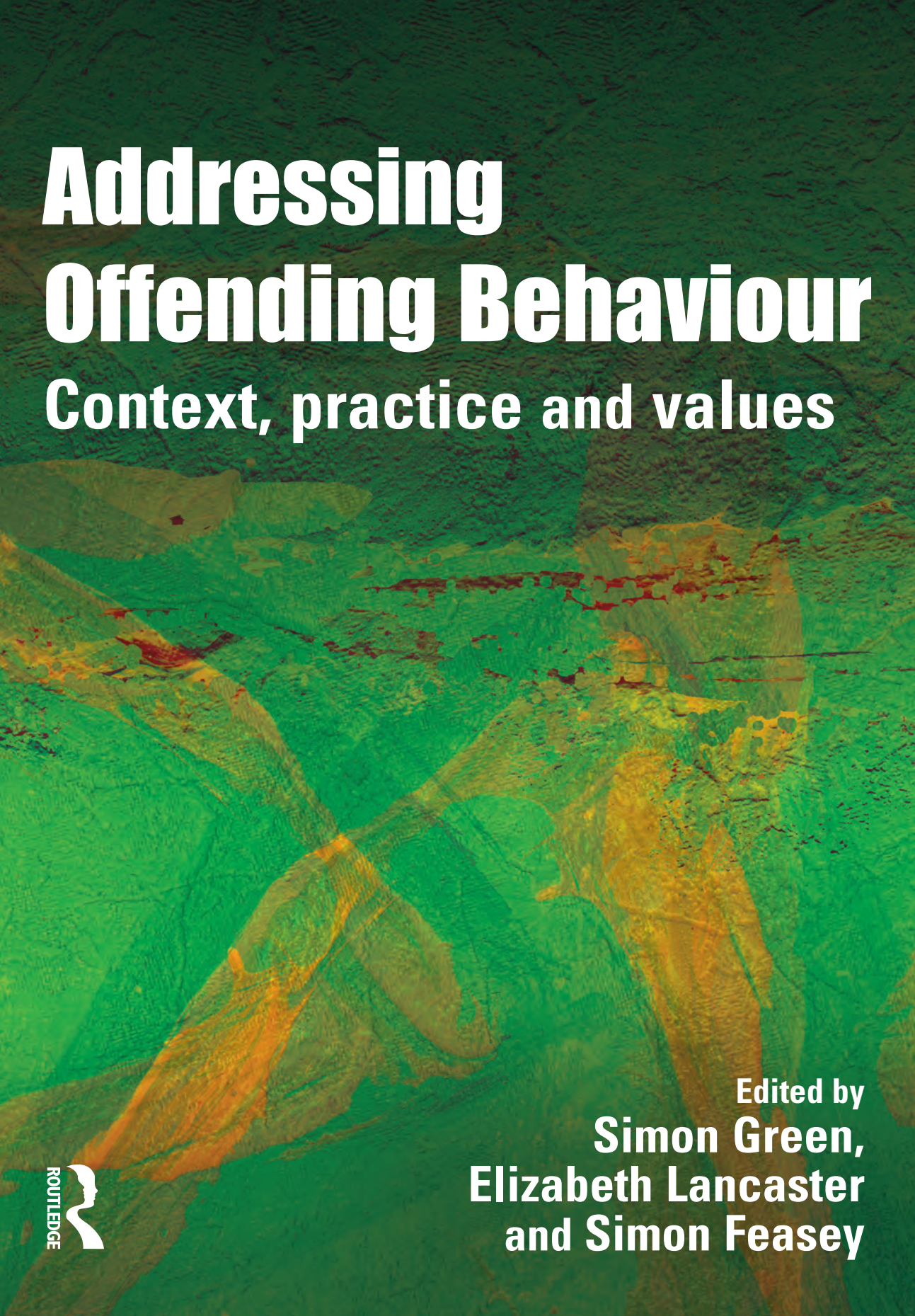
Addressing Offending Behaviour

Context, practice and values



Edited by
Simon Green,
Elizabeth Lancaster
and Simon Feasey

ROUTLEDGE

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Contents

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Simon Green, Elizabeth Lancaster and Simon Feasey

Notes on the contributors

Pauline Ashworth has recently taken up appointment as a teaching fellow in social work at the University of York. She previously taught criminal justice and social work at the University of Bradford, and still tutors in criminal justice for the Open University. She spent many years as a probation service officer and probation officer in court and field teams in a range of settings. She specialises in practice teaching and learning, offering training in communication skills and methods of intervention. A key interest is in the link between theories/methods and practice, and how the former can shape and enhance the latter.

Clare Beckett lectures in Social Policy at the University of Bradford. She is Programme Leader for the BA Honours Community Justice and for the MA Diversity and Social Policy. She is author of *Margaret Thatcher* (Haus Publishing, 2006) and joint author of *Bevan* (Haus Publishing, 2005). She has jointly edited *Negotiating Boundaries – Identities, Sexualities, Diversities* (Cambridge Scholars Press, 2007). Her current research interests interrogate the processes of supervision in a diverse world, focusing on probation supervision.

Julian Buchanan is Professor of Criminal and Community Justice at Glyndŵr University where he established the Social Inclusion Research Unit, and has over 25 years experience in the drugs field as a practitioner, lecturer and researcher. His research interests include problem drug use, drug policy and practice, social exclusion, criminal justice and marginalised people. He has published in a wide range of journals, is on the editorial board of the *Open Addiction Journal*, *Probation Journal* and *British Journal of Community Justice*, and is Specialist Assessor for the *International Journal of Drug Policy*.

Rob Canton is Professor in Community and Criminal Justice at De Montfort University, Leicester. He worked in the Probation Service for many years in a number of different practice and training roles. His particular research interests include mental disorder and offending, most aspects of probation, the ethics of penal practice and international exchanges of knowledge and practice. He has been extensively involved in recent years in work to help other countries to develop their practices in supervising offenders, especially Ukraine and Russia. He has also contributed to probation development in Turkey and Romania.

Bankole Cole is Lecturer in Criminology and Director of the Centre for Criminology and Criminal Justice at the University of Hull. His research areas include comparative policing and criminal justice, race and diversity issues in criminal justice, community engagement and accountability mechanisms in the local delivery of criminal justice. His most recent publication is *Globalisation, Citizenship and the War on Terror*, co-edited with M. Mullard (Edward Elgar, 2007).

Simon Feasey is Principal Lecturer in Criminal Justice at Sheffield Hallam University and Deputy Director of the Hallam Centre for Community Justice. Prior to embarking on an academic career Simon had worked for the Probation Service for a number of years, experiencing a broad range of roles, and in the 1990s was involved in the development of 'What Works' within probation practice. His current research interests are located within resettlement, community safety and prolific and priority offenders. He also delivers teaching and training to criminal justice practitioners and undergraduate and postgraduate students.

Anthony Goodman was a probation officer for 15 years before moving to Middlesex University where he trained probation officers when this was based in social work. His doctoral thesis was on the changing nature of probation practice and he has continued to research and write in this area. He has been an external examiner on a probation training degree programme for the past four years.

Hannah Goodman Chong is a research fellow with the Community and Criminal Justice Division of De Montfort University. She is interested in researching and writing about the needs of victims of crime. She has previously worked as a research fellow with the Centre for Social Action at De Montfort University, as a probation service officer for the resettlement team in Leicester and as project development worker for the Victims and Witnesses Action Group which was a priority group of the Leicester Crime and Disorder Reduction Partnership.

Simon Green is Lecturer in Criminology and Community Justice at the University of Hull. He is involved in the training of probation officers across Yorkshire and Humberside and has an interest in the relationship between social theory and evolving forms of community punishment. Other research interests include victims, restorative justice, community and sociological theory.

Yvonne Jewkes is Professor of Criminology at the University of Leicester. She has published many books on the media and crime, cybercrime and imprisonment including, most recently, *Prisons and Punishment 3-Volume Set* (Sage, 2008), *Handbook on Prisons* (Willan, 2007), *Crime Online* (Willan, 2007) and, with Jamie Bennett, *Dictionary of Prisons and Punishment* (Willan, 2008). She is co-editor of *Crime, Media, Culture: An International Journal*, and series editor

of the Sage *Key Approaches to Criminology* series. Her current research interests include Internet access in prisons and the architecture of incarceration.

Elizabeth Lancaster studied trade union history for her PhD and worked as a welfare rights adviser, probation officer and Senior Lecturer in Social Work at the University of Bradford. As Director of the Diploma in Probation Studies she was involved in managing and teaching on the Diploma until 2005. She has published articles on working with the perpetrators of sexual crime and on values in the criminal justice system. Although no longer working in academia full time, she tutors for the Open University.

Amanda Loumansky is a senior lecturer in the Business School at Middlesex University where she teaches Child Law and the English Legal System. Amanda has published in the field of ethics and has recently completed research in the United States on behalf of the British Academy.

Trish McCulloch is a lecturer in Social Work at the University of Dundee. Prior to becoming an academic in 2003, Trish worked as a social worker in youth and adult justice settings. Research interests and publications have addressed various aspects of criminal justice including the social context of offending and desistance and the role of community in responding to crime.

Fergus McNeill is Deputy Head (Research) in the Glasgow School of Social Work, and a Network Leader in the Scottish Centre for Crime and Justice Research at the University of Glasgow. He previously worked in residential drug rehabilitation and as a criminal justice social worker. His research interests and publications have addressed sentencing, community penalties and youth justice. Latterly his work has focused on the policy and practice implications of research evidence about the process of desistance from offending. His first book, *Reducing Reoffending: Social Work and Community Justice in Scotland* (co-authored with Bill Whyte), was published by Willan in 2007.

Iolo Madoc-Jones is subject leader in the Social Care subject area at Glyndŵr University. He practised as a probation officer and senior probation officer for 15 years before joining the University of Wales and currently teaches on the BA social work and BA therapeutic childcare programmes, specialising in theory and practice-related issues. He is presently completing his PhD which focuses on the experiences of linguistic minorities in the criminal justice system in the UK. He has published widely on the issues of justice and language in journals such as *The British Journal of Social Work*, *The Howard Journal* and *Children and Family Social Work*.

