

Discussion paper

Criminal justice and government at a time of austerity

By David Faulkner

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About the Criminal Justice Alliance

The Criminal Justice Alliance (formerly the Penal Affairs Consortium) is a coalition of organisations committed to improving the criminal justice system. It has 48 members - including campaigning charities, voluntary sector service providers, research institutions, staff associations and trade unions - bringing together a wide range of organisations involved in policy and practice across the criminal justice system.

For more information on the Criminal Justice Alliance and our work visit www.criminaljusticealliance.org

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Foreword

The recently-elected coalition government has inherited a criminal justice system in crisis. The prison system is severely overcrowded, reoffending rates are high, and public confidence in the system is limited. Yet while trying to address this the Ministry of Justice and the Home Office, the two government departments primarily responsible for the criminal justice system, must now also make cuts to their budgets of between a quarter and third over the next four years. Achieving this will require substantial reductions in the budgets of all the criminal justice agencies, reversing significant increases in spending in recent years.

Reform of the criminal justice system will consequently be a priority for the new government and in his first major speech as the new Justice Secretary Rt Hon Ken Clarke QC MP described the need to ‘rethink from first principles how we can deal with the problems we face and provide the services that the public interest demands in a more targeted way’. Building on the conclusions of *Transforming Justice: New approaches to the criminal justice system*, a collection of essays proposing potential routes to reform of the criminal justice system published by the Criminal Justice Alliance at the end of last year, this discussion paper is a contribution to this debate, examining, in Clarke’s words, how to ‘reconcile drastic and necessary cuts in public spending with positive policy making’. Written by David Faulkner, a former senior civil servant in the Home Office and now a Senior Research Associate at the University of Oxford Centre for Criminology, it reflects on reforms to the criminal justice system conducted over the last two decades and examines how the lessons learnt over this period can be applied in the future.

The criminal justice system is at a crossroads. The current situation is both undesirable and unsustainable, but future changes will need to be carried out while cutting costs and improving efficiency. It is therefore essential that reform is grounded in a fundamental reassessment of what the criminal justice system is for, and what it is realistically able to achieve. With this in mind, the Criminal Justice Alliance is delighted to be publishing this discussion paper as a contribution to this important debate on the future of the criminal justice system.

Jon Collins
Campaign Director, Criminal Justice Alliance

Introduction

This discussion paper considers the state of criminal justice as it has developed in England over the last 15-20 years, the assumptions and policies which have led to that situation, and the issues facing the coalition government which took office in May 2010. It then reviews the wider context of policy making and governance which affects public services of all kinds, and the implications of the period of austerity which must now be expected in all areas of public expenditure. Radical changes which have been needed for some time may now be easier to achieve, not only in criminal justice, but also in what the country expects from its public services, in the style and scope of government, and perhaps in the nation's attitudes to social and political issues and the means of dealing with them.

The paper's main focus is on England. Important differences are beginning to emerge between England and Scotland and to some extent between England and Wales, but similar issues arise throughout the United Kingdom and in other European countries. It carries forward the discussion contained in *Transforming Justice: New approaches to the criminal justice system*, edited by Jon Collins and Susanna Siddiqui and published by the Criminal Justice Alliance in 2009, but with a focus which is more on assumptions and expectations and dynamics and relations than on structures and institutions.

The state of crime and criminal justice in England

Britain once claimed that it had a proud tradition of criminal justice. The rule of law, trial by jury, the presumption of innocence and the principle of equality before the law established a tradition which became respected, though not always copied, across the world. The qualities of mercy and compassion were valued, even if they were expressed more often in literature than in statute or jurisprudence – famously in Portia's speech on the quality of mercy in Shakespeare's *The Merchant of Venice* and in Isabella's exchange with Angelo in *Measure for Measure*.¹ As recently as the 1980s, Lord Denning could thrill an audience of students or magistrates with a speech about a glorious heritage which went back to Henry II and Magna Carta. And yet, only a few years later, the government came to regard criminal justice in England as a 'failing system', not capable of doing its job in a modern, globalised world. The Prime Minister Tony Blair saw it as unable to protect the public

¹ Portia's speech on behalf of Antonio is in *The Merchant of Venice*, Act 4, Scene 1, 179-200. Isabella's plea to Angelo and their subsequent exchange are in *Measure for Measure*, Act 2, Scene 2, 99-123. Both Portia and Isabella challenge the idea that the process of justice must always take its course, regardless of its effect on individuals. Angelo responds to Isabella by claiming, in effect – as many would do today – that pity for future victims, and perhaps even regard for public opinion, takes precedence over any regard for the individual offender. Isabella replies that it is “good to have a giant's strength, but tyrannous to use it like a giant”; and expresses her contempt for “...man, proud man, Dressed in a little brief authority...”

from crime or to give proper consideration to its victims, and declared that ‘Of all the public services we inherited in 1997, the most unfit for purpose was the criminal justice system’ (Blair, 2004).

The Labour government regarded the system as failing in several respects.

- Sentencing was inconsistent and too many sentences were inadequate to protect the public or satisfy public opinion.
- Sentences were administered ineffectively, with too little attention to punishment or to the enforcement of conditions and the prevention of reoffending.
- Too many crimes remained unsolved and too many people were escaping conviction.
- Juvenile crime in particular was out of control, and children needed to be brought more firmly within the scope of the criminal law and punished accordingly.
- Antisocial behaviour was a similarly serious problem and should be dealt with through the criminal rather than the civil justice system, using civil rather than criminal standards of proof to simplify the process and avoid the need for a formal conviction.

It saw society as polarised between a ‘hardworking’ and ‘law-abiding’ majority and a lazy or criminal minority.² Like the previous Conservative government, it believed that much of the criminal justice system was infected by a dangerous ‘liberal’ or ‘metropolitan’ elite which put the system ‘on the side’ of the minority and against the victim and the public. The system had to be radically rebalanced ‘in favour of the victim’, with a much stronger emphasis on protecting the public (Blair, 2006). Like other public services, criminal justice was to be managed in accordance with the principles of modern public management based on targets, markets and contracts (Prime Minister’s Strategy Unit, 2006).

Those criticisms do not for the most part reflect any actual deterioration in the performance of the criminal justice system, but higher expectations of what it can or should achieve.

What has been achieved – successes ...

