

PAYING FOR JUSTICE: PRISON AND PROBATION IN AN AGE OF AUSTERITY

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Based on the 10th Annual Community Justice Portal Lecture delivered at Sheffield Hallam University on 23rd May 2013.

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Introduction

Looking at some of the current developments in penal policy, there is a sense of history repeating itself. Almost exactly twenty years ago, a hard line Secretary of State took up post, promising decent but austere prisons, while today's minister offers the prospect of Spartan but humane ones. (Mail on Sunday 2013) The 1990's saw the very existence of a probation service threatened by a minister whose big idea was replacing social work trained professionals with former military personnel. Today there is once again the existential threat to probation with the big idea appearing to be the unleashing of an army of ex-offender mentors on those leaving prison - although as with the earlier proposal there are major questions about the viability of the plan (Daily Telegraph 2013). In the 1990's, Michael Howard went on to propose the scrapping of parole and early release measures which prompted the then Chief Justice to opine that "never in the history of our criminal law have such far reaching proposals been put forward on the strength of such flimsy and dubious evidence" (House of Lords, 1996). Today we read that Justice Secretary Chris Grayling is to change Britain's 'dishonest' sentencing rules that allow inmates to walk free halfway through their jail terms (Daily Mail 2013).

Perhaps with economic woes and divisions over Europe, back to basics style criminal policies look now as they did in the 1990's attractive ways of shoring up electoral support. Whether it will be a case of history repeating itself, first as tragedy then as farce, remains to be seen.

The question of paying for justice could scarcely be more topical with the Government announcing their Transforming Rehabilitation Strategy early in May 2013, an Offender Rehabilitation bill introduced in Parliament shortly afterwards and a fierce debate raging in particular about the future shape of the probation service, the likely privatisation of large parts of its work and the mechanisms proposed for financing this activity in the future. This is to say nothing of the proposed changes to criminal legal aid, which despite the potential for far reaching consequences for defendants, for social justice and the rule of law must lie outside the scope of these present remarks. The aim of this lecture is rather to share one or two observations about what is happening to policy and practice in the areas of prisons, probation and youth justice as a result of the need to reduce public spending and the so called austerity which has resulted.

Crime itself of course appears to be confounding conventional criminological theory by continuing to fall at the same time as more and more people find themselves subject to risk factors previously thought to be associated with committing it. Experts seem unable to agree whether it is because targets are harder and less valuable, young people are drinking less, taking fewer drugs and more addicted to computer games, or due to longer term factors such as the legalisation of abortion or the removal of lead from petrol. There is also some disagreement about whether the fall is genuine or masks some massaging of the way crime is recorded. Others suggest that the fall ignores the scale of the switch to cybercrime, or is yet to reflect the impact of the economic downturn which will surely arrive at some stage.

In as much as the fall in certain kinds of crime is a real one – and few dispute this much-

better policing is often put forward as part of the explanation. The police are facing both cuts in resources and changes in governance. For the Inspectorate “this can be seen as an opportunity to innovate and refresh or as a reason to continue as is and see services cut back” (HMIC 2011). For some commentators ‘enforced contraction’ could be a positive opportunity to reappraise what the police should be doing (Millie 2013). I want to suggest that the same is true for the criminal justice system as a whole and that in straitened times we should be looking to develop a “narrower” approach to the use of prison and with it a broader approach to community justice.

The Use of Prison

Faced with reducing their spending by 20% by the end of this Parliament, one obvious step for the Ministry of Justice might have been to look to reduce the use of imprisonment by a fifth. Of the Ministry’s £8 billion budget, almost half is spent on the National Offender Management Service (NOMS), the demand for whose services come largely from the courts and the supply of which is in large part imprisonment. Jurisdictions across the globe faced with budgetary pressures are looking to reduce prison numbers, whether in California from a very much higher starting rate than England and Wales or the Netherlands from a much lower one. 27 jurisdictions in the USA (most notably California) have participated in forms of Justice Reinvestment with two thirds legislating to stabilise corrections populations and budgets (Sentencing Project 2013).