Mike Nash is Reader in Criminology and Head of Department at the Institute of Criminal Justice Studies, University of Portsmouth. He has written extensively on public protection and criminal justice policy. He works closely with a range of local and national public protection agencies. His latest book

(with Andy Williams) entitled the *Anatomy of Serious Further Offending* was published by Oxford University Press in 2008.

Dave Phillips is a senior lecturer and course leader for the BA (Hons) Community Justice (Probation Studies) at Sheffield Hallam University. He has 20 years' experience working as a probation officer, specialising in work with high-risk offenders. This is an area that he has investigated further in his current role. He is particularly concerned with developing training for offender managers who deal increasingly with risk assessment and management.

Alyson Rees currently teaches on the MA in Social Work at Cardiff University. She was a probation officer for 17 years and has run many groups for offenders, and more latterly has worked for the NSPCC in a domestic violence unit, running groups for the perpetrators of domestic violence. Alyson's current research interests are around domestic violence, fostering and child neglect.

Mark Rivett is Senior Lecturer in the School for Policy Studies, Bristol University and a family therapist in South Wales. He is a qualified social worker and family therapist and is current editor of the *Journal for Family Therapy*. Most recently he managed an NSPCC domestic violence project in Cardiff which worked with abusive men, their partners and also children who had witnessed domestic violence. His publications cover therapeutic approaches to work with abusive men and to children who witness domestic violence. He has also published books on family therapy and working with men.

Mark Sambrook is a probation officer who has worked for Humberside Probation Trust in a variety of roles since 1990. Currently he is a facilitator, treatment manager and regional trainer for the Integrated Domestic Abuse Programme. This role involves working within two long-standing areas of interest. Specifically, these are enabling and supporting staff to develop as reflective and critical thinkers and practitioners, and working with men who have offended, concentrating on issues of belief systems and masculinity.

Paul Senior is Director of the Hallam Centre for Community Justice at Sheffield Hallam University and Visiting Professor at the University of Wales, NEWI. Paul has a professional background in probation and has been involved in professional education, consultancy and research for 25 years. Between 1995 and 2001 he also worked as an organisational development consultant working on projects with the Home Office, the Community Justice National Training Organisation, CCETSW and other national organisations. He has published widely on resettlement, probation practice and criminal justice policy-making. His latest publication is *Understanding Modernisation in Criminal Justice* (Open University Press, 2007) with Chris Crowther-Dowey and Matt Long.

Anna Souhami is Lecturer in Criminology at the School of Law, Edinburgh University. Her main research interests lie in the sociology of criminal justice

professions and policy. Her current research explores the emergent system for the governance of youth crime in England and Wales. Her previous research in youth justice examined the radical restructuring of youth justice services in England and Wales under the Crime and Disorder Act 1998 and its effects on youth justice professionals' sense of occupational identity and culture. She is the author of *Transforming Youth Justice: Occupational Identity and Cultural Change* (Willan, 2007).

Louise Sturgeon-Adams is Lecturer in Community Justice at the Centre for Criminology and Criminal Justice, University of Hull. She is qualified as a probation officer and has worked as a counsellor for people with drug and alcohol problems. She is experienced in a range of qualitative research methodologies and is currently undertaking research into the culture of cannabis cultivation. She has a developing interest in the ways in which practitioners within the criminal justice system manage the competing demands of various aspects of working with offenders.

Chris Tallant is a senior probation officer for Humberside Probation Trust and is currently involved in the training and development of trainee probation officers and probation services officers. Through his work as a probation officer, practice teacher and practice development assessor he has maintained a long-term interest in the connections between theory and practice and the importance of staff developing as good reflective practitioners. His ongoing interests include the management of offenders and the impact of diversity in the workplace.

Martin Wasik is Professor of Criminal Justice at Keele University. From 1999 to 2007 he was chairman of the Sentencing Advisory Panel, for which work he was appointed CBE in 2008. Martin also sits part-time as a Crown Court judge, practising on the Midland Circuit.

Brian Williams was Professor of Community Justice and Victimology at De Montfort University in Leicester. His main research interests were services for victims of crime, restorative justice, community justice and criminological research ethics. He previously worked at Keele, Sheffield and Teeside universities, and as a probation officer. He was an Executive Committee member of the British Society of Criminology and chair of its Professional and Ethics Committees. His most recent book was *Victims of Crime and Community Justice* (Jessica Kingsley, 2005). Brian died in a motor accident in March 2007.

List of abbreviations

ACE	Assessment, Case management and Evaluation
ACMD	Advisory Council on the Misuse of Drugs
ACOP	Association of Chief Officers of Probation
ASPIRE	Assess, Sentence Plan, Implement, Review, Evaluate
ASRO	addressing substance-related offending
AUR	automatic unconditional release
BASW	British Association of Social Workers
BME	black and minority ethnic
CAFCASS	Children and Family Court Advisory Support Service
CALM	controlling anger and learning to manage it
CBT	cognitive-behavioural therapy
CCA	common client assessment tool
CDRP	Crime and Disorder Reduction Partnership
CDVP	community domestic violence programme
CHI	Commission for Health Improvement
CJA	Criminal Justice Act
CJSW	Criminal Justice Social Work [Development Centre]
CNI	Criminogenic Needs Inventory (New Zealand)
CPO	chief probation officer/community punishment order
CPRO	community punishment and rehabilitation order
CRO	community rehabilitation order
CSA	Child Support Agency
CSAP	Correctional Services Accreditation Panel
C-SOGP	community – sex offender group programme
CSP	community safety partnership
DAIP	Domestic Abuse Intervention Program (Duluth, USA)
DID	drink impaired driver
DIP	Drugs Intervention Programme
DoH	Department of Health
DSPD	dangerous and severe personality disorder
DTTO	drug treatment and testing order
EM	electronic monitoring
ETE	education, training and employment,
HDC	home detention curfew
HMIP	Her Majesty's Inspectorate of Probation

IDAP	Integrated Domestic Abuse Programme
IDVA	independent domestic violence advocate
IPP	imprisonment for public protection
JPPAP	Joint Prisons and Probation Accreditation Panel
JRF	Joseph Rowntree Foundation
LEDS	Life Events and Difficulties Schedule
LSI-R	Level of Service Inventory – Revised
MaCRN	Maori Culture Related Needs Assessment (New Zealand)
MAPPA	multi-agency public protection arrangements
MAPPP	multi-agency public protection panel
MARAC	Multi-Agency Risk Assessment Conference
MI	motivational interviewing
MSC	Multicultural Counselling Competences
MUD	moral underclass discourse
NAPO	National Association of Probation Officers
NOMIS	National Offender Management Information System
NOMS	National Offender Management System
NPM	New Public Management
NPS	National Probation Service
N-SOGP	Northumbria – sex offender group programme
OASys	Offender Assessment System
OGRS	Offender Group Reconviction Score
OMIC	Offender Management Inspection Criteria
OMM	Offender Management Model
OSAP	offender substance abuse programme
PCEP (YJ)	Professional Certificate in Effective Practice (Youth Justice)
PI	programme identity
PPO	prolific and other priority offender scheme
PRISM	personal reduction in substance misuse
PSA	public service agreement
PSM	pro-social modelling
PSR	pre-sentence report
R&R	Reasoning and Rehabilitation
RAPt	Rehabilitation for Addicted Prisoners Trust
RED	redistributionist discourse
RoH	risk of harm
SDVC	Specialist Domestic Violence Court
SEU	Social Exclusion Unit
SGC	Sentencing Guidelines Council
SID	social integrationist discourse
SIR	Statistical Information on Recidivism
SMART	specific, measurable, achievable, relevant, timed
SMARTA	specific, measurable, achievable, relevant, time-bound, anti-discriminatory
SLOP	Statement of Local Objectives and Priorities
SNOP	Statement of National Objectives and Priorities
SOO	sex offender order

SPJ	structured professional judgment
STOP	Straight Thinking on Probation
TFBAO	Think First Black and Asian Offender Programme
TI	treatment integrity
TV-SOGP	Thames Valley – sex offender group programme
WSU	women's safety unit
VAC	voluntary after-care
VCS	voluntary and community sector
VLO	victim liaison officer
YJB	Youth Justice Board
YJCEA	Youth Justice and Criminal Evidence Act 1999
YOI	young offender institution
YOT	youth offending team

Introduction

Simon Green, Elizabeth Lancaster and Simon Feasey

Our primary motivation for editing a collection of this sort was to begin redressing what we saw as a serious deficit in the literature. Emerging from our collective experience of working with offenders and training criminal justice practitioners we have often been frustrated by the lack of coherent literature which brings together theoretical and practical debates about how work with offenders is carried out. This text aims to bridge this gap, combining wider theoretical and contextual debates with more practice-orientated concerns. Our objective is that this book should become a critical reference text for practitioners, researchers and academics interested in addressing offending behaviour.

Further, in contrast to many other texts, this book is not specifically about 'probation work' but about 'work with offenders', and consequently draws on generic issues of practice that are applicable to both the voluntary and community sectors as well as the statutory. In a climate of increasing cooperation between academic teaching and criminal justice training (for example, the establishment of the 'Skills for Justice' organisation) this text aims to become essential reading for a new generation of more skills-based, employment-orientated undergraduate programmes and for those training and working in the criminal justice sector.

The motivations for embarking on this project are twofold: one, to share the combined experience of those of us teaching and working in this field; and two, to inject a more critical appreciation of current policy and practice into the criminal justice training arena. This book is designed to provide an up-to-date discussion of the types of work that are typically undertaken with offenders. While there are many good texts about probation or probation-related issues on the market they tend to be about specific areas of interest such as the 'What Works' debate or the findings from a particular study. This text is substantially different from these as it is concerned with providing the first account in some time of the different ways in which offenders are helped to change their behaviour.