Some success has been achieved. Prisons are on the whole safer and more secure than they were 15 years ago, they are more ‘decent’ as a result of the campaigns of successive Directors-General (HM Chief Inspector of Prisons,

² The distinction has a long history, both in criminology and in social science more generally – for example between the ‘deserving’ and the ‘undeserving’ poor. It is sometimes politically convenient but does not stand up to close analysis, as Seebohm Rowntree (1901) demonstrated a hundred years ago.

2010), and their ‘moral performance’ has improved (Liebling, 2004).³ The police are more responsive and sensitive to the public, and neighbourhood policing has made them more visible and has contributed to reductions in crime and improvements in public confidence. Racially motivated violence and discrimination against minorities are less common, although disproportionate numbers of black people are still caught up in the criminal justice system, and conflicts of culture or religion may become an increasing concern. The government has been more ready to consult and to reply to the consultation, although the impression remains that it has sometimes been more ready to tell than to listen. The needs of victims are better understood and more often met, although there is more to be done especially for families affected by homicide or disabling injury and for children who have experienced sexual abuse. The volume of crime, whether uncovered by the British Crime Survey or recorded by the police, has fallen substantially since 1996,⁴ although the facts and the explanation are open to argument (see below).

Some of the reforms of management and organisation can also be regarded as successful. Examples include the local structures for youth justice, the reforms of the Crown Prosecution Service and the Court Service, and the arrangements for strategic management at national and regional level including cross-departmental Public Service Agreements. The independent commission for judicial appointments, the Sentencing Guidelines Council and now the Sentencing Council are improvements on the arrangements which existed previously. Many people consider the creation of the Supreme Court to have been long overdue, although others have expressed concerns about its implications for the relationship between the judiciary and Parliament. The formation of a Ministry of Justice had been argued for many years (Faulkner, 2006: 339-342), although the way in which it was announced, with no notice or consultation, caused confusion at the time. The balance of power and influence between the Home Office and the Ministry of Justice may become an important issue.

... and disappointments

There have however been failures and disappointments. Some of the reforms of structure and process, especially the creation of the National Offender Management Service, were badly managed and produced confusion and frustration (Hough, Allen and Padel, 2006). Targets and performance indicators provide an essential source of management and public information and are

³ Although Alison Liebling and Ben Crewe have subsequently written (forthcoming): ‘Most prisoners now face a deeper, heavier, ‘tighter’ and less liberal version of imprisonment than their predecessors, with some Victorian notions of individual responsibility and less eligibility returning in new guises’.

⁴ Crime reported to the British Crime Survey fell by 42% overall between 1995 and 2006/07. The fall was greatest for burglary (59%) and vehicle thefts (61%) (Home Office, 2007).

an important part of a service's accountability, but they have sometimes had some perverse consequences. Those for the police have been replaced by a single target to 'improve public confidence in whether local crime and community safety priorities are being identified and addressed' (Home Office, 2008).

Legislation included 60 or 70 criminal justice acts, some of them running to hundreds of sections, and hundreds of new criminal offences have been created. The volume and complexity of legislation has caused confusion for the courts, the police, victims and the country as a whole. The previous Lord Chief Justice, Lord Phillips, criticised the sentencing structure which emerged in the *Criminal Justice Act 2003* as 'restrictive, complex and difficult for the courts to administer or the public to understand' (Phillips, 2009). Indeterminate Sentences of Imprisonment for Public Protection (IPP) have proved to be a special problem, both in the injustice that their application can cause to those who receive them, and in the demands they make on prison capacity (House of Commons Justice Committee, 2008; HM Chief Inspectors of Prisons and Probation, 2008). Parts of the *Criminal Justice Act 2003* which might have moderated the use of imprisonment — those for 'custody plus' and for intermittent and suspended sentences — have not been brought into effect, whether for lack of resources, fear of criticism of the restrictions they would place on the courts' ability to impose short sentences of imprisonment, or (for intermittent custody) because they were unworkable in the first place.

Successive governments' policies, combined with the courts' greater sensitivity to criticism in the media, have resulted in more severe sentencing by the courts, more recalls to prison for breaches of conditions and more restrictive use of parole, so that the prison population in England and Wales has doubled since 1992 and had reached 85,000 at the time of the election in May 2010. The penal system has for some years been in a state of chronic overcrowding and pressure on its capacity which prevents it from functioning at more than a basic level of performance. Prisoners who have mental health problems and those serving indeterminate sentences are among those most seriously affected.

It is tempting to connect the increase in punishment, and especially the use of imprisonment, with the fall in crime which has taken place since 1996. The increase will have had some effect, but the greatest reductions have been in offences of burglary and vehicle theft (see footnote 4), where considerable effort had been devoted to improving the security of premises and vehicles from the 1980s onwards. Rising prosperity during the 1990s and the loss of the market for stolen electrical equipment will also have helped. It is an open question how far the 'real' level of crime has actually fallen, and how far offences such as burglary have been displaced by newer forms of crime such as 'doorstep' or credit card fraud, much of which is not recorded.

Evidence that the public feels safer as a result of the government's measures is hard to find. Many people believe that the problem of crime is still as serious as or even more serious than it was 15 years ago. Governments and politicians have so far seen no way of shifting that view, and have sometimes contributed to it through their own criticisms of the system and their sometimes hasty statements and reactions to events. Their only solution has been to go on finding new 'tough' measures that they think will appeal to the public and promote public confidence.

What went wrong?

Research over many years has shown that the reasons for which people commit crime are more complex than governments have been willing to admit. People react to different situations in different ways which cannot easily be predicted. Studies during the 1970s and 1980s showed that changes in criminal justice are by themselves unlikely to have more than a marginal effect on the general level of crime. Police resources and methods have only a tenuous relationship with levels of crime or clear-up rates (Clarke and Hough, 1984). Sentencing does not have much deterrent effect (Von Hirsch et al, 1999), and sending more people to prison has only a limited impact (a 15% increase in the prison population might reduce crime by 1% - Halliday, 2001). A large proportion of the male population has criminal convictions or admits to having committed criminal offences, many victims are or have been offenders, and most offenders have been victims. It is false to make a hard distinction between the 'law-abiding majority' on the one hand and 'criminals' on the other.⁵

The separation of crime from its wider social context, and the belief that problems of crime can be solved by criminal justice measures taken in isolation, have always been unrealistic, as the Home Office came to acknowledge 30 years ago (Home Office, 1977). The Conservative Party manifesto for the 1987 general election saw a quite limited role for government, which was to give a lead

'by backing ... the police; by providing a tough legal framework for sentencing; by building prisons in which to take those who pose a threat to society – and by keeping out those who do not; and by encouraging local communities to prevent crime and help the police to detect it' (quoted in Windlesham, 1993: 221).

