Article 3, Protocol 1, but that governments can decide how to implement a limited ban on certain prisoners and gave the UK Government 6 months from May 2012 to respond (BBC News May 2012). A draft bill was published on 22 November 2012, the Voting Eligibility (Prisoners) Draft Bill, for pre-legislative scrutiny by a joint Committee of both Houses. This committee published its report on 18 December 2013 and recommended that the government should introduce legislation to allow all prisoners serving sentences of 12 months or less to vote in all UK Parliamentary, local and European elections. Chris Grayling did offer a brief response to the Committee's report on 25 February 2014 but the Coalition Government did not bring a bill forward during its term of office. In October 2013, paralleling the English court ruling on W-LO, the Supreme Court dismissed the appeals of life prisoners George McGeoch and Peter Chester, who had previously challenged the ban. The Supreme Court rejected the claim that the blanket ban was incompatible with European Union law.

But as the Prison Reform Trust argued when offering comments on the consultation paper of December 2010, 'the drive to greater personal responsibility on the part of prisoners should include encouraging prisoner councils and volunteering by prisoners and prisoner re-enfranchisement.' This seems to fit into the Howard League point when they suggested that the Coalition Government has 'overused the word "rehabilitation" as an umbrella term for its various component parts'. In this case what seems

to lurk under the umbrella is not only a punitive, as already noted, but an exclusionist policy.

As Horne and White (2015) show, once again, England and Wales are out of step with many of their European partners on this matter. Of the EU member states (28 in total), six states exercise blanket bans on prisoners voting (Bulgaria, Estonia, Greece, Hungary, Malta and the UK), 11 states have no bans on prisoners voting (Croatia, Cyprus, Czech Republic, Denmark, Finland, Ireland, Latvia, Lithuania, Slovenia, Spain and Sweden) and 11 states have conditional/discretionary bans on prisoners voting (Austria, Belgium, France, Germany, Italy, Luxemburg, The Netherlands, Portugal, Poland, Romania and Slovakia). Further afield, Russia, Japan and five of the seven Australian states maintain a blanket ban. In the USA there is a blanket ban on the prisoners' voting rights for all those convicted of felonies. In 11 states this ban is permanent. The majority of states impose a voting ban on felony offenders only whilst they are in prison, during parole and on probation. Only two states do not impose a ban at all for those who have been convicted of felonies. Ten states impose a voting ban on those misdemeanour offenders whilst they are in prison (Felon Voting Pros and Cons Website, 2014). It was estimated that in 2012, 5.85 million Americans were disenfranchised because of these rules, with African-Americans disproportionately affected (8% of black Americans were felony disenfranchised compared with 1.5% of the whole population) (Pilkington 2012), a matter also raised by the Prison Reform Trust/Unlock document in February 2010.

The position here has many similarities with the issue of W-LO dealt with in Chap. 4. Both share an insistent exclusionary zeal, which conflicts with the general tenor of EU countries and brings the UK into conflict with the ECtHR. It cuts across four fundamental issues in twenty-first-century politics: the role that punishment should have in dealing with offenders, the limits that should be imposed on 'othering' or exclusion when dealing with offenders, the limits of the British state vis-à-vis the EU and the calculation of what is politically possible. The position maintained places the UK out on a limb and, like W-LO, closer to the position taken by the relatively recently democratic nations (like the ex-Soviet bloc nations or Greece ruled over by a military junta between 1967 and 1974) and the USA, even though, like W-LO, practice is more

restricted in the UK to those imprisoned only and only during their term of imprisonment.

Conclusion

We are left with two more tasks before ending this chapter—to assess the Coalition Government policies in their own terms and against the comments made by their critics and the issues raised in Chap. 3 of this work. On the measures to make the prison estate more affordable (with the exception of privatization where the impact is not known), the Coalition has achieved some success in its ambition to impose austerity. The Coalition has been much less successful regarding the working prisons initiative. Indeed, this policy has been decentred, transformed and undermined. The net result materially detracted from the desire to protect the public (by reducing reoffending) and neglected one of the central features of the supposed revolution, rehabilitation. The changes introduced by the new IEPS reinforced rather than detracted from this. The maintenance of a blanket ban on prisoners voting not only detracted from rehabilitation but was inconsistent with a move to see offenders as responsible agents. The reforms of the prison services did little to encourage greater transparency and accountability (indeed, the further incursion of privatization has yet further limited accountability) and greater decentralization.

Turning to the broader considerations set out in Chap. 3, as with sentencing reform, the Coalition Government has failed to demonstrate honesty about the limits of the prison and neglected the social factors that prefigure the route to jail. But more than this, their policy has been rooted in a fundamental denial that a just penal system is impossible in a fundamentally unjust and unequal society. Despite the official crime rate falling over a lengthy period by 2015 (with the exception of sexual offences), the Coalition Government has done little to depoliticize the prison. Instead, images of the prison house have been trotted out to energize jaded support. Even during the 2015 general election the Conservative election manifesto made reference to the tired old view (much tried and always failing) of the need for 'a short, sharp spell in

custody to change behaviour' (Conservative Party, May 2015:60). Little is evident in Coalition policy on the prison estate that would seriously detract from the marginalizing impact of the prison system. The recommendations of the Corston Report (2007), that if women needed to be incarcerated then small local custodial centres should be used, has not been implemented.

The reforms of the Coalition Government have done little to ameliorate the prison crisis. On the one side, the material resources of the prison estate have been diminished by austerity measures, including a reduction in prison stock as well as staffing, whilst the propensity to imprison has remained high and the number of imprisonable offences has expanded, resulting in the institutionalization of overcrowding. The attempt to find a new raison d'être for the prison, contained in the notion of the rehabilitation revolution, has signally failed, with the collapse of the working prison initiative. A more punitive IEPS has done much to ensure that the move to punishment is further consolidated. The legitimacy of the prison remains precarious amongst offenders (who daily experience the resulting conditions as being unjust and unfair) and prison staff (who feel increasingly embattled and undervalued). As Table 4.2 shows, public confidence in the overall fairness and effectiveness of the criminal justice system increased between 2010–11 and 2014–15. However, when public confidence in the prison is separated from other agencies like the police and the Crown Prosecution Service (CPS), with regard to effectiveness, a different picture emerges with, in 2013–14, only 32 % of respondents expressing confidence that the prison is effective at punishing offenders (up from 31 % in 2012–13) and only 22 % of respondents expressing confidence that the prison is effective at rehabilitating offenders (remaining the same as the previous year) (Jansson 2015:3).

Chapter 6 goes on to consider Coalition policy on community-based offender services.

6

Community-Based Offender Services

Introduction

This chapter provides a critical assessment of the Coalition Government's policies on the management and supervision of offenders placed on community sentences by a court and also resettlement services working with prisoners before their release and when they are released into the community on licence, deemed here community-based offender services. The chapter examines the emerging policy agenda, the actions actually undertaken as well as justifications offered, the reactions they provoked and the impact they had, where known. As in Chaps. 4 and 5, comparative data are used where they can throw some light on the possible impact of the measures discussed. An internal and external critique is also provided.

The emergent agenda is, by this point of the book, starkly clear—a movement towards outsourcing and punishment in the context of austerity. The three self-generated initiatives here make their own contributions to these themes. Thus the first theme deals with the drive to the outsourcing of 70 % or more of the supervision of both community sentences and resettlement services; the second, theme examines the introduction of lengthy and onerous licence arrangements for prisoners serving more

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than 1 day and less than 12 months though also the development and initial operation of resettlement services for all prisoners released on licence; and the third theme considers how the development and operation of robust and demanding community sentences meant an increasing emphasis on punishment.

The Outsourcing of Community-Based Offender Services

The probation service was, in 2010, the primary body responsible for the bulk of adult and young adult community-based offender services including pre- and post-release work with licensed prisoners, as well as supervising offenders placed on community orders by the courts. The pre-release work with prisoners was provided for by a probation unit in all prisons. Probation officers supervised all prisoners released early from prison on licence. They also undertook some, albeit limited, voluntary aftercare. The probation service made provision for the varied aspects of the multifaceted community order providing approved premises used for residence requirements in hostels, day centres used for some activity requirements, probation supervision and the organization of the community payback. The probation service was involved in the supervision and management of offenders on suspended sentence orders (SSOs). They also provided a service for the courts based on report writing and risk assessment and the ongoing assessment and management of offenders under Multi-Agency Public Protection Arrangements (MAPPA) as well as advising Parole Boards on matters related to risk.

By 2010 the probation service had been through a period of turbulence and change. In 2011 some 18,000 people were employed by the service, 5300 as probation or senior probation officers and 4800 as probation service officers, and with the rest engaged as senior managers and administrators. In the same year there were 46,000 new offenders placed on community and other orders managed by probation and 12,000 newly released prisoners on licence with a total of about 236,000 supervised/managed in the community (consisting of about 130,000 on court orders including the community sentence and the SSO) and about 106,000 prisoners under pre- and post-release supervision (NOMS

March 2011; MOJ June 2011b). In comparison, the probation service dealt with few post-release prisoners on a voluntary basis largely because of official instructions which prioritized statutory supervision (Maguire et al. 2000). In 2011 some 51,489 offenders were managed under MAPPA (MOJ October 2011:3).

The Coalition Government initially put forward a number of reasons for undertaking a fundamental change in the organization of community-based offender services. Community penalties were seen to be part of the general malaise affecting the penal system in that they did not do enough to reduce reoffending and contributed to the overall lack of affordability of the penal system. The 'Breaking the Cycle' consultation paper (MOJ December 2010:46) indicated, furthermore, that there was a need to 'fundamentally reshape … probation services to reduce unnecessary bureaucracy, empower frontline professionals and make them more accountable' by means of 'reforming the way in which probation trusts are managed… reviewing targets and standards to ensure greater flexibility and professional discretion; considering the scope and value of different business models…and … reforming the NOMS to reduce costs and enable effective local commissioning in the longer term'. The proposals meant creating a new role for probation trusts, moving them from providing management and delivery of service, to strategic leadership and commissioning. Through the competition involved in commissioning, the Coalition Government proposed that standards would be pushed up, improvements to community payback made, new methods for delivering court orders found, new ways of delivering punishment, reparation and rehabilitation identified and used, and a way of 'properly holding providers to account for results' found by means of payment by results (PBR) (MOJ December 2010:38). And all of this would be accomplished at reduced cost.

The early paper also suggested that change would be based on the experience derived from '…at least six new rehabilitation programmes, delivered on a PBR basis' (MOJ December 2010:1). The PBR pilots were of two types. The first type tested the impact of through the gate services for prisoners on reduced reoffending, although in the event only two limited pilots were set up (in HMPs Peterborough and Doncaster). The second type was concerned with justice reinvestment in two main areas (Greater

Manchester and four London Boroughs and both were successfully set up and ran from July 2011 to June 2013) and attempted to examine the impact of a local incentive scheme on demand for criminal justice services (MOJ December 2010:43). Justice reinvestment here meant asking 'local partners to work together to… jointly commission innovative services (and) target their resources on specific groups of offenders in line with their local priorities and crime patterns' (MOJ December 2010:43). Any savings resulting from reduction in the demand for criminal justice services attributable to their joint efforts would then be passed on so that the money could be reinvested in further, local joint working.

But prison reform, under the banner of a rehabilitation revolution, apparently took initial priority over the reform of community-based offender services. There was, however, one change set in train by the first consultation paper (MOJ December 2010), namely, the short-lived attempt to outsource community payback (MOJ Competition Strategy for Offender Services, July 2011), variously otherwise known as community service or unpaid work. The MOJ intended to put up for bids competition contracts for running more intensive community payback. One such deal (covering London) was indeed done, with a 4-year £37million contract being awarded to Serco and the London Probation Trust in June 2012 (Munro and Harrison 2012). However, probably as a result of changes in the MOJ over the summer of 2012, combined with new ideas about outsourcing linked to PBR (leading to MOJ January 2013a), the MOJ delayed further competition bidding (NOMS Probation Instruction PI 17–2012 November 2012:3). It is noteworthy that the contract with Serco was terminated prematurely (by the end of 2014) by the MOJ, amidst conflicting claims that Serco had found running the contract to be a 'disaster', that offenders were not being properly supervised and with the MOJ suggesting that they wanted to overhaul all probation services nationally 'to ensure a consistent approach' (Watts 20/02/2014).

The foundation for competition-driven, market-based PBR community orders and licence supervision was elaborated on in two pairs of papers (MOJ March 2012a and October 2012: and MOJ January 2013a, May 2013). Driving down costs features as an important consideration in light of the MOJ's 'fundamental commitment' to make the 'substantial savings' of £2 billion from its budget by 2014–15 required by

the 2010 Spending Review (MOJ January 2013a:28). And yet, despite this, the proposals included significantly extending licence arrangements for short-term prisoners. The MOJ logic was that the net effect of the increase in spending due to this innovation would be far outweighed by the savings resulting from the reorganization of NOMS and the probation service, together with the impact of having broken the cycle in terms of fewer people being sent to prison and receiving community-based interventions. The market for supervising those on the new licence arrangements was made to look attractive for bidders, based as it was on an annual turnover of £1 billion and possessing a healthy sustainability factor, especially as the 'consumers' of the service were required by law to participate and accompanied as it was with a tightening up of licence 'compliance' (MOJ January 2013a:19).

The MOJ consultation paper (January 2013a) echoed the earlier paper (MOJ December 2010) by placing an emphasis on a combination of competition and PBR which was seen to stimulate a movement away from state bureaucracy and towards diversity of provision and local partnership working. Indeed, the belief is so great that, despite the continuing emphasis on local knowledge and the utilization of local community and charitable groups, the later paper (MOJ May 2013) announced that it had been decided to go ahead with procurement at the national level with the services divided into geographical areas based on the prison and probation areas, albeit with some emphasis on lead providers voluntarily involving local charities as second- or third-tier partners.

In order to maintain public protection the consultation papers proposed a division in service provider for offenders of different levels of risk. A reorganized national probation service would supervise high-risk offenders (probably less than 30 % of the total), undertake court reports, advise Parole Boards, undertake risk assessments, manage allocations and act as a report receiver in terms of non-compliance, as well as engaging in ongoing assessment of those seen to be exhibiting escalating risk. The rest of the offenders (in excess of 70 %), including those on licence and on community orders, would be managed by outsourced providers on a PBR basis. A pragmatic 'what works' view was adopted concerning the methods used by the outsourced providers. As long as the methods were consistent with the court orders, appeared to reduce reoffending and

catered for diversity in the offender population, the outsourced providers were free to utilize a variety of interventions (MOJ January 2013a:16). The later paper in 2013 (MOJ May 2013:34) put forward a tight implementation schedule in three phases culminating in the new services going live from autumn 2014.

Chris Grayling provided a partial response to criticisms concerning the indecent haste associated with the changes (Travis 2013) by delaying the deadline for 2 months for an important part of the reorganization, the termination of the contracts of the 35 probation trusts in England and Wales preparatory to the setting up of a National Probation Service. A new national public sector probation service was thus established only in June 2014 after some controversy about whether new legislation was needed (in the event the Offender Management Act 2007 was relied on), although the deadlines for the whole scheme going live remained relatively unchanged. The new National Probation Service was tasked to carry out duties in line with the previous proposals including the initial risk assessment of every offender, the allocation of an estimated 236,000 low-/medium-risk offenders to providers and the direct management of the estimated 31,000 high-risk offenders. The providers were contractually obliged to refer back to the national probation service any offenders showing increased risk. The service also retained a number of other functions including preparing pre-sentence reports for courts, managing approved premises for offenders with a residence requirement on their sentence, assessing offenders in prison to prepare them for release on licence to the community, helping all offenders serving sentences in the community to meet the requirements ordered by the courts and communicating with and prioritizing the well-being of victims of serious sexual and violent offences, when the offender has received a prison sentence of 12 months or more, or is detained as a mental health patient.

Following the establishment of the new national probation service on 01 June 2014, 21 new Community Rehabilitation Companies (CRCs) were created. The CRCs were initially owned by the MOJ but were put out to tender with successful bidders taking up ownership in late 2014. The contracts were estimated to be worth between £5 billion and £20 billion over 10 years. The bidding process was completed by December 2014. For each contract a lead provider was named together with various,

usually local, subcontractors, arranged in 'tiers'. See Table 6.1 for details. The table reveals that only one of the companies was not in some part run by a private, profit-making organization Achieving Real Change in Communities (ARCC); six areas were allocated to Sodexo, the large company already holding contracts for five private prisons (four in England and Wales and one in Scotland) and five areas were allocated to 'Purple Futures', a vehicle for the private limited company 'Interserve'. Two of the other big players in the privatized offender services field, Serco and G4S, were allowed to bid for the new outsourcing contracts despite being investigated for fraud concerning their electronic monitoring work. They were not awarded any contracts because, as Mark Leftly (2014) put it, 'G4S and Serco were found …to have billed the MOJ for electronically tagging offenders who turned out to be dead, overseas or already in custody.'

The brief of the CRCs was to reduce reoffending by working with all prisoners in the last 3–6 months of their time in one of the newly created resettlement prisons, as well as operating in the community, supporting short and longer sentence low- to medium-risk prisoners released on licence and supervising offenders sentenced to community orders and SSOs. The (slightly revised) timetable envisaged that the new CRCs would start offering the service by mid to late 2015 (Clinks February 2015). The process has itself not been without controversy when it was discovered that not only was there a link between the chief inspector of probation (Paul McDowell) and one of the major bidders for the contracts (his wife, Janine McDowell, Director of Sodexo Justice Services, previously Chief Executive of NACRO), but Sodexo, together with NACRO, had indeed been awarded six CRC contracts. Subsequently, Paul McDowell resigned from his post because of a 'conflict of interest', the reality of any conflict of interest being denied by Chris Grayling (Travis 2015).

The rehabilitation revolution proposed in government papers by Kenneth Clarke proved to be a revolution in the delivery of service. What put the 'rev' in the 'revolutionary' plans of Chris Grayling was not so much the move to rehabilitation (see the penultimate section of this chapter), but the creation of a business opportunity, entirely consistent with the turn to punitiveness and the neo-liberal insistence on the apparent need to roll back the state (whether it actually cuts public funding rather than simply changing its recipients is a moot question) and at a

Table 6.1 Allocation of community rehabilitation contracts, December 2014

Name of partnership/ lead company	Subcontractors	Contracts awarded
Lead company: Sodexo	NACRO	Six contracts for Northumbria; Cumbria and Lancashire; South Yorkshire; Bedfordshire, Northamptonshire, Cambridgeshire and Hertfordshire; Essex; and Norfolk and Suffolk
Partnership : 'Purple Futures' Lead company: 'Interserve', a support services and construction company	'3SC', a company that wins and manages public service contracts for third sector organizations and two charities: 'P3' and 'Shelter'	Five contracts for Humberside, Lincolnshire and North Yorkshire; West Yorkshire; Cheshire and Greater Manchester; Merseyside; and Hampshire and the Isle of Wight
'Working Links', 'a public, private and voluntary company' (Clinks 2014)	'Innovation Wessex', a probation staff mutual	Three contracts for Wales; Bristol, Gloucestershire, Somerset and Wiltshire; and Dorset, Devon and Cornwall
'MTCNOVO' led by the Management and Training Corporation (MTC)	'Novo', a consortium with a number of public, private and third sector shareholders	Two contracts for London; and the Thames Valley
The Reducing Reoffending Partnership led by 'Ingeus', UK, a private company involved in running the Work Programme	The St Giles Trust and Crime Reduction Initiatives, both charities	Two contracts for Staffordshire and the West Midlands; and Derbyshire, Leicestershire, Nottinghamshire and Rutland
'Seetec', 'a private limited company' (Clinks 2015)	No subcontractors were identified by Clinks (2015)	One contract for Kent, Surrey and Sussex
EOS Works Ltd, a private company and part of the 'Staffline' Group	Willowdene Rehabilitation Ltd, a social enterprise company	One contract for Warwickshire and West Mercia
'ARCC' (Achieving real change in communities), a Community Interest Company	Including a probation mutual, a social landlord, Stockton and Darlington Borough Councils and the Vardy Foundation	One contract for Durham and the Tees Valley

Sources: Clinks February 2015; Interserve Website July 2015; Purple Futures Website July 2015)

stroke legitimizing an attack on state involvement and making vigorous strides towards yet further outsourcing of community-based offender services. The proposals met much opposition and will no doubt continue to be the source of critical evaluation for some time to come.

There were seven main objections to the proposed outsourcing of the supervision of both prisoners on licence and those offenders on community orders. The objections covered the process by which the changes were introduced, the outcome of the bidding process, the expected impact on service delivery, the central mechanism by which the success or otherwise of the CRCs was to be measured (PBR), the ability of the MOJ to manage the contracts effectively, the overall affordability of the changes and, finally, the impact of the changes on vulnerable offender groups.

The import of the first objection is best exemplified by the comments made by the Probation Association and the Probation Chiefs Association (February 2013, May 2013), although the sentiments expressed were by no means confined to this group, when they wrote that the pace of change was indecent and not feasible. Another criticism of the process of the commissioning of the CRCs, which a number of bodies noted, was that because it was undertaken at the national level it went against the government's own intention to encourage decentralization (Probation Association and the Probation Chiefs Association February 2013, May 2013; TUC 2014).