This text focuses on bridging academic and practitioner concerns and integrates theory within a discussion of offender management. Therefore the bulk of the chapters (particularly in Part 2) discuss the actual forms of work undertaken, the skills required and the types of assessment tools and intervention strategies used. This is matched by a consideration of the theoretical and conceptual underpinnings of practice along with its limitations and possible dangers. Hence this book is distinguished from others in two ways: firstly, through a clear focus on the actual practice of working with

offenders; and secondly, through a very real attempt to span both intellectual and practical considerations. This will broaden the appeal of the text making it relevant to academics, students, researchers, practitioners and trainee practitioners interested in addressing offending behaviour. With this broad base in mind we offer a text that provides a synthesis of academic and practitioner concerns.

All contributors have considered, where possible, the following themes:

- the current legislative framework and policy debate;
- the relevant skills and techniques employed by practitioners when working with offenders;
- the broader theoretical and conceptual issues that provide an understanding of how and why certain interventions are used with offenders;
- a critical consideration of the limitations and potential dangers of current practice;
- some discussion questions or topics that can be used by students, trainees and practitioners to consider the critical issues;
- selected further reading at the end of each chapter.

We hope this meshing of themes has provided a hybrid study that details both the practical and intellectual issues in working with offenders.

Contributors have been drawn from those in academic posts who have direct experience of working with offenders or strong research and/or teaching portfolios in the particular area of their chapter. Part 2 also includes senior practitioners, some with an established track record of publishing. While some of these will be less well known in academic circles they will be recognised names within practitioner circles.

The book is split into three sections with the second section containing the majority of the chapters. Part 1 provides a contextual framework for working with offenders, Part 2 the key skills and interventions and Part 3 looks at the treatment of minority and vulnerable offender populations.

The first part of the book discusses the context for working with offenders. Wasik details the changing legal framework for working with offenders, Nash notes the broad policy context, the 'managerialist'initiatives which shape criminal justice policy being in evidence across most of the public sector, while Goodman considers the 'What Works' agendaand its impact on practice. Jewkes concludes this part by offering an analysis of the social construction offenders which informs both the legal framework and the broad policies which structure day-to-day practice with offenders.

We have divided the middle section of the volume into two parts, the first dealing with generic issues, the second looking at specialised areas of working with offenders. Generic issues cover both individual practice considerations and the broader themes/influences on practice. Individual practice considerations include Tallant, Sambrook and Green's exploration of different types of engagement skills, highlighting a tension between managing offender needs and managing organisational needs. Ashworth explores an often overlooked element of practice, the written word, and considers the skills required to produce accurate, relevant, useful and understandable records, suggesting that these skills are often downplayed, paradoxically, given the reliance on written forms of communication throughout the whole criminal justice system. Sturgeon-Adams offers guidance for practitioners in how to evaluate their

own practice. Evaluation is not something to be left to 'the academics' but is an intrinsic part of effective practice and she approaches the subject from a perspective of practitioner empowerment. Madoc-Jones challenges the current cognitive-behavioural orthodoxy by applying different models of intervention to a recurring case example, discussing how a model of intervention might be applied differently depending on the theoretical lens through which it is viewed.

The broader themes and influences on practice incorporate Loumansky, Goodman and Feasey's consideration of the impact of the enforcement culture on practice and the move away from practitioner discretion, with practitioners becoming more risk averse in the process. Phillips' discussion of practice in a risk-based penology calls for a shift in emphasis from the instrument of assessment to the process of assessment, and a rebalancing of the system towards a consideration of individual desistance factors and a return to proportionality and rigorous cooperation between agencies. The importance of individual desistance factors is echoed by McCulloch and McNeill who note that desistance literature, which pursues a broader agenda than that provided by the 'what works' literature, has as yet had little impact on policy and practice, arguing that interventions should pay greater heed to the community, social and personal context in which offenders live and change.

Cooperation between agencies is the core of Souhami's chapter in which she explores multi-agency and inter-agency working in the youth justice sector before drawing conclusions for the whole criminal justice sector, suggesting that as multi-agency working becomes more deeply embedded it risks eroding the diversity at its core.

The second part of the middle section focuses on specialist areas of practice though much of what is written here has relevance in the generic context also. A trio of chapters – on dangerous offenders, substance misuse and mentally disordered offenders – discuss interweaving themes. Nash describes dangerous offenders as the issue that has driven the criminal justice agenda for a decade or more, illustrating how the perception of and response to dangerousness 'has had significant knock-on effects in the criminal justice system for other less serious and more common offenders' and suggesting that 'defensible' decision-making is giving way to 'defensive' decision-making and catching some offenders in an 'upwardly punitive spiral'. This theme is continued by Canton who considers policy to be distorted by an overemphasis on the risk posed by mentally disturbed people. He suggests there needs to be an appreciation of social influences on mental distress, a theme mirrored by Buchanan who concludes there is little chance of reintegration of those who have problems with substance misuse without looking at deep-seated underlying psychosocial and structural problems. This has some resonance with Senior's view that successful resettlement following prison requires needs-based support. Lack of staff skills, lack of coordination and communication between agencies together with a focus on the most risky lead to the most needy being overlooked.

Two chapters consider group work – the first looks at accredited programmes generally and the second at groups as the vehicle for intervention with domestic violence perpetrators. Feasey revisits the importance of process issues in undertaking group work noting that the experience of being in an accredited programme is dynamic and driven by interactions between group members. Rivett and Rees explore the context of work with victims and

perpetrators of domestic violence and the predominant approaches, observing that a consensus has developed around intervention with such offenders though the evidence of effectiveness is still uncertain.

Williams and Goodman Chong review the current legislative and policy framework in respect of victims, and the skills and techniques required by practitioners picking up on the worrying theme that consideration of the needs of offenders is seen to be at the expense of the needs of victims.

Contributors in the final part all express some dissatisfaction with the values base of the criminal justice system. Lancaster notes the similarity in the values statements of key organisations in the criminal justice system, particularly in the need to 'respect' service users. She argues that values discussions take place at different conceptual levels and that there should be a recognition of these different levels in order to foster a holistic approach to 'values talk' in the criminal justice system. Beckett and Cole respectively acknowledge the theoretical debates and the attempts to incorporate gender and minority ethnic awareness into policy and practice. Both conclude that much remains to be done. Beckett suggests that the criminal justice system still uses traditional reactions to work differentially with women and that current models of offender management employ a generic 'gender blind' approach. Cole argues that while significant changes are taking place in the criminal justice system in order to address ethnic diversity, criminal justice interventions are not yet responding adequately to 'race' issues, suggesting that a starting point should be the recognition of racism as a criminogenic risk factor. Green concludes this section, and the volume, by writing about the most overlooked category of offenders – 'poor people' – who also form the majority. He argues that the welfare and redistribution values which recognised poverty, and hence 'poor people', have been replaced by a new set of moral values about personal and civic responsibility, in which poverty as an issue is lost. He proposes the extension into the community of the incentives and earned privileges scheme of the prison setting and suggests that this would fit well with other community justice initiatives.

As editors, we had a view of what the book would look like as a whole, and proposed areas of discussion and synopses of each chapter for our contributors. Each contributor, of course, has added their personal emphasis and developed their chapters in particular ways, but out of this individuality a certain commonality has emerged. Thus a number of contributors have argued for the need to be mindful of the social influences when addressing offending; others have developed arguments around diversity and difference with a caution about the 'one size fits all' approach to intervention and offender management; a third strand suggests caution about the evidence base of accepted methods of intervention. These common areas of discussion have helped give the book a cohesion for which the editors are hugely grateful.

Finally, it is our solemn duty to record the untimely death of two of our contributors. John Whitfield died in the early stages of preparing this book and the chapter on multi-agency working was consequently undertaken by Anna Souhami. Brian Williams died as we were preparing the text for publication. His co-author, Hannah Goodman Chong, has chosen not to amend the sections of the chapter prepared by Brian and we have consequently included these in their unrevised form. Condolences are sincerely offered to all those affected by these deaths.

Part I

Context

Chapter 1

The legal framework

Martin Wasik

A brief history

The origins of dealing with offenders in the community in an attempt to assist in their rehabilitation goes back to the latter part of the nineteenth century, when voluntary societies appointed police court missionaries to help with the reformation of drunkards and others who appeared before the inner-city courts. The Probation of Offenders Act 1907 put this practice on a statutory footing, and enabled courts to make probation orders in a manner quite similar to that which existed until the end of the twentieth century. Probation was regarded as a form of diversion from the criminal courts. It was imposed 'instead of sentencing', and required the offender's consent. The probation order was for many years effectively the only community sentence available to the courts. It gradually became more flexible in content, offering a range of requirements tailored to the needs of the offender which could be written into the order by the court. Local probation services began to offer attendance at 'day centres', accommodation at a probation hostel or various activities and programmes which could be described to the court in a social inquiry report and be made part of the order to be served. Treatment for a mental condition could be ordered as part of a 'psychiatric probation order'. Attendance centres for young offenders were created by statute in 1948, but the community service order was the next major change, introduced as an experiment in 1972 and made generally available in 1975 (Advisory Council on the Penal System 1970).

Community service, another order to which the offender had to consent, involved the performance of between 40 and 240 hours' work (as specified by the court) in the community. The order was overseen and managed by the probation service, but work on site was carried out alongside community volunteers. Community service rapidly gained general acceptance, perhaps because it had elements to appeal to all penal perspectives. It was punitive, requiring the offender to perform physical tasks for the benefit of the community. It was rehabilitative, with the prospect (at least) that the positive values of the volunteers might rub off on the offender. Community service

was also the first tangible move in the sentencing system towards reparation, but indirectly through repayment to the community rather than directly to the victim of the offence. A limited mix of probation and community service was also developed, known as a combination order. At this time community-based disposals were usually referred to as 'intermediate sanctions' or 'alternatives to custody', but it was never clear whether community service was an alternative to custody, an alternative to probation or a little of both. Was it part of, or distinct from, the sentencing tariff occupied by discharges, fines and custody? Should a smaller number of hours of community service be equivalent to other non-custodial penalties and a larger number of hours be seen as alternatives to custody? If so, what was the 'conversion scale' between numbers of hours of community service and weeks or months in prison? The development of community service stirred an important debate over the rationale of community sentences generally (Pease 1978; Ashworth 1983: 385–407). The debate was overtaken by wider legislative change.

