

SCOTTISH CRIMINAL POLICY —
THE CASE FOR REFORM

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On 5 April 1976, *The Scotsman* carried the banner headline "Work Orders for Scots Offenders" across its front page. The paper was reporting the announcement made the previous Saturday by the Solicitor General for Scotland at a meeting of the Howard League for Penal Reform that the Government was to introduce, on an experimental basis, a scheme by which offenders who might otherwise be sent to prison could be required to perform a period of service to the community. In the two years which have passed since this initial announcement was made, the scheme has moved from concept to reality, and in four Scottish regions, Lothian, Strathclyde, Grampian and Tayside, selected courts are now able to order such a disposal. Implementation of the scheme depended both on the acceptance of the central government initiative by the four regional authorities who were asked to make the administrative arrangements, and the co-operation of the judiciary in making the orders. The four authorities were encouraged by the provision of financial backing from central government made possible because the scheme was designated "experimental", and a total of £100,000 was allocated to cover an initial two year period. Judges too were consulted and found to be favourably disposed towards the new measures. A legislative base for community service has recently been enacted through the Community Service by Offenders (Scotland) Bill introduced into the House of Commons in April 1978. When the Bill becomes law, the option of community service should gradually become available to courts throughout Scotland. The Bill also provides for the costs of introducing community service on a national basis to be met through grants from the Treasury. This action

indicates that the Government no longer sees community services as an experiment, and the new disposal is likely to become a permanent weapon in the judicial armoury of sentences available to Scottish Courts.

As a disposal, community service by offenders is not new. The measure was first introduced in England and Wales in 1972 and its implementation south of the border has already been the subject of two evaluations by the Home Office Research Unit.¹ In carrying out community service, offenders are required to work for a period of between forty and two-hundred and forty hours in any one year, usually in their spare time. Tasks have ranged from house decoration and rehabilitation to providing services for the elderly and the handicapped. Frequently, offenders work alongside non-offenders, and a review of an offender's suitability for community service includes an assessment of the kind of contribution he may be able to make. Commentators have noted that community service schemes have the potential of reducing the stigma of many sentences, and as a disposal, community services appeals to a wide spectrum of opinion. The liberal is attracted by the prospect of reform, the conservative by the expectation that the offender will make reparation.²

It is perhaps for this reason that the Government has now chosen to introduce community service in Scotland. Its introduction is the first significant innovation in Scottish criminal policy in the last decade and marks a cautious step in the direction of change. This chapter outlines the need for change and suggests some possible explanations for the lack of positive initiatives in recent years. Its thesis, which some may regard as partisan, is that there is a pressing need for reform in the fields of criminal justice and the treatment of offenders in Scotland.

The Legislative Background

It is not always realised that although the Act of Union in 1707 created one legislative assembly for Scotland and England at Westminster, Scotland has maintained a separate legal system with its own history and traditions, and separate provision for the administration of criminal justice. In those fields where these traditions and provisions are well established (and criminal justice is one such) it is usually necessary to introduce separate legislation for Scotland into the Westminster Parliament. This procedure has

drawbacks, the most serious being the problem of finding adequate time in Parliament to debate Scottish affairs, but it has also enabled Scottish policy makers to exercise some autonomy in the framing of legislation. In the criminal justice field, however, legislation has been more conspicuous by its absence than by anything else.

In recent years, the only pieces of Scottish legislation of any significance have been the 1949 Criminal Justice (Scotland) Act which introduced the present legislative framework for probation, and the 1963 Criminal Justice (Scotland) Act which established fines' supervision and the present framework for Young Offenders' Institutions and statutory after-care. In addition, Scotland accepted either in whole or in part two United Kingdom Acts, the 1967 Criminal Justice Act and the 1974 Rehabilitation of Offenders Act. From the former, Scotland adopted only the system of parole which allows for a proportion of offenders with sentences of 18 months or longer to be released from prison under supervision on completion of one third of their sentences. The latter has little direct effect on those sentenced to imprisonment, but allows for setting aside of criminal convictions for some of those who have subsequently "gone straight". The official guide to the Act published by the Home Office states unequivocally that the Act "does not help persistent offenders who have ever been sentenced to more than 2½ years in prison". Whilst English legislation and services cannot be regarded as wholly exemplary, the fact remains that the English, legislating through the same Parliament, and ironically perhaps depending on occasion on the votes of Scottish Members of Parliament for a parliamentary majority, have pushed through a number of legislative and administrative reforms including the Criminal Justice Act of 1972. Although limited in scope, this Act widened the range of options available to the police and courts for dealing with the adult offender. The measure makes possible the decriminalisation of drunkenness offences, the wider use of hostels, the introduction of day training centres for the inadequate recidivist and the implementation of community service, the measure which six years later is now being introduced in Scotland.