Three issues were raised concerning the outcome of the bidding process. It was criticized for leading to a highly concentrated resource pattern which could create market instability and the possible failure of companies awarded the contracts, a real concern in light of the closure of many private nursing homes, the withdrawal of A4E from the learning and skills contracts in London prisons (Gentleman 2014) and Private Finance Initiative contractor circle pulling out of the deal to run Hinchingbrooke Hospital (Riley-Smith and Williams 2015). The chair of the House of Commons Public Accounts Committee (HCPAC May 2014) noted that 'the supervision and management of offenders is an essential public service that must be maintained in the event of a supplier failing or withdrawing from the contract.' She went on to say that she was not reassured by the MOJ response that in these circumstances the National Probation Service would be the provider of last resort especially as the MOJ was unable to provide details of its contingency plans. The Trade Union Congress (TUC) paper (2014:23) posited what it called 'supply

chain and contract problems'. It is not clear, with regard to the CRCs, that the problems experienced with the Work Programme, whereby larger contractors pushed aside smaller, local groups, will not be repeated in practice with regard to community-based offender services, with the lead company contracted for 10 years but the lower-tier groups only for the first 3 years, creating a potential opportunity, when the nature of the new business has been assimilated by the lead company, to marginalize or even exclude the lower-tier contractors, despite the supposed safeguards. Indeed, the contract award process seems to have frozen out voluntary sector main providers (only one such provider, ARCC, was awarded a contract) because of 'a tension within Government between: the policy rhetoric and stated commissioning intentions—which sought voluntary sector involvement; and procurement teams who sought to apply strict commercial terms' (Russell Webster Blog September 2015).

A number of objections were raised concerning the probable impact on service delivery (Dobson 2012; Probation Association and the Probation Chiefs Association February 2013, May 2013; Prison Reform Trust March 2011; TUC 2014) including the likely fragmentation of the service resulting from the splitting of offender management between the CRCs and the probation service in local areas. It was also suggested that such an arrangement would lead to lack of continuity of support for offenders, raising questions about the impact on public safety, especially given that the reorganization depended on a conception of risk which was inappropriate because it was binary and static rather than dynamic (Dobson 2012). The TUC paper suggested that the reorganization would have a detrimental 'impact on delivery, with fewer staff employed and lower salaries … paid' (TUC 2014:7) as in other areas within the penal system which have been outsourced, for example, electronic monitoring and private prisons. Dobson (May 2012) also argued that the government plans failed to understand the complexities of accountability in the criminal justice system and created a situation where courts would not be able to easily identify which organization was responsible for what actions/clients, whereas if the public sector had retained responsibility for offender management then the lines of accountability would be clear.

Next a number of serious objections were raised about the PBR method adopted (Prison Reform Trust March 2011; Probation Association and

the Probation Chiefs Association February 2013, May 2013; Prison Reform Trust 2013a; TUC 2014). The first objection stressed, on the one hand, the importance of PBR to the success of the whole endeavour, and, on the other hand, the untested nature of PBR. When the outsourcing model was implemented the full results of even the reduced number of sample-restricted pilot projects were not available (Probation Association and the Probation Chiefs Association February 2013, May 2013), maximizing the possibility that the mechanism could contain a 'bleeding edge' of perverse incentives or unintended consequences (Prison Reform Trust February 2013a).

Both the Prison Reform Trust (February 2013a) and the TUC (2014) suggest that the PBR model used by the MOJ was inherently flawed because the performance measurement model depends on a simple binary distinction separating offenders into two categories of high risk and low risk which will distort incentives for providers and drive them to work with the least needy, neglecting 'the real value that providers can add through tackling complex and high-risk individual cases' (TUC 2014:21), and 'provide… no incentive to work with those who have reoffended' (ibid:21).

Furthermore, the model operated without a 'statistical uncertainty' threshold related to the baseline reoffending rate which would enable an estimate of the change to reoffending within a cohort that is likely to happen because of extraneous factors which are beyond the control of the provider. According to the TUC paper, calculations show that this factor could be between 1.7 and 2.3 percentage points and could lead to not only a lack of bonus payments but the residual fee being clawed back, making the scheme unattractive to investors. The paper goes on to use the Peterborough social impact bond pilot as a test—this 'state of the art' rehabilitation programme achieved a 2.9 % reduction in reoffending, at a cost of £1700 per offender. But the CRCs are unlikely to be resourced in the same way (the paper estimates between 25 % and 50 % of the Peterborough pilot funding being available), making reaching the various thresholds extremely difficult. This in turn gave rise to concerns about the accountability of the providers. 'Given that the MOJ has ceded operational control to the providers and relies on PBR mechanisms to incentivize providers and ensure quality provision, the MOJ will be left with few ways of holding the providers accountable' (TUC 2014:22).

The Prison Reform Trust also provided a lengthy response concerning PBR arguing that PBR failed to take account of the fact that desistance from crime is slow and uncertain. The Prison Reform Trust favoured a 'distance travelled' view rather than differential payments which they suggested, at least as far as the Work Programme was concerned, had not produced positive results. Instead, a distance travelled view places emphasis on factors known to aid desistance from crime (housing, education, employment and strengthening family ties). They also note that there is potential difficulty in how the various PBR systems, operated by Drug and Alcohol Recovery, Transforming Rehabilitation and the Work Programme, will interact with each other.

Serious questions were raised about the capacity of the government in general and the MOJ/NOMS in particular to successfully manage large contracts and contractors (TUC 2014). This point was supported by the HCPAC Chair, Margaret Hodge, when she wrote that 'the MOJ's extremely poor track record of contracting out—such as the recent high-profile failures on its electronic tagging contracts—gives rise to particular concern.' Ms Hodge, the chair of the committee, went on to call for the National Audit Office to be given full access to contractual information, 'so that we can follow the taxpayers' pound' and be 'assured that value for money is being served and contractors are not gaming the system as has happened in the past' (HCPAC 2014).

Severe doubts were expressed, particularly telling in the context of the drive to austerity, about whether the changes were affordable. Criticisms of the proposals were made by the House of Commons Justice Select Committee (HCJSC) in their interim report on crime reduction policies (HCJSC January 2014). The Justice Select Committee had significant apprehensions about the 'scale, architecture, detail and consequences of the reforms and the pace at which the Government is seeking to implement them' (HCJSC 2014:Para 24). The report went on to express concern that given the poor state of some provisions associated with the requirements that can be attached to community orders (including mental health, drug and alcohol treatment), the massive structural change that is involved in making the transition to the CRCs delivering community justice and the NOMS-imposed budget restrictions, it is not clear

how the whole scheme, including pre- and post-release supervision of prisoners, is affordable (HCJSC 2014:Para 34).

Finally, the Prison Reform Trust (February 2013b) also highlighted their concerns about the impact of the transforming rehabilitation agenda on women offenders. They welcomed the government's recognition of the need for a distinct approach to working with women in the criminal justice system but suggested that this needs to be considerably strengthened by ring-fencing the funding of community-based women's services during the transition to a new commissioning system. They also argued for the establishment of a body with national oversight of policy and practice for women offenders, the introduction of a statutory obligation to ensure women-specific services in the community and the improvement of support available for vulnerable women.

In summary, it is clear that the move to outsourcing the resettlement of prisoners on licence and the supervision of community orders has encountered concerted opposition on the grounds that it expected too much change, too soon, that the bidding process led to an unstable concentrated resource pattern and promoted a pattern favouring lead contractors, that the process would have a series of negative consequences on the delivery of service including reductions in staffing, reduction in service standards, fragmentation of service, lack of continuity of support, issues connected to public safety and problems of accountability, that the main mechanism connecting government to the outsourced providers was untested and likely to have a 'bleeding edge', that the whole scheme was not affordable and that vulnerable groups were insufficiently protected in the process of change. Daniel Sandford indicated that 'critics of the scheme were concerned it was more ideological than practical, and driven by an interest in privatization rather than by evidence that using contractors actually worked' (BBC News February 2015). If Chris Grayling had been back in 2013 making a pitch to the Dragons' Den entrepreneurs one could see that they would have all concluded that 'I'm out' if he could not guarantee a take-up of the service—which is just what the imposition of a 12-month licence requirement did for the new clients and what community orders had already done for the rest.

The Introduction of Licence Requirements for Short-Term Prisoners

The introduction of new licence arrangements based on a resettlement agenda for short sentences' prisoners may be seen as part of the rehabilitation revolution set in train by the first government consultation paper (MOJ December 2010). However, as will become clear, the revolutionary character of the changes introduced was compromised by an unwillingness to recognize the limitations of short sentences of imprisonment, on the one hand, and, on the other hand, the movement not so much to a rehabilitation revolution as a revolution in the delivery of the licence process, which came to place less emphasis on the style of delivery and more emphasis, ostensibly, on the results, namely, reduced reoffending.

Some introductory explanation of the situation circa 2010 is necessary before proceeding to consider the introduction of licence arrangements for prisoners serving more than 1 day and less than 12 months. The Criminal Justice Act 2003 (Section 244) made provision for the release of most prisoners serving determinate sentences, except those seen as posing a threat to the public, at the 50% point of their sentence, but this was dependent on up to 42 additional days being added for disciplinary offences (Criminal Justice Act 2003, Section 257) and a maximum of 135 days being taken off if release under Home Detention Curfew (HDC) was obtained (Criminal Justice Act 2003, Section 246). HDC applied to all determinate sentences under 4 years of duration but was limited by the prisoner having to serve a minimum of 4 weeks or a quarter of their sentence and provided their offences were not presumed unsuitable, that is, of a violent or sexual nature. If obtained, HDC meant that the released prisoner was subject to a curfew arrangement for at least 9 hours a day at their place of residence surveilled by an electronic tag in turn monitored by a for-profit private security company. A breach of the HDC requirements could lead to a recall to prison.

Post-release supervision arrangements varied by sentence type. Adults serving less than 1 year of a prison sentence (normally referred to as short sentence prisoners) were released unconditionally and not subject to

licence conditions such as supervision but with the remaining part of the prison sentence held in suspension. If they reoffended, they could be required to serve the suspended part, as well as any further sentence for the new offence. On release they would walk out through the prison gate with little more than their travel warrant and the statutory £46 discharge money. Any further support they did receive would be on a voluntary basis provided by the probation service or one of the relevant charities, though if they were released additionally early on HDC, they would be the subject of an electronically surveilled curfew, as noted above.

Most determinate sentence prisoners serving more than 1 year were also normally released at the 50 % point of their sentence, subject to the 'snake' of additional days and the 'ladder' of HDC. However, under the provisions of the Criminal Justice Act 2003 (Sections 249–250) such prisoners were released conditionally and subject to licence arrangements lasting for the whole of the rest of the sentence. Licence conditions could vary but normally included being of good behaviour, being supervised and keeping in contact with the allocated supervisor, as well as any additional conditions imposed by the prison governor or the sentencing court (Criminal Justice Act 2003, Section 238). A breach of the licence arrangements could lead to a recall to prison.

Prisoners serving extended determinate sentences in 2010 as a result of a decade of change (Criminal Justice Act 2003; Criminal Justice and Immigration Act 2008) were eligible for automatic release at the 50 % point of their sentence but not for HDC. Prisoners serving indeterminate sentences (imprisonment for public protection [IPP], or the mandatory or discretionary life sentence) could be released by the Parole Board after the expiry of their tariff. Life sentence prisoners were then subject to supervision for life (Crime [Sentences] Act 1997, Section 28[5]) whereas IPP prisoners were subject to post-release supervision for 10 years (Criminal Justice Act 2003, Schedule 18).

That short sentence prisoners contributed disproportionately to recidivism and to the crime rate and yet were not subject to post-release supervision had been a feature of policy documents for some time. The Conservative Party 'Green Paper' noted two matters relevant to short sentence prisoners. Firstly, that 'two thirds of (adult) offenders leaving prison

each year received sentences of 12 months or less and so have no supervision by the probation service—and it is this group of offenders who have amongst the highest reconviction rates' (2008:46). Secondly, short sentence prisoners (now defined as serving 6 months or less) contributed proportionately less to the prison population than those receiving longer sentences, and there was no justification in trying to limit the courts' use of such sentences, thus ruling out the most obvious way of solving the problem, limiting the use of short prison sentences by courts.

These sentiments were repeated in subsequent MOJ documents. For example, the first MOJ foray into penal policy reform (December 2010) highlights the increased recidivism rates of short sentence prisoners (defined as those receiving sentences of less than 12 months) as 58 % in 2000 rising to 61 % in 2008, that they are very often prolific offenders and that 'there is no requirement for supervision unless they are between 18 and 21 years old' (MOJ December 2010:6). However, the 'logic' of the previous Conservative Party 'Green Paper' is repeated in that the de facto abolition of, or restriction on, the use of short prison sentences is rejected out of hand (perhaps with a less than supportive acknowledgement of the plans afoot in Scotland in 2010/11) and the consultation paper goes on to propose introducing the release of such prisoners on licence and links it to 'a model which pays some prisons by results for rehabilitating offenders (which) … will incentivize the prison… to make the best use of the time they have with the offender and connect them back into the community on release' (Ibid:41). It is noted that one pilot project is under way utilizing social impact bond funding and that three further large-scale pilot projects are planned (ibid.:42).

However, during their first few years in office the Coalition Government seems to have concentrated on cuts to the prison estate rather than the reorganization of community-based offender services and further consideration is given to the matter in the consultation and response documents of 2013 (MOJ January 2013a, May 2013). In the first of these, a general concern is expressed about reoffending rates running at almost one half of offenders being reconvicted after 1 year, but in particular concern is expressed about the reoffending rate of adult offenders who had served a prison sentence of less than 12 months, which the document suggests is 57.6 % (MOJ January 2013a:7). A plan is announced (again) to 'extend

rehabilitative provision to offenders released from short custodial sentences of less than 12 months…to make sure they receive targeted rehabilitative interventions, and extend statutory supervision to ensure they engage with these programmes' (MOJ January 2013a:11). Like the previous MOJ papers, this document indicates that provision will be made by opening up the 'market' for community-based offender services to a range of providers who will operate on a PBR basis. The brief of such agencies will be to deliver the requirements of both community orders and licence conditions for the majority of offenders. This brief will, for the latter group, mean that they are contracted to provide through the gate (TTG) services, 'engaging (prisoners) before their release into the community and maintaining continuous support' (MOJ January 2013a:13). TTG services would be provided only in the newly designated resettlement prisons and be available for all prisoners 3 months before their release and for the period of licence after release.

The Offender Rehabilitation Act (ORA) was placed on the statute book in March 2014 and Section 2 imposed licence requirements on all fixed-term prisoners serving more than 1 day and less than 2 years (except for those under 18 years of age, serving an Extended Determinate Sentence or whose offence was committed before the relevant section of ORA came into force), with the supervision period extending from the end of the custody part of the sentence for 12 months. As noted above, a new national probation service was set up in June 2014 and contracts were awarded to the companies responsible for providing pre- and post-release support to prisoners in December 2014, in preparation for the first offenders entering the scheme when the ORA came into force on 1 February 2015. The process of setting up a new probation service and the new TTG providers had been delayed (though not as much as the critics suggested should have happened as noted in the previous section), with the first groups of offenders potentially coming into contact with the new TTG services in mid to late 2015 (Clinks February 2015; Press Association February 2015; BBC News February 2015).

The reactions to the proposals for the statutory provision of licence requirements for short-term prisoners and TTG services were mixed. Opinion was strongly in favour of intervention with short-term prisoners and very much in favour of TTG services. However, there was less

agreement about placing this intervention on a statutory footing and considerable disagreement about the actual arrangements for providing such services for the vast majority of offenders, via a PBR system based on a market for community-based offender services. Since the issue of outsourcing and its implications for the probation service has been dealt with above, comments here will be confined to the nature and cost of TTG services and whether aftercare should be voluntary or compulsory.

The Prison Reform Trust (February 2013a) indicated that, subject to reservations about how the scheme was to be effected, both the focus on rehabilitation and extension of support to short-sentenced prisoners was welcome. Indeed, the paper goes on to suggest that 'the needs of this group have been neglected for too long.' They see this opportunity, more in hope than expectation, as presenting 'a compelling case for government and local authority departments to work together to address the social factors that drive crime' (Prison Reform Trust February 2013a:1).

The Prison Reform Trust paper goes on to argue that the extension of support for short sentence prisoners through statutory supervision (which is combined with the threat of custody if they either do not engage or breach requirements) is likely to increase the contribution of this group to the prison population because such an arrangement will be used by the courts more often as it looks safe and it is likely to lead to more breaches of the requirements and recall to prison, mainly because of the complex and multiple needs of prisoners in this category. And 'a measure intended to be rehabilitative could end up reinforcing the revolving door of prison, breach and recall back into custody' and 'the additional costs incurred could wipe out the savings the government is hoping to gain through the consultation's proposals' (February 2013a:17).

The paper goes on to propose additional safeguards if statutory provision is proceeded with. These include, firstly, 'a presumption against custodial sentences of under three months …to mitigate against the potential overuse of short sentences by the courts'; secondly, that 'prison recall … for breach of license conditions for people serving the new sentence should remain a genuine last resort'; thirdly, 'license conditions should be proportionate with as much flexibility built in as possible to ensure that all other avenues of redress and appropriate means of support are tried first before a recall to custody is considered' (February 2013a:16).

But more importantly the Prison Reform Trust proposed (as did Dobson in May 2012) that given that short prison sentences are clearly not working, rather than adding licence supervision to them, the government should substitute community sanctions for them for non-violent offenders. Such sanctions would provide mentoring and support, be cheaper and more effective and involve an already existing network of agencies. The paper went on to contrast the reoffending rate of short-term prisoners of 57.6% with adult offenders on community sentences with a reoffending rate of 49.6%. The difference between the two methods was attributed by the Prison Reform Trust report to lack of continuity of supervision and the disruption to life caused by short custodial sentences (particularly with regard to homelessness, unemployment and family breakdown), all of which increase the probability of reoffending on release.

Juliet Lyon, Director of the Prison Reform Trust, was reported to have argued more recently, at the point when TTG services were due to become active, that 'the justice secretary is staking everything on making prison an early port of call, rather than a place of last resort, in the justice system.' This meant that he was 'encouraging the courts to bypass more effective penalties and instead use already overcrowded prisons as a gateway to treatment' with the risk that the 'new mandatory measures will lead to 13,000 recalls and the need for 600 more prison places at a cost of £16 m.' She added that the move constituted a social experiment which places the prison as the 'route to rehabilitation' at a time when prison budgets have been significantly reduced (see Chap. 5) and the probation service has been reorganized (see immediately above) (Press Association 1 February 2015).

Both the HCJSC (January 2014) and the HCPAC (May 2014) considered the license arrangements from a financial perspective. In its interim report on crime reduction policies the HCJSC concluded that on the information available, 'it is not clear to us whether sufficient funding is in place to meet the costs of transition to the new system and of statutory rehabilitation for those sentenced to less than 12 months in custody' (January 2014:Para 34). This was so partly because of the paucity of existing rehabilitative provision in custody, including through-the-gate supervision for all prisoners coming to the end of their sentence and

partly because of existing provision (including mental health, drug and alcohol treatment), which should contribute to reducing reoffending and subsidize the move to pre- and post-release work with prisoners, especially in the context that 'NOMS plans to dedicate to them (all) only the community based element of existing rehabilitation resources' (HCJSC January 2014:Para 49). The HCPAC (May 2014) also expressed concern noting that the provision of rehabilitation services will be extended for the first time to those sentenced to less than 12 months in custody leading to an increase of some 50,000 offenders, which represents a 22% increase on the number of offenders managed by the probation service during 2012–13. And yet 'the Ministry could not tell us how this significant increase in the case load of probation staff would be managed' (HCPAC 2014).

Clearly, at the time of writing, it is too early to say what the impact of the introduction of the statutory licence requirement for short-term prisoners will be, given that such services only started in mid 2015. Some indication though of the likely impact may be found in the pilot projects mentioned by the MOJ paper in December 2010. Have these projects produced evidence of significant reductions in reoffending? Such a question is relevant for two reasons. Firstly, it enables an assessment of the extent of the risks associated with the government's gamble that the reorganization of community-based offender services will not only pay for itself but save money. Secondly, it enables an assessment of the claim that the introduction of licence conditions for short sentence prisoners really will reduce reoffending.

A number of issues need to be considered before proceeding here. Firstly, the promised number of pilot projects were not set up as suggested by the MOJ paper (December 2010:42). Instead, only two such projects were started at HMPs Peterborough and Doncaster (MOJ August 2014:4). Secondly, the study of the impact of the resettlement process had to be brought to a premature end at both establishments because the government decided to go ahead with the change before the results were finished (the final results of the first cohorts at the two prisons were published in August 2014) (MOJ August 2014b:2 Note 1). Thirdly, the cohorts in the two prisons were quite different; in HMP Peterborough the pilot only included prisoners serving sentences of up to

12 months; in HMP Doncaster it included all prisoners released during a period though the figures were broken down to look at this group. Fourthly, there are various discrepancies in how reconvictions are measured between the two studies and between the two studies and the government's own 'Proven Reoffending Statistics'. The final results for the second cohorts for Peterborough and Doncaster were expected in 2016 (MOJ January 2015a:7).

It is also worthy of note that further caution has to be exercised in considering the results as a test of the policies considered here because the two pilots did not depend on compulsory licence requirements but offered training and support to prisoners whilst in prison and after release. Given that there would be no sense of any extra injustice but only positive intervention in resettlement issues in the last period in prison and on release, and given that the rate of resource was much higher per offender in the pilots, the results obtained constitute a best case scenario for the later scheme.