There are a number of ways of reducing imprisonment which are discussed in more detail later on in this the paper. One straightforward measure would be to cut the average length of prison sentences by a fifth. A recent study undertaken for the Criminal Justice Alliance on lessons from Europe found milder sentencing tariffs in several countries where crime has been falling (as in the UK) but where prison numbers have come down too (Allen 2012). While reducing the maximum penalties for theft and burglary would be politically hard, working with the Sentencing Council to develop more austerity in the use of imprisonment by reducing the going rate for offences which do not involve violence might not be as fanciful as it sounds.

But as we know the present Government at least since Mr Clarke’s removal in 2012, has not wanted to go down this road. The Prime Minister in the autumn of 2012 dismissed the idea of arbitrary targets for the prison population, arguing that “the number of people behind bars will not be about bunks available but about how many people have committed serious crimes” (Cameron 2012).

Mr Grayling a few weeks later made it simpler still. “We have to focus on making the prison system cheaper not smaller. I don’t want someone who should be in prison on the streets because there is no space available” (Grayling 2012).

Reducing Costs of Prison

Making prison cheaper sounds attractive and indeed in the UK along with many other countries the costs of detention have come down in recent years. Within the 47 member

states of the Council of Europe, the average cost of detention per day fell from 105 Euros in 2007 to 93 in 2011, with numbers of prisoners per custodial officer going up from an average of 3.1 to 4.2 (Council of Europe 2008, 2011). There are enormous variations here: Norway spends a hundred times more per prisoner than does Ukraine. But driving down costs is not unique to the UK. The key question is what impact cost and staff reductions might have on the way our prisons operate?

Consider a local prison where only 10 per cent of prisoners spend ten or more hours out of their cell on a weekday: where a third say they have felt unsafe, and fewer than a third say a member of staff has checked on them personally in the last week to see how they are getting on; where less than a quarter think it easy to see the doctor and a fifth report that they have been prevented from making a complaint.

These are (selective) findings from a questionnaire survey undertaken during a recent inspection of a local prison. This is not an unusually poor establishment. The findings are from what the Prison Inspectorate described as “a very positive inspection: much of what the prison did appeared to be very successful and we identified much good practice that should be emulated elsewhere” (HMIP 2013). But will running it more cheaply – which inevitably means reducing staff numbers - do anything to address what seem to be pretty serious shortfalls in performance in important areas?

Are fewer resources likely to increase the number of prisoners – 11% at the moment - who feel that a member of staff has helped them prepare for release? Or raise from 23% the number of prisoners who say their cell call bell is normally answered within five minutes?

Without being apocalyptic, I do think that as things stand, making prisons cheaper could be inviting a range of problems both inside and out. One could go as far as to say that currently within prisons there is “too great a degree of tolerance of poor standards and of risk” (Francis 2013). The quotation is taken from the Francis report on what happened in Mid Staffordshire NHS Trust, compulsory reading I suggest for anyone working in the public services. Such a tolerance was one of the reasons why numerous warning signs did not alert the system to developing problems.

An investigation I conducted into the near death of a prisoner at Holloway in 2004 found staffing levels to have been too low. “In particular”, I concluded, “on Saturdays and Sunday evenings when many women may have visits which might prove distressing for one reason or another, there is a need for women to be able to talk to staff” (Allen 2010). I was told in response merely that Prison Governors review their staffing levels to ensure that they are able to deliver a prison regime” (NOMS 2010).

In another investigation at HMP Bedford, I recommended that greater priority should be given to ensuring that each prisoner thought to be at risk of suicide and self-harm is allocated to a Personal Officer who attends or reports to the meetings held to review the case. This was not accepted by NOMS. There is no requirement, I was told, for prison establishments to offer a Personal Officer Scheme (NOMS 2013).