Scotland's Criminal Policy Hiatus

What has been the impact of the legislative neglect in the

field of criminal justice and the treatment of offenders during the post-war period, and how can it best be understood?

In 1975, the latest year for which figures are available, a daily average of 4,951 persons were held in Scottish prisons. With the exception of Finland, where motorists driving under the influence of alcohol receive a mandatory prison sentence, the figure taken as a proportion of the national population is the highest in Western Europe. A breakdown of prison receptions in 1975 provides some indication of why this is the case. The majority (over 65%) were not sentenced to imprisonment but held on remand or in default of the payment of fines.³ Of particular concern is the figure not yet made available in published Government statistics but revealed through the probing of a parliamentary question⁴ which showed that more than 250 of those held on remand in adult penal establishments in 1976 were juveniles under the age of 16. Of the men over 21 held in default of the payment of fines, 33% were given no time to pay and over 40% served the full period of imprisonment in lieu, demonstrating that in many cases imprisonment did not have the desired effect of making them pay up. What seems clear is that fines are being used as disguised prison sentences and imposed in the full knowledge that the offender will be unable to pay and will therefore go to prison. The way in which an offender's means are presently assessed is inadequate and it is not unknown, for example, for a judge or magistrate to fine someone whose sole income is a subsistence payment from the Department of Health and Social Security. Another disturbing aspect of the high prison population in Scotland is the large proportion of offenders under the age of 21 held in custody (more than 25% of the sentenced prison population).⁵ Although it is true that the incidence of criminal behaviour in this age group is high, the numbers committed to prisons and Young Offenders' Institutions compare very unfavourably with the figures for England and Wales⁶ and illustrate the lack of alternatives to imprisonment for offenders in this age group.

These are some of the worst manifestations of the cumulative neglect that has characterised criminal policy and practice in Scotland. In summary, a close study of the prison statistics for Scotland indicates that the bulk of receptions into prison consists of persons on remand, persons committed to prison

for failing to pay fines, young offenders and persons sentenced to short terms of imprisonment for comparatively minor offences. Many of these present problems are social rather than criminal yet they continue to be processed through a system which has the primary objectives of security and order, and which may have the effect of reinforcing rather than reducing criminal behaviour. The Prisons Division of the Scottish Home and Health Department in a rare moment of insight has acknowledged as much. Their report of 1971 referring to the question of short term prisoners contained the following admission: "For all of these, comprising altogether more than 40% of the whole penal population . . . there is no practical possibility of planning or carrying through meaningful individual or group treatment programmes, even if the facilities were available. The prison service's role in relation to this section, proportionately very much larger than, say, in England and Wales, is primarily therefore one of containment and physical care."⁷

One practical outcome of the large number of persons passing through Scotland's prisons is that the conditions in which they are held are very poor. Many prisons are overcrowded with two or three prisoners confined in cells which were intended for one person, and sanitary arrangements in the older prisons are primitive and degrading. The work which prisoners are required to undertake often has little relevance to work opportunities which may be available outside prison (some prisoners are still sewing mail bags by hand) and prisoners, especially those on remand, spend long periods locked up in their cells. The introduction of the more liberal Special Unit at Barlinnie Prison for long-term prisoners who present particular disciplinary problems is a welcome step but caters for only a tiny proportion of the total prison population. Its creation and management has provoked heated public and political debate, because the principles on which it is run are in conflict with the attitudes of the general public and many administrators and discipline staff working within the prison system.⁸