The final analysis of the first cohorts for both HMPs Peterborough and Doncaster was published in August 2014 by the MOJ. Cohort 1 in the scheme at HMP Peterborough provided by 'One Directions', which ran from September 2010 to July 2012, recruited a sample of 1000 short-term prisoners. There were two targets for the scheme. The first target was that there should be a reduction of 10 % in the frequency of reconviction events in the first cohort, defined as the number of court convictions only, unlike the 'Proven Reoffending Statistics' published by the MOJ, not including cautions (MOJ August 2014b:4), in comparison with the 2009 baseline. The second target was at least a 7.5 % reduction in the frequency of reconviction events for both cohorts put together dealing with a sample of 2000 short-term prisoners (MOJ August 2014b:2). The final analysis of cohort 1 showed that whereas the 10 % reduction target for reconviction events was not met (baseline 155 events per 100 prisoners; actual 142 events per 100 prisoners giving a 8.4 % reduction which was statistically significant at the 10 % level), it was thought likely that the second target would be met (ibid.:6). For cohort 1 reconviction rates for Peterborough were shown to be 2.4 percentage points below the baseline of 55.7 % and considerably lower than the then latest figures for reconvictions nationally of 57.6 % (ibid.:6).

Cohort 1 at HMP Doncaster, where TTG services were provided by Serco, the same company that runs the prison, showed a 52.8 % reconviction rate (defined as the proportion of released prisoners gaining a court-imposed conviction; Ibid:4) compared with a baseline rate of 58 % for all prisoners. The 5 percentage point target was met and a 'demonstrable decrease' effected. Indeed, a separate analysis of the reconviction rates of short sentence prisoners revealed a reconviction rate of 55.7 % at Doncaster, against 64.1 % in the baseline rate and 58.7 % nationally.

The 'best assessment available' for cohorts 2 at both HMPs Peterborough and Doncaster was published by the MOJ in January 2015. This shows that for HMP Peterborough with smaller samples (recruited over 18 not 24 months and reconvictions measured over 6 not 12 months) that the frequency of reconvictions events was 87 per 100 offenders for the HMP Peterborough sample and 88 per 100 for the baseline sample and nationally 87 per 100. A very small effect seems evident. For HMP Doncaster the interim results using smaller samples due to the restriction of the period revealed that reconvictions rates at Doncaster were 57.4 % against a the baseline of 60.0 %. The sample for Doncaster included all released prisoners and not just short sentence prisoners, as noted above, and no separate analysis was provided of this subsample (MOJ January 2015a:4–5).

The final results for the cohort 2 pilot at HMP Doncaster reveal that the re-conviction rate for released offenders was 3.3 percentage points lower than the 2009 baseline year. This was deemed by the report as being an unsuccessful outcome for the provider, SERCO, because the 5 percentage point threshold had not been achieved, and they therefore were required to reimburse 10 % of the core contract value for the pilot year 2012−13. Separate analysis of the re-conviction rates of pilot short-sentence prisoners only revealed a re-conviction rate of 57.4 % against a baseline rate of 64.1 % (MOJ July 2015). The final result for cohort 2 at HMP Peterborough will not be available until 2016 (MOJ July 2015).

Although any reduction in reconvictions is to be welcomed the results suggest that, even on this best case scenario, a relatively small impact on reconvictions howsoever measured can be expected from incarcerating offenders for short periods and then providing help with resettlement. This is complicated by the TUC (2014) comment about the absence of baseline data enabling a separation of pilot effect from background 'noise'.

Whether the impact on reconviction events and reconviction rates is significant enough to enable the whole scheme to not only pay for itself but produce savings is a moot question. So too is the claim that the introduction of licence conditions for short sentence prisoners will reduce reoffending. Perhaps it would be more effective in terms of reconviction rates and certainly less costly to not incarcerate non-violent offenders for short periods at all, but impose an onerous community sentence instead.

Comparative data on measures of this kind is limited. However, the recent Scottish experience provides us with an opportunity to contrast events in England and Wales with another legal jurisdiction on the issue of limitations on court use of short prison sentences, a reform explicitly rejected south of the border. But the experience reveals that limitations on the use of short prison sentences by courts can be countenanced and even introduced but that if they are permissive (i.e., advise rather than require courts to act), they do not work and may even be counterproductive because of the sentencers' investment in such measures. As we have seen, the Coalition Government refused to limit or abolish short prison sentences. Instead, it developed the notion of applying a post-release licence to offenders given prison sentences of more than 1 day and less than 12 months. But across the border, vociferously opposed by both Scottish Conservatives and Labour, the Scottish National Party Government steered the Criminal Justice and Licence Act 2010 through, Section 17 of which introduced a presumption against courts using prison sentences of 3 months or less (originally 6 months or less but to get the bill through a political compromise was struck), on the grounds that they do not aid rehabilitation and have a number of negative effects (Sanderson February 2015).

Evidence has emerged, however, which shows that the previously established decline in the use of these sentences up to 2010 has been halted and to some extent reversed. The first full year of the legislation being implemented, 2011–12, 28 % of offenders were given these short prison sentences; in 2012–13 and 2013–14, this increased to 29 % (Sanderson February 2015).

There was no opposition—indeed, there was outright support—for providing resettlement services for all prisoners dealing with a variety of matters including employment, accommodation and income support as well as drug and alcohol dependency and mental health issues.

However, there was considerable concern in official circles about doing this in the context of a 22 % increase in caseloads when there were significant reductions in MOJ budgets and a relatively poor existing infrastructure. Furthermore, the wisdom of tagging on to the clearly failing short prison sentences a lengthy period of licence supervision was questioned. Following this course meant building on failure and creating a situation which, given the chaotic lives of many repeat offenders, would almost certainly mean a high rate of breakdown and breach for non-compliance, resulting in recall to prison. Given the lower reconviction rates for community sentences (probably resulting from avoiding the worst negative consequences of imprisonment), the fact that they are cheaper than imprisonment and could offer a longer, more intensive intervention commensurate with the level of offence seriousness, it is hard to see how the more elegant solution—the use of community sentences more for non-violent offenders—was not taken up, with restrictions being placed on court use of short prison sentences. Following the Corston Report and its strictures concerning the use of prison sentences for non-violent women and the need for a non-custodial sentences to become the norm for such groups, this is especially so.

'Robust and Credible' Community Sentences

An assessment is made here of the emergent rationale for and practice of community sentences, including community orders and financial penalties. The conclusion reached is that a clear gap between rhetoric and reality developed. Although rehabilitation, understood as little more than moral reform, was placed at the forefront of community sentences by the political rhetoric of the period, it remained at best a tertiary aim, with punishment being primary from the beginning. Punishment gained greater salience as time progressed, by means of further rhetorical gymnastics (punishment and rehabilitation being seen as inseparable) and, eventually, a blatant pragmatism concerning what is to be done with offenders as long as they do not reoffend, the outsourced providers complied with the court order and operated within the general punitive parameters set down by government. However, this did not mean that rehabilita-

tion and reparation were totally neglected, although these aims became increasingly compromised by the growing emphasis on punishment.

The Conservative Party 'Green Paper' (2008:14) set the scene by suggesting that 'Community… sentences will be based on four pillars—punishment, rehabilitation, work… and reparation.' Punishment was given highest priority and meant 'sentences should fit the crime by punishing the offender adequately, to satisfy natural justice and to deter future offending by them and others' (ibid.:47). Community-based penalties needed to be sufficiently harsh and visible so as to constitute a deterrent and be sufficiently strictly enforced to reduce non-compliance. Furthermore, the work required of offenders on community orders needed to be tough and demanding with tight enforcement constituting an aspect of punishment. The second priority was reparation. This meant that 'all offenders should be expected to make amends for their crime to victims, by financial means or through restorative justice approaches' (ibid.:48). Restoration was seen to be an important part of community sentences via community payback and the payment of fines. But only 'by accepting punishment and making amends' (ibid.:48) does the offender deserve the opportunity of rehabilitation. Rehabilitation, though apparently primary in the politics-speak catchphrase, represented only a tertiary priority. Deserving offenders gain 'the right to support and guidance to address their offending behaviour', learning how to 'take responsibility for living a crime-free life' (ibid: 47). What this amounted to was help with multiple issues but particularly drug and alcohol dependency which, in turn, is linked with stiffening the existing drug rehabilitation requirements under the community order as well as linking this with 'contracting with private and third sector organizations to operate the treatment programmes and paying them by results' (ibid.:14–15). Rehabilitation is also closely linked to work in that offenders on community orders need to be compelled to undertake work and disciplined to seek and retain paid employment.

Government policy on community sentences from 2010 has been subsequently shaped by three pairs of government papers (MOJ December 2010 and June 2011a: MOJ March 2012a and October 2012: MOJ January 2013a and May 2013) and three acts of Parliament—LASPO Act, 2012; the Crime and Courts Act, 2013; and the Rehabilitation of Offenders Act, 2014.

The first round of government papers on the matter (MOJ December 2010, June 2011a) again placed punishment at the top of the agenda with community sentences needing to consist of 'robust and demanding punishments' (MOJ 2010:9). The notion of protecting the public was seen to apply only negatively to community penalties in that risk concerns would generally preclude the use of such penalties for those who have committed a serious offence and/or pose a threat, preserving the status of the penalties as separate from and not alternatives to custody.

Various concrete proposals were made. Firstly, that community payback should be made more intensive and immediate, placing 'hard work for offenders …at the heart of our plans' (MOJ December 2010:9). This would mean that offenders would be speedily inducted in the tough discipline of regular working hours. It was also proposed that community payback would build on approaches which allow communities to influence the type of work completed by offenders. Secondly, curfew orders monitored by electronic tagging would be used more often (as indicated in Chap. 4) and would be made tougher by extending the curfew period and the overall duration of the order. Consideration was also given to developing electronic monitoring using global positioning systems (GPS) (ibid.:17–18). Thirdly, not only would a greater use of compensation orders be encouraged as noted in Chap. 4, but specific proposals were put forward regarding fines including making 'more punitive use of powers to seize the assets of offenders' (ibid.:20). Finally, as also noted in Chap. 4, a new prohibition was put forward consisting of 'imposing restrictions on overseas travel' (ibid.:62).

Reparation is the next priority of the consultation papers. This was seen as not only having a rationale in itself (by paying back for the harm done), but also contributing to punishment (by having to do hard unpaid work and/or pay a fine) and to rehabilitation (as it may contribute to realizing the consequences of actions) and was to be effected through a number of changes: local communities were to be seen to benefit directly from the harder work of offenders engaged in community payback; the victim surcharge to types of sentence other than the fine and increasing the amount levied (the victim surcharge was already levied on fines at the rate of an additional £15); increased use of the fine together with better

fine enforcement; and 'increasing the range and availability of restorative justice approaches to support reparation' (ibid.:22).

Some concern for rehabilitation was evident, even if a tertiary consideration. Rehabilitating offenders was seen to need an integrated approach to local services (including probation and police), as well as getting drug-dependent offenders off drugs in the community; helping to get offenders into jobs (making them eligible for entry into the Work Programme and by skill development) so that they could pay their own way and enabling access to accommodation. The provision of an intensive community-based treatment pilot was proposed.

Part of the move to rehabilitation was to be based on the reform of the Rehabilitation of Offenders Act 1974, which created 'unnecessary obstacles to successful rehabilitation' (ibid:33). The consultation paper suggested that though the aims of this act were sound—to remove barriers to rehabilitation by allowing offenders who have not been reconvicted of an offence over a specified time period, to normally treat them as 'spent' and to not have to declare them when, for example, applying for a job—it was fundamentally flawed. The criticisms made of the act suggested that it was inconsistent with contemporary views about sentencing and rehabilitation because the rehabilitation periods were too long, the threshold at which a sentence never becomes spent (30 months) and were too low given that sentencing lengths had increased, and an ever-growing number of occupations were exempted from the Act. The Act was also criticized as being overly complex and confusing. The Coalition Government proposed broadening the scope of the Act so that it covered all offenders who received a determinate sentence, reducing the length of rehabilitation periods and modernizing and simplifying the language of the legislation.

A final part of the move to rehabilitation was signalled by the consultation paper proposing working with the Department of Health and the Home Office to pilot and roll out liaison and diversion services for mentally ill offenders. The paper also suggested mental health training for criminal justice personnel as well as allowing more discretion to probation officers to deal with the non-compliance of those offenders on community orders who exhibited mental health or drug/alcohol issues. Perhaps some clarification of terms is necessary before proceeding. Putting aside the problems of defining mental disorder, some thought needs to be

given to the notion of diversion and liaison. The Bradley Report (2009) provided a broad definition which is useful here: 'Diversion is a process whereby people are assessed and their needs identified as early as possible in the offender pathway (including prevention and early intervention), informing subsequent decisions about where an individual is best placed to receive treatment, taking into account public safety, safety of the individual and punishment of an offence' (Bradley 2009:16).

With those who are seen to present the symptoms of mental illness, diversion can mean movement away from the criminal justice system to health care, but it can also mean movement within the criminal justice system—from the prison to a community-based intervention, for example. Where diversion involves something more than simply movement from one service to another, but also involves support and information sharing then this is usually referred to as liaison and since the two go hand in hand they are usually connected together. Thus 'the right way to improve public safety and reduce the number of victims is to reform offenders to reduce reoffending. This means offenders must tackle the problems which underlie their criminal activity, but which also means they will be caught quickly and punished if they commit further crimes' (MOJ December 2010:10).

Both MOJ papers made some effort to address the issue of vulnerable offenders. It was broadly accepted that women offenders present 'a different profile of risks and needs', that they tended 'to be convicted for less serious offences' and that they tended 'to have multiple and therefore more complex problems related to their offending' connected to mental health and/or drug and/or alcohol problems (ibid.:30). The earlier MOJ paper also went on to suggest that this necessitated an emphasis on rehabilitation in the community, tackling these various problems, possibly combined with 'education and interventions aimed at helping women offenders come to terms with issues such as physical and sexual abuse' (ibid.:31). There was also a need to use intensive community-based programmes to divert women away from custody and a need to tackle domestic violence.

The next set of papers (MOJ March 2012a, October 2012) more specifically addressed the issue of effective community sentences and offered proposals 'in the context of affordability' (March 2012a:7). They offered

not only further development of existing ideas but a 'step change' in the programme. Here punishment became the dominant theme, via the rhetorical gymnastics of the mantra being established by repetition that punitive methods can also rehabilitate. The later paper went further and questioned that there was a 'choice between punishment or rehabilitation'; indeed, it asserted that this was 'a false division' and 'any sensible system needs both' and 'stronger, more sensible community sentences will deliver better punishment and better rehabilitation' (MOJ October 2012:5).

The key additional proposals made are fivefold, nearly all of which are punitive. Firstly, a need is identified to 'ensure that there is a clear punitive element in every community order' in order to act as a desert-based punishment as well as enabling 'wrongdoers go straight' (MOJ March 2012a:2). For example, astonishingly, the minister in the foreword exemplifies the 'going straight' claim by stating that extending the use of curfews and tagging will ensure that offenders are kept off the street at night and 'contribute to reform of the offender—by ensuring that offenders are home before appointments to access drug treatment, or do Community Payback' (ibid.: 2). Reforms clearly rooted in rehabilitation were limited—one was the need to 'tackle alcohol-related crime' (ibid.: 7) by means of alcohol abstinence and monitoring requirements for community and SSOs.

Secondly, there is a promise to 'explore the creation of a robust and intensive punitive community disposal' (MOJ March 2012a:1) for higher tariff offenders involving intensive community payback and 'significant restrictions on liberty through an electronically monitored curfew, exclusion, and a foreign travel ban; a driving ban; and a fine' (MOJ March 2012a: 9) and the paper notes that the proposal here is not unlike the Intensive Alternative to Custody (IAC) pilots already being run in some areas 'but should include a core of punitive elements' (MOJ March 2012a:10). The later paper did not pursue the notion of an IAC with a core of punitive elements, leaving the matter to judicial discretion (MOJ October 2012:6). The extension of electronic monitoring to the surveillance of the location of the offender using GPS is noted in the latter paper enforcing the curfew and also preventing entry into banned areas even in the day.

Thirdly, the government expressed the need to encourage 'a more creative use of financial penalties alongside community orders, ensuring that they are set at the right level and effectively enforced' (MOJ March 2012a:2). The papers also noted the need for a general tightening up on compliance and proposed that in addition to being able to issue a warning or to return the offender to court for breach proceedings, offender managers should be able to impose a fine without reference to a court largely because this will provide an immediate and cheap response. The later paper abandons this proposal. Both papers also propose tightening up fine enforcement in order to restore court confidence in the measures and this was given more developed treatment in the second paper of the pair by measures to seize the assets of offenders as well as make income and Her Majesty's Revenue and Customs (HMRC) records available to courts to enable them to assess fine levels and, where default on payment occurs, what action to take. These steps are seen as ways of making financial penalties 'really bite' (MOJ October 2012:4).

Fourthly, the latter paper notes that restorative justice can improve victim satisfaction and help offenders realize the consequences of their wrongdoing. A change in the law was proposed to support much greater use of restorative pre-sentence measures. It was also noted that the £5000 cap on compensation orders would be lifted in the Magistrates' Courts.

Fifthly, it was noted that arrangements for women offenders warrant a separate paper (by the end of 2012) (MOJ October 2012:18) and the paper then goes on to repeat that women can have a different profile of risks and needs than men. The paper states that the MOJ was committed to taking these different needs into account but does so in a more qualified manner. Such needs will be taken into account where appropriate ensuring that there is 'suitable provision in the community to support the use of community orders that can help to address factors associated with women's offending, such as mental health; substance misuse; domestic and sexual violence; housing, finance and employment needs' (Ibid.:9). The promised paper entitled 'Statistics on Women and the Criminal Justice System' was published in late 2012 (MOJ November 2012) and demonstrated that women offenders did indeed have a very different profile to men in 2011, but left others to draw out policy implications.

By the time of the second paper in the set, in October 2012, the LASPO Act 2012 had increased the daily duration of the curfew whilst also increasing the maximum length of curfew orders overall (Section 71). Section 76 made provision for an alcohol and monitoring requirement of a community order, allowing for offenders to be ordered to abstain from consuming alcohol for a specified period (maximum period 120 days), and made provision for the testing that the requirements were being complied with. The Act made the provision to improve breach arrangements, by giving courts a wider range of options to respond to breach and encourage compliance. This included the availability of a fine of up to £2500 as a penalty for breach (of an SSO, Section 69) and removed the limit on maximum fines on summary conviction (Section 85). Section 139 of LASPO also made two key changes to the Rehabilitation of Offenders Act 1974 which came into force in March 2014. The first change extended the scope of the Act to cover custodial sentences of up to 48 months (previously limited to sentences over 30 months), and the second change shortened the length of some of the rehabilitation periods for different prison sentence lengths as well as for community sentences. For example, the 'rehabilitation period' for prison sentences of between 6 and 30 months was reduced from 10 to 4 years and for fines and other community sentences was reduced from 5 years to 1 year. The convictions of prisoners sentenced to more than 48 months, however, remained never spent.

Changes to community payback were treated by the MOJ as operational matters not requiring legislation. The MOJ had hoped that the changes to community payback could be introduced at the same time as a major competition bidding process was engaged to outsource provision in 2011 (as noted above), and the first community payback contract was awarded to Serco/London Probation Trust in June 2012, with the new regime beginning in October 2012. However, the roll-out of competition bidding to other parts of the country was delayed and, in order to implement intensive community payback and ensure consistency in sentence delivery, NOMS produced Probation Instruction 17/2012 which required existing probation trusts to implement the revised specification by April 2013 (NOMS Probation Instruction November 2012). A number of changes were introduced by this instruction: all those start-

ing community payback should do so within 1 week of the court's decision; unemployed offenders sentenced to community payback should be enrolled on intensive schemes, working for a minimum of 28 hours per week; and all those subject to community payback should experience longer working days.

Though primarily about the organization of the new probation service and the new community-based offender service providers, the last pair of papers (MOJ January 2013a, May 2013) dealt with the orientation of community sentences and licence arrangements in three ways, introducing what is referred to as another 'step change in the way we rehabilitate the offender (which) will lead to year-on-year reductions in reoffending' (MOJ May 2013:4). First, priority goes to establishing 'a tough but intelligent Criminal Justice System that … punishes people properly when they break the law' (January 2013a:5) and a clear tendency to transmute rehabilitation into what works to reduce reoffending. As long as the new outsourced providers deliver the sentence of the court they 'will be free to utilize other interventions aimed at reducing reoffending' using 'greater flexibility' (January 2013a:163) and the minister specifically states, 'I want to give the front-line professionals the flexibility and resources to innovate and do what works' (May 2013:3). Community sentence providers will 'deliver activities which *they judge* will be most effective to reform offenders. This *might* include signposting offenders to accommodation, education, or health services or offering a mentor' (January 2013a:11). The TTG providers will 'offer a resettlement service for all offenders in custody before their release …(and)…this *may* include support in finding accommodation, family support, mentoring and financial advice (May 2013:10) (author's emphasis). Beyond following their interpretation of the court order, TTG providers will do what works to maximize PBR. Government need no longer concern itself with the minutiae of operation or orientation. Government is also distanced from failure. Nevertheless, some emphasis remains on a system that 'supports (offenders)… to get their lives back on track, so they don't commit crime again in the future' (MOJ January 2013a:5) by focusing on what are referred to as 'broader life management issues' and these are exemplified by reference to 'helping with finding accommodation and employment, accessing training and other public services, addressing offender attitudes, think-

ing and behaviour, and connecting to mental health, drug and alcohol treatment programmes' (January 2013a:17).