So there is limited fat to trim on the prison bone. In their recent report about NOMS, the Public Accounts Committee - whose concern is not the merits of policy but value-for-money - expressed concern about safety and decency, the institutionalisation of overcrowding and the risk that cost reductions result in prison staff having to focus solely on security at the expense of offender management, training and rehabilitation (PAC 2013).

There are three main approaches to managing with fewer resources. The first is to reduce what we expect of prisons; the second is to look to private sector solutions and third to deliver economies of scale.

Expectations

On expectations, the current rhetoric about spartan prisons as well as reinforcing the notions of less eligibility that come to the fore in times of economic hardship also paves the way for a reduction in standards. It is interesting that Xenophon wrote that in the Spartan educational system the boys were fed just the right amount for them never to become sluggish through being too full, while also giving them a taste of what it is not to have enough. He might have been impressed by the Chief Inspector of Prisons' report in 2010-11 which noted that in three young offender establishments, "external nutritionists had been consulted but young men said they frequently felt hungry" (HMIP 2011).

Alongside the tough rhetoric there will be changes to the incentives scheme from November, with a new entry level of basic conditions for new arrivals and more privileges to be earned – changes which are designed to improve confidence in the prison regime. But there is also a commitment to deliver a full working day for prisoners, to create specialist resettlement prisons and in the case of juvenile custody to create a new generation of establishments with a greater focus on education. Can these laudable objectives really be met while at the same time cutting costs?

On the juvenile estate, NOMS has reportedly recommended that for every 12 young people there should be one officer as the minimum staffing standard (Puffett 2013). Currently, child-to-staff ratios differ across YOIs, however a NOMS spokesperson is quoted as saying that they are committed to reducing costs for the taxpayers and where this means reducing staff numbers, they will work constructively with trade unions to avoid compulsory redundancies as far as possible.

But what about the young people and the commitment to a greater educational focus? How do NOMS plans fit with the guidance on the treatment of looked after children which emphasise measures which "encourage warm and caring relationships between child and carer that nurture attachment and create a sense of belonging so that the child or young person feels safe, valued and protected" (NICE 2010)? Recent Inspections have included findings that young people spent too much time locked up during their induction and this contributed to their overall feelings of being unsafe; that staff admitted that they did not always respond to bullying because the formal systems were too complex and that the lack of staff engagement with young people continued to be a problem and managers felt

that this often stemmed from a lack of confidence in some staff in dealing with difficult situations. In most establishments the use of force by staff to control young people is high and in some bullying between young people is a serious problem. An inspection at Feltham conducted after the 2011 riots found the introduction of some young people to gangs and a violent culture in prison, which they had not previously experienced (Allen 2012b).

The introduction of the new ratio is part of a NOMS review of staffing at YOIs across the country in light of the large and welcome fall in the number of under-18s in custody in recent years. It is surely not unreasonable to suppose that in such a situation those who continue to go to custody are likely to be some of the most damaged and demanding young people, requiring more generous not more restricted staff ratios. It seems there is a potentially dangerous reality gap opening up between willing the ends and willing the means.

Private sector

The favoured way of closing that gap appears to be to increase the use of the private sector providers and to spread more widely the use of private sector practices across the public prisons. The Coalition government after all is committed to scaling back state run services and rebalancing the economy in favour of the private sector.

Clearly questions have emerged over the last year about the reliability of the private sector and more recently it seems in respect of electronic monitoring, its propriety, with an investigation underway into the billing arrangements . In fact until recently one of the main alleged benefits of private sector prisons – that they are cheaper than public ones - was far from unequivocally clear and regardless of billing controversies a free market think tank has been highly critical of the high contract cost of and lack of innovation in electronic monitoring (PAC 2013).

The debate on costs of prison has all changed with the opening of HMP Oakwood, the 1600 place G4S prison which opened last year and where the cost per place is £13,200. This, is less than half the average cost of existing prison places, and we are told sets the benchmark for future costs. Surely some scepticism is called for about whether such low costs are wholly reliable or represent a fair comparison. Running any institution or concern at less than half the average cost of a comparator seems on the face of it unrealistic, even allowing for economies of scale.