In general terms, reforms within the Scottish penal system have been of a conservative nature. Despite calls for more hostels and half-way houses, a number of new secure establishments have been built, including a women's prison at Cornton Vale. At Dungavel an attempt has been made to organise the prison regime on an industrial model which simulates outside working

conditions, but with this exception, planning has been relatively unimaginative. Statistics show, for example, that three times more money was spent in 1975 on paying travelling and removal expenses for prison staff than was spent on the educational and recreational needs of prison inmates.⁹ The emphasis to a quite unjustifiable extent is still on security, and little attempt is made to devise training or treatment programmes which might assist an inmate to cope with the demands of the outside world. In common with prison inmates in some other parts of the world, Scottish prisoners have few rights — incoming and outgoing mail is censored, meetings with visiting relatives are strictly supervised, political rights, including the right to vote, and the right to a recognised representative organisation are refused, and access to genuinely independent hearings in matters of prison discipline is problematic. All the evidence suggests that the policy of the Prisons Division of the Scottish Home and Health Department continues to rest on the division's assumptions that the experience of prison both deters and rehabilitates.

Neglect — The Reasons

The shaping of criminal policy is a sensitive political issue. In a situation where the incidence of recorded crime is rising, governments intending to introduce any legislative reform must continually glance over their shoulders for signs of a possible backlash, whilst political parties seeking power may choose to exploit "law and order" issues as a means of gaining the popular vote. Issues are further clouded by the fact that empirical research has not provided much assistance to the policy maker. The results of studies into the effectiveness of different kinds of sentences tend to show that they are neither more nor less effective than each other.¹⁰ This leaves the policy maker in the position of having to balance political expediency with such basic principles as humanity, justice, economy and efficiency and tempts the timid or the sceptic to leave things alone. Besides, it is not always clear which people or what circumstances ultimately influence the direction of criminal policy. There are many actors on the scene, politicians, civil servants, lawyers, academics, pressure groups, the media and everyman in the guise of "public opinion". What is more, those working within the present system are able to exercise considerable discretion in the way they choose to carry out their responsibilities. The

use or abuse of this discretion has been an important feature in the administration of Scottish criminal justice.

The Question of Discretion

Scotland has a system of public prosecution, and the Lord Advocate and his agents, the Procurators Fiscal, have the right to exercise discretion in matters of prosecution. The criminal law as it presently stands also allows discretion to sentencers (save in the very small number of serious offences where the sentence is prescribed) to impose a sentence from alternatives which may involve fining, imprisonment, or social work help. Under the Social Work (Scotland) Act of 1968, local authority social work departments have the general responsibility of making rehabilitative resources for offenders available within the community. It can therefore be argued (and this argument has frequently been put forward by central government administrators in the criminal justice field) that the framework for the development of a more progressive policy exists without the need for further legislation, and this argument has been a potent force behind the reluctance to legislate further. To the observer the argument appears suspiciously like "passing the buck". The Home and Health Department can say that its first priority must be to cope with the large numbers committed to prison from Scotland's criminal courts, and that this influx effectively prevents a more progressive approach; sentencers can say that the lack of community-based alternatives to imprisonment means that a greater number of offenders are committed to prison than they would ideally wish; and finally social work departments can say that their resources do not stretch to cover a full range of community-based services for the offender given the scale of provision which they must make for other disadvantaged groups within the community.

The overall picture is a confusing one, with the responsibility for reform effectively dispersed between groups who tend to view each other with suspicion, if not open hostility. The problem is further complicated by the fact that the administrative and advisory functions of central government relating to penal institutions and community-based services for the offender are split between two government departments. Prisons are centrally administered as a division of the Scottish Home and Health Department, whilst the Social Work Services Group, which

advises local authorities on the development and provision of social work services, including services for the offender, is a division of the Scottish Education Department. With functions scattered between central government departments, and central and local government, it is clear that no one ultimately accepts administrative responsibility for drawing the threads together. Three factors in particular can be identified as having compounded the problems which have been described. These are the lack of an independent advisory body in the field of criminal policy; the fragile relationship between central and local government, and the problems involved in the joint funding of services; and finally, and most crucially, the lack of any concerted political initiatives to bring about change in Scottish criminal policy.