Secondly, the step change is not so much an operationalization of the rehabilitation revolution but an implementation of a revolution in the delivery of rehabilitation, that is, a revolution, as noted in the first section of this chapter, in the delivery of licence arrangements and community orders, by means of outsourcing and PBR. Thirdly, despite the claims in previous reports regarding women offenders, particularly that the specific needs and priorities relevant to female offenders should be recognized and addressed, this is now set in the context of a PBR approach based on national contract bidding. Despite the results of consultation after the January (2013a) paper which suggested that there was a need to ensure that providers are commissioned to deliver services tailored to the specific needs of women offenders, 'it remains our intention to commission all rehabilitation services across geographical areas under a single contract rather than competing services separately for different offender cohorts' on the grounds that this will 'minimize duplication across the system, and deliver services at reduced cost' (MOJ May 2013:15). Instead, government will, presumably at the bidding stage, 'expect providers to be able to articulate and respond to the particular needs of women offenders *where these* differ from men and *may be* more complex' (May 2013:16). This, they go on to suggest, will be strengthened by the NOMS review of the women's custodial estate due for the summer of 2013 and 'our plans to open up provision to a diverse market' (MOJ May 2013:16). It is also noted that the move to licence conditions for short sentence prisoners will benefit women as they are overrepresented in this group, though it does not make reference to the need to avoid custodial sentences for non-violent women offenders recommended by the Corston Report (2007), in the first place.

The second report in the set was published 1 month after the Crime and Courts Act 2013 became law. This Act made a number of changes to the requirements of the community order (all contained in Section 44 and Schedule 16). They included introducing a requirement on sentencers to include one punitive element in every community order (Part1), allowing a deferral of sentence for restorative justice interventions (Part 2), the removal of the financial limits on compensation orders for adults

(Part 3), extending the definition of electronic monitoring requirement to enable the courts to impose the monitoring of an offender's whereabouts as a requirement on its own as well as for monitoring compliance with other requirements (Part 4) and allowing for the electronic monitoring of those on SSOs as a stand-alone able to utilize curfew by tagging, but also tracking (Part 4), tightening up of breach procedures with regard to community sentences (Part 5) and allowing courts to access HMRC and other financial records of offenders (Part 6). The Act effected a number of the proposals made over the last 2 years about fine enforcement including placing fine enforcement with private agencies and granting powers to make defaulters contribute to the costs of collection (Section 26).

The reform of the rationale and practice of community-based offender services drew much comment from a variety of sources including the Prison Reform Trust (July 2010, March 2011, June 2012a and b, February 2013a and b), the HCJSC (2011/12, 2013), the Howard League for Penal Reform Submission to Justice Committee on Probation Services (2011) and the Criminal Justice Alliance (2011). The overall thrust of the comments can be summarized in three main areas, though the overwhelming view was that the renewed emphasis on community sentences was welcome.

Firstly, most assessments of the government-planned reforms welcomed the emphasis on rehabilitation but also recognized the need for an appropriate balance between punishment, reparation and rehabilitation in community sentences (Prison Reform Trust July 2010, March 2011; Criminal Justice Alliance 2011; Howard League for Penal Reform 2011). But as time went on questions were raised about whether an appropriate balance had been achieved and that punishment was gaining ascendancy over rehabilitation and reparation. Concerns were also raised that punitive measures had the potential for counteracting the gains achieved through rehabilitation, the Coalition Government's rhetorical gymnastics equating punishment and rehabilitation notwithstanding.

There was a broad welcome for many of the rehabilitation-based measures including the renewed emphasis on community penalties generally, the reform of the Rehabilitation of Offenders Act 1974, a more integrated approach to offender management, diversion schemes for mentally ill offenders, attempting to reduce the barriers to the rehabilitation caused

by worklessness, mental health and drug issues. But many thought that the proposals did not go far enough.

Two examples are worthy of consideration. The reform of the Rehabilitation of Offenders Act 1974 was widely seen as justified because it would assist offenders to gain training and employment and improve their chances of not reoffending. Existing evidence (May et al. 2008:6) suggested that there are clear differential reoffending rates for those released from prison who have (43%) and who do not have (74%) problems with accommodation and employment. But the Prison Reform Trust suggested that there was scope to go much further by incentivizing employers to take on ex-offenders and the Criminal Justice Alliance (2011) suggested the provision of employment mentors for offenders. Indeed, the Prison Reform Trust argued that there was a need to treat this matter in the broader context of the whole 'financial exclusion' (Prison Reform Trust July 2010:5) of offenders, which needed to be dealt with in a holistic fashion following the recommendations of the All-Party Penal Affairs Group in 2010. Stacey (April 2015, July 2015) suggests that, on the basis of a comparison of practice in England and Wales with France, Spain and Sweden, on this matter, England and Wales tends to view 'criminal' as a master status which cannot be shaken off, even after the ORA, 'regardless of what they go on to achieve in their lives' (Stacey July 2015:18).

The second example concerns the move to an integrated approach to offender management. Again, this was broadly welcomed. But the Prison Reform Trust argued that 'government policy should explicitly recognize the importance of health as a partner of probation' (March 2011:2). Furthermore, it was felt that whilst attempting to reduce the barriers to rehabilitation a more integrated and systematic approach was possible than that suggested. For example, the proposal to deal with drug use, including alcohol, by offenders was appropriate but there was a need for 'a high level strategic approach across a number of departments led by health and justice' (March 2011:2).

Although there was recognition of the need to balance rehabilitation with punishment and reparation, there was much criticism of the growing ascendancy of punishment and of the relative neglect of reparation. The Prison Reform Trust specifically criticized the move to impose a duty on sentencers to impose at least one punitive requirement for all com-

munity orders on the grounds that the balance of punishment, reparation and rehabilitation should not be decided by compulsion for two reasons: firstly, that it could undermine rather than increase the confidence of the courts and the public in community penalties as it might stimulate further breaches of the orders, especially for those with clear obstacles to reducing reoffending (e.g., those who are drug dependent or have mental health or learning disabilities); and secondly, that such a balance is a proper matter for the courts as advised by the Sentencing Council and the particular circumstances of the case, with Sentencing Council guidelines needing to show cognizance of the support needs of offenders, thus preventing any unnecessary escalation of penalties (Prison Reform Trust June 2012a). In a similar vein they welcomed the move to extend the IAC because of their demonstrated value particularly for young adult offenders.

The Prison Reform Trust (June 2012a) indicated that it accepted that electronic monitoring could offer a robust and appropriate sanction which could avoid the disruptive effects of imprisonment 'but its use must be carefully monitored and not replace the importance of face to face contact with probation' (June 2012a:2). Two issues are noted regarding curfew orders surveilled by electronic monitoring: firstly, that they are too often imposed as a lone sanction, not as part of a plan to reduce reoffending, and that both enforcement thresholds and information are far from being without difficulties. The Criminal Justice Alliance (2011) noted that the use of longer curfew periods (up to 16 hours) needed to be undertaken with care given the possible impact on existing or future employment.

On the reforms to make Community Payback more rigorous and demanding, the Criminal Justice Alliance suggested that these 'focus too narrowly on low-skilled, physically demanding labour' and are unlikely to reduce reoffending as they do not encourage the movement to employment which depends on 'the opportunity to engage with meaningful activity that is centred around the development of skills and experience of real worth' (Criminal Justice Alliance 2011:7). They also fail to improve public confidence in community sentences which depends on achieving a reduction in reoffending. 'Hard work' for offenders may be seen as suitably punitive but is unlikely to help to deal with one of the barriers to rehabilitation and raises questions about its suitability for certain cat-

egories of offender (the older and disabled offender, women with young children).

Similarly, the measures to impose financial burdens on offenders are seen to have a role but concern is expressed about proposals that might 'exacerbate the existing financial exclusion of many offenders, forcing them further into debt and increasing the likelihood of their reoffending' (Prison Reform Trust June 2012a:2) including the seizure of the assets of offenders, as well as increased fines, greater use of higher value compensation orders and the payment for fine recovery costs.

The stance of the Coalition Government on reparation was generally welcomed. However, it was seen to not go far enough in that 'an opportunity exists for an even bolder stance' because 'the current adversarial approach to crime is very expensive and produces a poor return in terms of victim satisfaction and reoffending rates' (Prison Reform Trust March 2011:2) and it is argued that the government needed to be bolder, placing restorative justice at the heart of the justice system as an alternative to formal criminal justice action, as well as a sentence. The advantages of restorative justice are seen to be multiple, not the least that, on the basis of substantial evidence, it works to reduce reoffending (because restorative approaches can 'motivate offenders to engage with the treatment they need to stop offending') (Prison Reform Trust March 2011:13) and satisfy victims. Similarly, restorative justice is not seen as limited to reparation but should also involve victim and offender mediation though for the offender on a voluntary rather than directed basis. Indeed. the Prison Reform Trust suggests that restorative justice may be particularly appropriate for certain types of offenders—'women offenders seem to be particularly receptive to approaches which recognize their prior victimization, yet expect them to repair the harm they have caused others' (Prison Reform Trust March 2011:13). And the Prison Reform Trust argues that 'restorative justice should be placed at the heart of the justice system in youth justice and also increasingly for adults. It should be available as an alternative to formal criminal justice action, as well as at each stage of the criminal justice process. The form the restorative approach would take would be determined by the willingness of the victim and the offender to participate, the nature of the offence and associated risk factors' (Prison Reform Trust March 2011:2).

Secondly, though it was recognized that there was a need to tighten up on compliance with community sentences, making them more immediate in the case of community payback and enforcing completion, and perhaps increasing court and public confidence in the measures, doubts were expressed about the possible consequences of punitive and inflexible procedures. The Prison Reform Trust (July 2010) and the Criminal Justice Alliance (2011) argued for more, not less, flexibility in how offenders on community orders are managed, so as not to impose impossible burdens on offenders and consequently precipitating escalation, as well as avoiding pushing the orders in a more punitive direction.

Thirdly, doubts were raised as to the extent to which the changes in the orientation of community sentences impacted on vulnerable groups including those with learning difficulties, the mentally ill, women, foreign national prisoners, young adults, members of ethnic minorities and older people. Clearly, an agenda rooted in a rehabilitation revolution could be expected to have recognized that changing offenders meant addressing their needs. To illustrate, two examples will be considered: mentally ill offenders and women offenders.

As noted, the Coalition Government committed itself to funding and rolling out diversion and liaison services nationally by 2014 so that they would be accessible to all courts and police custody centres. Two methods have been used: the Department of Health set up a national pathfinder programme involving adult liaison and diversion schemes and, in addition, this programme included piloting the transfer of police custody health care to the NHS across ten sites. A commitment to the evaluation of the schemes was also made.

The Criminal Justice Alliance (2011:20) agreed with the need, recognizing that a high proportion of prisoners suffer from mental health. Indeed, it suggests that in 'Singleton et al.'s landmark study only one in ten prisoners showed no evidence of any of the five disorders (personality disorder, psychosis, neurosis, alcohol misuse and drug dependence) considered in the survey.' But the Criminal Justice Alliance pointed out that before the Coalition Government there were already '100 mental health liaison and diversion schemes operating in courts and police stations, with varying levels of quality and funding' (Criminal Justice Alliance 2011:20) and the real task was to transfer existing good practice in the

form of national guidance on the establishment and operation of mental health liaison and diversion schemes, detailing what constitutes a 'good' scheme and what the benefits are of a successful scheme. However, there was little evidence that this had been done at least by 2011, as Senior et al. (2011:4) noted that:

'We concluded that liaison and diversion schemes provide a service for clients who are currently not always well served by mainstream health and social services, but there appear to be opportunities for service improvement through a standardization of approach; a national model of practice; improved data collection; and more consideration to the conduct of ongoing evaluations into service impact and outcomes.'

The transfer of police custody health care to the NHS was undertaken following a pilot in Dorset (de Viggiani et al. 2010). The pilot was based on a national policy framework, articulated by the Bradley Report (2009) and oriented towards a pathway model of criminal justice health and social care management. Under this model, primary care trusts have a central role in developing and governing health and social care services across the criminal justice system to build good quality, integrated health and social care services. However, the pilot revealed that the provision of integrated services and the operation of partnerships raises significant issues connected to 'melding professional and organizational cultures' and the redirection of funding 'on a large and potentially expanding scale from police budgets (Home Office) to primary care trusts with significant oversight responsibilities for the Ministry of Justice' (de Viggiani et al. 2010:47).

A national programme commenced in April 2011 inviting police forces to enter into a 2-year project based on a voluntary partnership with the Department of Health (now NHS England area team) commissioners. The aim of the voluntary partnership was to establish a position of readiness to transfer the commissioning responsibility for all police custodial health care. The first year saw 10 police forces join up followed by 23 more in year 2 and the final tranche saw the remaining English forces, including also the British Transport Police and UK Border Force join the programme, totalling 40 police forces across England. Up to 2015, however, the arrangements continued to be voluntary pending appropriate legislation (NHS Commissioning Website 2015).

On 6 January 2014 the Department of Health and the Home Office announced extra money (£25 million) in ten pilot areas for mental health nurses and other mental health professionals to work with police stations and courts so that people with mental health and substance misuse problems get the right treatment as quickly as possible in order to reduce reoffending. This meant that people with mental health illnesses, substance misuse problems and learning disabilities suspected of committing an offence and who came into contact with the police would have an assessment of their health needs, including mental health, which would be shared with police and the courts to ensure that decisions were made about charging and sentencing which took account of an individual's health needs and would enable treatment to be provided more, quickly reducing reoffending. The website states that although pilots would be evaluated the results were not due until 2017 (Government UK Website Press Release January 2014).

In January 2014, the Home Secretary commissioned Her Majesty's Inspectorate of Constabulary (HMIC) to conduct a thematic inspection on the welfare of vulnerable people in police custody. The report noted that the pilot schemes referred to above had been extended from 10 to 12 areas and that the findings of the pilots on the first 10 will be available in August 2015, later delayed to the end of 2015 (HMIC March 2015:40, NHS England Website September 2015) and the scheme will be rolled out to cover 50% of the population of England with similar arrangements for Wales in 2015/2016 (Home Office October 2014:5). The HMIC report of 2014 made a number of observations pertinent to assessing the effectiveness of diversion: firstly, concern was expressed 'that a number of police officers were unaware of the options open to them at the point of arrest such as … diversion schemes' (ibid:60); secondly, 'though some progress had been made on developing shared policies, concordats and guidance amongst agencies nationally and locally' significant change 'was frustrated by the absence of a single partnership forum taking ownership of and responsibility for services in police custody, and diversion away from custody, for vulnerable …adults' (ibid.:112); thirdly, there was still a need to 'promote a joint, multi-agency approach to training for frontline staff, including those working in custody, on practical ways to support diversion from custody, vulnerability assessment and risk

management' (ibid.:125); and, finally, there was a need to ensure that in police custody there was 'timely access to healthcare, and …diversion services' (ibid.:130).

The second example concerns women offenders. On this matter the Corston enquiry was commissioned by the previous government and reported in 2007, with the then government accepting the majority of its recommendations. This meant that by 2010, when the Coalition Government took office, a number of principles and practices relevant to community sentences were in place. These included, firstly, the articulation of a national service framework for women offenders providing a management guide for working with women offenders specifically intended to improve NOMS' and probation's response to women; secondly, support for the Women Awareness Staff (training) Programme; thirdly, extra funding to invest in provisions for women offenders in the community (£15.6 million was made available in 2009 for setting up one-stop shops offering support and providing courts with a strengthened community sentence which could act as an alternative to custody with 44 such facilities being opened [Criminal Justice Alliance 2011] and £5 million for keeping women out of custody who had high need levels); fourthly, the inclusion of women offenders as a specific item in performance monitoring; and, finally, the appointment of women's champions.

The Coalition Government's impact here is assessed using just two indicators: the career of one-stop community shops for and the strategic delivery of services to women offenders. The idea of one-stop shops derived from the Corston Report and was based on an extrapolation of the Together Women Programme. The proposal was to set up a larger network of one-stop community centres for women who offend or are at risk of offending (the existing centres at Asha and Calderdale were specifically mentioned as good examples). The centres would provide for local needs and cater for all women. Their role would be to act as referral centres (from a variety of agencies) and could also be used for court and police diversion, as part of community orders, and for delivery of probation and other programmes (Radcliffe et al. 2013); £15.6 million was made available for a 2-year funding of such centres in 2009. However, the Criminal Justice Alliance (2011) expressed two concerns about the centres after the Coalition Government came to power: firstly,

doubts were expressed about whether the funding for the centres would be continued after 2011; and, secondly, the Alliance considered that the PBR method proposed by the Coalition would not fit the scale and operation of the one-stop shops (Criminal Justice Alliance 2011:14).

Research by Radcliffe and others (2013:13) found that although the 2009 funding had been extended by the MOJ in 2011 for a further 2 years for 31 such projects and that funding was to continue to be ring-fenced, it would be the decision of local probation services and NOMS how the funding would be used, creating considerable uncertainty, which was only exacerbated by the reorganization of probation, the fervour for outsourcing and PBR that came to dominate policy in this area from 2013 onwards. However, although part of the funding of one-stop shops was continued into 2013–14 (NAO 2013:9), the NAO report went on to make it clear that funding delays and uncertainty had created 'chaos' in the sector, detrimentally affecting service provision. Furthermore, the increasing emphasis on PBR (as measured by reduced reoffending), usually by methods which fail properly to take account of distance travelled, had disadvantaged such centres and had resulted in the withdrawal of provision for those at risk of offending.

A number of changes to the strategic management of women offenders were inherited by the Coalition Government from Labour in 2010. These included a cross-departmental criminal justice women's unit to manage and coordinate the work on Corston across all relevant departments at an official level, an Inter-Ministerial Sub-Group to the Inter-Ministerial Group (IMG) on Reducing Reoffending established to coordinate the implementation of the commitments made in the government's response to the Corston Report, the appointment of a ministerial champion for women and criminal justice and the creation of a national service framework for women offenders and an offender management guide to working with women in order to improve NOMS and probation's response and to ensure that necessary changes were made to improve interventions and services for women in the community (All Party Penal Affairs Group 2010:4).

However, the HCJSC (2013:7) noted that 'much of the evidence we received claimed that the current Government had accorded less priority to fulfilling the Corston agenda, having dismantled this governance infrastructure.' The cross-departmental criminal justice women's unit set

up in 2009 was abandoned in March 2011, the Inter-Ministerial Sub-Group to the IMG on Reducing Reoffending was 'disbanded' after the general election and the ministerial champion for women and criminal justice was a short-lived role with the Coalition Government abandoning it when they came to power in 2010 (HCJSC 2013:13).

Some advances were noted by the HCJSC as having been achieved. Firstly, in September 2012 the Secretary of State for Justice decided to separate responsibility for women in the criminal justice system from men, recognizing that there are different issues to address, and appointed Helen Grant as Parliamentary Undersecretary of State for Justice, Women and Equalities. Secondly, slow progress had been made towards the publication of government strategic priorities for women offenders. In March 2012 in the House of Lords Baroness Corston drew attention to the lack of a written strategy for female offenders developed by the Coalition Government. According to the Justice Committee, 'Ministers responded by stating that a strategic document on the priorities for women would be published 'in due course', which was later declared to be expected in December 2012' but this was delayed by the appointment of a new ministerial team in September 2012 and the subsequent acceleration of the introduction of PBR such that 'near the end of our inquiry there was no specific strategy for women offenders or those at risk of offending.' However, the realigned strategy taking into account the 'rehabilitation revolution' was published in March 2013 (HCJSC 2013:15–16).

However, the HCJSC also noted that there have been 'a number of relevant developments which have occurred since we announced our inquiry, including the Government's appointment of a Ministerial champion; publication of its strategic priorities for women offenders; and embarkation upon an extensive overhaul of the provision of offender management and rehabilitative services' (HCJSC 2013:13).

The final matter dealt with here as part of the move to more strategic treatment of issues connected to women offenders concerned the need for an extensive overhaul of the provision of offender management and rehabilitative services in line with the first recommendation of the Corston Report, namely, that 'every agency within the criminal justice system must prioritize and accelerate preparations to implement the gender equality duty and radically transform the way they deliver services for

women' (Corston Report 2007:3). In evidence to the Justice Committee (2013:17) Baroness Corston indicated the importance of this duty: 'It gave a legislative backstop for the argument about gender specific services (and)… led to the National Service Framework for Women Offenders and the Gender Specific Standards for Women Prisoners.'

The Equality Act of April 2010 has subsequently replaced the gender equality duty with a broader equality duty (seen as a retrograde step by some—see evidence provided by 'Wish' to the HCJSC [2013:17]), and this 'seeks to encourage public bodies to understand how different people will be affected by their activities so that policies and services are appropriate and accessible to all, and meet different people's needs' (HCJSC 2013:17). In response, NOMS states that 'under the previous public sector equality duties (for race, disability and gender), public bodies occasionally took unnecessary, disproportionate or even counterproductive action in the name of equality. However, with the new equality duty this approach has changed so that the focus is on performance and outcomes, not process' (NOMS 2012:8).