The alleged costs reported for Oakwood by the Ministry of Justice have already crept up. According to the Impact assessment for the Probation Review in January 2012, Oakwood “will provide places at the lowest operational unit cost in the estate at £11,000 per prisoner per year” (MOJ 2012). By the time of the NOMS Competition Update in June 2012 the cost had risen to £13,000 per prisoner per year (MOJ 2012a). The MoJ told me that the discrepancy was because “for true comparison with other prisons, it is necessary to

include other cost elements that are not included in the contract price. These include rates, controller teams, interventions, gas utilities, library and head of learning and skills”.³ The government have emphasised that Oakwood’s low cost does not come with an impoverished regime – the specification for the prison requires standards as high as those in other prisons. But how it is working in practice is as yet unknown. If Oakwood is to be the model for future prisons we surely need some objective information about how well it is operating. And if its low costs are to be put forward as the new benchmark, greater clarity is needed about what they include and how they are achieved. The Inspectorate and NAO need to take a trip to Wolverhampton to find out.

In the meantime, the Inspectorate’s report about SERCO run Thameside in London is not reassuring. The prison’s regime was one of the most restricted they have ever seen. Time out of cell was very limited. 60% of prisoners were locked up during the working day, and some spent 23 hours a day in their cells. There were far too few activity places for the needs of the population, and much of the provision required improvement. There was too little vocational training, and most of the work available was low skill (HMIP 2013a).

Economies of Scale

If the jury is still out on private prisons, it might have been thought to have delivered its verdict on large scale prisons. Five years ago Jack Straw wanted to build 2,500 place Titan prisons but strong opposition from practitioners, parliamentarians and pressure groups forced a climb-down of sorts. The Conservatives were amongst the critics, proposing in their Green paper *Prisons with a Purpose* that they would “sell off old prisons and rejuvenate the prison estate, building smaller local prisons instead of the ‘titan’ prisons proposed the Government” (Conservative Party 2008). They seemed to accept the Prison Inspectorate’s view that smaller prisons worked better and the argument that so-called super jails will struggle to prepare their residents for return to the various communities in which they live. Now in government, the attractions of economies of scale seem to outweigh concerns about impact on the reintegration of prisoners. The Justice Ministry announced in January 2013 that it is to start feasibility work on what would be Britain’s biggest prison with a capacity of more than 2,000.

As far as paying for prisons is concerned, the evidence points precisely the opposite direction to the government’s policy. What we need is smaller, not cheaper rather than cheaper not smaller. That goes both for the overall size of the prison population and the size of establishments.

Probation

Whether or not we have Titan prisons, we seem to be heading for Titan probation, with perhaps one national public service responsible for about 30% of the current caseload. More than seven out of ten cases are likely to become the responsibility of private and

³ Personal Communication from NOMS

voluntary organisations operating large contracts- though not as large as the government proposed or the private sector lobbied for.

This “rehabilitation revolution” is intended not only to reduce costs to meet MOJ targets but to produce savings which can be used to expand supervision to the cohort of prisoners serving sentences of less than 12 months. This is the group for whom as recently as 2011 the government removed from the statute book the provision for “Custody Plus” on the grounds that it was unaffordable. Are the savings from privatisation really likely to be able to fund the supervision of 50,000 additional offenders, the costs of prison places needed to deal with those who fail to comply with it and still meet Ministry of Justice austerity targets?

If there was a prize for 21st century organisational meddling and ineptitude, despite a strong field, the Home Office and then Ministry of Justice would certainly make the short list for their treatment of the Probation service. Successive ministers have been unable to reach a settled view or workable policy about the proper balance of national and local accountability, the nature of probation’s relationship with prisons or the extent to which probation services might be outsourced to private and voluntary sector organisations.