Policies to reduce crime during the 1980s were focused more on improving security and on situational and social measures to reduce crime than on arrest, prosecution and punishment (Faulkner, 2006: 110-114). Legislation on

⁵ A distinction which is sometimes assumed by critics of the *Human Rights Act*, who argue that 'rights' should only be held by those who 'deserve' them, having 'earned' them by responsible behaviour.

sentencing such as the *Criminal Justice Act 1991* was designed more to improve consistency, remove anomalies and reduce what was thought to be the unnecessary use of custody than to reduce crime (Windlesham, 1993: 215-224).⁶

Michael Howard rejected that approach when he became Home Secretary in 1993 and later Home Secretaries, and Tony Blair as Prime Minister, have done the same.⁷ Governments since then have implicitly shared the classical economist's view that most human behaviour is a matter of deliberate choice, based on a rational judgement of the risks, benefits and costs. They have supposed that government can influence that choice by providing incentives and deterrents, and in particular they have assumed that it can reduce crime by insisting on rigorous enforcement of the law, certainty and severity of punishment, the incapacitating effect of imprisonment, 'interventions' to prevent an offender from reoffending, and the use of the latest technology.

Those assumptions seem to many people to be no more than common sense. They have provided governments with a politically promising framework for policy and legislation which responded to public opinion and the public's increasing aversion to risks of all kinds which has become prevalent since the 1980s. They give the impression of being 'tough' and realistic, and are hard for 'liberals' to challenge. They are, however, seriously flawed as the foundation for a government's criminal justice policy.

All that is well known to those who work in or are familiar with the criminal justice system, but it is rarely acknowledged by government or the political parties and not well understood by the general public. Unless there is some change in the 'direction of travel', the prospect is one of increasing investment in ineffective law enforcement, further pressure on the penal system, and an indefinite need for new prison-building with little impact on people's experience of crime, or on their safety or well-being more generally (Hough, Allen and Solomon, 2008). The House of Commons Justice Committee reached similar conclusions in its comprehensive and radical report *Cutting Crime: The case*

⁶ It has sometimes been thought surprising that Margaret Thatcher's Conservative government, with its commitment to 'law and order', should have pursued criminal justice policies which would now be regarded, and by some people condemned, as 'liberal'. Those policies could however be seen as part of a long-standing Conservative tradition of justice and humanity which went back through R. A. Butler and Winston Churchill (although a Liberal at the time when he was Home Secretary) to Robert Peel, to whom Douglas Hurd paid tribute in a speech delivered in Tamworth to celebrate the bicentenary of his birth on 5 February 1788. On that view the policies of Michael Howard could be seen as a departure from a long-standing Conservative tradition. Whether a future Conservative or coalition government could return to it is an interesting question.

⁷ Commentators have speculated about the reasons. They may include the public reaction to the murder of James Bulger in 1993; the fact that rising crime was having an increasing effect on the middle class so that it became a more sensitive political problem; changes in the way in which crime was reported in the media; and the fragmented state of the Conservative Party at the time.

for justice re-investment (House of Commons Justice Committee, 2009).

The mistaken assumptions and unrealistic expectations of the 1990s led to radical and often misguided reform of probation and sentencing. The coalition government's intention to introduce a 'rehabilitation revolution' and to 'conduct a full review of sentencing' (Cabinet Office, 2010) recognises the need to reconsider those reforms and construct better arrangements for the future.

Probation, protecting the public and desistance from offending

The transformation of the probation service from a local to a national structure, and from an agency for social support to one of law enforcement and public protection, has been described many times (McNeill, 2006). The process began as long ago as the 1960s when the probation service became responsible for prison after-care, and then for the new sentence of community service in the 1970s, but it accelerated during the 1980s. The intention at that time, of the government and of the leaders of the service if not always of the service as a whole, was to create a more effective and publicly accountable service, still with a social work base but with modern systems of management and able to play an increasingly active and influential role in what was coming to be recognised as a national criminal justice system. Supervision by the probation service, or 'punishment in the community', was to be seen as the natural first line in the treatment and punishment of offenders, with imprisonment being regarded as a genuine last resort.

The government's vision for probation changed in the 1990s with the change of direction that has already been described. Probation, if it was to exist at all, had to be 'tough', the social work base had to be abandoned, and the functions of 'advising, assisting and befriending' had to be replaced by punishment, enforcement and control. Responding to that situation, the service came to develop a new professional identity, based on the assessment of criminogenic and social needs and on meeting them through various types of programmes or interventions, systematic case management procedures, and rigorous enforcement of conditions (Underdown, 1998; Raynor and Vanstone, 2002).

The promise offered by those programmes enabled the service to survive in a hostile political climate, but the personal relationship between the probation officer and the offender came to be seen as relatively unimportant, and it was more difficult to sustain as caseloads grew larger and practices such as visiting offenders in their homes and making contact with their families were discouraged (Burnett and McNeill, 2005). To the offender and their family, the probation officer could be a remote and even threatening figure, more to be feared as someone who would have them sent or recalled to prison than respected as a source of practical guidance and wise advice.

The Labour government presented its approach to ‘managing offenders’ in the cold, managerial language of ‘delivery’ and ‘value for money’, and in the language of coercion and control - ‘Offender management ensures that we have a firm grip on offenders throughout their entire sentence, both in custody and in the community’ (Ministry of Justice, 2008a). Alison Lieblich and Ben Crewe (forthcoming) have written of the Prison Service ‘... very few managers speak a language of empathy or compassion ... Criminological, legal and philosophical thinking has to a large degree been ... replaced by the neutral language of management-speak’. The generosity of spirit which spoke through the minutes and correspondence of the Borstal Association⁸ a century ago and which inspired the voluntary after-care movement was still reflected in government statements and parliamentary debates until the 1960s. It now has to struggle to make itself heard, and has almost entirely disappeared from government. There seems to be no place for mercy or compassion, and to suggest that there might be would be seen as a sign of weakness and provoke ridicule from government, much of the media and on the internet, although there were some brief signs of compassion when it was realised that a large number of men in prison had previously served in the armed forces (Napo, 2009).