The overall position on these matters taken by the Justice Select Committee in 2013 (19–20) was summed up when they wrote

> It is regrettable that the Coalition Government appears not to have learnt from the experience of its predecessor that strong ministerial leadership across departmental boundaries is essential to continue to make progress, with the result that in its first two years there was a hiatus in efforts to make headway on implementing the important recommendations made by Baroness Corston in 2007. It is clear that the matter of female offending too easily fails to get priority in the face of other competing issues. The lack of central drive has resulted in outsiders having difficulty determining Ministry of Justice policy and direction, and insiders detecting a dampening in mood and enthusiasm, leaving an impression that for this Government it was not a sufficiently high priority.

They go on to suggest that only clear leadership and broad support from other ministers will make up for lost time and remedy the unfortunate situation whereby the equality duty in relation to gender has not been used robustly to hold providers to account. The report points to other lost opportunities namely the possibility of obtaining positive impacts by encouraging local commissioners of service to provide gender-specific

services which attempt to ameliorate the underlying causes of women's offending, and the MOJ and NOMS allowing gender issues to inform broader policy initiatives. It ends its summation by suggesting:

> For too long, while the needs of female offenders have been recognized as different from those of males, the criminal justice system generally and the National Offender Management Service in particular have struggled to reflect these differences fully in the services it provides. A key lesson still to be learnt is that tackling women's offending is not just a matter for the justice system (Justice Select Committee 2013:19–20).

The critical view of the HCJSC on overall strategic policy is echoed by many groups. The Prison Reform Trust (March 2011:2) expressed the view that the early consultation paper (MOJ December 2010) needed to pay more attention to the recommendations of Baroness Corston's review, particularly that sentences in the community should be the norm for women convicted of non-violent offences, that alternatives to custody should be designed to allow for the particular needs of women (e.g., those with childcare responsibilities) and that the particular support needs of many women offenders should be recognized and met. In particular this should mean restorative justice approaches being used for women. The Prison Reform Trust (June 2012a:28) went on to recognize some achievements but, nevertheless, with regard to community-based offender services suggested a number of recommendations based on the findings of the Women's Justice Taskforce, set up by the Prison Reform Trust and Bromley Trust in 2010 and reporting in 2011. These included allowing ring-fenced, sustainable funding for women's community-based services to allow NOMS a separate commissioning round that would integrate with health and local authority support. They also included an emphasis on women's needs in the new national network of mental health and learning disability diversion schemes in police stations and courts and ensuring that probation trusts, local police authorities and police and crime commissioners work effectively within national commissioning arrangements to enable a more coordinated, multi-disciplinary approach to working with women offenders. They also recommended that the development of a PBR model taking account of the particular needs and characteristics of women, a review of the women's prison estate, the accelerated closure of women's prisons with the money saved being reinvested

in support services for women offenders and vulnerable women in the community, women's community provision being developed beyond the voluntary organizations that were originally supported to improve availability across the country. Finally, they recommended making women's services an integral part of all future reducing reoffending contracts. In the Taskforce's view all providers should develop interventions tailored to the needs of vulnerable women, either directly or through the subcontracting of specific women's services, and should promote further research on the effectiveness of women's community provision.

The Prison Reform Trust Report (February 2013b) devoted specifically to women offenders urged the Coalition Government to develop and publish a strategy for women offenders which designated clear and specific leadership at the national and local levels, giving women offenders proper priority in the allocation of resources, and set down requirements for the provision of women-only services with appropriate child care. The Prison Reform Trust also expressed concern that the outsourcing of providers for supervising both licence arrangements and community orders would have disadvantageous effects for vulnerable offenders. Firstly, outsourcing could lead to a dislocation of service and 'fragmented services often impact adversely on the vulnerable' (Prison Reform Trust June 2013b:7). Secondly, since many vulnerable offenders are also repeat offenders and difficult to manage they felt that the move to outsourcing would mean that many of them would not benefit from a system which was based on 'creaming' the easy to manage offenders and 'parking' the rest (Prison Reform Trust February 2013a).

In commenting on the 'Transforming Rehabilitation' agenda the Prison Reform Trust (February 2013b) offered a number of comments arguing the need to fund community-based women's services during the transition to a new commissioning system or women's access to rehabilitation would be jeopardized; the appointment of a body to provide national oversight of policy and practice for women offenders; the avoidance of large contract package areas as they are likely risk marginalizing women's services, the need for a premium to be paid for working effectively with women in recognition of their multiple and complex needs; the early diversion of women who commit non-violent and minor offences out of the criminal justice system at an early stage; and the need for a coordinated local approach to reducing offending by women.

Overall, an increasing emphasis has been placed on punishment, at the expense of the positive development of rehabilitative and reparative measures. The development of services for mentally ill offenders and women offenders has progressed but at a very slow pace, in comparison with the plans for outsourcing licence arrangements and the management of community orders and the reorganization of licence arrangements, which rendered offenders as sustainable materials for the ideologically inspired action of rolling back the state and the generation of private profit.

Conclusion

This chapter has dealt with three main issues: the outsourcing of licence and community order supervision, the extension of licence requirements to short sentence prisoners and the provision of 'robust and credible' community sentences. We are left to assess whether overall the Coalition Government succeeded by its own standards—protecting the public; punishing and rehabilitating offenders; transparency and accountability; decentralization and austerity—and whether it can be seen to have succeeded according to its critics and the criteria suggested in Chap. 3.

To what extent did the Coalition Government accomplish what it set out to do regarding specific measures and how consistent was the result with the five principles of the consultation paper? There is little doubt that considerable government priority was given to the achievement of the first two main items relating to community-based offender services, in that in less than 2 years the basis for the outsourcing of the supervision of offenders on community orders had been effected, though the full impact of these changes is not yet known at the time of writing. Furthermore, the infrastructure and legal basis for the supervision of all released prisoners on licence was also rapidly established, including the extension of lengthy compulsory licence conditions for short-term prisoners. At the time of writing the impact of these measures has not been established. The progress on the third item, the establishment of robust and credible community penalties, had also been pushed forward at a pace.

But were the principles adhered to? The outsourcing arrangements did draw a line between high- and low-risk offenders retaining MAPPA arrangements largely intact. However, there has been much criticism as

to adequacy of the arrangements to protect the public given the lack of understanding on the non-binary, dynamic character of risk and the lack of continuity of offender management the new arrangements provided. In broader terms if, as stated, one of the primary ways of protecting the public was by reducing reoffending, then the jury must remain out on this issue. There can be little doubt that the changes have placed a much greater emphasis on punishment in the community, but rehabilitation and reparation seem to have suffered and there has remained a stark contrast between the rhetoric and the reality concerning the reform of community-based offender services. Revolutionized or transformed rehabilitation has remained more a matter of words than deeds. The move to PBR seemingly emancipates government from this dilemma by placing an emphasis on reduced reoffending, only leaving outsourced providers to manage those on licence or community orders as they see fit as long as they remain within the terms of the court order and obtain results.

The primary instrument through which the Coalition Government claimed to deliver transparency, accountability and decentralization in community-based offender services was outsourcing and PBR. It is not known what the impact of these reforms will be at this moment, but there are clear fears that outsourcing will only shift the reason for not being held fully accountable to commercial confidentiality and the pattern of contract awards and the ideological commitment to privatization may make many of the providers 'too big/unable to fail'. The organization of the process of bidding at the national level and the pattern of contract awards did little to enhance decentralization, despite the invention of tiers. Time will tell whether those agencies lower down the tier structure obtain a fair deal.

The budget of the MOJ has been reduced in keeping with the demands of austerity, probably mainly by the reduction of the cost of legal aid and prison closures, rather than through the joint impact of cheaper private outsourcers delivering a product which is cheaper in itself and more effective, leading to reduced reoffending and reduced costs.

How are the changes to be judged by reference to wider criteria? The first essential point is there should be honesty about both accomplishing penal policy reform and the kind of impact penal policy alone can realistically have on crime rates. The move to the primacy of punishment

has been made whilst ignoring key evidence and exaggerating the likely impact of punishment alone on reducing reoffending. There is much that either does nothing to ameliorate social marginalization or actually exacerbates it (the emphasis on financial penalties, for example; or the lengthy compulsory licence conditions which will almost certainly set offenders up to fail or the failure to limit court use of short prison sentences). More specifically, the measures in relation to mentally ill offenders have been slow to progress. As for women offenders, the provision of community-based one-stop shops has suffered as a result of the changes discussed here and the strategic lead on women offenders diminished. There is thus little basis for suggesting that the Coalition Government allowed for greater honesty in community orders and licence arrangements or has seriously addressed social marginalization.

Has the penal crisis been alleviated by the changes effected in community-based offender services? Firstly, have the changes introduced in community-based offender services done anything to alleviate the 'crisis of material resources' as set out in Chap. 3. In particular have the changes reduced stretched caseloads and generally eased the resource crisis? There would seem to be little evidence for improvement in either area. Indeed, there has been a material increase in caseloads caused by the requirement to supervise released short-term prisoners on license for 12 months. This, in turn, has stretched resources further at a time of general austerity. The government gamble that the increase in caseload and expense would be compensated for by the reduced reoffending that resulted from such arrangements combined with a PBR approach, remains just that, a gamble, with many factors suggesting the odds are against them, including, for example, the consequences of imposing license requirements over a concerted period on such offenders.

If no improvement in material resources has been produced, have the changes resulted in community-based offender services being seen to have greater legitimacy with offenders, staff including sentencers and the public? It is unlikely that the changes have produced a sense of being treated with more humanity and greater fairness with offenders. Short-term prisoners who would previously have served 50% of their prison sentence (minus any HDC), now, on release are subject to 12 months of requirement-heavy, post-prison supervision. The impact of the changes on pro-

bation staff has meant radical, bitterly resented changes in their terms and conditions of employment (BBC News March 2014a, c). Whether the courts and the public are persuaded by the changes to community orders remains an open question, best assessed when the schemes are fully operational and public knowledge of the changes has increased, though they start from a low base with only 26% of respondents in the CSEW (2013–14) expressing confidence that the probation service was effective at preventing criminals from reoffending (Jansson 2015). The essential changes here—a movement to outsourcing and punishment, undertaken in the name of austerity (though the jury is out on the actual impact)—give little basis for hope that a worthwhile direction has been taken.

Chapter 7 goes on to consider how the penal policy changes introduced by the Coalition Government fit into longer-term patterns and how such longer-term patterns can be explained.

7

Neo-liberalism and Austerity, Outsourcing and Punishment

This chapter summarizes the trends in penal policy promoted by the Coalition Government, relates these trends to broader patterns that have been observed by others and provides a tentative explanation of the identified trends and observed patterns.

The tasks set out for this chapter require a shift in narratives, to the sociology of punishment. This means putting to one side the approaches to penal policy adopted so far, for example, in Chap. 2 when the various justifications for the disposal of convicted defendants were discussed. The notion of 'punishment as a moral problem' (Garland 1991a:115) is useful for conceptual clarification but cannot provide an answer to the questions addressed here. Furthermore, thinking of 'punishment as crime control' (Garland 1991a:115), that is, as only a matter of technical questions concerning its efficacy, needs to be put to one side. Much of the debate and research presented in Chaps. 4, 5 and 6, takes this approach. Again, this is not to dismiss such concerns, as evidence-based penal policy as a response to crime is essential, but it is to recognize that such an approach does not address the issues raised in this chapter.

Punishment may be conceived of as one of the many social institutions that make up society. Social institutions—churches, families, schools,

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universities, factories, the House of Commons, governments—have an internal dynamic and indeed a particular culture. But social institutions cannot be properly understood as isolated islands, but must be seen as part of the broader society in which they are embedded. This should not be understood to mean that institutions of punishment simply only respond to broader external pressures, but that there is mutual interaction between internal penal and external social dynamics. Furthermore, social institutions need to be understood as revealing changing forms and patterns over time, as well as offering a consideration of how such patterns and trends (in both material and meaningful circumstances) affect and are affected by situated actors. This means taking on board penality as a site of possible social oppression, not simply as an administrative apparatus, and recognizing that all of this is influenced by and influences cultural processes.

Before proceeding further it is also important to set out what it is that is at issue here. Chapters 1 and 3 suggested that this book is about the career of the emergent penal policy of the Coalition Government and the practices of the penal institutions insofar as they are influenced by such policy. Penal policy is part of a political process determined by government action and sometimes reaction. It is rooted in a myriad of factors including principles dictated by the ideologies of the parties making up the Coalition as well as the operation of realpolitik based on the relative influence of such parties, the outcomes of conflicts within and between parties within the Coalition in terms of ideology and interest, the calculated interest of the moment and even the longer term, various factors concerned with the strength of opposition within parliament, the assessment of what the public believes (either honestly or expediently), the responses of pressure groups in the penal field (like the Howard League for Penal Reform) and the reactions of penal practitioners during both policy formation and implementation and events as they happen. Government penal policy influences penal practice, though is not necessarily determining of it because, firstly, government actions both reflect and help to form wider views about crime and control which act to set the general operating context of penal practice; secondly, it sets out detailed changes to the practice and procedures of penal institutions concerning the general legal and sentencing framework, and how custodial

institutions and community-based offender services should be organized; and, thirdly, governments can and do control the finances for such institutions and are able to reward approved developments and stifle others.

Trends in Penal Policy Promoted by the Coalition Government: Punishment and Outsourcing

A summary of Coalition Government penal policy, as documented in Chaps. 4, 5 and 6, is provided in Table 7.1. This table takes each of the 21 main items of Coalition Government penal policy and assesses whether, by design and/or effect, they promoted a movement in a specific direction or directions. The terms used here to indicate the directions—punitive, managerialist, rehabilitative and reparative—are defined in Chaps. 2 and 3.

Table 7.1 shows that the Coalition Government 2010–15 has shaped the penal landscape in a more punitive and managerialized form, despite the ostensible emphasis on rehabilitation. Some proposals did favour rehabilitation (e.g., the working prisons agenda) or reparation (changes with regard to OOCDs and financial payments like fines and compensation as well as attaching the earnings of prisoners to pay victims). But the career progression of the proposals was such as to strengthen the punitive (either explicitly enhancing punishment or to do nothing to inhibit existing patterns towards punishment) and the managerialist thrust of policy (the managerialist, austerity-backed drives to reduce the costs of courts, legal aid and the prison estate are notable examples) and to diminish the importance of rehabilitative measures (e.g., the failure of the working prisons agenda).

Reparative measures have had a more variable career gaining some success in certain areas (e.g., compensation orders) but also in some circumstances contributing to punishment by deepening financial marginalization. Managerialist measures seemed to have fared better when associated with a punitive approach (e.g., cuts in legal aid and the drive to make prison more affordable) as opposed to a rehabilitative agenda (e.g., the failure to obtain increased sentencing discounts for guilty pleas).

Table 7.1 The direction of penal policy under the Coalition Government, 2010–15

Penal policy item	Nature of intended impact: punitive, rehabilitative, managerialist and reparative	Accomplished, partially accomplished or not accomplished **Net impact**	Referred to in
1. Create a simpler sentencing framework	Managerialist and punitive	Partially accomplished **Did not inhibit existing punitive trend**	Chapter 4
2. Prevent the proliferation of unnecessary new criminal offences	Managerialist	Not accomplished **Not punitive by intent, but because not achieved, did not inhibit existing punitive trend**	Chapter 4
3. Increase the sentencing discount on guilty pleas	Managerialist and rehabilitative	Not accomplished **Might have been counterpunitive but was rapidly abandoned, did not inhibit existing punitive trend**	Chapter 4
4. Reform criminal legal aid	Managerialist and punitive	Begun later, on target **Managerialist in intent, but punitive and managerialist in effect, directly adding to exclusion and punitiveness**	Chapter 4
5. Court reforms	Managerialist and punitive	Begun later, on target **Managerialist but with a punitive sting**	Chapter 4
6. Make the custodial sentencing framework more transparent	Punitive	Not accomplished **Did not inhibit existing punitive and managerialist trends**	Chapter 4
7. Make better use of prison to punish serious and dangerous offenders	Counterpunitive and punitive	Partly accomplished—abolished Imprisonment for public protection **A mixed impact. Abolished new IPPs but allowed those already sentenced to remain on the orders**	Chapter 4
8. Abolish the statutory distinction between young adult offenders and adult offenders	Managerialist and punitive	Not accomplished **Did not inhibit existing punitive trend**	Chapter 4

Table 7.1 (continued)

Penal policy item	Nature of intended impact: punitive, rehabilitative, managerialist and reparative	Accomplished, partially accomplished or not accomplished **Net impact**	Referred to in
9. Retain W-LO	Punitive	Accomplished **Directly adding to exclusion and punitiveness**	Chapter 4
10. Retain supervision in the community on licence ensuring that custodial sentences are better explained and have a more flexible approach to recall	Managerialist and rehabilitative	Accomplished. **Counterpunitive and managerialist**	Chapter 4
11. Reshape community sentences in order to enable courts to punish, rehabilitate and effect reparation	Punitive, reparative and rehabilitative	Partly accomplished **Clearly contributed to punitiveness because of priority given to punishment rather than other aims**	Chapter 4
12. Encourage greater use of financial penalties, with a renewed focus on reparation	Managerialist, reparative and punitive	The punitive elements largely successfully accomplished. Some accomplishments with regard to reparation **Clearly contributed to punitiveness by enhancing economic marginalization. Some general reparative impact**	Chapter 4
13. Encourage the use of OOCDs	Managerialist and rehabilitative	Not accomplished. **Did not inhibit existing punitive trend**	Chapter 4
14. Simplify and extend ASB provision	Punitive	Partly accomplished? Clear changes introduced but failed to deal with significant problems. **Clearly contributed to punitiveness**	Chapter 4

(*continued*)

Table 7.1 (continued)

Penal policy item	Nature of intended impact: punitive, rehabilitative, managerialist and reparative	Accomplished, partially accomplished or not accomplished **Net impact**	Referred to in
15. Make the prison estate more affordable	Managerialist and punitive	Accomplished. **Clearly contributed to both managerialism and punitiveness**	Chapter 5
16. Introduce 'working prisons'	Managerialist and rehabilitative	Not achieved. Subverted by cuts. This alternative to punitiveness was sidelined. **Did not inhibit existing punitive trend**	Chapter 5
17. Reconfigure prison discipline	Managerialist and punitive	Accomplished. **Clearly contributed to punitiveness and managerialism**	Chapter 5
18. Maintain the voting ban on prisoners	Punitive	Accomplished so far. **Clearly contributed to punitiveness and exclusion**	Chapter 5
19. Outsource licence arrangements for most short-term prisoners and the operation of most community sentences	Managerialist	Accomplished so far. **Clearly contributed to managerialism**	Chapter 6
20. Introduce statutory supervision for short sentence prisoners	Managerialist, punitive, rehabilitative	Accomplished so far. **Clearly contributed to punitiveness and managerialism**	Chapter 6
21. Ensure that community orders operate in a robust and credible manner	Managerialist, punitive and reparative	Accomplished so far. **Clearly contributed to punitiveness**	Chapter 6

The net impact of outsourcing and cost cutting has been considerable. The NOMS Business Plan (April 2014:27) was able to claim that contracted out services then made up '40 per cent of our £1.42 billion budget' in the 2013–14 period. Since then a swathe of community-based offender services have been contracted out but in the absence of a business plan (2015–16) no estimate of this was available by September 2015. The NOMS annual report and accounts indicated that the budget had been reduced by 24 %, by a total of £900 million (June 2015:9). Combined with cuts in legal aid and court services the overall MOJ budget has been cut by 27 % with spending reduced to £7.6 billion (MOJ Annual Report and Accounts, March 2015:9), more than fulfilling the general requirements of the Coalition Spending Review Document (HM Treasury, October 2010).

There were a few exceptions to the general drift towards punitiveness and managerialism. The abolition of IPP appears as a counterpunitive measure although it probably also contained elements of pragmatism rooted in reducing the prison population. Similarly, the attempted abolition of the YOIs for young adults was both punitive and managerialist, but failed. The introduction of more liberal recall to prison arrangements for licensed prisoners serving sentences of more than 12 months, which despite being non-punitive, succeeded, probably because it acted pragmatically to ease the prison numbers crisis.

This joint development of punitive and managerialist logics does not ensure their compatibility. The punitive trend places an emphasis on vengeance and suffering, and provides an emotional response to crime which prioritizes emotional satisfaction over the pursuit of 'what works' and value for money. On the other hand, the managerialist logic emphasizes what works and value for money over emotionally satisfying, symbolic revenge.

Coalition Government Trends and Broader Patterns in Penal Policy

Turning now to the second task, to consider whether the trends in 2010–15 fit in with broader patterns observed by others, it is immediately clear from even a cursory review of the literature that a number of

criminologists have identified that penal policy has assumed what may be called a punitive managerialist form (Cavadino et al. 1999). For many observers penal policy started to take a 'punitive turn' in the 1970s in late modern societies which continued up to 2010. This trend has been variously called 'populist punitiveness' (Bottoms 1995), 'revived punitiveness' (Garland 1996:463) and the 'new punitiveness' or 'penal populism' (Pratt et al. 2005; Pratt 2006). It is seen to be unequally distributed within (Hinds 2005) and between (Meyer and O'Malley 2005; Nelkin 2005) countries and not confined to the penal realm being found in the prosecution process (e.g., so-called zero tolerance policing) and outside the criminal justice system (e.g., changes to welfare benefit payments).