The Lack of Advice

The reasons which push governments to form committees of enquiry, Royal Commissions and permanent advisory bodies, are several. The establishing of a Royal Commission can be a delaying tactic or a move to take the pressure out of a "hot" political issue. The corridors of power, and access to confidential memos and the machinery of the Civil Service are seductive and an invitation to an outsider to sit on an advisory committee or committee of enquiry accords status and can be a means of co-opting and even silencing previously independent critics. Reports frequently take several years to prepare and may collect dust in libraries and offices without being implemented. With these reservations there is nevertheless an urgent need for governments to seek expert advice. Politicians who take the final decisions cannot hope to master in detail all the policy areas for which they are responsible, and a rather curious tradition of the Civil Service means that many civil servants who carry important advisory and administrative functions, may have little or no specialist knowledge of the fields in which their advice is sought.

In Scotland where the Secretary of State's brief is very wide, the need is particularly acute. Yet in the field of criminal policy and the treatment of offenders, the only body with the remit to take an overall view of criminal policy developments in Scotland, the Scottish Council on Crime, was not re-convened following the change of government in 1974. No reasons for

this decision were ever given. Perhaps it had to do with the fact that the first and only report of the Council¹¹ was a very general one, confining itself to the theme of preventing crime rather than the functioning of the penal system and the treatment of offenders; perhaps it had to do with the fact that the composition of the Council was somewhat eccentric with several of its members having little specialist knowledge of the areas under discussion. In recent years two other government committees have produced reports on aspects of the criminal justice system, the Thomson Committee on Criminal Procedure, whose main report was published in 1975,¹² and the Dunpark Committee on Reparation by Offenders which reported in 1977.¹³ Both reports made recommendations which would substantially change aspects of law and criminal procedure in Scotland, but none of the recommendations has yet been translated into appropriate legislation. Another body with a possible role to play in the development of policy for the treatment of offenders in Scotland is the Advisory Council on Social Work. Yet this body has not published any reports, or provided any lead for social workers facing the problems of rehabilitating the offender in the community.

In England and Wales some of the impetus for change, including the introduction of community service, has been created by the existence of a permanent Advisory Council on the Penal System, drawing its membership from acknowledged experts in the fields of law, social policy, criminology, psychology and social work.¹⁴ The present neglect of criminal and penal policy in Scotland underlines the need for a similar body to be constituted in Scotland.

The Relationship between Central and Local Government

The reorganised structure of local government in Scotland, and the further changes which may follow the setting up of a Scottish Assembly in Edinburgh, have been much debated. The creation in 1975 of nine regional authorities carrying responsibility for local economic and strategic planning, and the major public services of education, police, and social work, was intended to provide both a more rational administrative structure and a greater delegation of power from the centre. Whilst the new authorities have undoubtedly gained in power, the extent of this power is circumscribed in a number of ways. Firstly,

and most importantly, central government holds the purse strings, providing more than half of the local authority expenditure each year through the rate support grant. Secondly, through the issuing of circulars, the vetting of capital projects, the provision of some financial incentives, the offering of advice and the inspection of services such as education, central government exercises indirect influences on the way that local government carries out its functions. The continued existence of these powers means that the relationship between central and local government in Scotland remains uneasy. Many local politicians and local government employees still feel constrained by the extent of central government influence, whilst central government officials argue that their hands are tied by the increased *de facto* power of the new larger local government regions.

The respective powers of central and local government are of particular importance in the field of criminal policy because the Social Work (Scotland) Act of 1968 abolished the separate Probation and After Care Service which had provided services to offenders in the community, and gave this responsibility to local authority social work departments. Although the Probation and After Care Service was not directly under the control of central government, this transfer of responsibility has lessened the grip which central government once held on this important area of service. Two consequences stand out. First, although central government can influence and constrain local authorities in a number of ways, it cannot direct the way in which their money is spent. Secondly, the separate budgeting systems of central and local government make it virtually impossible for money which is spent on the building and running of penal institutions (a central government responsibility) to be redirected towards the establishing of non-institutional community-based services for the offender, a trend which is apparent in countries with more progressive criminal justice policies and programmes.