There is, however, an important body of research which shows the importance of a ‘desistance’ model of probation work, or offender management, which focuses on relationships, motivation, social situations, communities and social and human capital. It brings important insights, including the realisation that change in behaviour or character is not an event where a person succeeds or fails, but a process which has to be supported over time and needs to focus more on the person as an individual and their situation than on the programme and its content for their own sake. The arguments and the evidence are now well established in the literature (McNeill, 2006) and the practical implications for offender management and for probation’s organisation and training have been explored (McNeill et al, 2005; Robinson, 2005).⁹

An essential part of the coalition government’s rehabilitation revolution will be for government and the probation service to take the arguments more seriously and translate them more effectively into practice.

⁸ Executive Committee of the Borstal Association: meetings 1-30, 1904–1910 and 31-47, 1910–1918. National Archives, HO 247/97 and 247/98. Letters to Sir Evelyn Ruggles-Brise, 1897–1935, National Archives HO 247/103. Known reoffending seems to have been about 25 per cent, but records were less reliable and the populations were hardly comparable. About 25 per cent had gone to sea as merchant seamen (there was a system for them to sign on at Cardiff docks) or had emigrated to the colonies, and a similar proportion were in touch and reported to be doing well. There was no information about the remainder. The files contain letters from Edwardian grandees offering positions on their estates or enclosing donations, including one from Herbert Asquith.

⁹ For similar conclusions from a quite different set of studies in the US, see Christakis and Fowler (2010).

The coalition's *Programme for Government* announced that it would introduce a 'rehabilitation revolution' that would 'pay independent providers to reduce offending, paid for by the savings this new approach will generate within the criminal justice system', and that it would 'explore alternative forms of secure, treatment-based accommodation for mentally ill and drugs offenders' (Cabinet Office, 2010). Those commitments pick up the radical proposals in the Conservative Party's report *Prisons with a Purpose* (Conservative Party, 2008).

Critics might be sceptical about the financial assumptions which support those proposals; they might claim that they are unrealistic so long as the pressure on the prison and probation services' capacity continues as it is at present; and they might argue that new building could not realistically take place on the scale and at the pace which the proposals contemplated – certainly not in present circumstances, perhaps not ever. Some of the language reflects the mistaken assumptions and misguided attitudes described earlier in this paper, and there is still a sense that criminal justice will still be set apart from the rest of society. But reforms based on 'the principles of decentralisation, clear accountability, [and] greater use of the voluntary and private sectors'; 'trust for professionals who would have new powers and freedoms ... to run rehabilitation services both in and out of prison'; and 'smaller, local prisons' deserve serious consideration. They would be an example of the 'new public governance' described later in this paper.

Creation of new criminal offences

Governments have continuously and for several years expanded both the number and types of activity or behaviour which they try to control, and the mechanisms by which they do so. New criminal offences have been created at a rate of about 150 a year for almost 20 years, including regulatory offences in matters such as public order, road traffic, and health and safety; and offences such as attempts, possession, taking photographs, or being in the wrong place in anticipation of acts which might never be intended or take place. Many are absolute offences for which there is no defence, although the police and the Crown Prosecution have a wide discretion on whether to enforce them for which there is no effective form of accountability.

The process has not followed any consistent principles, for example about when a new offence or a longer sentence is needed, what alternatives ought first to be considered, what tests should be applied, how an offence should be enforced, or what purposes it can be expected to achieve. Powers enacted for one purpose, for example to prevent terrorism, have been used for other purposes such as to control nuisances for which they were never intended – an abuse against which the coalition government has said in its *Programme* (Cabinet Office, 2010) it will introduce safeguards. Often the government

would admit that the purpose was to ‘send a message’, for example by changing the classification of cannabis, or to demonstrate action in response to events.

Governments, and Parliament, should return to a more rigorous approach to the creation of new criminal offences, to make sure that the problem cannot be dealt with adequately by other means; that the offence is clearly defined and is capable of being effectively enforced; to provide protection against oppressive enforcement; and to avoid declatory offences wherever possible. The coalition’s *Programme for Government* has given a welcome commitment to ‘introduce a new mechanism to prevent the proliferation of unnecessary new criminal offences’.

Ideas of justice ...

The *Criminal Justice Act 2003* treated sentencing as an instrumental process designed to achieve specified results, determined by government, comparable with processes in manufacturing or service industries managed by the private sector.

In government and politics, the word ‘justice’ is now used as a factual description of processes or institutions, for example the ‘criminal justice system’; or as the outcome of a process of trial, conviction and sentence where ‘justice has been done’ if the sentence satisfies the victim or public opinion or if it will be effective in protecting the public. There is not much connection with the idea of justice as a value or an ideal.

Ideas of justice have been debated since antiquity, with contrasting and some often conflicting theories about what it means and what it involves. It may be seen as an ideal, a set of principles to guide behaviour, a social contract or a social choice. Its relationship to other ideas such as fairness, equity, equality, the rule of law, human rights or democracy has been variously debated. Amartya Sen (2009) brought many of the threads together in his book *The Idea of Justice*, drawing attention to the ‘pervasive plurality’ of the ingredients of what people see as justice and the difficulty of reconciling them in some situations and the comparative ease of doing so in others. He argues that the reconciliation has to be found through a democratic process which involves more than ballots — and he might also have said more than opinion polls and online petitions — and which includes ‘public reasoning and government by discussion’. That has been absent from England for some time.

... and of punishment

The ideas of justice and punishment are closely related.

There is confusion, which governments have created, about the place of punishment in a modern society, its nature and purpose, the conditions which make it legitimate, and the responsibilities of those who have to be involved in its administration. The confusion was illustrated by the difficulty which people have found in understanding the sentences, and in some instances the verdict and decision to prosecute, in the recent (February 2010) trials for mercy killing (Frances Inglis, life imprisonment and Kay Gilderdale, a suspended sentence), defending one's home (Munir Hussain, two and a half years imprisonment suspended on appeal), and disturbed children (the Edlington boys, indefinite sentences with a minimum of five years). It has been compounded by the complexity of the legislation and of the arrangements for release, so that the sentence pronounced in court bears little resemblance to the time which the offender will spend in prison – one reason for the public's apparent lack of confidence in the sentencing process, and for the proposals in the Conservative Party's manifesto for courts to be able to specify the maximum and minimum periods which an offender should spend in prison.