Although there is some disagreement as to what constitutes the punitive turn, and even that it has happened at the expense of more rehabilitative approaches (Matthews 2005 and see below) and recognizing that the sanctions fall disproportionately on some groups (non-white, non-Christian, the poor) than others (Hudson 2007), certain features of the pattern pertinent to the penal realm can be identified and connected to the extant Coalition penal agenda of 2010–15. The Coalition Government promoted an agenda which aligns with representations of the public mood as overwhelmingly vengeful, and promoted a sentencing policy that requires courts to engage with punitive options and identifies recidivism as a justification for lengthier (e.g., 'three strikes and you're out') and/or indeterminate incarceration. The Coalition has also put forward sanctions that permit and extend punitive bifurcation (where punitive bifurcation may be understood as not just a division between serious and less serious offenders, with the former group being treated more harshly, but a general ratcheting up of punishment for all groups as well), has done little to limit the movement to 'mass imprisonment' based on high prison populations and high rates of imprisonment (Garland 2001b), and has actively engaged in changes to prison regimes which make them tougher through the new IEPS. It has also produced 'unintended', but, nevertheless, effective toughening of prison regimes by subverting more liberal approaches (e.g., staff cuts that lead to in effect lengthy lockdowns where prisoners are confined in cells for long periods and their participation in activities prevented or significantly reduced); actively promoted actions that effect and/or perpetuate

civil death for prisoners and other populations including the emotionally driven insistence on the retention of W-LO and the temporary civil death of prisoners contained in the voting ban; and promoted changes to community-based offender sanctions that make their operation more intense and robust and effected further social marginalization especially those connected with cuts in legal aid and the financial marginalization in and out of prison created by the increased use of financial penalties. Finally, it has not only extended the range of civil powers backed up by criminal sanctions (e.g., adding criminal behaviour orders) but made the grounds on which they are granted more ambiguous as well as failing to deal with many of the key existing flaws and extended the reach of the prison house by including short-term prisoners in potentially entrapping licence requirements.

Similarly, a number of observers have noted an already established trend towards what has been variously conceived as penological pragmatism (Bottoms 1980:4), managerialism (McEvoy 2001), the 'new penology' (Feeley and Simon 1992) or 'new public management'(Hood 1991; McLaughlin et al. 2001). Perhaps it is as well to separate these notions from a position of simple pragmatism. Getting the job done with some degree of administrative efficiency and effectiveness and with a view to cost certainly has its place in running the penal system. But rationality of means, as this approach stresses, leaves the ends undecided and is not therefore, in itself, a satisfying answer to the key issues faced by the penal system. Nazi Germany combined effective and efficient administration with the mass extermination of unwanted 'others' (Bauman 1989). Managerialism emerged during the late 1970s and early 1980s and grew in influence between then and the present day, with governments espousing a position that was 'managerial rather than transformative' (Feeley and Simon 1992:452), that is to say, it concentrated on means by which offenders could be managed, which often meant concern with increasingly downplaying moral positions (based on punishment or rehabilitation) in favour of assessing and managing groups of offenders according to the risk they were assessed to present and led to assumptions that the private sector was superior in its ability to run even state institutions.

This managerialist trend has been seen as a response to the emerging penal crisis of the 1970s and 1980s which was based on not just a squeeze

of resources but a loss of overall rationale and precipitated increasing calls for improvements in the effectiveness, efficiency and economy of the penal system that in turn led to calls for privatization. A form of managerialism, New Public Sector Management (NPM), was, in turn, a response to the calls for in the 1980s for the wholesale privatization of public services. NPM is clearly associated with claims of modernization and the rationalization of offender treatment and pushes towards a pragmatic 'what works' view that increasingly regards matters of penal philosophy to be operational issues, but, nevertheless, sets the general operating context. As noted in Chap. 3 it may be seen to have taken two forms in the period 1980–2010. The Coalition Government has elaborated a further layer of managerialization based on a critique of what was defined as stage 2 in Chap. 3. The new style is based on measures to ostensibly promote greater efficiency and effectiveness as well as versions of transparency, accountability and decentralization, whilst moving further towards a performance culture based no longer on Key Performance Indicators but PBRs, with the whole package in this period being firmly connected to the leitmotif of the 2010–15 period, austerity. Much success was achieved with various aspects of sentencing and custodial and community-based offender services including cuts in legal aid and court expenditure, significant cuts to the prison estate (based on the closure of 17 public sector prisons), prison workforce restructuring, the streamlining of staffing requirements in relation to the new IEPS and, finally, the wholesale conversion of the majority of short-term prisoners released on licence based on an actuarial risk calculation and offenders on community orders into a sustainable resource for profit making. Finally, the increasing stress on what works based on a PBR method makes actual intervention a pragmatic matter.

It is time for some qualifications to be offered. The thesis advanced so far suggests that the penal policy trajectory of the Coalition Government does not stand alone but fits in with already established patterns, which have been in operation at least since the late 1970s and early 1980s. This might be taken to mean that what is suggested is that the process is the equivalent of an avalanche, inexorable and overwhelming, transforming everything in its path. On the contrary, the account offered is that this is very much a human process which is contingent and is more a matter of

ebbs and flows, than an overwhelming transformative, epochal process in either society (thus a movement to late modernity rather than postmodernity) or punishment.

This pattern has not been established without opposition and conflict. Many of the proposals of the Coalition Government have met with concerted disagreement, from both within and outside the government. Discontinuities in the process are also evident. There is a continual interplay between running an affordable penal system as opposed to one that is punitive (as punitiveness is not necessarily cheap) as well as ideological variations within the Coalition Government and within the parties making up the Coalition Government. Sometimes a recognition of rank injustice (with a tinge of cost implications?) may mean that some measures, punitive in nature, are abandoned—hence the abolition by the Coalition Government of new IPPs, though the change was not backdated leaving those already sentenced to an IPP to languish in prison, even those with short tariff periods.

The movement to punitive managerialism is not unidimensional, unstoppable and inexorable. It can be and has been resisted, although the net impact of this resistance has been variable. Strong resistance to the legal aid reforms was and continues to be mounted by a well-organized and vociferous combination of parties over a lengthy period. The Coalition Government went ahead anyway, using a tactic of divide and rule (absolving barristers from some but not all of the proposed cuts). In contrast, the opposition to the abolition of YOIs for young adults over a short period (less than 6 months) was effective enough to wring a concession out of the minister to at least postpone such a proposal until after the report of the Harris enquiry, and the life of the then government (and as it proved, his term of office as Minister of Justice). But it is clear that where resistance is encountered which plugs into what ministers believe to be the punitive orientation of the general public a rapid U-turn is likely, as was witnessed over the attempt to introduce further discounts on prison sentences for guilty pleas and to limit the creation of new 'unnecessary' criminal offences. On the other hand, prison staff resistance concerning cuts in resources has so far proved relatively ineffective as these are difficult to countermand given the hegemony of the efficiency, effectiveness and economy mantra built into managerialism, the continuing presence of traditional prison officer cul-

ture (Liebling and Arnold 2004; Arnold et al. 2007) and the more general and growing hostility to union action as part of the neo-liberal orthodoxy. Similarly, probation staff objections have been brushed aside and significant changes to the supervision of offenders on community orders and prisoners on licence from prison introduced. Even policies that could seemingly contribute to reduced cost failed to achieve success. The proposal to publish judicial data, which fitted in with transparency and accountability, was not accomplished, probably because of bureaucratic inertia. Limiting the creation of new offences would have reduced criminalization and saved costs but foundered on the rocks of departmental independence. Increasing the discount on guilty pleas and thereby saving the costs of a trial and imprisonment was rapidly abandoned because it was seen to appear soft on crime. The abolition of young adult YOIs and the possibility of reducing prison overcrowding by being able to make more 'rational' use of custodial accommodation met concerted moral opposition tinged with a 'on your head be it' argument and was suspended. The simplification of OOCDs (out of court disposals), potentially saving the costs associated with court prosecution and subsequent punishment, was again not successfully implemented.

Explaining the Observed Trends and Identified Patterns: Neo-liberalism Turbocharged by Austerity

There is much agreement amongst observers that the move to punitiveness is associated with particular social changes that have altered the broader landscape of late modern societies. In particular neo-liberalism is seen as a significant factor. Reiner (2007:2) provides a useful account of the term neo-liberalism, suggesting that it may be understood as 'an economic theory and practice that has swept the world since the early 1970s' which 'postulates that free markets maximize efficiency and prosperity by signalling consumer wants to producers, optimizing the allocation of resources and providing incentives for entrepreneurs and workers'. Reiner suggests that the influence of neo-liberalism extends outwards in society and is not confined to economic processes alone. Indeed, as he argues (2007:2), 'beyond economics …it is… the hegemonic discourse of our

times, …deeply embedded in all corners of our culture.' Neo-liberalism is so embedded that it has 'become the common sense, taken-for-granted orthodoxy' of social and political life. A neo-liberal political economy has become established which is increasingly rooted in the reduction of welfare benefits, the growth in inequality and significant and mutually reinforcing social, economic, political, cultural and penal exclusion.

A number of studies have found a correlation between the growth of neo-liberalism and the movement to punitiveness. Most such studies classify societies as being of one of four types (see Cavadino and Dignan 2006), on the basis of (in summary) whether political participation is wide or narrow, welfare benefits are generous or restricted and whether the range of inequality is narrow or wide. The main types identified are:

- neo-liberal (political participation is narrow, state welfare benefits are restricted and the range of inequality is wide);
- conservative corporatist (political participation is wider, state welfare benefits are more generous and the range of inequality is narrower than the neo-liberal type but wider than the social democratic or oriental corporatist types);
- social democratic (political participation is at its widest, state welfare benefits are the most generous and the range of inequality is relatively narrow);
- and oriental corporatist (where political participation is narrow, private welfare benefits are generous and the range of inequality is the narrowest).

Cavadino and Dignan (2006) operationalize punitiveness using the imprisonment rate (number of people in the prison population per 100,000 of the country as a whole). A country is seen to be punitive if it has a relatively high imprisonment rate.

Cavadino and Dignan (2006:22 and column two, Table 7.2 here) using data covering the period 2002–03 showed that there would seem to be a clear correlation between the high rates of imprisonment and types of society. Neo-liberal societies are shown to have the highest imprisonment rates (range 115–701), followed by conservative corporatist societies (range 93–100), social democratic countries (range 70–73) and oriental

corporatist countries (49). An examination of the International Centre for Prison Studies World website reveals figures for the period 2013–15 and shows the same kind of relationship exists currently. All but two of the countries identified as neo-liberal (the exceptions are the USA and South Africa) have increased in punitiveness (new range 148–698). Most of the conservative corporatist countries show a reduction in imprisonment rates (new range 75–100). The Netherlands reveals a remarkable decrease. France is the exception in this group as the imprisonment rate has increased, but not so much as to overtake the neo-liberal countries. All the social democratic countries have experienced a decrease in punitiveness (new range 57–60) as has Japan. Neo-liberalism continues to be correlated with punitiveness. Although less detailed work seems to have been undertaken on it, it is clear that the growth of managerialism has arisen in the same period, and that it has arisen alongside both punitiveness and neo-liberalism.

Table 7.2 A comparison of political economy and imprisonment rates 2003–04 and 2013–15

Political economy/ country	Imprisonment rate (per 100,000 of population)/ [year] source: Cavadino and Dignan 2006:22	Imprisonment rate (per 100,000 of population)/ [year] source: ICPS Website 2015
Neo-liberal		
USA	701 [2002]	698 [September 2013]
South Africa	402 [2003]	292 [March 2015]
New Zealand	155 [2002]	190 [December 2014]
England and Wales	141 [2003]	148 [June 2015]
Australia	115 [2002]	151 [March 2015]
Conservative corporatist		
Italy	100 [2002]	85 [May 2015]
Germany	98 [2003]	76 [November 2014]
The Netherlands	100 [2002]	75 [September 2013]
France	93 [2003]	100 [May 2015]
Social democratic		
Sweden	73 [2002]	60 [October 2014]
Finland	70 [2002]	57 [May 2015]
Oriental corporatist		
Japan	53 [2002]	49 [mid 2014]

Derived from Cavadino and Dignan (2006) and ICPS Website, accessed 21/07/2015

As the authors themselves make clear, the studies here are not without methodological difficulties connected to both the operationalization of punitiveness (imprisonment rates are a convenient although rather crude measure of punitiveness) and the classification of countries (concerning their mutual exclusivity). Furthermore, it is not clear to what extent other variables have been allowed for, including how far NPM has penetrated penal systems and the presence of repressive sentiment or the 'absolutist' quality of the state, unless the move to neo-liberalism is taken to be the sole measure of state absolutism. Of the 23 current states that comprised the old USSR, some of which are authoritarian states, 15 have imprisonment rates which are higher than that of England and Wales. Clearly, some of this effect may be that such countries have been particularly unprotected from the excesses of quickly implemented neo-liberal remedies, but it also suggests that the nature of the absolutist character of the state may be a further factor. The connection between managerialism and neo-liberalism is much less well explored and more uncertain. Finally, it is necessary to recognize that the change discussed here is less of an absolute epochal shift and more about the ebbs and flows that characterize real historical change, leaving aspects of older practices embedded in the new.

Neo-liberalism seems to be correlated with punitive managerialism. But before going further we need to be clearer about what this move to punitiveness and managerialism means. Foucault, though concerned in his seminal work 'Discipline and Punish' (1985), primarily with 'a phenomenology of penal control,' also contributed to both 'an influential account of penal history and the political determinants of penal change' (Garland 1991b:133). Foucault (1985) suggested that there were three contending modes of the power to punish evident in late eighteenth- and early nineteenth-century Europe: the corporal, the disciplinary and the juridical. The corporal mode was rooted in semi-sacred monarchical power and based on inflicting symbolic and real, overwhelming physical damage to the body of the condemned person. The carceral or disciplinary mode was based on training individuals in institutions particularly prisons, but also workhouses and asylums, and based on increasingly secularized, democratic power and rooted in discipline which can be understood to have two elements, exposing problematic individuals to

ongoing, all-encompassing surveillance and training them to be obedient subjects. The final mode was juridical and was based also on more secularized, democratic forms of power and was rooted in requalifying individuals as citizens through using fixed and proportionate penalties. As a result of significant broader social change as well as flaws within the institution itself, Foucault argued that in France in the early nineteenth century the corporal form declined and was replaced, not by the juridical, but the disciplinary mode of the power to punish. Later work, whilst largely accepting the importance of the concept of discipline and the role it played in the prison, has disputed the timing at least for the UK (Ignatieff 1989; Garland 1985). It will be clear to the attentive reader that these modes of the power to punish correspond to the agendas set out in Chap. 3, with the punitive turn corresponding to a form of the corporal; the medical or scientific rehabilitation of the 1945–70 period corresponding to the later stages of the carceral; and the juridical project corresponding to the human rights-based proto-policy.

The managerialist mode has been apparently ignored. But this is not so. Indeed, Foucault (2001, 2003) may be seen as carrying through that part of the Weberian project (e.g., Weber's classic work on the protestant ethic, 1992) concerned with examining the rationalization of societies, although treating it not as a project with some contingent flaws (disenchantment of the world, the oppression of routine) but as an efficient, effective and economic means by which oppression is achieved. In this sense the birth of the prison and its disciplinary practices was the managerialism of its day based on a thorough-going rationalization of penal policy. Foucault contrasts the emotional, public, dramatic, painful, brutal and bloody dispatch of the regicide Damiens in 1757 in which the body of the condemned is subjugated to horrific physical degradation, with the regime for Parisian Houses of Correction in the 1830s based on routinized and bureaucratized, secluded, pedestrian, bloodless and measured control focusing on the minds of the inmates. In the nineteenth century the impact of 'managerialism' led not to austerity and cuts in public services, outsourcing and coercive control by means of punishment and PBR but vast and unprecedented public expenditure (this was the time of the 'great incarcerations'), nationalization and centralization (all prisons came under national government control in 1877)

and disciplinary control. In the carceral vision each prison, asylum and workhouse was 'a mill for grinding rogues honest, and idle men industrious' (Letter from Bentham to Brissot Bentham Website, August 2015) or at least rendering them useful for the maintenance of the particular social order. These ideas are summarized in Table 7.3.

How might we understand the nature of the contemporary move to punitive managerialism? Any explanation here needs to avoid falling into the trap identified by Matthews (2005) when he wrote that those who advocate the turn to punitiveness thesis make selective use of trends and evidence, by emphasizing rising imprisonment rates and the more austere conditions in prisons whilst ignoring the increased use of rehabilitative programmes whether in the prison or the community. Essentially his argument is that punitiveness is not new, and that punitive and disciplinary mechanisms have coexisted for some time. There is no epochal shift that might otherwise be assumed. And though the present work does assert that there is clear evidence of a growth in punitive managerialism under the Coalition Government, this does not mean that rehabilitation has been removed from the penal agenda or that the whole penal realm, including courts and prison community-based offender services, has been turned into punitive, for-profit, outsourced enterprises. Rather, it can illuminate the ebbs and flows of penal policy in these areas and asserts that the last 5 years have seen significant advances in the movement to punishment and outsourcing. Furthermore, punishment is conceived here as simultaneously rooted in rational and highly bureaucratic forms (as analyzed by Weber and more recently Jacobs 1977), connected to the maintenance of social inequality, based on the operation of particular technologies of punishment, but still operated in a social context where 'the punitive condemnatory sign… throws a long shadow over everything that the penal system does' (Garland 1991b:191).

The move to punitive managerialism is understood here as a reassertion of a modified and more 'civilized' corporal mode, which no longer stresses leaving the marks of vengeance on the body of the condemned, but seeks to impose symbolic and real vengeful and coercive penalties on those found guilty. There is also an increasing emphasis on control both within the prison and in the community, running alongside an increasingly vociferous emphasis on a 'rational' means to reduce or

Table 7.3 Social order and the power to punish

Societal form	Period	Social order	Mode of the power to punish
Pre-modern	Up to the end of the eighteenth century	Monarchical	Corporal
Early modern	The end of the eighteenth century to the end of the nineteenth century	Nascent social democratic	Corporal/disciplinary
Mid-modern	The end of the nineteenth century to the last quarter of the twentieth century	Social democratic	Disciplinary; based on the rationalization of administration and centralization and nationalization
Late modern	1970 onwards	Neo-liberal, in 2010–15 austerity	Managerial and modified corporal based on decentralization, outsourcing and PBR

redistribute public expenditure, relying no longer on nationalization, but outsourcing justified by austerity. Austerity is treated here not as factual assessment of fiscal crisis but as a powerful ideological and political strategy which has enabled the Coalition Government to rescue and turbo-charge the neo-liberal project and contribute to various and interrelated patterns of exclusion. Table 7.3 provides a summary of the changes.

These developments with regard to offenders thus break with Scull's (1977) early attempt to understand the pattern of change as 'decarceration' of deviant populations linked to fiscal crisis as, although such an account works for the mentally ill (they were decanted out of long-stay mental hospitals in the last decades of the twentieth century), it does not explain why very different solutions have been sought for offenders (large prison populations together with the growth of community control). To do this means taking account not just of economic or fiscal but cultural and political factors. To the extent that they depend on greater control in the community, the present developments conform to what Cohen (1979, 1985) claimed was a dispersal of control. But Cohen was mistaken, at least as far as developments in the penal realm are concerned, to portray these as overwhelmingly disciplinary, because although they emphasize surveillance, they do not attempt to change lawbreakers one by one.

But neither do the current developments support the juridical thesis advanced by Tony Bottoms (1983), insofar as the changes to date do place a premium on punishment not discipline, but it is not the form of punishment during which one simply sits in a penalty box waiting for the penalty to be served, although there were at that time, as Bottoms argued, indications of this with regard to the increasing use of community service (now known as unpaid work) (Skinns 1990), compensation orders and fines. But Tables 7.4 and 7.5 show little support for the notion that there is an ongoing tendency for the growth in the use of community penalties (although unpaid work remains a popular sentencing option), compensation orders and fines (though fines do seem to have revived somewhat under the influence of the Coalition Government). On the contrary, the overall use of imprisonment has increased, the average sentence lengths have increased for offenders sentenced for indictable offenders (by 37 % between 2010 and 2014) and there has been an increase in supervision in terms of those placed on community orders or SSOs as well as an internal reorganization of such orders making them more surveillance-based and punitive. Curfew by electronic monitoring is now used as both a penalty and a condition of early release from prison as part of license conditions for prisoners. At the same time, consideration of 'what works' penetrated further in both the 1997–2010 and the 2010–15 periods, with the 'on the ground' intervention being provided for 70 % of all on community orders and prisoners on licence by outsourced groups.

So far a correlation between neo-liberalism and punitiveness has been noted and an attempt has been made to understand the nature of the change identified. However, correlation does not constitute cause. In what circumstances has the development of a neo-liberal political economy occurred? How has the neo-liberal political economy shaped penal policy? How have penal practices acted back and shaped the society? What other factors are involved and mediate these relationships?