On the last of these, Lord Carter’s 2003 review of Correctional Services, accepted without consultation by David Blunkett, expected that within five years, contestability – Labour’s word for competition - would have been introduced across the whole of prisons and community interventions, with outcome based contracts. Two years later the Offender Management Bill offered the prospect of 50% of Probation work being outsourced. But it is only now, ten years on, that there look like serious intentions to contract out large chunks of probation supervision to private companies and charities, although legislation permitting this has been in place since 2007.

A range of practical objections have, and no doubt will continue to be raised to the dismantling of a hundred year old service, not least about the fragmentation or atomisation of offender supervision. The success of this depends crucially on cooperation between agencies, reliable exchange of information about risks and needs and partnership working to address them, much of which needs to be undertaken at a local level.

Other critics may point to the references in the Mid -Staffordshire NHS Trust report to the failure to appreciate the risk of disruptive loss of corporate memory and focus resulting from repeated, multi-level reorganisation in the Health service, - the organisation which would probably win the meddling prize.

The Institute for Government has recently identified success factors from analysing a number of policy initiatives (IfG 2012). Of the seven key factors, the probation reforms appear currently to include one – the need to create new institutions to overcome policy inertia. Four others are largely absent - the need to understand the past and learn from failure, to open up the policy process, to be rigorous in analysis and use of evidence, and to recognise the importance of individual leadership and strong personal relationships. The total absence of the two other dimensions should set loud alarm bells ringing in

Whitehall- the need to take time and build in scope for iteration and adaptation and to build a wider constituency of support.

There are however two specific questions which have not received sufficient attention. The first relates to the legitimacy of supervisors in the eyes of those made subject to community sentences. Chris Grayling might be right that there's no-one better than a former offender turned good to help someone turn their life around and the brave new world may provide more opportunities for initiatives like peer mentoring. But actually the evidence is rather limited. But what of the bread and butter supervision requirements that form part of almost all community sentences, all of which are to have a punitive element in the future. How will offenders react to being punished for profit?

Recent Cambridge University research has modified earlier claims that the private sector offers a more courteous prison environment than the public sector in the light of findings that public sector establishments were better at 'getting things done'; a distinct component of respect in prison, according to prisoners. It is plausible to think this is important to those on probation too. The comparative study also found that in the public sector prisons, officers are confident and knowledgeable, delivering routines that are safer and more reliable than in the private sector (Hulley et al 2012).

The second question relates to how magistrates and judges will relate to the implementation of sentences by profit making companies. Their sentencing decisions will suddenly take on a commercial dimension. Work at Rethinking Crime and Punishment a few years ago gave judges and magistrates the chance to visit community based programmes to try to boost their understanding and confidence about what is involved when they impose a particular sentence (Hedge 2006, 2007). But the context of a corrections market may inhibit these kinds of endeavours. The Guide to Judicial Conduct makes it clear that the requirements of a Justice's office and terms of service place severe restraints upon the permissible scope of his or her involvement with any commercial enterprise (Judiciary 2013; 8.31).

These are perhaps two examples of consequences not fully being thought through of a plan to place the majority of probation work into the hands of private companies. The directors of such companies must act in the way they consider would be most likely to promote the success of the company. Contrast this with the ethical codes of Probation trusts which as non-departmental public bodies require the obligations of public service to be placed above personal interests.

PBR

As for payment by results, all that can really be said at present is that the approach has yet itself to show sufficient results in any area of social provision to be able to design with any confidence an operating system that does not risk huge unintended consequences. It may well in the end prove neither workable nor desirable.

Ministers are fond about comparing the costs of prison to the costs of Eton, something with which many are no doubt familiar. Nick Clegg did it again in a recent speech although he might have chosen Westminster school whose fees are £31, 290 per year rather than Eton (£32,067), (Clegg 2013).