Most people have been brought up to believe that if the state is to punish a person, it should be for something they have been proved to have done; the punishment should be deserved; it should be proportionate to the seriousness of the offence and the culpability of the offender; and the rules of due process should have been followed in what can be seen as a fair trial. Once those requirements had been satisfied, the sentence or punishment could follow, with some room for mercy or compassion where possible. That could once have been said to be the 'British tradition' going back through Dicey (1885) and Blackstone (1765) to Magna Carta.

Within that tradition, the sentencing of persistent offenders has troubled governments and the courts for a long time – since the Gladstone Committee in 1895, or even since the stocks went out of use early in the nineteenth century. Preventive detention as a sentence was found unsatisfactory and was abolished by the *Criminal Justice Act 1967*. Judges in the 1970s and 1980s were on the whole reluctant to send persistent offenders to prison for longer terms each time they were reconvicted, and sometimes applied the principle of 'progressive loss of mitigation' – slightly longer sentences for the second or third offence, but no additional penalty for persistence after that. The *Criminal Justice Act 1991* sought to consolidate that approach and to remove the inconsistencies and anomalies which resulted from the more or less haphazard practice which was being followed at that time.

The Labour government took a different view when it came into office in 1997. It saw sentencing as a means of protecting the public from bad people, so that they should be punished not for what they had done but for the people

they were and for what they might do in future. All crime should be met with punishment and repeated offending should be punished more severely on each occasion ('progression in sentencing').

It now seems to be taken for granted that all crime should be met with punishment. The House of Commons Justice Committee has expressed its concern that 'an unthinking acceptance has evolved of punishment – for its own sake – as ... the only way of registering the seriousness with which society regards a crime' (2009: 5). The idea that courts might be able to make a probation order as an alternative to a sentence or punishment (as they could until the *Criminal Justice Act 1991*) now seems very old-fashioned, although the probation order worked well for most of the twentieth century. Restorative justice offers an alternative to the formal adversarial process but the Labour government showed little enthusiasm for it while in office. It is however widely used in the youth justice system and all the main political parties made favourable references to it during the 2010 election campaign.

Purposes of sentencing

The *Criminal Justice Act 2003* set out five purposes of sentencing – punishment of offenders, reduction of crime, reform of offenders, protection of the public, and reparation to the victim or the community. Separate legislation (the *Crime and Disorder Act 1998*) stated that the youth justice system for children and young people aged under the age of 18 had a single main aim of preventing offending. The statutory recognition of the five purposes was generally welcomed, but it has never been made clear how sentencers were to choose or to resolve any conflicts between them, or how it might be possible to show whether the purposes have been achieved. Sentences have in practice been decided in accordance with guidelines issued by the Sentencing Guidelines Council, and in future by the Sentencing Council. The guidelines cover subjects such as the offender's culpability, the harm done, and any aggravating and mitigating factors, but they do not say how the different statutory purposes should be applied or how a court is to choose between them.

The 2003 Act also enabled people to be kept in prison or recalled to prison not only for a crime they have committed, but also to protect the public if they were assessed as likely to reoffend in the future. The tests of culpability and proportionality do not then apply.

No evaluation of the Act has been carried out, and it is hard to say what difference it has made except to complicate sentencing, increase the number of people sent to prison and the time they spend there, and add to the pressures on the penal system.

The different purposes of sentencing reflect different, often conflicting, attitudes to punishment and different positions about punishment's place in society which can often conflict with each other (Walker, 2009). The conflict can be especially difficult to resolve if the difference is between moral beliefs, but some resolution is necessary if sentencing and punishment are to have authority and legitimacy. Ian Loader (2009) has suggested that the basis of a resolution could be found in the concept of 'penal moderation'. However that may be, more clarity and a stronger foundation of principle are needed if sentencing is to become more intelligible and coherent, and if confidence is to be restored.

That punishment still has a place in modern society cannot politically be questioned. But its relationship with, and its potential for solving, problems of crime and social disorder and of dysfunctional communities and families is much more uncertain. Those problems are part of a wider and usually complex situation of relationships, opportunities, temptation and motivation where the punishment of individuals can have only a limited impact. A recent study suggests that the public might be better protected by improving the arrangements for the offender's resettlement than by repeated sentences of imprisonment (Burnett, 2009), and that is one of the implications of the Bradley report on people with mental health problems or learning disabilities in the criminal justice system (Bradley, 2009).

The situation is now engaging the concern of criminal lawyers and criminologists (Ashworth and Zedner, 2008; Loader, forthcoming, 2010; Zedner, forthcoming, 2010); of magistrates, especially in respect of police cautions and on-the-spot fines; and of practitioners, especially in respect of IPP sentences. The House of Commons Justice Committee expressed similar concern in its report on *Cutting Crime: The case for justice re-investment* (2009). The coalition government has announced that it will set up a full review of sentencing. That is very much to be welcomed, even if it still uses language which may raise unrealistic expectations, '... to ensure that it [sentencing] is effective in deterring crime, protecting the public, punishing offenders and cutting reoffending'. The hope must be that hasty and unwise decisions are not taken while the review is in progress; that the review will take account of the evidence assembled ten years ago in the Halliday report (Halliday, 2001) and the advice in that report; and that it will also consider the wider question of the place which punishment should hold in a modern democratic society.

Further questions which might be considered in the course of the review and in wider debate include:

- What political techniques can be used in understanding and managing public expectations about the impact of sentencing on crime, in the context of wider strategies for reducing crime? What can politicians do to respond

to an apparent ‘zero tolerance’ approach to the risk of reoffending, and how realistic is it to place the burden of managing that risk on the prison and probation services and the Parole Board?

- Will governments always need to take into account a public determination to believe in a deterrent effect from sentencing, even for the most recalcitrant offenders, in spite of the uncertain evidence for such a belief?
- Why have ‘affordability’ and ‘cost-effectiveness’ not featured more prominently in debates about sentencing and the use of imprisonment, as they have in respect of other public services?

For punishment as for justice, the ‘pervasive plurality of ideas’ has to be managed through a process of public reasoning and government by discussion.

Wider reforms of government and public services – the ‘New Public Governance’

The situation in criminal justice is part of a wider problem of the way in which government has functioned over the last 20 years.

Public services in England have been transformed over that period, partly as a result of what has become known as the new public management (NPM), but also because of their greater politicisation and of wider changes in the social and economic environment. The distinctive features of NPM included:

- the use of models taken from the private sector;
- competition, contracts and the construction of ‘markets’;
- hands-on management, by generalist managers rather than professionals or specialists in the service concerned;
- separating ‘operations’ from ‘policy’;
- an emphasis on the measurement and control of inputs and outputs, and on performance management and evaluation; and
- assessment and management of risk.