Moreover, local government services are seen by the public at large to be financed through the levy of rates, an unpopular local tax. Political expediency militates against an increase in expenditure on services for the offender when other disadvantaged groups, such as the elderly and the handicapped, are more obvious vote catchers. Those responsible for central government expenditure, raised through direct and indirect taxation, are not accountable to public opinion in such a visible

way, and it is arguable that because offenders are a stigmatised group whose problems are unlikely to receive much informed understanding or support, it would be more sensible to finance services for them from central government rather than local government sources.

In England and Wales, Probation and After Care has remained a separate specialist service jointly financed by central and local government, but answerable to independent probation committees. This arrangement has undoubtedly enabled more resources to be directed towards the offender, but the retention by the Home Office of important powers of advice and inspection has meant a greater degree of control from the centre. The reasons for integrating the Probation Services with social work departments in Scotland were more connected with ensuring an even spread of resources and trained social work staff across a broad spectrum of social need, than with the provision of better services for the offender. Their integration in 1969, and the reorganisation of local government in 1975 have done little to improve the provision of rehabilitative services for the offender in the community. Indeed, the changes could be said to have contributed to the neglect which is the theme of this chapter. Whether this neglect is wholly the fault of local government, or whether central government has failed to use the powers that it has in a forceful and imaginative way, is an open question. Central government has a highly paid team of advisers with a duty to promote developments in policy and practice in the social work field, yet they have remained remarkably silent on the question of services for the offender. Unless there is better planning and co-operation between central and local government in the development of rehabilitative services, the case for the re-introduction of a separate social work service for the adult and young adult offender, more closely aligned to the centralised court and prison system, will remain a strong one.

The Lack of Political Initiatives

Social change often requires the exercise of influence at the political level. Politicians and political parties introduce legislative and social reforms as a practical expression of their personal and political philosophies, as a response to well-organised lobbying, or through an appreciation of political realities. As ambitious men and women they also know that

careers can be made or lost through association with particular legislation, or a particular ministry. What is striking about Scotland, and what may account in large measure for the reluctance to legislate in the field of criminal justice, is the absence, until recently, of any concerted political lobby for reform of the Scottish penal system. It would be nearer the mark to say that many Scottish MPs have aligned themselves against rather than for any ideas of reform, striking this posture with very little knowledge of the facts.

In the absence of political pressure the responsibility for reform has rested with the Scottish Office. Here the brief for criminal justice matters is shared by the Lord Advocate and the Under Secretary at the Home and Health Department. This latter post, which includes the important job of overseeing the workings of the prison system, has never carried much political weight and a succession of Under Secretaries have failed to make an impact. Annual Prison Department Reports consistently ignore the evidence of failure which surrounds them and are confined to a descriptive account of prison routine and procedure, with little attempt to discuss policy issues or make use of the evaluative research which is available.¹⁵ In the absence of political direction or initiatives, the civil servants seem content to administer the system and are understandably loath to take steps to introduce change.

The Introduction of Community Service

The introductory paragraphs to this chapter sketched in the arrangements for introducing Community Service in Scotland as a new disposal available to the Criminal Courts which marked a cautious step in the direction of change. The background of neglect from which this new disposal has emerged has been dealt with in some detail to demonstrate both the need for initiatives of this kind in Scotland and to provide an analysis of why so little has been accomplished. How did the initiative to develop Community Service come about, and what implications does it hold for the future?

Over the past few years the problems facing the Scottish penal system have in fact received greater public attention. In 1975 the Howard League for Penal Reform in Scotland, published a policy review on the prison system.¹⁶ This review drew attention to some of the more unpalatable facts and

received wide coverage in the press. It was later followed up by a further policy review¹⁷ which documented the decline in the use of probation in Scotland at a time when the prison population was rising. Strong criticism also came from a number of sheriffs who were concerned about the standard of social work services to the courts. The Parole Board for Scotland, who needed assurances of the adequacy of social work supervision and support before releasing prisoners on parole added their voices to this criticism.¹⁸ In 1976, following a joint initiative by the Scottish Association for the Care and Resettlement of Offenders and the Howard League for Penal Reform, an all-party group of Scottish MPs was established to bring pressure to bear at Westminster. Since then a small but committed group of MPs has tabled a wide range of questions about Scottish criminal policy in the House of Commons.