The Criminal Justice Act 1991

The Criminal Justice Act 1991, based on a 1990 White Paper (Home Office 1990), for the first time set out in statute a general sentencing framework (Wasik and Taylor 1994; Easton and Piper 2005). Central to the Act was the principle of proportionality – that each upward move in the scale of available sentences, from discharge, to fine, through community sentence to custody, had to be justified on the basis of the seriousness of the offence. The Act declared that an offence always had to be 'serious enough' to justify a community sentence, or be 'so serious' that only custody could be justified. It was based on proportionality (or 'desert') principles, but it allowed the courts to incapacitate high-risk violent and sexual offenders by the introduction of 'longer-than-commensurate' and 'extended' prison sentences. Community sentences were significantly reworked in the Act, with a rejection of the 'alternatives to custody' model. They were now, instead, to be regarded as restrictions on liberty, capable of being graded in terms of their relative severity (Wasik and von Hirsch 1988). This change reflected the decline in the rehabilitative model, which had held sway in the middle decades of the twentieth century, and the resurgence of 'desert' which had begun in the United States in the 1970s and was becoming influential worldwide (von Hirsch 1976). This did not mean that rehabilitative efforts in community sentences were to be abandoned – it meant that the duration of the order and the requirements it imposed on the offender must be kept in proportion with the seriousness of the crime(s) committed. The rhetoric of desert also chimed well with policy-makers, who wanted to see a fall in the prison population but were faced with resistance from sentencers and the public over community measures which were seen as 'soft'. It was thought that rebranding these measures as restrictions on liberty might help to convert

some of the doubters, but more recent surveys show that the problems endure (Coulsfield 2004; Linklater 2004). After the 1991 Act there was now no question that community service fitted within the sentencing tariff and was to be regarded as a form of punishment. Probation also became, for the first time, a sentence in its own right. The Act also introduced the curfew order, which could be enforced by electronic tagging. The curfew was the first community sentence designed to be punitive and restrictive of liberty, with no rehabilitative pretensions at all.

Some of the intended effects of the 1991 Act were watered down in the Criminal Justice Act 1993, but these reverses did not affect community sentences. A White Paper published in 1995, however, returned to the theme that community penalties were insufficiently tough, the public and sentencers lacked confidence in them and they were not enforced rigorously enough (Home Office 1995). The Crime (Sentences) Act 1997 abolished the requirement that the offender must consent to probation and to community service. As the technology became more reliable there was an exponential growth in the use of electronic tagging to enforce not just curfew orders (Nellis 2004), but to monitor bail conditions and home detention curfew on early release from custody (Dodgeson *et al*. 2001). Tagging could now be combined with other elements in a community sentence. The drug treatment and testing order (DTTO) was introduced in 1998. This innovative community sentence could be imposed for a period of between six months and three years, with offenders required to undergo treatment for drug dependency and to submit themselves for testing at regular intervals (Turnbull *et al*. 2000; Hough *et al*. 2003). The Court of Appeal issued guidance on the proper use of the DTTO in *Attorney-General's Reference (No. 64 of 2003)* [2004] 2 Cr App R (S) 105. It stated that judges should pass sentences which had a realistic prospect of reducing drug addiction whenever it was possible sensibly to do so, but clear evidence was necessary that the offender was determined to free himself from drugs. A DTTO would be more likely to be imposed in the case of an acquisitive offence carried out to obtain money for drugs and could be appropriate even where the offender had a bad offending record, but a DTTO would rarely be suitable for serious offences involving violence or threats of violence with a weapon. The DTTO had the further element that the sentencer imposing the order could oversee its management, requiring the offender to return monthly to court for progress reviews (McKittrick and Rex 2003; Robinson and Dignan 2004). In 2000 the names of several of the community sentences were changed in a further attempt to make them sound more rigorous. 'Community service' became 'community punishment' and 'probation' became 'community rehabilitation', a change criticised as unnecessary and confusing (Faulkner 2001).

From the 1990s onwards sentencing became an ever more volatile and politicised area of public policy (Wasik 2004). 'Populist punitiveness' over sentencing was, and still is, fuelled by the media and by politicians (Bottoms 1995), but research demonstrates consistently that when members of the public are properly informed of the facts of a case and educated as to the

sentencing alternatives available, they will propose a sentence comparable to, or more lenient than, the sentence which would be selected by a criminal court (see Hough and Roberts 2002; Halliday 2001: App. 5). The traditional discretion of the courts in sentencing matters was coming under pressure from Parliament. The White Paper in 1990 declared that 'sentencing principles and sentencing practice were matters of legitimate concern to the government' (Home Office 1990). While it was generally accepted that it was for Parliament to set the agenda in penal policy, but for judges and magistrates to make individual sentencing decisions, there was disagreement over the 'middle ground' in sentencing. General principles of sentencing, aggravating and mitigating factors, guidelines and starting points had all been gradually developed over the latter decades of the twentieth century by the Court of Appeal, with little or no intervention from government. That all changed in the 1991 Act with the new legislative framework. There was much opposition to the Act from judges and magistrates, with the Lord Chief Justice of the day describing it as a 'straitjacket' on judicial decision-making, and insisting that what was needed instead of legislative restrictions was 'the widest range of possible measures, and the broadest discretion to deploy them' (Taylor 1993). Parliament pressed on, however, bolting onto the sentencing framework various special rules such as minimum sentences in the Crime (Sentences) Act 1997 for domestic burglary, drug trafficking and (in the Criminal Justice Act 2003 and the Violent Crime Reduction Act 2006) firearms offences. The Court of Appeal responded by reinstating flexibility wherever it could (see *Cunningham* (1993) 14 Cr App R (S) 444 on the general provisions of the 1991 Act), and by emphasising judicial discretion to avoid legislative prescription where 'exceptional circumstances' existed (see *McInerney* [2003] 2 Cr App R (S) 240 on the three-strikes rule for domestic burglary and *Offen* (No. 2) [2001] Cr App R (S) 44 on automatic life sentence provisions, repealed by the 2003 Act).

The Criminal Justice Act 2003

The Criminal Justice Act 2003 (CJA 2003) is now the key statute, certainly as far as offenders aged 18 and over are concerned (Ashworth 2005: ch. 10; Taylor, Wasik and Leng 2004: ch. 12) The Act was, in the main, the product of the Halliday Review (Halliday 2001), as subsequently endorsed by the government (Home Office 2002). The Act recasts community provisions once again. Replacing the earlier range of community sentences, there is now a single community order, within which one or more of 12 possible requirements may be specified by the court. These requirements, with some minor differences, reflect the former community sentences, but the terminology has changed again, so that (for example) 'community service', which became 'community punishment' in 2000, is now a 'community order with an unpaid work requirement'. Halliday's criticism of the old community sentences was that they had grown up piecemeal, and should

be simplified and made more understandable to the community, sentencers and offenders (Halliday 2001: para. 6.2, though see Rex 2002). The new order is used for offenders aged 18 and over in the Crown Court and in magistrates' courts for offences committed on or after 4 April 2005 (the relevant commencement date). A different community sentencing regime, with a range of different orders, continues for young offenders under 16. A third scheme exists for 16- and 17-year-old offenders, who have not been brought within the 2003 Act provisions and still fall to be dealt with under the old community sentences. Initially this situation was for an interim period only (until April 2007), but it has now been extended by Parliament until April 2009 (SI 2007/391).

The new scheme adopts the 1991 Act criteria in providing that a court must not pass a community order on an offender unless it is of the opinion that the offence (or combination of the offence and one or more offences associated with it) was serious enough to warrant such a sentence (CJA 2003, s.148(1)). This is the 'community sentence threshold' of offence seriousness, below which a different option, such as a fine or a conditional discharge, should be used. Just because an offence is 'serious enough' to justify a community order does not mean that such a sentence is inevitable. If appropriate, a fine or conditional discharge can still be used instead. The Criminal Justice and Immigration Act 2008 made the community order unavailable for offences which do not carry imprisonment as a penalty, a change designed to restrict the availability of more intensive (and expensive) community measures on serious offences (Home Office 2006b).The phrase 'associated with' in s.148(1) means that the court must weigh up any other offences for which the offender is being sentenced at the same time, and any further offences which the offender admits and has asked the court to take into consideration. If the offence is 'so serious that neither a fine alone nor a community sentence can be justified' then a custodial sentence will normally be imposed (CJA 2003, s.152(2)). This is the 'custodial sentence threshold'. It is clear from the statute (CJA 2003, s.166(2)) and from case-law (*Cox* [1993] 1 WLR 188), however, that even if an offence crosses the custody threshold, mitigating features relating to the offender, together with a timely guilty plea (see SGC 2007) can mean that the sentencer may suspend the period in custody or impose a community order instead.

Community Order Requirements

Every community order under the 2003 Act contains a general duty on the offender to keep in touch with the responsible officer (who will be a probation officer if the offender is aged 18 or over) and must notify that officer of any change of address. A community order may contain one or more of 12 requirements. These are now set out in turn, together with some key features of each requirement. These descriptions are drawn from

the Probation Bench Handbook (National Offender Management Service 2007), an excellent authoritative source of information for sentencers. The Handbook should be consulted for full details of the requirements and for further information. The effectiveness of these various requirements is considered in depth in other chapters in this book but see also Harper and Chitty (2005) for a thorough review of a number of specific programmes.

(i) *Unpaid work requirement*

- Main purposes: punishment, reparation and rehabilitation.
- Expressed in hours between 40 and 300.
- The court must be satisfied that the offender is suitable to perform work.
- The requirement must be completed within one year.
- A small amount of basic skills learning can be incorporated within the requirement, to take place while carrying out the work.
- If a significant amount of skills learning is necessary, an activity requirement might be included in the order as well.