NPM was imposed on services and departments by the Conservative government, through a series of initiatives such as the Financial Management Initiative, the creation of ‘Next Steps’ agencies, privatisation and contracting out. Its intention, and achievement, was to change the focus from the services’ internal performance as measured by its own and governments’ rules, assumptions and expectations, to an emphasis on their external performance in terms of outcomes, results, effectiveness, efficiency and value for money.

NPM had some salutary effects and those should not be denied. But it was from the beginning the subject of criticism. Regular complaints have been the bureaucratic burden which targets and indicators placed on services and their sometimes perverse effects. Other criticisms have been the unsuitability of commercial models of marketing and competition when applied to public services which serve the population as a whole, including its most disadvantaged members; the culture of blame which was sometimes a consequence of 'driving up performance' and failure to meet rigid targets; and the sacrifice of quality in the pursuit of quantified results. The ascendancy of NPM in British politics and public administration can be seen as having come to an end in 2007 or 2008 (Faulkner, 2008).

Public administration scholars have now identified a 'new public governance' which they see as now beginning to emerge (Osborne (ed), 2010). They distinguish it from NPM by its emphasis not on the performance of individual services but on the outcomes of partnerships and other forms of collaboration, co-working and co-production between different government departments, local authorities, services and other bodies such as voluntary organisations and user groups.

Not much has been written specifically about new public governance in the context of criminal justice, but managers and practitioners would immediately recognise it in situations where partnerships are formed with other departments, services or voluntary organisations to deliver services in prisons or for offenders in the community, or in youth justice or community safety. Activities which are important for reducing crime, helping victims or preventing reoffending may involve several departments, local authorities or voluntary organisations, but it may not be a high priority for any of them or contribute directly to their formal objectives. Differences of power, influence, professional culture and capacity have to be reconciled to create a sense of shared ownership of the task in hand and of shared satisfaction in its successful completion. Command models based on authority and top-down communication do not work in settings of that kind and new ways of working based on consultation and mutual confidence and respect have to be found. Representatives at meetings may have to speak for colleagues – it will not do to say 'that is not my responsibility'. Different personal qualities and skills may be needed – a determination to get something done rather than to protect positions and avoid risks. Continuity in post, depth of experience, and the wisdom and respect which flow from them may need to be more highly valued.

Further questions include the need for changes in the processes of policy formation, legislation and implementation; relationships between ministers and public servants and public services; the use of scientific research and expert advice; the assessment and management of risk; the structures and relationships that should be developed at local level and the mechanisms that are needed for

their accountability and legitimacy; and the role of the voluntary and community sector. They are not questions to which there can be final answers, to be settled by a commission or a review and then embodied in policy and legislation. But they are questions which need constant attention and vigilance, within a framework of principles and values which transcend party politics.

The Bradley report on people with mental health problems or learning disabilities in the criminal justice system (Bradley, 2009) shows very clearly one area where all those considerations come into play. Families and children, and people with problems of drugs or alcohol, are other subjects where responsibility is divided between different departments and services, where arrangements for a 'lead' department or service have never been entirely satisfactory. They are also subjects where voluntary organisations, and citizens themselves, may be expected to play an increasing role in future. Achievement depends on the skills, capacity, motivation and relationships of those on the ground, but there are important issues of policy, management and leadership to be taken into account and new answers may need to be found to the familiar questions about accountability, organisation and structure, and skills and competences.

The ideas are relevant to the Conservative Party's (Cameron, 2009), and now the coalition government's, vision of a 'big society' where citizens, local communities and voluntary organisations would work together to replace 'big government' – see below.

Local discretion and control: The 'big society'

All the political parties seem committed to providing for more local control over public services and less interference from central government. They also seem to accept that measures to deal with crime and its consequences cannot be left to government and the criminal justice services on their own; that local authorities also have an important part to play; and that communities and civil society have some responsibility for preventing crime, for trying to keep young people out of trouble and for helping those affected by crime – perpetrators, victims and their families – to repair or recover from the damage to themselves and to others. Wide local variations in law enforcement or sentencing would generally be as unacceptable as 'postcode justice', and there must be some concern that greater local influence might lead to more aggressive or intrusive policing, to pressure for more severe sentences, or that unrepresentative local interests might have a disproportionate influence; but there is evidence that the public are more likely to be satisfied and less likely to be dissatisfied with services at a local level than they are with the service at the national level (Roberts and Hough, 2005). Even so, very little has been said about localisation in criminal justice.

The main thrust of the Labour government's policies was towards using local co-operation and partnerships to achieve economies and greater efficiency in public services and to improve public confidence and to support government policies. Its initiatives included the programme of 'civil renewal' which David Blunkett (2003) promoted during his time as Home Secretary, and the green paper on 'Communities in Control', which included plans for better public information, opportunities for citizens to have a greater influence over local councils' policies and budgets, and measures to ensure more effective local accountability (Department for Communities and Local Government, 2008). The Total Place Programme promotes local incentives and empowerment for statutory agencies to improve their performance by working across boundaries. The proposals in *Putting the Frontline First: Smarter Government* (Byrne, 2009) were mostly for practical measures to improve efficiency and achieve economies, but Prime Minister Gordon Brown's foreword states that they include a 'radical dispersal of power [and] a new dialogue between people and public service professionals'; that they would 'strengthen democratic deliberation and control in local communities'; and that they must be based on 'our enduring beliefs in equality of opportunity and a fairer society'. It is not clear how the Labour government would have taken those ideas forward if it had remained in office.

The Labour government allowed some local choice in the work to be done by offenders serving community sentences; in the projects to be supported by confiscated criminal assets; and in the priorities for neighbourhood policing teams. It abandoned its plans for the wider development of community justice on the lines of the promising but expensive 'community court' which had been established in Liverpool. The green paper on policing (Home Office, 2008) described plans to give the public more chance to 'drive local priorities and to improve the visibility and effectiveness of police authorities' but the subsequent white paper (Home Office, 2009) was more cautious and limited in its vision, concentrating on plans for 'smarter working'.