The decision to introduce Community Service in Scotland was probably a response to these pressures. The Government, embarrassed by the evidence of its own inactivity, decided that something should be done. Once the decision was taken, those responsible had to grapple with the problems of implementation resulting from both the lack of suitable legislation and the fact that no ready way existed to provide the local authorities with the necessary money to make community service available on a permanent basis. In the event, use was made of a clause in the Social Work (Scotland) Act which enabled central government to finance experimental projects and this was the major reason for introducing community service in Scotland as an "experiment". To surmount the problem posed by the lack of legislation it was decided to make community service a possible requirement of a Probation Order, a move initially thought to be of doubtful legality and one which could have led to arguments on appeal.

That the Government has now brought forward legislation (the only part of an originally much more extensive Criminal Procedure Bill for Scotland to be saved) indicates concern about these makeshift arrangements. The new Bill shows signs of hasty drafting. It borrows heavily from the legislation passed for England and Wales and compromises on the question of whether community service should be a separate disposal or a condition attached to a Probation Order by making possible both alternatives. With more forward planning this compromise would not

have been necessary. Perhaps the most significant aspect of the Bill is that it legislates for the introduction of community service throughout Scotland and includes a clause which provides for the local government expenditure involved to be defrayed from central government funds. A government statement which accompanied the introduction of the Bill indicated that half a million pounds is to be spent on Community Service over a five year period. This move is a welcome acknowledgement of the fact that community-based services for the offender in Scotland need more central government support. Whether the sum allocated is sufficient and whether local authorities will provide adequate resources for community service at the end of the five year period remains to be seen, but at least a start has been made.

The Future of Criminal Policy — Scotland

The introduction of Community Service is a belated attempt to inject some new thinking into meeting the challenge of Scotland's high prison population. As a measure it is hardly radical, having already been tested in England and Wales, and on its own it will do little to reduce the number of people incarcerated in Scottish prisons. In putting the case for reform this chapter has indentified a number of factors which have contributed to the lack of impetus for change. The most important of these have been:—

1. The lack of advisory and executive bodies with the remit to develop and implement an overall strategy for the direction of criminal policy, and the management of the penal system.
2. The effects of placing community-based services in the criminal justice field under local authority control, and the problems involved in the joint financing by central and local government of services and resources for the offender within the community.
3. The absence of political initiatives in the field of criminal justice which have led to the legislative and administrative neglect of an important area of Scottish social policy.

These problems must be tackled if progress is to be made. As immediate steps, aspects of criminal procedure such as bail,

remand, and the collection of fines, some of which have already been examined by government committees, should receive urgent legislative attention, and new ways of financing local initiatives by social work departments and voluntary groups and organisations explored. As a long-term strategy, policy makers must consider the possibility of redirecting resources from the building of more penal institutions to the provision of a wider range of community-based services. There is also a need for a thorough review, both of the scope of the criminal law and of the possibility of dealing with some offenders without proceeding to trial, a step which, with appropriate safeguards, would be practicable in Scotland, given the system of public prosecution. It is to be hoped that the government committee recently established by the Secretary of State to examine "Alternatives to Prosecution"¹⁹ will have some positive proposals to make in this regard.

But what of the crucial question of the political will to act? The recent legislation on community service was only one part of a proposed Criminal Procedure Bill for Scotland which was dropped from the parliamentary timetable. No reasons have been given for this decision. Perhaps it was felt that Scotland had received more than its fair share of attention as a result of the Scotland Bill. Perhaps it was felt that criminal policy should be a matter for the proposed Scottish Assembly. Perhaps the Government was simply "clearing the decks" for a General Election. Whatever the reasons, this chapter has drawn attention to the neglect of criminal policy matters in Scotland and to the pressing need for reform.

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