(ii) *Activity requirement*

- Main purposes: rehabilitation and reparation.
- Expressed in days but details of the actual period and content of each attendance will be given in the order.
- The requirement involves the offender attending a specified place, such as a community rehabilitation centre, to take part in activities such as debt counselling or financial management; employment, training and education; mediation; mentoring.

(iii) *Programme requirement*

- Main purpose: rehabilitation.
- Normally expressed in terms of the number of sessions (e.g. two sessions of three hours a week for 11 weeks).
- Cannot be included in an order unless recommended in a pre-sentence report (PSR).
- A programme requirement will normally be combined with a supervision requirement to provide additional support.
- The programme must be accredited by the Correctional Services Accreditation Panel (CSAP).
- Exceptionally, multiple programme requirements can be made by inserting a separate requirement for each programme into the order, e.g. a general offending behaviour programme, followed by an offence-specific programme.
- Programmes fall into five categories – general offending, violent offending, sex offending, substance misuse and domestic violence.

- The National Probation Service currently offers the following programmes, though not all programmes are available in all areas of the country:
    1 enhanced thinking skills
    2 think first
    3 one to one
    4 the women's programme
    5 aggression replacement training
    6 controlling anger and learning to manage it (CALM)
    7 community – sex offender group-work programme (C-SOGP)
    8 Thames Valley – sex offender group-work programme (TV-SOGP)
    9 Northumbria – sex offender group programme (N-SOGP)
    10 drink impaired drivers (DIDs)
    11 addressing substance-related offending (ASRO)
    12 offender substance abuse programme (OSAP)
    13 personal reduction in substance misuse (PRISM)
    14 community domestic violence programme (CDVP)
    15 integrated domestic abuse programme (IDAP)
    16 internet sex offender programme.

(iv) *Prohibited activity requirement*

- Main purposes: punishment and protection.
- Expressed as refraining from a specified activity on a day or days, or during a period for up to 36 months.
- The court must consult the probation service before making the requirement.
- A prohibited activity requirement might be used in relation to drink-related offending linked to pubs in general; prohibition from association with named individual(s); stalking or sex offending – prohibition from approaching or communicating with victim and/or family members without prior approval; sex offender – prohibition from taking work or any other organised activity which will involve a person under the relevant age; sex offender – prohibition from approaching or communicating with any child under the relevant age without prior approval; sex offender – prohibition from residing or staying in the same household as any child under the relevant age.
- Where appropriate a prohibited activity can be used with a supervision requirement to support and reinforce desired changes in behaviour.

(v) *Curfew requirement*

- Main purposes: punishment and protection.
- Expressed in hours between two and 12 in any one day, and limited to operate within six months of the order being made.
- Requirement must normally be electronically monitored.

- A single requirement of an electronically monitored curfew can be used as a simple punishment.
- Curfews can also be considered alongside a long unpaid work requirement in cases with a low level of offending-related need and risk of harm but where the seriousness level is high, or as part of a complex package of interventions with high levels of offending-related need and/or risk of harm where the seriousness level is very high.

(vi) *Exclusion requirement*

- Main purposes: punishment and protection.
- Expressed as exclusion from a place or area for a specified period of up to two years; the exclusion may be limited to particular specified periods.
- A report is advisable in cases where significant risk of harm is identified.
- An exclusion requirement might be used in drink-related, public order or violent offences associated with particular public houses or areas of town; stalking – exclusion from area of victim's home or workplace; sex offender excluded from named swimming pool, leisure centre, playground or from a specified radius of named schools; persistent shop theft – exclusion from a named store or shopping area; domestic violence cases – exclusion from the victim's home and environs.
- The court should normally impose electronic monitoring.
- Where appropriate an exclusion requirement can be used with a supervision requirement to support and reinforce desired changes in behaviour.

(vii) *Residence requirement*

- Main purposes: rehabilitation and protection.
- Expressed in months or years up to 36 months.
- Residence can be at approved premises or at a private address.
- Residence in a hostel or institution must be proposed by the probation service and will normally be accompanied by a supervision requirement to ensure support and contact.
- A residence requirement should be distinguished from a curfew requirement.

(viii) *Mental health treatment requirement*

- Main purpose: rehabilitation.
- Expressed in months or years between six and 36 months.
- The court must be satisfied on the evidence of a doctor that the mental condition of the offender is such as requires and may be susceptible to treatment, but does not warrant the making of a hospital order or guardianship order, and that treatment has been or can be arranged.

- The offender must be willing to comply with the requirement.
- A supervision requirement will normally be proposed to provide additional support, unless the treatment is to be residential in which case supervision would not normally be necessary and the role of the responsible officer would be limited to that of case manager; a separate residence requirement is not necessary.

(ix) *Drug rehabilitation requirement*

- Main purpose: rehabilitation.
- Expressed in months or years between six and 36 months.
- The court cannot impose a DRR unless the probation service has recommended it.
- The court must also be satisfied that the offender is dependent on or has a propensity to misuse drugs that this is susceptible to treatment and that treatment has been or can be arranged.
- The offender must be willing to comply with the requirement.
- Drug rehabilitation includes testing, but sentencers may wish to consider whether an accredited substance misuse programme should be undertaken through a separate programme requirement.
- Progress reviews by the court are mandatory for requirements of over 12 months and optional for those under 12 months.
- Court of Appeal guidance on DTTOs (set out above) is applicable here.

(x) *Alcohol treatment requirement*

- Main purpose: rehabilitation.
- Expressed in months or years between six and 36 months.
- The court must be satisfied that the offender is dependent on alcohol, requires and may be susceptible to treatment, and treatment has been or can be arranged.
- The offender must be willing to comply with the requirement.
- Where attendance on an accredited substance misuse programme or the drink impaired drivers programme is necessary, this would be specified in a separate programme requirement.

(xi) *Supervision requirement*

- Main purpose: rehabilitation.
- Expressed in months or years between six and 36 months and, if included in an order, is always the same length as the order.
- There should be a clear expectation between the court and the offender about what work is to be undertaken and what this will involve.
- The Probation Service will indicate the initial frequency of contact.
- Typically supervision can involve contact to undertake work to promote personal and behavioural change; monitor and review patterns of behaviour

and personal activity; undertake work to increase motivation and provide practical support to increase compliance with other requirements; deliver pre- and post-programme work for accredited programmes; support and reinforce learning being undertaken as part of a programme or activity requirement; deliver individual counselling; form and maintain working alliances to support the offender through other requirements in the order; model pro-social behaviour.
- Normally the contact would be individual but these activities can be carried out in small groups if appropriate.

(xii) *Attendance centre requirement (if offender is aged under 25)*

- Main purpose: punishment.
- Expressed in hours between 12 and 36, with a maximum of three hours per attendance and one attendance per day.
- A centre must be available and accessible to the offender.
- If an attendance requirement is the only requirement then the responsible officer will be the officer in charge of the centre.

In addition to the specific points mentioned, a number of general provisions apply whatever the requirement or requirements inserted by the court. The requirement or requirements must be such as in the opinion of the court is or taken together are, the most suitable for the offender, and the restrictions on liberty imposed by the order must be such as in the opinion of the court are commensurate with the seriousness of the offence (or offences) committed (CJA 2003, s.148(2)). There is an obvious tension between these two criteria, a difficulty which was also to be found in the earlier law (Rex 1988, and see further below). Where more than one requirement is inserted into the community order, the court should consider whether they are compatible with each other (CJA 2003, s.177(6)). Whenever the court makes a community order imposing a curfew requirement or an exclusion requirement, the court *must* normally also impose an electronic monitoring requirement, and *may* do so in respect of any of the other requirements (s.177(3) and (4)).

The agreement of the offender to the requirement is *not* necessary except where mental health treatment or drug or alcohol rehabilitation is involved. In every case the community order should specify the area in which the offender will live throughout the order, and the court must ensure that, so far as possible, the order will avoid conflict with the offender's religious beliefs, conflict with the requirements of any other order to which he may be subject, and avoids interference with the times (if any) at which the offender attends work, school or other educational establishment. The order must specify a date, not more than three years from the date of the making of the order, by which all the requirements must have been completed or fully complied with (s.177(5)), but there are some other rules for particular requirements which are more specific than this. All the hours under an

unpaid work requirement should normally be completed within 12 months, for example. Details of the order and its requirements will be written down and copies given to the offender, the responsible officer and to certain other persons who will be affected by the order. There are further detailed provisions in the Act relating to each of the requirements, but these are not covered in this chapter.

Guidance on the community order

The practical operation of the community order is only partly laid down in the statute. Additional guidance is provided by the Sentencing Guidelines Council (SGC), and by national standards applicable to the National Probation Service (now part of the National Offender Management Service – NOMS). The SGC was set up by the Criminal Justice Act 2003, and issues sentencing guidelines to which all courts must have regard (CJA 2003, s.172). It issued guidelines on the new community order at the end of 2004. The guidelines state that when deciding which requirements to include the court has to consider both the degree of restriction on liberty which is involved and the suitability of the requirement(s) for the offender, but that the first consideration for the court should be proportionality ahead of suitability (SGC 2004: para. 1.1.13). This shows that the principle of proportionality, or 'desert', remains central to achieving consistency in community sentencing (compare Wasik and von Hirsch 1988, an article which argues for this approach, with Morris and Tonry 1990, which prefers much greater interchangeability among community measures). Desert is a limiting principle on the onerousness of community sentence length and requirements.

The SGC then goes on to provide that the community order should be divided into three sentencing ranges (as was suggested in Halliday 2001: para. 6.8) to reflect cases of low, medium and high degrees of seriousness. The low range is for cases which only just cross the community sentence threshold, and for persistent petty offenders whose offences only merit a community sentence by virtue of failing to respond to the previous imposition of fines. Here, one requirement will normally be appropriate, such as short period of unpaid work (40–80 hours), or a curfew, or a prohibited activity requirement, or an exclusion requirement if no electronic monitoring is necessary. The high range is for cases falling just short of custody, or where the offence crosses the custody threshold but the personal mitigation is such that a community sentence can be passed instead. More intensive sentences which combine two or more requirements are appropriate here. Suitable requirements might include unpaid work of 150–300 hours, an activity requirement up to the maximum of 60 days, an exclusion order for up to the maximum of 12 months, and/or a curfew order of up to 12 hours a day for 4–6 months. The middle range caters for those cases which fall in between, where suitable requirements might include 80–150 hours

of community work, an activity requirement in the middle range (20–30 days), a curfew requirement in the middle range (up to 12 hours for 2–3 months, for example), an exclusion requirement lasting for six months and/or a prohibited activity requirement. It is important to note that the three sentencing ranges are not intended to be prescriptive, and should remain flexible enough to take account of offender suitability, his or her ability to comply and the varying availability of particular requirements in the local area (SGC 2004: para. 1.1.14).