The Conservative Party's, and now the coalition government's, vision of a 'big society' translates into a range of policies relating to the planning system; the ownership and control of public amenities; volunteering, philanthropy and social action; the transfer of power from central to local government; and support for mutuals, co-operatives, charities and social enterprises. The details are still to emerge. Nothing is said about criminal justice in that context, and the main feature of the coalition government's programme for criminal justice at the local level is its carefully worded but controversial commitment to 'introduce measures to make the police more accountable through oversight by a directly elected individual, who will be subject to strict checks by locally elected representatives'.

There has been little discussion so far of measures to enable local communities to accept greater responsibility or to act collectively in setting priorities or allocating resources, especially in situations where conflicting local interests have to be reconciled, local priorities might not correspond with those of central government, or difficult judgements might have to be made about affordability, but as individual choices become constrained in a situation of scarcity and austerity those are the kind of choices that will increasingly have to be made.

The way forward in criminal justice: Austerity and reform

The coming period of austerity is likely to have as profound an effect on public services as NPM and the reforms which gathered momentum 30 years ago. One critical difference is that those reforms and the active style of government that went with them could for the most part be promoted with new money, allocated and controlled by central government so that new initiatives could be centrally and politically driven forward, with the government always ready to take the credit and show that it was in charge. That luxury may not be available in the period that is to come: adjustments to reduced funding will often have to be made painfully and locally and government may be less willing and probably less able to micro-manage the course of events. Power will be devolved downwards and government's enthusiasm for local empowerment and responsibility will become a rationalisation of a process which is inevitable in any event.

How that situation will affect criminal justice is still uncertain. Criminal justice will not and certainly should not to be exempt from the need to make economies. Richard Garside has estimated that expenditure on public order and safety in England and Wales increased from £15.6 billion in 1987-8 to £21.1 billion in 1996-7 and just under £31.4 billion in 2007-8 (Garside, 2010). That is quite a small proportion of total public expenditure, about 5.6 per cent, although it is considerably higher than in most other European countries.¹⁰ As Garside points out, that proportion is not a large amount compared with the size of the national deficit, but to exempt criminal justice from making its contribution would suggest a misguided assumption that British society is so 'broken' that it has to be 'mended' by the criminal justice system. It would also suggest that criminal justice was somehow to be privileged above other services, with damaging effects on the relationships

¹⁰ Comparative research across 16 European countries shows that the greater the proportional expenditure on public order and safety, the lower the level of public trust in the police (Kaariainen, 2007), with the suggestion that investing in public safety leads to the public feeling less rather than more secure, irrespective of what actually happens on the ground. See the report of the seventh Oxford Policing Policy Forum (Longstaff, 2009).

between criminal justice and other services and organisations on which progress will increasingly depend.

Looked at more positively, the need to make savings should provide the opportunity for improvements which would be fully justified on their own merits but politically difficult in more favourable economic circumstances. It would be a tragedy if recovery enabled the system simply to revert to its default position of more criminalisation, more enforcement and more punishment.

The usual method of making reductions has been for departments to be required to make percentage cuts in their budgets and achieve them through a combination of efficiency savings and reductions in programmes or services. That may be effective for its immediate purpose, but there is a danger that arbitrary reductions in expenditure will reduce safety and damage the effectiveness of programmes to help prisoners' resettlement and reduce reoffending (HM Chief Inspector of Prisons, 2010), including those which the coalition government is itself keen to promote. The same could apply to reductions in other departments' budgets where offenders' rehabilitation might be disproportionately affected.¹¹ The withdrawal of a contribution to a shared service will affect others who then have to find other sources of funds or allow the service to collapse. Plans for reductions or a redistribution of expenditure should be made with an appreciation of their wider implications and look beyond organisational and institutional boundaries to the outcomes that are to be expected from them.

The coalition government has already announced that it will make efficiency savings, including savings in consultancies, travel, information technology, the National Policing Improvement Agency and the Serious and Organised Crime Agency; and that it will look for savings in policing and providing services such as prisons. The processes of devising, imposing and then monitoring standards, targets and pilot schemes could be scaled down, and the Ministry of Justice should go further than the *Simplification Plan* which it produced in 2008 (Ministry of Justice, 2008b). Economies should also be possible in policing (Flanagan, 2008; Blair, 2009: 294-296), notwithstanding the political difficulty of a situation where police pay is a large proportion of the cost and police numbers have for 40 years been treated as a measure of the government's performance.

Perhaps the most serious strategic decision to be made is whether, and if so how, to limit the growth in or to reduce the use of punishment, especially but

¹¹ It is notoriously difficult to demonstrate the 'effect' of expenditure on social welfare or social 'interventions' in terms of crime or reoffending, but Farrall and Hay (2010) see a clear connection between unemployment and the social policies of the Thatcher government and the rise in crime which reached its peak in the mid-1990s.

not only imprisonment. The then Conservative government faced a similar situation after the general election in 1987 and decided to do so (Faulkner, 2006: 107-121). It achieved some success in reducing the prison population in the short term, but in a political and legislative context which could not be recreated today. It could not prevent, and perhaps could not have foreseen, the punitive ‘arms race’ and the doubling of the prison population which followed.

The House of Commons Justice Committee (2009: 138) has however recommended that:

‘The prison population could be safely capped at current levels and then reduced over a specified period to a safe and manageable level likely to be about two thirds of the current population’.

That is a surprisingly radical recommendation to come from a cross-party committee of Members of Parliament, but many would argue that it is no less than the situation requires. The Committee has put forward a range of important recommendations for putting it into effect, but the difficulties should not be underestimated. As the Committee recognised, it would need sustained political commitment, across party lines, extending over at least two Parliaments, and a determination by government and opposition to face down the inevitable criticism. The judiciary might broadly accept the desirability of a lower prison population, but they would fiercely resist measures to achieve it which set targets, ‘rationed’ the use of prison accommodation, or otherwise restricted their sentencing discretion in particular cases.

A provocative commitment of the kind favoured by the Select Committee may not be the best way to begin. A reduction in the use of imprisonment might be better seen not as an objective to be pursued for its own sake but as one of the consequences of other measures towards crime and the people who commit and suffer from it – one which forms part of a broader approach to social policy and social justice.