Garland (2001a) and later Loader and Sparks (2012:80) identified five of the broader factors at work when identifying the circumstances in which the development of a neo-liberal political economy has occurred. These include changes in patterns of production and exchange connected to a reconfiguration of labour markets, the intensification of consumerism and, together with other factors, a reconfiguration of politics; the

Table 7.4 All convicted offenders by year and type of sentence (%), 1970–2014

Year	Immediate custody	Suspended sentence	Community order	Fine	Absolute or conditional discharge	Otherwise dealt with
1970	3.3	2	3.5	85.5	4.3	1.5
1980	3.1	1.6	4	86.4	4.1	0.8
1990	3.8	1.8	6.7	78.8	7.6	1.4
2000	7.5	0.2	10.9	71.1	8.5	1.7
2010	7.4	3.5	13.9	65.5	7.3	2.4
2011	8.1	3.7	13.5	65.3	7.2	2.2
2012	8	3.6	12.3	66.9	7.1	2
2013	7.9	4.1	10.7	67.9	7	2.2
2014	7.5	4.4	9.3	70.2	6.4	2.2

Source: Adapted from sentencing statistics overview tables; Table A1.1 (MOJ, May 2015)

Table 7.5 Offenders convicted of indictable offences by year and type of sentence (%), 2004–14

Year	Immediate custody	Suspended sentence	Community order	Fine	Absolute or conditional discharge	Compensation order	Otherwise dealt with
2004	71 (ACSL 40.3)	1	24	0.55	1	0.13	2
2010	70 (ACSL 38.7)	9	19	0.23	0.54	1	1.5
2011	71 (ACSL 42.5)	8	18	0.11	0.32	1	1.5
2012	72 (ACSL 45.2)	8	18	Less than 0.1	0.35	0.41	1.45
2013	74 (ACSL 49.6)	10	14.5	0.31	0.32	Less than 0.1	1.5
2014	73 (ACSL 52.7)	11	12.5	0.20	0.44	Less than 0.1	2.5

Average custodial sentence length = ACSL in months
Source: Adapted from MOJ May 2015

restructuring of family life in terms of family size, dual incomes and task sharing but also changes in the nature (single sex) and methods of recognition, of partnerships; the ongoing changes in the social geography of cities leading to suburbanization and ghettoization; the increasing spread

of the electronic media, particularly the computer, the Internet and the mobile 'phone; and, finally, a significant change leading to a democratization of social attitudes ushering in 'a marked decline in unthinking adherence towards authority'.

How has the neo-liberal political economy developed and shaped penal policy and how has penal policy acted back on the political economy? This book is too short to provide a full history of the political economy of neo-liberalism. However, it is clear that neo-liberalism began its life in the work of out-in-the-cold economists (Hayek 2001, originally published in 1944; Friedman 2002) but was converted to broader appeal by the economic tribulations after 1970 together with the unstinting lobbying of a variety of groups (including the Institute for Economic Affairs, the Centre for Policy Studies, the Adam Smith Institute, the Centre for Social Justice, Reform, the Policy Exchange) and campaigning organizations like the Taxpayers' Alliance and the work of like-minded advertising executives, coordinated by the St James Society according to Jones (2015:28). Under these joint pressures, neo-liberal ideas were taken up slowly at first, but gained momentum from the 1980s onwards, becoming sedimented in the Conservative Party (Jones 2015) and later the Liberal Democrats, particularly the contributors to the 'Orange Book' reforms (Marshal and Laws 2004).

Neo-liberal ideas had an elective affinity with that part of the Conservative Party trying to explain and manage the fallout from the dissolution of the Heath Government (1970–74) and to come to terms with the subsequent electoral failure. The ideas were forged in the 1980s and 1990s when there was a need to manage and gloss the economic and social issues of the period, including its own policies and their consequences. In so doing, it reconfigured itself, providing an increasingly cogent narrative of these woes and a programme for a government attempting to remake Britain in its image. But the wheel came off the project (most notably after Black Wednesday, 16 September 1992) during the Major Government's tenure, leaving New Labour partially transformed in the 1994–97 period in the neo-liberal image, to carry on at least part of the task under the image of the 'third way', and the consequent penal policy made use of the slogan 'tough on crime and tough on the causes' of crime. Fortunately for the Conservative Party and

subsequently the Coalition Government, the second 'mishap' with neo-liberalism, the banking crash of 2007–08, could be conveniently blamed on New Labour as could the recession of the early years after 2010. The 2010–15 period was a time when neo-liberalism could be redeemed and then turbocharged by the application of austerity. Interestingly, even the general election of 2015 has not fundamentally questioned this interpretation of events with the Conservative Party returned to government after a gap of 23 years, and without its Liberal Democrat 'brake', the victory being seen as an endorsement for the Conservative approach (with many Liberal Democrats rushing to disidentify themselves) and an encouragement for more of the same neo-liberal high-risk purgative in the future.

During the 1979–2010 period, somewhat falteringly perhaps, a neo-liberal political economy has been forged. This is not merely an economy rooted in notions that the market should rule (implying deregulation at a variety of levels particularly with regard to profit making and reregulation at other levels, particularly affecting organized labour), instability and insecurity in employment, cuts in welfare benefits and privatization, but a new version of social order resting on a 'free' market economy, burgeoning social inequality and a diminishing welfare state. Such an accomplishment led to, somewhat prematurely perhaps, Prime Minister Thatcher's claim that 'there is no alternative' and the increasing normalization of neo-liberal ideas creating and expressing a neo-liberal political, economic and social hegemony. The term 'hegemony' is used here not to suggest that there is a consensus across economic, political and social life, but merely that particular sets of ideas which have come to promote the interests of particular groups have been rendered as common sense (heterodox opinion asserts that such 'common sense' may not be 'good sense'), and allow the dominance of these groups to be taken for granted.

The neo-liberal political economy is dependent on a reconfiguration of social and cultural life. Some aspects relevant to penal policy are considered here. Firstly, a concerted shift to individualism which dictated an asymmetrical calculation, encouraging people to take what they can in terms of benefits (NHS, welfare, education) but minimize any social contribution in terms of time and tax. The rational kernel of the notion of 'welfare scroungers' is expressed here though the true targets may not be the 'usual suspects' (migrants, offenders, those dependent on traditional

welfare payments like job seekers' allowance or tax credits), but all those individuals who put an absolute minimum into the life and finance of the society, and yet expect continuing high rewards (many bankers and the self-employed) as well as companies (big agri-businesses reaping the harvest of subsidies, large companies who because of a legal form of tax avoidance fail to contribute in a proportionate way to HMRC). The shift to egoistic individualism contributes to harsher attitudes to those who offend in two ways. Failure is owned by the blameful individual. Also, blaming those who fail separates the blamer from any such approbation. It also fuels *ressentiment* as noted below. In turn, such *ressentiment* fuels government policies rooted in punishment.

Secondly, the move to the breakup of traditional communities pushed by external economic forces and pressured by the desire on the part of 'liberated' individuals to get in the 'race' cuts the ties of tradition, religion and family loyalty and also reduces sympathetic understanding and releases any surviving inhibitions towards punitiveness. Thirdly, the continual process of change has weakened the checks and balances within the political system. Political parties have gone through recurrent crises during which they exercise little real opposition. But also caught up in the process of reconfiguration, political parties, since 1970, have engaged in a penal arms race.

Fourthly, the move to a political economy based on neo-liberalism has led to the emancipation of disgust and the stimulation of *ressentiment* which Young (2007:10) sees as 'a feeling of anger, bitterness and powerlessness, which searches out culprits and mobilizes difference'. The British television programmes such as 'The Weakest Link' (which ran from 2000 to 2012 Weakest Link website 2015) both reflected and encouraged such sentiments, and the growing number of 'living on benefits' shows (targeting the 'usual suspects') act to establish channels for such disgust. Punitive penal policies both respond to and stimulate such disgust.

Fifthly, a process we may deem entrepreneuralization has been at work. The British television programme 'The Apprentice', which started in 2005 and still commands large audiences (25.6 % of the Wednesday evening 9.00 to 10.00 audience watched the second programme of the tenth series) (Plunkett October 2014), and 'Dragons' Den', which has run since 2005, enable this process by which 'every individual is more

and more obliged to adopt the economic attitudes of the responsibilized and competitive entrepreneur' (Garland 2001a:157). The stance of the individual becomes, as Garland notes, 'tensed-up, restless, regarding one another with mutual suspicion and no great deal of trust' (Garland 2001a:157) and money becomes the measure of everything. Part of the price of the pursuit of moral, market and individual freedom is an increasing sense of risk and insecurity, which in turn, fuels *ressentiment* and disgust. Solomon et al. (2015) suggest that the isolated self-interested individual is exposed to the fear of death and thus more able to express negative feelings about those perceived as different. Furthermore, they also draw a link between consciousness of death (as revealed to the isolated individual living in a dangerous society of predators) and self-esteem, with those at the bottom of the system, 'losers' in the race to the dream of affluence and success, more likely to suffer existential terror and be more inclined to express negative feelings towards those seen as different.

Finally, the process leads to a growth of material inequality as the rewards of those at the top are increased (and the tax take made less progressive) whilst those at the bottom see their rewards decrease as a result of pay freezes, changes in benefits and the disorganization of labour. But marginalization is not confined to economic processes related to income and wealth; it is also civil, social and political leading to 'a perfect storm' of social exclusion which affects whole, increasingly ghettoized and vilified communities.

Beyond these specific matters, it is clear that punitiveness is nothing more or less than the extrapolation of neo-liberal sentiments to crime and criminal justice. *Homo economicus* becomes the basis for apparently understanding *homo criminalis.* The offender is reconceived as free willed, selfish and ill-intentioned existing in a largely benign society and worthy of disgust and *ressentiment*. Punishment is entirely justified not only to defend society but to reassert 'justice' and demonstrate that 'ordinary' people are being listened to. On the one hand, a number of factors have pushed towards freeing the individual to engage in doubtful perhaps criminal action in a 'get rich quick' manner. If the only measure of things, including self-worth, is money, then the accumulation of money becomes paramount, not the means by which it is gained (whether that

be sharp financial practices in banking like rigging the London Interbank Offered Rate (LIBOR) or the newly 'liberated' self-employed overcharging for their services), with accumulation of capital, if and where it occurs, allowing everyone to 'get on' (Karstadt and Farrell 2004). Everyone becomes the tensed-up entrepreneur on the lookout for the big deal which will make their fortune and after which they can wallow in the luxury so frequently and lovingly detailed on television screens. On the other hand, punitive sentiments have been emancipated from surrounding constraints; disgust can be expressed along with anger, bitterness and powerlessness and becomes a realistic basis for policy, though such disgust is never appropriately applied to the self and immediate others. The current changes liberate broad sentiments of disgust and anger, which can be apparently legitimately held and expressed and used to prop up penal policies.

Managerialism represents the idealized expression of the very free market sentiments which are at the heart of neo-liberalism. Private enterprise, in this view, can save public service, by taking over, and where this is not deemed suitable, by outsourcing, simply because private enterprise is superior in terms of efficiency, effectiveness and economy, not only at the level of government pronouncements but in the everyday life of ordinary people transformed into tensed-up, would-be entrepreneurs that such changes have created . Austerity, assisted by managerialism, places a premium on private excess (because you deserve it) and public frugality. It is primarily a rationality of means, to increase efficiency, effectiveness and economy and most of all save money, not of goals or perhaps one unquestioned and increasingly unquestionable goal—money based on private income and wealth.

The above would seem to suggest that there is a simple relationship between public punitiveness and neo-liberalism. This is not so. As Mayhew and van Kesteren (2002) showed, using data drawn from the International Criminal Victimization Survey in 2000, a scoring on a punitiveness rating for the public did not closely correlate with imprisonment rates or social types. Studies of public opinion concerning trust and confidence in knowledge about and perceptions of the legitimacy of local and national justice reveal a complex picture of mutual interrelationships. It is undoubtedly the case that crime causes strong emotions

and feelings of anxiety. Such feelings are exacerbated by politicians taking the public voice where knowledge of the actual operation of justice is skewed or limited (Roberts and Indermaur 2009) and where lack of trust and confidence raise questions of legitimacy. As Hough and Roberts (2012:294) put it, 'It seems likely that trust in justice co-varies with levels of social trust and political trust, which themselves will be associated with factors such as social mobility and social inequality.'

What this suggests is that punitive managerialism is mediated by factors other than political economy, including the existence of a political elite that shapes opinion through the creation of constructs of punishment (von Hofer 2003). The media play an important role here, even though there is a tendency of media coverage and ownership to be shaped in a particular direction by neo-liberalism. Finally, the balance of mediating factors may vary from country to country.

Such policies do not go unresisted and the whole neo-liberal mindset is also variously challenged by social movements. Nor is it indicative that the changes discussed here represent a complete break with the past merely a change in emphasis, in this a case a flow towards punitive managerialism. Thus even in the period usually seen as dominated by a rehabilitative ethos in the 1945–70 period, there was much opposition to this approach both within the penal realm, from magistrates and prison officers, and, more broadly, amongst the public. Today, there has been a shift, but it is not unopposed, even in some parts of the Conservative Party and the penal policy communities. State employees may be subject generally to a force majeure, but this has not and will not cancel out everyday resistances.

The movement to punitive managerialism is not without contradictions. The key contradiction evident is that punitiveness undermines economy. Furthermore, there are clear limits to treating offenders in a punitive and exclusionary manner making it difficult to maintain in a society where there has indeed been a civilizing process at work, and the state agencies are bureaucratized. The assumption which is at the heart of managerialism—that private enterprise is more efficient and effective than state provision—is highly questionable in penal terms. Privatization and outsourcing also evidence a clear contradiction. The neo-liberalism of the twenty-first century rests on an absolute commitment to roll back

the state but also wishes to preserve authoritarian government. NPM allows the contracting out of state functions—through DCMF contracts and outsourcing—whilst retaining an overall leading role and continuing to act, using tax revenues, as paymaster. To use the rowing and steering analogy here, it is not just that with managerialism the state allows the outsourced contractors to row the boat and whilst it does the steering. But also, ultimately, the state says whether boat ownership is allowed, whether boat competitions are legally possible and how they are to be regulated, it owns the boat, determines which races are run, can claim the successes but can disown the failures because the outsourced contractors have been given freedom to use the methods that work. Thus Jones' claim that 'the state runs through modern capitalism like lettering through a stick of rock' (2015:xvi) is apposite with regard to the penal system. The state retains control. But it retains such influence at a financial cost—of generous payments to, at least in the penal field, a relatively small number of private companies. Other tensions are evident here. Interestingly, these same private companies can also act back on government via lobbying, a phenomenon which has the potential to undermine the claims to greater transparency. PBR, as noted in Chap. 6, also raises serious questions of accountability.

It is clear that underlying the multitude of processes leading to the present position there are two key themes. Punishment expresses still deeply entrenched repressive sentiments, even in modern societies. Particular types of government (absolutist and even zealous) trigger such responses, in part because of political manipulation (repression deriving from above) but also in part because of repressive sentiments deriving from below. As Durkheim (1973) remarked, even in the most advanced social types of society there would be a residue of repressive sentiments at the individual, small group and social levels. Marcuse (1987) made the distinction between surplus and normal repression. Perhaps though the extent of repression is reduced in modern societies there remains a basic level, which is raised when the impulse to ressentiment is liberated.

The second theme is that of rationalization associated with the work of Weber. For him rationalization was not some inexorable force but merely the net result of processes set in train from the enlightenment. Managerialism clearly expresses this theme as well as exemplifies all its

limitations. Some of these limitations may transcend mere 'disenchantment of the world' (Weber 1967:148) associated with depersonalization and oppressive routine, but also include a movement to a society which knows the price of everything but the value of nothing, squeezing out humanity and creating a collective amorality.

To summarize, it has been argued that the movement to punitive managerialism championed by the Coalition Government reforms of penal policy can be incorporated into broader patterns of penal and social change and that both trends are not merely correlated with but complexly caused by the growth of a neo-liberal political economy in the 1970–2015 period and that, in the 2010–15 period, austerity was used as an ideological and political strategy to rehabilitate and then turbocharge the swathe of policy reforms engaged in, including those relating to the penal realm. The central thrust of penal policy reforms under the cloak provided by austerity has been a flow towards an internally contradictory pattern based on punitive managerialism, enabling the Coalition to have their penal cake and eat it too! At a deeper level it has also been shown that these patterns represent and express fundamental aspects of change and punishment, on the one side, the drive towards the civilization of punishment, limited by the psychologically, social psychologically and socially grounded repressive sentiments, and, on the other side, the tendency of social change to move towards a rationalization of the world, whilst recognizing that such rationalization has its limitations, including not just disenchantment with the world, but oppression managed by casual bureaucracy and routine.

The final chapter goes on to summarize the key findings of the book, considers the research implications and examines what can be done to limit this turn to punitive managerialism.

8

Conclusion

In this, the last chapter of the book, four tasks are attempted. A brief summary of the key arguments of the work is provided. Some of the limitations of the book are considered. Key research questions and topics raised by the text are set out. Finally, the 'what is to be done' question is addressed about how to achieve an affordable, emotionally satisfying yet humane and rational penal policy which enjoys maximum legitimacy with staff, the public and offenders.

The Changing Penal Landscape: Punishment, Outsourcing and Austerity

The analysis of the penal policy reforms of the Coalition Government, 2010–15, provided in Chaps. 4, 5, and 6 revealed a shaping of the penal landscape towards punitive managerialism in the context of neo-liberalism turbocharged by austerity. The emphasis on punishment in the sentencing process has increased and the regulatory framework for the operation of both prisons and community-based offender services made more coercive and vengeful. As noted in Chap. 7 the move to

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managerialism has mandated a significant growth in outsourcing, with NOMS claiming that contracted out services made up '40 per cent of our £1.42 billion budget' in 2013–14 not including the extensive contracted out community-based offender services at that point yet to start (NOMS April 2014:27). Overall, NOMS claimed that by 2015 it had achieved budget cuts of 24% (NOMS June 2015:9). Its parent organization, the MOJ, claimed overall budget cuts, in the same period, of 27% (MOJ March 2015a:9).

Limitations of the Book

All works have their limitations, this one being no exception. This book is restricted to the penal system and even here some areas have been neglected, for example, changes with regard to terrorism and regarding victims. The subject matter of the text only deals with young adults and adults in England and Wales. Furthermore the topic focuses on government-made penal policy and the regulatory context it provides, but not the point of implementation in penal institutions which may comply with or resist such changes. Clearly limitations also derive from a purely document-based critical review of penal policy reform. A further limitation resides in the fact that this work was dependent on existing sources of evidence and could not use self-generated data. The document searches have not included all opinions available and word constraints have restricted the detail that could be provided about the views of individual groups. Finally, the explanation provided of the key trends identified remains tentative.

But the book accomplishes the aims as set out, which were to provide an inclusive review of the main penal policies engaged by the Coalition Government, 2010–15, examining sentencing, custodial services and community-based offender services, whilst giving an indication of the arguments used to justify the changes as well taking account of critical opinion and, where available, comparative evidence. Further the work does provide a cogent internal and external critique of the policies and, although confined to one chapter, attention is given to not just setting out the trends, but offering an explanation of them.

Key Research Questions Raised by the Book

A number of pertinent topics have emerged as worthy of further investigation in the process of preparing this work. One such umbrella topic that seems crucial is a direct empirical account of penal policymaking, something akin to David Faulkner's account of his work as a civil servant at the Home Office during the 1980s and 1990s (Faulkner 2014), although not necessarily based on the observing participant but systematic contemporary data collection through participant observation and interviewing, though the difficulties of gaining access to provide such an account would be considerable.

A crucial question with regard to the criminal legal aid reforms is the extent to which they have limited access to justice. Within this is the concern that some groups are being more affected by the changes than others. Criminal court charges were introduced in April 2015 but abolished in December, 2015. However, despite this change, some assessment of the contribution of the financial penalties introduced or revitalized by the Coalition to the economic marginalization of offenders is necessary. The Crime and Courts Act of 2013 required courts to impose at least one punitive requirement on those sentenced to community orders. An exploration of not just the sentencing decisions connected to this but also of how magistrates orientate to the requirement is pertinent. Also useful would be an investigation into the impact of the consultation process on the eventually published sentencing guidelines in the 2010–15 period, based on a reading of the consultation and final guidelines issued concerning the nine main offence categories dealt with.

Turning now to custodial institutions then a crucial question is how benchmarking has affected the operation of prisons in terms of staff and prisoner experience. Although the drive to turn prisons into places of hard work has generally not been successful, some prisons have developed this to a much greater degree than others. What accounts for this success and indeed accounts for the failure in others? How can their example be extended to less successful prisons? The Coalition Government significantly modified the IEPS but how has this affected day-to-day practice and how has this impacted on the lives of staff and prisoners? Indeed, how does the prison discipline system (including here not just the IEPS

but adjudications) work in the new regimes? Workforce restructuring has been a significant aspect for those employed in prisons. An examination of how prison staff orientate to this process is needed together with a consideration of what strategies of independence it has stimulated. Connected to this is a critical examination of the impact of the more recently outsourced prison service, prison maintenance. The advantages and limitations of prisoner self-advocacy require thorough investigation following the work of Schmidt (2013).

There are three obvious questions to ask about community-based offender services. Firstly, in 2018–19, a timely critical review of the Community Rehabilitation Companies (CRCs) is necessary after 3 years of operation to determine whether the marginalization of second- and third-tier providers has occurred. It would be useful to also explore the whole penal landscape created by CRCs, taking account of the range of employers, employees and prisoners. Secondly, an assessment of the impact of the CRCs and resettlement services on offenders and reoffending rates for short-term prisoners on licence is necessary. Thirdly, an assessment of the impact of the CRCs on staff and offenders on community orders is also called for.