In many cases the PSR (or other appropriate report) provided by the National Probation Service will be crucial in helping the sentencer to decide whether a community sentence is appropriate and, if so, which requirement or combination of requirements will be the most suitable for the offender. Offending behaviour programmes are accredited by the Home Office and regulated in accordance with national standards. There has been very substantial government investment in research, evaluation and programme accreditation by the Correctional Services Accreditation Panel. Accreditation is based upon available empirical evidence that the particular programme has been designed in a manner consistent with what is likely to be effective in reducing reoffending. The PSR will also make considerable use of risk prediction tools, especially OASys (Offender Assessment System), which allows the report writer to present a balanced view of the likelihood of reconviction, the relative degree of risk of future harm and the factors which must be addressed (such as drug misuse) if the offender's criminality is to be addressed. Not all programmes are available in every area. The sentencing court should be advised as to local availability and should clearly specify the name of the relevant programme when making the community order.

The normal expectation is that the court will order a report whenever a community sentence is a likely outcome, although the SGC suggests that the court may consider dispensing with a report if the offence falls within the low range of seriousness and the sentencer has just a single requirement in mind (SGC 2004: para. 1.1.17). The government is consulting again on this matter, from the point of view of better targeting of probation resources (Home Office 2006b). The SGC guidelines state that, wherever possible, sentencers should indicate their provisional thinking on which of the three sentencing ranges is relevant and the purpose(s) of sentencing that the package of requirements is intended to fulfil (SGC 2004: para. 1.1.16). While this proposal is sensible and has been welcomed by the probation service, it does not appear to have worked well in practice. The main difficulty is that a series of Court of Appeal decisions, going back to *Gillam* (1980) 2 Cr App R (S) 267, say that an indication of sentence which raises a legitimate expectation on the part of the offender will be binding on the judge (or a different judge dealing with the matter later on) if the report is positive. The tradition has been for courts to avoid this restriction by stating that 'all options are open' when asking for a report.

As we have seen, under the framework of the 2003 Act there is just one community order rather than a number of separate community sentences.

This does not, of course, mean that an offender who has received a community order in the past cannot receive another one. Further community orders, perhaps with different requirements, may well be appropriate for the repeat offender. The SGC guidelines say that whenever an offender is ordered to serve a community order the court record should show clearly which requirements have been imposed. Any future sentencer, whether dealing with breach or a future offence, should have full information about the requirements that were inserted into a previous community order, whether that sentence was a low-, medium- or high-level order, and the offender's response. This will enable the later court to consider the merits of imposing the same or different requirements as part of another community order (SGC 2004: para. 1.1.36).

Research on the use and impact of the community order shows that, for the most part, courts have been using it in a manner consistent with the legislative intent and the guidelines (Centre for Crime and Justice Studies 2007). Probation officers appear to be reasonably satisfied with the new arrangements, which they regard as more flexible than the earlier scheme. The number of requirements used in the community order is again in line with expectations, although the researchers note that in a few cases orders are defined as low seriousness but have as many as three requirements. More generally, there is imbalance in the use of different requirements. While the unpaid work requirement is very popular with sentencers, half of the 12 requirements available under the Act are rarely used. There is some variation across probation areas with regard to the number and type of requirements used.

Breach, revocation and amendment of a community order

If the offender fails, without reasonable cause, to comply with one or more of the requirements in a community order, the responsible officer can either give a warning or initiate breach proceedings. If the offender fails to comply for a second time within a 12-month period, the responsible officer must initiate breach proceedings. When the matter comes before the court, the court must either increase the severity of the sentence (such as by imposing new requirements, or increasing the number of hours of unpaid work, or lengthening the supervision or operational period of the sentence) or revoke the order and resentence for the original offence (CJA 2003: sch. 8, paras 5–6). A differently structured community sentence could be imposed on resentencing. While Parliament changed the law in the 2003 Act to require an additional penalty as a consequence of breach, the government is now considering whether offender managers should have power, within a framework set by the court on sentence, to vary the punishment depending on their behaviour, without having to go back to court (Home Office 2006a, 2006b).

The court must always take account of the circumstances of the breach (CJA 2003: sch. 8, para. 9(2)), and make allowance for any portion of

requirements which the offender has successfully completed before the breach. The SGC says that, in considering which course to adopt when sentencing for breach, the court's primary objective is to ensure that the requirements are completed. Custody should be a last resort, to be reserved for cases where deliberate and repeated breach where all reasonable efforts to ensure that the offender complies have failed (SGC 2004: para. 1.1.45). If the offender commits a further offence during the period of a community order this is not technically a breach, but will be dealt with alongside sentencing for the new offence by revocation of the community order and resentencing. Again, when deciding what sentence to impose after revocation, the court should take into account the extent to which the offender complied with the order before committing the further offence.

Sometimes the terms of a community order can be varied following application to the court. This might occur if the offender's circumstances change, so that it is no longer possible for him to comply with one of the requirements. An order can also be brought to an end early if the offender has made exceptionally good progress.

Custodial sentence supervision

Sentences of under 12 months

Leaving aside special measures for dangerous offenders (considered further below) the standard custodial sentences are imprisonment for offenders aged 21 and over and detention in a young offender institution for offenders aged 18, 19 or 20. If a court imposes a custodial sentence of less than 12 months under current law the offender will be released at the half-way point of the sentence. For many, the release date will in fact be earlier, as a result of operation of the home detention curfew (HDC) scheme. On release there is no supervision or opportunity for placement on a programme to address offending behaviour. Short sentences such as this have been the subject of much criticism from reformers, who argue that there is insufficient time to undertake any meaningful work with offenders during the custodial part of the sentence and after release there is no provision for supervision or opportunity for placement on a rehabilitative programme. (See, in particular, the critical comments of Lord Woolf in *McInerney* [2003] 2 Cr App R (S) 240, at pp. 254–9). Reconviction rates after short sentences are very high, giving the effect of a short sentence revolving door.

The Criminal Justice Act 2003 contains provisions which, if ever brought into force, will change the regime of short sentences. The new sentence of 'custody plus', as proposed by in the Halliday Report (Halliday 2001) was scheduled for introduction in autumn 2006 as part of a package of increasing magistrates' courts' sentencing powers from six months to 12 months, but implementation has been deferred indefinitely. The custody plus sentence of between 28 and 51 weeks would comprise a term in custody of between

two and 13 weeks (to be set by the court) plus a licence period of at least 26 weeks. So for any sentence of custody plus the licence period will always be proportionately longer than the custodial part – at least 2:1 and at its extreme as much as 24:1 (i.e. two weeks in custody and 49 weeks on licence). The offender would then be subject to supervision until the end of the sentence. The court would specify one or more requirements to be complied with during that supervision period, chosen from the list of requirements for the community order (set out above) save that requirements (vii) to (x) could not be included. Draft SGC Guidelines on custody plus state that, although the period of time spent in custody under a custody plus sentence will often be shorter than is the case now, custody plus is potentially more onerous because of the presence of licence requirements which will last to the very end of the sentence (SGC 2006: para. 22).

Sentences of 12 months and over

For custodial sentences of at least 12 months but below four years, before the 2003 Act an adult offender would be released from custody at the half-way point of sentence and then would be supervised under licence until the three-quarter point of sentence. For some, the actual release date will be earlier as a result of release on HDC. If the sentence was for four years or more an adult offender would be eligible for release from the halfway point of sentence and, if not released before, would automatically be released at the two-thirds point of the sentence. Whatever the exact time of release, the offender would be supervised to the three-quarter point of sentence unless a violent offence or a sexual offence had been committed and the court had ordered that supervision should continue for a longer period of time. These arrangements have been changed by the 2003 Act, with effect from 4 April 2005 and they apply to offenders sentenced for offences committed on or after that date.

Assuming that the offender is not given an indeterminate (life) sentence or otherwise caught by the 'dangerous offender' provisions of the Act (see below), the offender will now be released from custody at the half-way point of the sentence, but will then be on licence until the very end of the sentence. The requirements to be inserted into the licence are not (in general) a matter for the sentencing court, but will be set by the executive authorities shortly before the offender is released. The SGC guidelines indicate that these requirements 'are expected to be more demanding and involve a greater restriction on liberty than current licence conditions' (SGC 2004: para. 2.1.5). Breach of a requirement will result in the offender being returned to custody following executive recall. Although licence requirements in sentences of 12 months or more are not generally a matter for the court, there is provision in the Act for the sentencing court to indicate what requirement or requirements it thinks might be appropriate. Any such indication is not binding on the authorities. The thinking here is that, especially in the case of long sentences, it will rarely be possible

for a sentencer to predict the most appropriate licence requirements, and this is better done by the authorities shortly before release. A court might suggest, however, that the offender should complete a programme directed at drug misuse, anger management or improving literacy skills and could recommend that this should be considered as a licence requirement if not undertaken and completed in custody.