There is nevertheless a broad consensus among practitioners, interest groups and academics in favour of moderating the use of punishment, and a history of well researched and well written reports, including those already mentioned and also those of the Coulsfield Commission (Coulsfield, 2004); of the Esmée Fairbairn Foundation’s programme on Rethinking Crime and Punishment (Esmée Fairbairn Foundation, 2004); and of Baroness Corston’s review of the position of women (Corston, 2007), as well as the reports from the Howard League’s Commission on English Prisons Today (2009) and the Local Government Information Unit/All Party Parliamentary Local Government Group (2009). Some politicians will accept them in private, but others

continue to dismiss them in public as unrealistic, liberal and elitist. Although *Prisons with a Purpose* proposed an immediate increase in prison building, its vision for the long term was still of an eventual fall in the prison population because the use of imprisonment could in time be reduced.

The coalition government might present a programme on the following lines, drawing on the ideas of partnership and collaboration which informed the vision of a ‘big society’.

- Reduce the waste of lives and resources resulting both from crime and reoffending, and from the unnecessary use of imprisonment and its effects on offenders and their families.
- Dismantle bureaucracy and restrictive controls (as has been done, more or less, for the police).
- Let the police, courts, prisons and probation get on with the job, with appeals and remedies if they fail the people they are meant to serve but without detailed direction from government. Have more trust in judges and magistrates.
- Introduce more steps which a court could take before deciding ‘there is no alternative’ to custody, for example attendance centres, restorative justice as ‘specified activity’, and developments in unpaid work.
- Provide more effective support and encouragement for reducing reoffending – enabling courts to review an offender’s progress (as in drug rehabilitation orders), more attention to influences on desistance, and more accessible help for drugs, alcohol and mental health problems.
- Continued and greater emphasis on early-years prevention and diversion. Build on the success already achieved in reducing the number of children entering the criminal justice system and the number of under-18s in prison.
- Review and apply the lessons that can be learnt from the last 13 years’ experience of risk assessment, innovation, and the role of the voluntary and community sector.
- A narrative and a language emphasising: learning, not blaming; responsibility and opportunity, not exclusion and demonisation; trust, not fear or suspicion; hope, and belief in the future; and the inclusion of all citizens in the ‘big society’.

A programme with that sense of direction should open the way for more rational and more effective ways of dealing with crime and its consequences.

The government should now consider seriously the scheme known as ‘justice reinvestment’, by which funds for the penal system would be placed in the hands of local authorities who could deploy them to the purposes

which would be of most benefit to the community. It has been described in some detail by Allen and Stern (2007); in the report of the Howard League's Commission on English Prisons Today (2009: 37-48); and by Rob Allen in his chapter in *Transforming Justice* (Allen, 2009). It has been endorsed by the House of Commons Justice Committee in its report (2009) already mentioned. The Commission's report makes proposals for the structures and relationships that would need to be established, and a comparison with the Criminal Justice Authorities and the National Advisory Board that have been set up in Scotland. The Local Government Information Unit/All Party Parliamentary Local Government Group (2009) has made somewhat similar proposals for 'primary justice' which would be 'local, community-based and focused on prevention'; it would be funded from a local budget drawn from 'the prison budget, the administration budget for magistrates' courts, local policing and probation' and would be about 'communities taking responsibility for meeting the needs of vulnerable people as part of delivering safety and justice for the whole community'.

Proposals on those lines should now be seriously considered, both as a means of increasing public confidence and in the hope of achieving alignment between capacity and demand. Opinions will be divided on whether the whole of the criminal justice system (not just the police, as the coalition government intends) should be placed under the control of an elected local official or 'sheriff', as Douglas Carswell proposed in his chapter in *Transforming Justice* (Carswell, 2009). But more work should now be done on the structures and relationships, the mechanisms of accountability and the financial arrangements that would be needed for a transition to the kind of system based on justice reinvestment.

Final thoughts: Values and ideals

Public discussion of values and principles has been difficult for some time. It has often been dismissed as self-indulgence and an evasion of the more serious business of numbers, quantities and practical results. Words such as 'conservative', 'liberal', 'neo-liberal', 'progressive', 'modern', 'realistic' and 'idealistic' have been misappropriated for different purposes and often used as terms of abuse. 'Justice' has lost its sense of value and has come to mean either the process which leads to a conviction and sentence, or punishment which is severe enough to satisfy public opinion or the victim. But political parties no longer appeal to principles or a distinctive vision of the future, and base their claims for support on their managerial or financial competence or the protection they can provide from harm or damage. It was a declared aim of New Labour and its 'third way' to treat political questions as if they were questions of fact and to present its policies as if they were value-free. But political parties now seem to realise that they should try to offer a

source of inspiration that is more than competence and material benefits, and public services need to be motivated by something more than efficiency and following the rules.

Public attitudes may reflect a generally optimistic view of human nature, a belief that there is some good in everyone and that people can change for the better and the country's condition can always be improved; or a view which is conscious of human imperfections, a belief that there is potential for danger in everyone and risk in every situation, and sees a broken society and a country in decline. Both views will always be present among people, communities and institutions, and governments will have to respond to them. Policies responding to the former give recognition and reward; they value initiative and innovation; and for offenders they see a place for compassion, repentance and forgiveness. Policies responding to the latter seek to enforce conformity and control; they appeal to self-interest; and their instruments are the incentive of material gain or loss and the threat of punishment.

The second of those views seems on the whole to have had more influence on government and politics in recent years. Many of the concerns expressed earlier in this paper arise from the need which governments have felt to appease that view, even if they might not otherwise have given it their support. It is too soon to tell whether the changes indicated at the beginning of this paper, or other movements in public or political opinion, will affect the balance between them. The hope must however be that in the future any government's process of decision-making will be more measured, more inclusive, more optimistic and better informed than it has sometimes been in the past; and that the country's response to the recession will provide the opportunity to correct some of the mistakes which have been made and remove some of the injustice which remains. ●

A longer version of this discussion paper, which examines the issues raised in more detail, is available at www.criminaljusticealliance.org/cjausterity2.pdf

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This discussion paper considers the state of criminal justice as it has developed in England over the last 15–20 years, the assumptions and policies which have led to that situation, and the issues facing the coalition government which took office in May 2010. It then reviews the wider context of policy making and governance which affects public services of all kinds, and the implications of the period of austerity which must now be expected in all areas of public expenditure. Radical changes which have been needed for some time may now be easier to achieve, not only in criminal justice, but also in what the country expects from its public services, in the style and scope of government, and perhaps in the nation’s attitudes to social and political issues and the means of dealing with them.

This paper can be downloaded from
<http://www.criminaljusticealliance.org/cjausterity.pdf>

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