What Is to Be Done About Control and Crime?

It is probably apparent by now that the author of this book has come to have little sympathy for the move towards punitive managerialism. In the limited space available then it is necessary to set out an alternative, arguing for the need for a humane and rational penal system which runs at minimum cost and obtains the highest reduction in reoffending, whilst providing at least some emotional reward for onlookers and maximum legitimacy. This task requires an understanding of the antecedents of crime *and* crime control taking into account psychological, social psychological and social factors. Attempts have been made to move in this direction by Taylor et al. (1973) and Hall et al. (1978), but a convincing account remains some way off, although more recently some authors are moving in this direction, albeit using a rather different theoretical base (Reiner 2007, 2012). Despite the absence of a unified theory some

preliminary indication of what needs to be done about control and crime in late modern societies is possible.

Chapter 7 suggests that the patterns of crime control in the period 2010–15 have been based on a movement towards punitive managerialism. In turn, this movement has been conditioned by the development and spread of neo-liberalism, an ideology promoted in the past by lobbying groups which had an elective affinity for the economic and political vicissitudes of the 1980s and 1990s and which thus become institutionalized as the basis for a reordered political economy. Further, the 2010–15 period has witnessed not a fundamental limitation on the neo-liberal project as one might have expected given the abject failure of the banks and the subsequent development of a recession, but a turbocharging of this ideology under the overarching alibi of austerity. The first part of the 'what is to be done' question resolves itself into what is to be done to halt the rise and subsequently replace neo-liberalism and reconfigure the economy and society in a new form. The main part of this task is cultural, political and economic. It is to first articulate an alternative vision (the work of Piketty 2014 or Mason 2015 might constitute a start), and then turn it into a political reality by the kind of work that the outriders of neo-liberalism engaged in the 1980–2015 period. In particular this requires an effective opposition imbued with such an alternative vision, as well as the systematic work of counterhegemonic groups like relevant political parties, UK Uncut, '38 degrees', the Occupy movement, New Economics Foundation and, of course, the trade unions. At the heart of this vision needs to be a just social order based on progressive taxation, an inclusive welfare state, improved political participation and properly regulated employment (the National Minimum Wage Act of 1998 was a major step forward here) all contributing to limiting the extremes of inequality, opening out the possibilities of social mobility and acting as likely antidotes to the drive to egoism. Enhanced civil participation (although not through notions like the 'Big Society') and alternative identities are needed to provide cultural alternatives to the concerted shift to an asymmetrical calculation of individual interest and what in Chap. 7 is referred to as entrepreneuralization. Just as prisons find it easier to keep their roofs on if seen as residually legitimate by most prisoners most of the time, so a society legitimated by greater political participation, reduced variations

in inequality, an effective welfare net and a just penal system can act as a factor in creating and maintaining social order.

As suggested in Chap. 3 the work of Reiner (2007) and Brantingham and Faust (1976) enables us to recognize the limitations of what can be achieved by changes in the penal system alone. They also suggest the need to look at other methods of crime prevention rooted in primary and secondary methods. The penal system can only address some of the factors leading to crime (particularly the movement to criminalization and some of the dispositional factors leading to crime) because it is concerned only with tertiary prevention (i.e., formal interventions which are engaged after the crime event). With these reservations in mind we can now turn our attention on the question of what is to be done about crime by the penal system. Before proceeding, further distinction would be useful—between changes that are immediate and those that are expected to impact over a longer period of time.

We have to start by acknowledging the faults of the existing penal system. They follow from the rest of the arguments articulated throughout the present work, but can be very briefly stated. Coalition Government policy has led to the further development of punitive managerialism which dishonestly exaggerates the impact that the penal system can have on crime reduction, it has contributed to and is part of a counterproductive arms race over penal policy; acts to yet further marginalize sections of the UK population; and, finally, worsens the penal resource crisis and does nothing effectively to lessen the crisis of legitimacy.

The principles guiding the reforms suggested here may be briefly stated and are variously discussed throughout the book: an insistence on the importance of human rights; an emphasis on legitimacy with the public, staff and offenders based on openness, fairness, accountability and appropriate uniformity of treatment; humane and effective offender disposals rooted in three key tenets of desert, rehabilitation and reparation placing a premium on reducing reoffending; and, finally, a balanced approach to making the penal system, like other state institutions, run on an economic basis.

The following proposals are intended for immediate impact and they are rooted in the need rapidly to address the size of the prison population, currently standing at 84,815 with average overcrowding of 111 % (MOJ

September 2015) to reduce overcrowding and the costs of imprisonment to prisoners and the public. Three levels of action are needed. Firstly, executive action, making use of existing powers, to speed up the release of non-violent adult prisoners. Next, Parole Boards that are empowered to give early consideration to the release of any appropriate, short-tariff IPP prisoners still held in the prison system. There are currently 6279 IPP prisoners, 77 % of whom are tariff-expired (Howard League for Penal Reform October 2015). Finally, local action on the part of prison governors to make well-founded but speedy use of Home Detention Curfew decisions. These measures in combination should either create a net outflow from prison of non-violent offenders or stabilize the prison population easing overcrowding and increasing the possibility of the establishment of normal regimes and maximizing the possibilities for purposeful activity in prisons and for reducing reoffending, as well as reducing costs. Alongside this, concerted efforts should be made to strengthen existing systems to deal with mentally ill and drug-dependent offenders, in terms of diversion from the criminal justice system as well as treatment being offered within the system. Prisons should not be used as substitutes for mental hospitals. Finally, it is proposed that there is an immediate withdrawal of the MOJ from austerity measures (if not the reduction of austerity measures altogether).

Longer-term proposals may be divided into two elements, general and particular. There are six general matters. Firstly, the government of the day needs to publicly and explicitly commit to three key principles—desert, rehabilitation and reparation. In particular sentencing needs to be linked more closely to desert, satisfying the basic desire for vengefulness. Within these levels offenders should be provided with opportunities for rehabilitation and/or reparation. The desert principles should be based on a revival of the provisions made for sentencing and the determination of the length of custodial sentences in the Criminal Justice Act 1991 (Sections 53, subsections 1 and 2). This in itself would act to limit the number of people sentenced to immediate custody and effect a decrease in the average sentence length. Secondly, effective work by government should be undertaken to actually accomplish what the Coalition saw as desirable, that is, limiting the proliferation of new offences. It could also aim to remove or modify existing offences where they have been little

used or had no desirable impact. Thirdly, a thoroughgoing attempt is needed to introduce the Corston agenda across the board allowing for all such 'categories of vulnerability' outlined in the report. Part of this will entail something more than expecting solicitors and barristers to engage in a modicum of philanthropy (Gove June 2015), and will involve a reassertion of the state role to ensure that everyone has the right to a fair trial, including legal advice and, if necessary, legal representation albeit means tested.

Fourthly, a general emphasis should be placed on rights and responsibilities affecting all relevant parties (politicians, the public, victims, offenders and staff). This should be rooted in accountability and openness based on legally enforceable standards and systematic, statutory monitoring of prisons and community-based offender services. Fifthly, outsourced services should not be absolved from the general guidelines for fulfilling the aims of the penal system, should be subject to quality inspections including consideration of how the pattern of contract award has been managed to sustain a broad range of involvement, and should not be exempted from loss of contract, transfer to the public sector or closure. In order to guard against moral hazard and too big to fail/undue influence considerations, multiple contracts should not be awarded to the same company. This would enable the gains from a mixed economy to be made whilst incorporating such firms into the penal system proper. Finally, as has been noted variously above, the baby, evidence-based policy, should not be thrown out with the managerialist, bathwater.

The particular proposals for reforms can be broken down into three areas concerned, respectively, with sentencing, custodial institutions and community-based offender services. Short sentences of imprisonment (up to 12 months) for non-violent offenders should be either heavily restricted or abolished as they achieve nothing and do much harm (see Chap. 6), with intensive community penalties put in their place (see below). In October 2015 there were 6279 short-term prisoners (Howard League for Penal Reform October 2015). Rather than increasing the discount for guilty pleas, general encouragement should be provided, through the sentencing framework (see above) and guidelines, to limit the length of prison sentences imposed in the future. All financial measures imposed on defendants (including fines, compensation orders)

should be made subject not only to the seriousness of the offence/harm done/court time taken test, but also to the ability of the defendant to pay (obtained independently of the offender through HMRC records) based on the unit fine introduced by the Criminal Justice Act 1991 and then vigorously pursued. W-LO should be abolished and such prisoners as previously included in this category should be treated as exceptionally serious, high-tariff life-sentence prisoners, making them subject to the same release procedures as other lifers. The role of mandatory life sentences should be critically examined.

Greater rehabilitative and reparative emphasis should be placed on community sentences. Reparation should not be seen in money terms only. Reform of the Criminal Justice Act 2003 should be undertaken to reintroduce single requirements for community orders allowing a broad range of separate orders that can be worked through, avoiding the risk of a one-off, 'tried that', premature movement to the use of custody. Where justified by current offence pattern, a combination of some community orders with tagging should be made possible. Tagging and GPS monitoring could be combined with a supervision requirement (previously known as a probation order). The limitations of tagging alone or in combination with mainly punitive measures should be recognized. The requirement to impose at least one punitive element in a community order should be repealed with the matter left to the discretion of the court, subject to the sentencing guidelines. There should be a much greater encouragement to use out-of-court disposals particularly ones involving reparative interventions subject to proper targeting of offences and offenders. Provision for out-of-court disposals should be more evenly distributed around England and Wales by means of police training to improve knowledge of the procedures. Accountability should be encouraged by the setting up of active scrutiny panels in all areas. An urgent review of legislation regarding anti-social behaviour and related orders (e.g., criminal behaviour order) to determine whether they are necessary, and where necessary, how they can be incorporated into a penal system that emphasizes rights, deserts, rehabilitation and reparation is needed. The key problems of the blurring of civil and criminal law, the usefulness of the distinction between anti-social and criminal behaviour, the problem of unenforceable, disproportionate and/or inappropriate conditions and their escalatory potential also need to be addressed.

A crucial element in the reforms of the custodial institutions and community-based offender services is the involvement of staff as they too often 'feel exposed at the front end of unworkable policies which have to be implemented in impossible conditions' (Arnold et al. 2007:492). Turning to prisons we have to start by indicating the need for legally enforceable standards for all prisons. When and if further prison closures are necessary then the performance of all such prisons should be taken into account. Prisons should also be linked to the overall statement of penal aims by imposing clear, reasonable and enforceable expectations about reoffending targets and reparative projects. Work in prisons should be developed with national minimum pay/modified living wage payments to prisoners, from which can be extracted damages caused in the prison and payments made to victims. Similarly, prison education should be made effective and regularly inspected with companies unable to fulfil contracts having their contracts terminated. Priority should be given by the prison to supporting prison education. Much greater clarity is needed regarding the objectives of prison education and to defining its curriculum. When contracts are awarded an important consideration should be the projected spending per prisoner by the bidding organizations. Greater opportunities for prisoners to show social responsibility should be developed including prison mentoring schemes, work outside the prison on temporary release, participation in the running of the prison within appropriate limits. Participation in running prisons may, as Edgar (March 2015) argues, include prison councils and representation on various prison committees dealing with a diverse range of issues including prisoner activities, education, regime, work safety, rehabilitation, visits, die, religious observance and other issues. This would produce potential benefits like the realization of management objectives, engagement of prisoners, reduced tension and conflict, opportunities for dialogue and communication and enhanced rehabilitation and responsibility. Greater responsibility could also be developed by all enhanced status prisoners serving 4 years or less being allowed to vote in elections, with the same re-enfranchisement being granted to all enhanced status prisoners in the last 2 years of their time in prison. All prisoners should also be given the opportunity to quit smoking rather than smoking/tobacco being banned. Further opportunities are possible via prisoners engaging in offending behaviour programmes

based on anger management and Cognitive Behavioural Therapy. This is not to assume that prisoners suddenly possess absolute free will, but only that they possess a degree of choice. If prisoners are expected to behave responsibly then this needs to be reciprocated. This has a bearing on a recent issues raised by the Supreme Court as a result of a judicial review of 'good reviews' (Bourgass and others v Secretary of State for Justice). 'Good reviews', as they are known in the prison service, are conducted by governors, to determine whether the continued detention of prisoners in segregation on the grounds of 'good order and discipline' under the Prison Act 1952, rule 45(2), of the 1999 Prison Rules and PSO 1700, are justified. But the Supreme Court recently ruled that decisions made by governors in these circumstances did not meet the requirement of being independent (Supreme Court Press Summary 29 July 2015). It is clear that in these circumstances 'good reviews' should only be undertaken by an independent and reviewable body. Further, day-to-day interactions between prisoners and staff, except in extreme conditions, should be conducted in a mutually respectful manner. The Prison Inspectorate and PPO Service should be placed on a statutory footing and able to issue enforcement notices, determined by the above-mentioned reviews and legally enforceable standards. Clearer lines of communication need to be established between all monitoring parties including HMIP, PPO and the Independent Monitoring Board for Prisons.

Community-based offender services need to be linked to the statement of principles through eventually non-negotiable targets, legally enforceable standards via the Inspectorate for Probation and the PPO. The ability of the CRCs to continue to involve a variety of groups in providing resettlement services should be kept under review, with their activities, and those of the probation service, being targeted on longer sentence prisoners as the use of short prison sentences is phased out or significantly reduced. Similarly, the continuing operation of community orders by the CRCs should be reviewed to determine that they continue to involve second- and third-tier groups. All services should be reviewed in terms of their actual contribution to reducing reoffending. The Probation Inspectorate and the PPO should be able to require changes to community-based offender services, on the basis of their failing to meet the predefined standards.

These social and penal reforms will ensure a more equitable, ordered society but will not, of course, eliminate crime, merely reduce it to lower levels. It is inevitable that some element of exclusion will occur, albeit temporarily. People will also still be sent to prison, some of them for long sentences, and some of these sentences will be indeterminate, until the risk they pose to others has substantially diminished. Whilst inside, longer-term prisoners will be able to work towards rehabilitation and make reparations. Prisons will inevitably remain oppressive places but they would place the onus of responsibility on prisoners and encourage a desire to think about victims, and consider new ways of acting to avoid harming others. Other offenders will inevitably be subject to various community sentences but will also be encouraged to take responsibility for their actions. In turn we, the onlookers, policymakers and staff in the various parts of the penal system, will harm them less.

The measures suggested, whilst not part of a policy rooted in austerity, at the same time do not add materially to the cost of services and hold out hope that reductions in the cost of crime will be effected. It is not possible in this work to provide a full costing of the measures suggested above. Various methods could be used but the relative financial costs and advantages will be assessed here by taking the hypothetical case of one short sentence prisoner serving 8 months. This prisoner would have to serve the requisite custodial period of one-quarter of the sentence, that is, 2 months (8.5 weeks) at a cost of £711 per week (Prison Reform Trust Bromley Briefing Summer 2014:5), £6043. In addition she/he would be tagged for 2 months (8.5 weeks) at a cost of £126 per week (Prison Reform Trust Bromley Briefing Summer 2014:10), or £1026 in total. After that, given the compulsory licence arrangements for this group she/he would have a period of licence of 12 months, at a cost of £2650 excluding any increases due to the CRCs (NAO 2014:14). Thus the total cost of penal intervention based on imprisonment into this prisoner's life would be at least £9719. In contrast, the same prisoners could instead be made the subject of an intensive community order consisting of unpaid work and various accredited schemes to help with her/his offending behaviour and any drug or alcohol or mental health problems. The average length of such schemes has in the recent past been about 14.5 months (Prison Reform Trust Bromley Briefing Summer 2014:74) at a cost of £83 per

week (NAO March 2014:14) or £5229 in total or 54% of the cost of short-term imprisonment. But there is more—imprisonment even for a short time can mean loss of employment (leading to reduced payment of taxation) and greater family dependency on welfare benefits. On the other hand, an intensive community order can mean retention of employment and reduction of the family dependency on welfare payments. Finally, the community penalty carries the bonus of being better by a figure of 7% (Prison Reform Trust Bromley Briefing Summer 2014:1) at preventing reoffending and the costs that that entails for the community and within the criminal justice system (in terms of prosecution and providing any new penalty).

More of the Same Old?

A rational assessment of the chances of the broader agenda for social justice and the particular reforms of the penal system as set out here ever happening suggests grounds for pessimism and optimism. In May 2015 for the first time in 23 years a Tory Government was elected to Parliament with an absolute majority of 12 (BBC News May 2015). This almost certainly means that for the next 5 years penal policy is likely to follow their world view and political calculations especially as the start of the term of office begins with yet another round of cuts, which for the MOJ means lopping a further £249 million off their budget (Smith June 2015). The Conservative Government is more likely to advance, than dismantle, neo-liberalism and the shift to punitive managerialism is likely to continue, the incumbency of Michael Gove in the role of Minister of Justice, notwithstanding.

But there are also some 'reasons to be cheerful' as Ian Drury expressed it (Metro Lyrics Website August 2015). Clearly, punitive managerialism is dependent at least in part for its survival on the continued viability of neo-liberalism. What are its prospects? Insofar as it depends in part on a Conservative Government then the weakness of the present government has to be noted, given that it has a majority of only 12 making it comparable with the Major Government of 1992, with its majority of 21, the Callaghan administration of 1974, with its majority of two, and the Heath

Government of 1970, with its majority of 30 (Lambert January 2015). Further, the hegemonic domination of neo-liberalism is more an expedience of the moment (though a long moment) than a deep commitment. Unless the Conservatives can come up with another useful rationalization when these ideas and practices push the country into another economic/social crisis then they may be left high and dry. Perhaps, a 'brake' on neo-liberalism fanaticism will emerge from existing one-nation ideas within the Tory Party. Furthermore, the Labour Party may be down but it is not yet out. The leadership contest of the summer of 2015 may have produced not simply the right person with the will and energy for the job but he may assist in the articulation of a significant alternative to the broader neo-liberal claims which is needed. The possibility of such alternative ideas may seem unlikely caught up as we are in the neo-liberal paradigm, but until about 30 years ago, neo-liberal ideas themselves were seen as beyond the pale by a wide range of the public and politicians, way out of the bounds of normal political and social thought—if this is so then it is not impossible to develop alternative ideas, currently marginalized by the neo-liberal hegemony. What this needs is widespread public participation in counterhegemonic groups and signals the need for those concerned about developments to get involved.

What are the prospects for punitive managerialism? The chances of the survival of managerialism seem greater than punitiveness. The public assessment of the importance to be attached to crime has reduced, as noted in Chap. 2. This is reflected in the party manifestos for the 2015 election, in which crime control did not take a prominent role. Even in the first 100 days of office of the Conservative Government very few of the actions taken related to crime and control (about one in every ten), though many did relate to cuts in welfare benefits (Sparrow August 2015) which are likely to precipitate yet further marginalization. Perhaps then it will be more difficult to be explicitly punitive, though the tendency to outsource seems to remain uncurbed. Similarly the debate that Michael Gove initiated as the new Minister of Justice, once again, stressed rehabilitation, in particular criticizing the prison system and placing an emphasis on prison education (Gove July 2015; Hutton July 2015). What one makes of this depends upon an assessment of whether Gove is an expedient or genuine one-nation Tory and how much influence this set of ideas has in the Tory Party, and what the prospects are for his apparent intentions to reprioritize rehabilitation. Clearly, his

predecessor, Ken Clarke, was not able to progress a similar agenda very far in the 2010–12 period, largely because of opposition from within the Tory Party, led by Michael Howard and Theresa May, and the impact of austerity. In any case, the new minister's views do not seem to be likely to put a brake on further managerialization since he advocates a policy of the closure of the old Victorian jails all of which are in the public sector and he seems to relicense the possibility of the contracting out of whole, new prisons, a policy put on hold by Chris Grayling in 2012 (Gove July 2015).

However, the limits of managerialism and in particular outsourcing have yet to be established though hints are available concerning this. The limits to outsourcing are evident in the very notion of PBR, even where the providers are insulated against the full impact of failure by the reward system that makes the PBR elements only a part, possibly a small part, of the overall revenue. There is also what we may call the moral problem of economic failure raised by the chair of the House of Commons Public Accounts Committee (see Chap. 6). High-profile withdrawals of service by outsourced companies may make the continuation of existing outsourcing more difficult and new outsourcing impossible to envisage. Finally, experience may lead to a questioning of the assumption that private enterprise is necessarily better at providing penal services, enabling at least a more balanced approach to provision which genuinely involves a range of providers and accrues benefits from this conjunction. As with the broader pursuit of social justice, the pursuit of penal justice depends on the continued opposition to ill-founded government reforms. Such resistance is provided through many already established groups like the Criminal Justice Alliance, the Howard League for Penal Reform, the Prison Reform Trust, the Prisoners' Education Trust and Penal Reform International. It also needs like-minded individuals to place pressure on relevant political parties to champion progressive penal policies, as well as act as outriders for change, as with blogs like JackofKent, a Internet source mainly but not exclusively concerned with the reforms to legal aid. Social media seem to have the potential to open up the field to progressive influences.

Whether neo-liberalism and punitive managerialism continue to survive is dependent on a number of contingencies. There is no inevitability about these processes. Neither are they somehow supra-human. It is within our capability to influence events. Get involved and do so!

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