Suspended sentences

One of the effects of the Criminal Justice Act 1991 was to marginalise the power to suspend a prison sentence and to make it available in 'exceptional circumstances' only. The new form of suspended sentence created by the Criminal Justice Act 2003 is quite different, and has proved to be popular with sentencers. The new suspended sentence (originally termed 'custody minus' in the Halliday proposals) applies where the court imposes a sentence of imprisonment or detention in a young offender institution of not less than 14 days but up to 12 months. It is available for offenders aged 18 and over. The court may suspend that sentence for a specified period between six months and two years. During that 'operational period' the court can impose one or more requirements for the offender to undertake in the community. The requirement or requirements must last for a period of not less than six months and not more than two years (CJA 2003, s.189(3)) unless an unpaid work requirement is imposed in which case the period must be 12 months. Obviously, the period during which the requirement(s) operate (known as the 'supervision period') cannot last longer than the operational period of the suspended sentence. The menu of available requirements is identical to those for the new community order, set out above. In addition there is always the condition that the offender must keep in touch with the responsible officer (CJA 2003, s.220). If the offender fails to comply with a requirement during the supervision period, or commits any further offence, the suspended sentence can be activated in full, or in part, or the terms of the supervision can be made more onerous. There is a presumption that the suspended sentence will be activated and that the activated term will run consecutively to any custodial sentence imposed for a further offence. The 2003 Act also provides that a court imposing a suspended sentence may require that the offender attends court for periodic review hearings (ss.191–192), in a manner similar to the drug rehabilitation requirement described above.

There are a number of similarities between the new suspended sentence and a community order, especially the identical menu of requirements. The main difference of principle is that a suspended sentence can only be imposed where the offence is so serious that it merits custody of up to 12 months, while an offence meriting a community order will generally fall below that threshold. In practice, however, personal mitigation and a timely guilty plea may rescue an offender from an immediate custodial sentence (CJA 2003, s.166(2)) and then the choice between suspending the sentence or passing

a community order will be a fine one. When comparing the suspended sentence with a community order the SGC guidelines suggest that, since the suspended sentence is in itself a punishment and deterrent, the number and onerousness of the requirements to be inserted into a suspended sentence should normally be less than would be appropriate for a community order. It says that a court wishing to impose onerous or intensive requirements (such as a drug rehabilitation requirement) on an offender might review its decision to suspend sentence and consider whether a community order might be more appropriate (SGC 2004: para. 2.2.14). Of course requirements imposed under a community order may take effect for up to 36 months, while the operational period of a suspended sentence can be 24 months at most and will often be shorter. Finally, as we have seen, a suspended sentence can be made subject to periodic reviews, while a community order cannot unless it contains a drug rehabilitation requirement.

Research on the operation of the suspended sentence indicates that it has proved popular with sentencers. There is little evidence that the introduction of the suspended sentence has diverted large numbers of offenders away from immediate custody, and there may well have been some 'net-widening' with suspended sentences being imposed on offenders who would formerly have received a community disposal (CCJS 2007). Also, it appears that sentencers are typically imposing more requirements in a suspended sentence than in a community order. This is not consistent with the SGC guidelines and may lead to a high level of breach.

Dangerous offenders

The Criminal Justice Act 2003 provides a range of new sentences which are applicable if an offender has been convicted of one of a list of 'specified offences' in the Act, and the court considers that there is a 'significant risk of serious harm arising from the commission by the offender of further specified offences' in the future. These sentences, of imprisonment (or detention) for public protection (IPP), and the extended sentence, may only be imposed by the Crown Court, but a magistrates' court may commit an offender to the Crown Court with a view to such a sentence being passed. In the case of an IPP the court will set a minimum term which must expire before the Parole Board can consider releasing the offender and, after release, the offender will be on licence for at least ten years. If the sentence is an extended sentence the court will specify a custodial period and an extension period (during which the offender will be on licence). The extension period can be for up to five years in the case of a specified violent offence, or up to eight years in the case of a specified sexual offence. The list of specified offences is very broad. It includes, for example, assault occasioning actual bodily harm where, perhaps, there will be many offenders who do not represent a significant risk of serious harm. This is a matter for the sentencing court in all cases, but where a specified offence has been committed and there is a previous specified offence on

the offender's criminal record, the statute originally created a presumption that the new sentences will be appropriate. The Court of Appeal issued guidance for sentencers in *Lang* [2006] 2 Cr App R (S) 6 on the imposition of these sentences. The Court stressed that a wide variety of information about the offender would need to be considered prior to imposing such a sentence, and the court would rely on the PSR prepared in accordance with the appropriate guidance (National Probation Service 2005), details of the offender's previous offending and, where appropriate, a psychiatric report. The probation service will carry out a full OASys assessment on all offenders under consideration for one of these sentences, will identify the person or persons at risk from the offender, and assess the level of that risk and the nature and seriousness of the potential impact (National Probation Service 2005).

The tight drafting of these provisions meant that these sentences were imposed in a substantial number of cases. Home Office figures show that they were being imposed by the courts at the rate of about 100 per month. The offences for which they were most frequently imposed were (in descending order) robbery, wounding with intent, arson, rape or attempted rape and attempted murder. It is robbery sentencing which predominates, and this is reflected in a large number of decisions of the Court of Appeal which dealt with appeals in such cases. The average length of the minimum term set by the courts, across the range, was around 30 months (equivalent, of course, to a fixed-term sentence of five years assuming release from the IPP at the first opportunity). In reality, many offenders sentenced under these provisions will spend much longer in custody before being released by the Parole Board. The Criminal Justice and Immigration Act 2008 has amended the law so as to restrict the use of IPP to cases in which a minimum term of at least two years is appropriate. The statutory presumption of dangerousness, mentioned above, has been repealed. The intended effect of these changes is to reduce significantly the number of offenders who qualify in future for an IPP or an extended sentence.

Before recommending release on licence the Parole Board must consider whether the safety of the public would be placed at unacceptable risk by release (see Hood and Shute 2000). The Board will be informed by a further report prepared by the probation service containing information on risk management and resettlement. The Board will take into account, among other factors, whether the offender has shown a willingness to address his offending behaviour by taking part in programmes or activities in prison designed to address his risk, and whether the offender is likely to comply with the conditions of his licence and the requirements of supervision. The licence period is designed primarily to provide protection for the public. The 2003 Act, extending provisions in earlier law, require the probation, police and prison services to establish multi-agency public protection arrangements (MAPPA) for the assessment and management of violent and sexual offenders. The MAPPA framework identifies three separate risk levels for offender management. Those offenders who pose the highest risk

of causing serious harm are referred to a multi-agency public protection panel (MAPPP) where their cases are scrutinised regularly. Offenders will be managed under MAPPA if they fall within one of three categories as defined in the Criminal Justice Act 2003 – registered sex offenders, violent and other sex offenders who have committed a specified offence and have received a prison sentence of more than 12 months, and other offenders who, although they do not fall into either of the first two categories, are considered to represent some risk of causing serious harm.

Discussion questions

1 To what extent has the revised sentencing framework in the Criminal Justice Act 2003 been designed to address different forms of offending behaviour?
2 How far do the guidelines developed by the Sentencing Guidelines Council assist the courts in selecting appropriate sentences and sentence requirements?
3 Why has the courts' use of (a) the suspended sentence and (b) the dangerous offender sentencing provisions outstripped government expectations? What are the implications of that (over-)use?

Further reading

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Harper, G. and Chitty, C. (eds) (2005) *The Impact of Corrections on Reoffending: A Review of 'What Works'*, Home Office Research Study No. 291. London: Home Office. The title says it: this is currently the most comprehensive and authoritative review of 'what works'.

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Chapter 2

The policy context

Mike Nash

Introduction

With the election of the 'new' Labour government in 1997, criminal justice agencies, along with the rest of the public sector, were to experience a sustained period of modernisation through a process of new public management (NPM) or 'managerialism'. Inefficient and outdated practices and processes were to be abolished and in their place a modernisation project would sweep in reforms based upon the best of private sector initiatives. However, McLaughlin *et al*. (2001) argue that the process went further than this and actually represented '… a fundamental assault on the professional cultures and discourses and power relations embedded in the public sector' (p. 303). Yet alongside this cherishing of market principles and apparent threat to traditional service values, there appeared to be a stance that at least offered some form of hope to Labour traditionalists and many working in the criminal justice organisations at the time. This was Tony Blair's celebrated 'tough on crime, tough on the causes of crime'. In these few words he had repositioned the Labour Party, enabling it to tackle the Conservatives head-on in their favoured law and order area (and eventually to electorally defeat them) while suggesting that a constructive rehabilitationist position would not disappear from the agenda. In their historic third term it is beyond dispute that a revolution has occurred, but has it delivered the improved effectiveness demanded by the Prime Minister? In the spring and summer of 2006 a huge media campaign took aim at the government across almost all aspects of its criminal justice organisations and programmes. The results were accusations of 'policy making on the hoof' (*BBC News*, 20 June 2006) and a resurgence of populist policymaking unseen since the days of Michael Howard as Conservative Home Secretary. This chapter will review the evolution of criminal justice policy under Blair in an attempt to determine the success or otherwise of what has been a massive change process.

A familiar backcloth?

Prior to the 1997 electoral victory for Labour, the party made a great deal of the failure of Conservative law and order policies. These failures were connected to a growing fear of crime as revealed by a succession of British Crime Surveys, rises in the prison population, urban social unrest (especially among young people) and concerns with the release and whereabouts of predatory paedophiles to name but a few. A decade on has the situation improved? During the summer of 2006 the media had given saturation coverage for weeks to a number of criminal justice 'scandals'. These were in many ways little different to those of the mid-1990s or earlier. The Home Office itself had come in for particularly scathing criticism, costing then Home Secretary Charles Clarke his job. Of particular concern had been the 'losses' of prisoners upon release from custody (those whose whereabouts were unknown but should have been subject to licence supervision). Among these were a number of very serious offenders including those convicted of murder and rape. Much of the media interest had been fuelled by high-profile murders committed by people who had been released 'early' from their prison sentences, including a life sentence. Inquiries by the Chief Inspector of Probation (HMIP 2006a, 2006b) revealed a number of flaws in the release process. The inquiry reports made much more public the previously secretive considerations of probation and prison staff and the Parole Board. With this opening-up of the process came much greater public approbation for those involved and a questioning of their judgments based, it must be said, more upon media distortion than real evidence. One result of the media glare has been a reported additional caution in crucial risk assessment decisions. One immediate impact has been fewer people released on parole and on life licence. From April to September 2006, out of 901 requests for lifer release only 106 were granted, the ratio typically being 1 in 5 previously (*BBC News*, 6 November 2006). In its 2005–6 annual report, the chairman of the Parole Board Sir Duncan Nichol stated, 'we will be absolutely sure before we release' (Parole Board 2006). However, the problems did not stop with prisoner release arrangements. A leading feature of Labour's revolution had been the use of technology and although successful in some respects – CCTV for example – newspaper reports revealed problems with other aspects ('more than 1,500 offenders rip off their tags', *BBC News*, 26 May 2006). An apparent lack of enforcement of community penalties (a mainstay of the probation revolution), a major increase in newly created offences and increased sentence lengths somewhat remarkably coincided with a surge in the prison population – now regularly exceeding 80,000. In an almost exact echo of the late 1980s calls were made to find ways of lowering the prison population to avoid a prisons' crisis, just at a time when other criminal justice measures were increasing it exponentially. Add to this a public panic over knife crime and increasingly gun crime related to gang violence and it seems as if nothing has changed. So has the revolution failed or is it the

case that such crises are inevitable whatever system of governance is in place?