Actually it is not true that the cost of sending a criminal to prison is more than it costs to go to these schools which typically provide accommodation and schooling for only seven months a year. But if it is true that we need a better return on our investment and payment by results is the way to do it, we might perhaps expect these schools to operate a PBR system. They do not do so. Eton's informative website explains that parents pay an initial registration fee and an entrance fee – £1,800 before the child starts (although £1,100 is returnable when you leave, provide your account is fully paid.) Then you pay in advance £10,689 each term. There is a complicated scheme of additional charges for music, fencing and the boat club. Music lessons totalling more than 90 minutes are charged at the 30-minutes-per-week rate from the 91st minute onwards, which sounds like an expensive regimen. In addition to these charges, boys' school accounts may include various other items which may total from £50 to £500 per term, besides any tradesmen's bills for items bought in local shops.

There does not seem to be anything about payment by results here. Indeed there is an absentee fee of £8,551 per term: you have to pay if your child is not actually at the school plus a withdrawal without due notice fee of the same amount. The school does not seem to be bearing much risk. It gets paid however well their pupils do and indeed if they are not present. It is perhaps worth reflecting on why institutions such as these are not funded in this way and why they are not so far offering to pilot it. Perhaps for the same reason that the Treasury are reportedly cooling on the idea: because hoped for savings could only be achieved by dangerously destabilising the institutional infrastructure that provides the services.

Conclusion

There are huge questions hanging over the government's strategy on both prison and probation. At a policy level, an opportunity is being missed to shrink the system of punishment and to develop measures instead which systematically seek to build the capacity of communities to prevent, absorb and cope with crime and insecurity. If we are to succeed as a society in locking fewer people up we will need instead a wider range of community based measures - therapeutic, restorative, educational and supervisory – to deal with the aftermath of crime. But as Todd Clear has written "rehabilitation programmes no matter how good cannot by themselves substantially reduce incarceration rates by reducing recidivism" (Clear and Austin 2009). Some other mechanisms are needed to reduce prison numbers.

Justice Reinvestment offers a promising approach but not yet a clear model or methodology (Allen 2011). It is a shame that the devolving of custody budgets for juveniles to local authorities appears to have been abandoned but there are surely lessons to learn from the remarkable fall in the number of under 18's in prison since 2008. (Allen 2011a). One option would be to extend the Youth Justice Board's remit to cover 18-21's.

Short of this an initiative to apply the lessons from youth justice to the next age group up is surely overdue (Allen 2012c).

But if we are to succeed in substantially reducing custody we will need a comprehensive programme aimed at rebalancing criminal justice away from prison and towards the community: greater use of diversion, more imaginative use of alternative sentences, imprisonment restricted for certain offences and types of offender. Some elements of such a package - as with the recalibration of sentence lengths mentioned earlier - would require central government will and action. *All* of the elements however require stronger locally based community justice systems involving the police and the range of organisations whose services are needed to reduce crime and offending. In short they require a probation service. This was something that was recognised by the Conservatives in opposition who proposed that “ instead of being directed by Whitehall, local probation chiefs and prison governors could answer to locally elected politicians, so that the community has the ability to ensure safety in its own area” (Conservative Party 2008). In short order that vision has been abandoned.

During the debate on the Probation of Offenders Act in 1907 the earl of Meath thought that probation would lead to the prevention of crime and the emptying of jails. It has not worked out quite like that particularly over the last twenty years. But perhaps it could do so.

Shrinking the system would enable some of the more drastic cost cutting faced by the prison system to be avoided and efforts made to address existing shortfalls in performance. Otherwise the welfare of prisoners and perhaps the safety of the public will be put at risk.

Given the far reaching nature of the probation proposals, there is a strong case for some kind of pause that goes beyond the short consultation which ended in April. What about a Probation Futures panel that could look objectively at the very serious concerns that have been raised during the consultation? The changes are after all to an extent similar in scope to those inflicted on the National Health Service in controversial legislation last year. In the case of the NHS the Coalition Partners the Liberal Democrats called for a pause so that an independent and expert assessment could be undertaken of the impact of the policy. As a result important safeguards were introduced to limit the scope of the market. The case for a similar pause and assessment is a strong one. Without it there is a risk that whatever the rhetoric, enormous damage will be done to the day to day functioning of criminal justice in England and Wales. We may pay less now, but pay dearly later.

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