Seeds of the revolution

As noted above, Labour's plans for criminal justice were part and parcel of major public sector reform. The 'labour' part of their political philosophy (commitment to the public sector) was to be rebranded to appeal to middle England in an attempt to win over disgruntled Conservative supporters. The public sector would be retained, but reformed to ensure better services, a more efficient use of resources and much greater public accountability. The basis of this revolution would be the adoption of private sector principles and methods. Thus although Labour traditionalists might have balked at the programme of reform, it did at least suggest a positive future for a public sector that had appeared increasingly under threat from Conservative policies. However, what had begun as a Conservative reform process became one of transformation under Blair. The essential principles of the conservative reforms (applied across the public sector) were to be: efficiency gains to end public sector lack of competitiveness, financial control to reduce the public sector borrowing requirement and thus facilitate tax cuts, and ideological developments aimed at breaking the dependency culture and introducing competition to the state machine (Massey and Pyper 2005: 46).

In essence the public sector was to be reined in and its focus to become outward looking (on customers or service users) rather than itself. Performance measurement and audit would become key components of everyday public sector life, backed by a range of public sector agreements introduced by then Chancellor Gordon Brown in the Comprehensive Spending Review of 1998. As they have developed these agreements have included a number of shared, cross-cutting targets underlining the government's intention to join up its provision much more than previously. The focus upon end-users means that organisations have to be clear about their outputs and targets, leading to the acronym 'SMART' entering the lexicon (Specific, Measurable, Achievable, Relevant and Timed). By 2003 there were over 400 key performance targets (Massey and Pyper 2005: 145) with no sign of their reducing in number or scope. Practitioners of course might argue that public service is not the same as business and that targets and outputs are varied and at times in opposition to each other. For example, if one considers the notion of a customer, who is the customer of the prison service? Many might argue that it is the prisoners themselves. They should have decent living conditions, good facilities for education, training, visits and exercise and the opportunity to put their offending behaviour behind them. This of course requires considerable expenditure on resources, physical and human. Yet other targets or policies – say to increase crime detection, or lengthen the punishments for particular crimes, or newly criminalise certain behaviours,

or restrict early release arrangements – may all increase the numbers going into or remaining in prison thus immediately threatening another target relating to prisoner well-being and rehabilitation. The customer of the prison service may therefore be the courts who supply the prisoners or the public who may demand that more people are incarcerated. This is different to a manufacturer producing an electrical item that may be improved to become cheaper or more saleable as a result of invention and innovation. The aim remains the same – to sell to the customer. In many areas of criminal justice this market philosophy simply does not apply.

Criminal justice policy in many contexts

Criminal justice agencies have therefore to operate in the new world of public sector management (see, for example, Horton and Farnham 1999; Massey and Pyper 2005; Savage and Atkinson 2001). This chapter cannot possibly review the scale and impact of new public management (NPM) but these texts should offer a sound introduction to what has been an all-consuming process. NPM has become something of a New Labour mantra and its effect has been very well described by Parsons (2000):

> NPM is the nearest we have come in this country, for a few hundred years at least, to a kind of state religion. To question or deny its essential doctrines is to place oneself beyond the pale. To shout as it parades past that it is stark naked – that the emperor has no clothes – is to risk being bundled away or injected with a tranquilliser or sent to a gulag. (Cited in Massey and Pyper 2005: 149)

Public sector managers therefore need constantly to focus upon cutting costs, on ensuring that central policies and guidelines are adhered to and complied with, that their organisation is ever ready for the next inspection and that its customer focus is always ready to adapt to the next political directive. Can the criminal justice sector easily fit into this model? The answer of course depends upon one's moral and philosophical view concerning how criminal justice processes should be administered. Consider the possible tension in the following example. The Crown Prosecution Service is asked to process cases more quickly and at lower cost. To do this it needs to avoid delays and repeat hearings. This could mean encouraging a greater number of guilty pleas by 'negotiating' over the charges or reducing the number of occasions the defence can request adjournments to prepare its case. Either of these methods might speed the flow of cases through the courts and make their targets appear more impressive. But what is the effect? Defendants may be encouraged to plead guilty to charges they are not actually guilty of or accept a lower quality of legal advice. If the rights of defendants are to be taken seriously then measures such as these are unlikely to gain favour. But, in an era when offender rights may be less prominent and a crime

control ethos in the ascendancy, there may be a greater acceptance of those rights being abrogated (Home Office 2006c).

Criminal justice policy therefore cannot simply be run on market principles. It is a highly politicised area and one that attracts huge media interest. No matter how carefully planned targets may be, they can be knocked off course in an instant and replaced with another which is viewed as more pressing by the government. For example the 1991 Criminal Justice Act (a Conservative measure) was widely held as being concerned with reducing the size of the prison population (and therefore cost). Despite being wrapped in quite punitive clothes there was a clear intent to punish more offenders in the community and within 12 months of its enactment the prison population had reduced from 48,000 to 42,000. However, the murder of schoolboy James Bulger by two teenagers in 1993 contributed to a moral panic over youth crime and 'soft' sentencing (with special antipathy reserved for repeat cautioning of young offenders) that saw a raft of new measures introduced in the 1993 Criminal Justice Act – measures which effectively led to a rapid rise in prison numbers. Due to the political battle between the emerging (Labour) and old (Conservative) parties of law and order a sharp reversal of policy was undertaken. Then Home Secretary Michael Howard announced the following indicating that prison numbers would again have to rise:

> I do not flinch from that. We shall no longer judge the success of our system of justice by a fall in our prison population … Let us be clear. Prison works. It ensures that we are protected from murderers, muggers and rapists – and it makes many who are tempted to commit crime think twice. (Newburn 2003: 204)

Thus a carefully thought-out strategy, which placed the Probation Service at the forefront of delivering a new-style punishment in the community, was overturned at a stroke. Huge amounts of consultation and training had gone into the implementation of the 1991 Act, and one (very tragic) case was to reverse the policy. Notice also how Howard was able to conflate the problem into the most serious (and least numerous) of offenders when inevitably it is those lower on the seriousness scale that suffer most from a general increase in punitiveness.

Law and order policy, as an integral part of public sector policy in general, therefore became less of a clash of differing ideologies and more of an escalation of the same agenda. In other words Labour and Conservative politicians occupied the same ground, with each side equally keen to reach the summit. Neither side therefore acted as a brake on the other's ambitions, it was more a case of outdoing each other in the punitive stakes. In their quest to win the middle ground of British politics both major parties have adopted a range of measures that have progressively increased the prison population (now seen as a positive achievement) at the expense of a humane or reformist approach to offenders (now seen as an unnecessary

political objective). If for a moment we fast-forward to 2006, then Prime Minster Blair made his intentions very clear, and at the same time appeared to damn many of his own reforms by association. The issues raised earlier in this chapter led to a seminal speech by Tony Blair with the apocalyptic title 'Our Nation's Future' (PM's Office, 23 June 2006) – a speech that would outline his vision of rebalancing the criminal justice system in favour of the victim. In making much of the new world in which we live (fixed order of community has gone, different employment patterns, absence of deference, more women in work, more prosperity and more opportunities for crime), he appeared to reject much of the basis of the traditional British legal system. As Blair stated, 'So we end up fighting 21st-century problems with 19th-century solutions.' He implied that the legal establishment – of which he was a member – were completely out of touch with the reality of inner-city life, for example. There may of course be elements of truth in this claim but in other respects the Blair agenda has undone much of this local knowledge and replaced it with top-down central directives (see, for example, Wargent 2002, on the local governance of probation). Despite massive reforms of policing, the CPS and the court services, the Prime Minister reported a detection rate falling from 47 per cent in 1951 to 26 per cent in 2004/5. Conviction rates over the same period fell from 96 per cent to 74 per cent. These figures cannot simply be put down to a 'changed world' or even a lack of understanding. It must also reflect performance, at least some of which has deteriorated under the modernisation programme launched by his government in 1997 and the Conservatives since 1979. Tony Blair has, however, shifted the argument from performance to a certain extent and refocused it on rights and balance within the criminal justice system. What was once regarded as a rightful concern for human rights is now regarded as a system balanced in favour of the offender. As Blair indicated, 'It's no use saying that in theory there should be no conflict between the traditional protections for the suspect and the rights of the law-abiding majority because, as a result of the changing nature of crime and society, there is, in practice, such a conflict …'

Blair made much of judging the effectiveness of criminal justice policy by reference to the 'reality of the street and the community'. This would, he felt, require a 'wholesale reform' and made mention of the new National Offender Management Service (NOMS) as being crucial, but already it seems needing to change. This view is encapsulated in his thoughts on sentencing reform:

> It is the culture of political and legal decision-making that has to change, to take account of the way the world has changed. It is not this or that judicial decision, this or that law. It is a complete change of mindset, an avowed, articulated determination to make protection of the law-abiding public the priority and to measure that not by the theory of the textbook but by the reality of the street and community in which real people live real lives.