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# **Penal Transformation in Post-Devolution Scotland: Change and Resistance**

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## Abstract

This thesis seeks to understand and theorise the process of penal transformation, using changes in penal policy within post-devolution Scotland as a case study. It is based on an in-depth analysis of the evolution, passage and implementation of the Management of Offenders etc. (Scotland) Act 2005, including interviews with key players at each stage of the process (politicians, civil servants, practitioner groups) and documentary analysis.

The thesis draws on Kingdon's multiple streams framework to explain how rapid changes in policy can occur. Kingdon argued that the greatest changes occur when a policy window is opened which allows three independent streams which run through policy at any one time, politics, problems and policies, to become joined (1995). However the thesis argues that to account fully for transformation, this framework needs to be developed to incorporate analysis of institutional structures which provide the most compelling explanation for the factors which lead to, escalate and impede change. Although structures are central in this analysis however, this thesis shows how both structure and agency are important in penal change: institutional structure forms the parameters in which political choice is made.

Pre-devolution policy-making was carried out in partnership between civil servants and agencies and the rate of change was incremental. Post-devolution criminal justice policy-making has been thrust into a volatile and politicised environment, although this has varied under the different administrations thus far. The primary reason for the accelerated rate of change that occurred following devolution was because of the creation of new democratic structures which provided the means and the incentives to create rapid change but it also involved explicitly political choices by key members of the Scottish Executive. Somewhat paradoxically, once change was instigated, the structure of post-devolution political institutions became critical in mitigating the pace and rate of change. The existence of PR electoral arrangements together with the relative decentralisation of power (in relation to the ownership of criminal justice services) meant that change had to be achieved through negotiation and compromise. Institutional structure is also important in the extent of the Parliament's ability to form any meaningful veto point on executive power.

Overall it was new democratic structures *combined* with a political capacity-building project *and* the availability of a politicised approach to law and order from England and Wales which could be easily translated to Scotland, which together, explain the period of rapid change in Scotland during this time.



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## **Declaration of Original Work**

I certify that this is an original work and it has been composed in its entirety by my self, Katrina M. Morrison, the author signed below. This work has not been submitted for any other degree of professional qualification other than that for which it is presently submitted which is for the PhD in the College of Humanities and Social Science at the University of Edinburgh.

Signed \_\_\_\_\_ on \_\_\_\_\_ March, 2012.

# Abbreviations and Terminology

## Scottish Executive and Scottish Government

The Scotland Act (1997) created a Scottish Executive, the term for the new devolved Scottish administration, and it remains named the ‘Scottish Executive’ within law. Although one of the Labour First Ministers attempted to adopt the term ‘Scottish Government’ in 2001, he was reprimanded by the UK Government, who were keen to keep the term for themselves. The SNP administration elected in 2007 ignored the UK Government’s objectives and rebranded the ‘Scottish Executive’ as the ‘Scottish Government’, which is now widely used except in Whitehall (Megaughin and Jeffrey 2009:12) and by unionist parties in Holyrood. In this thesis, ‘Scottish Executive’ is the term used for the administration in power from 1999-2007, and ‘Scottish Government’ is used for the post 2007 administration.

## CJSW

Criminal justice social work

## SPS

Scottish Prison Service

## HDC

Home detention curfew

## NST

National Support Team

## NAB

National Advisory Board

## SNP

Scottish National Party

## PR

Proportional representation

## FPTP

First past the post

## NPM

New public management

## ‘ ... ’

Denotes when a quotation has been truncated.

# Chapter One

## Introduction

This thesis seeks to understand what drives and affects penal change, drawing on developments within post-devolution Scotland as a case study. Devolution fundamentally changed the nature of criminal justice in Scotland. The rate of change, which had been relatively slow prior to 1999, escalated in speed and volatility following the creation of the new Parliament (see Croall 2005, 2006; McAra 2005, 2007, 2008). There are therefore many reasons why the Scottish case provides a valuable case study from which to examine the phenomenon of penal change: it allows for an examination of the factors which may have protected against change, those that created change, and those that shaped change once it occurred.

I argue that in order to fully understand penal change, a level of analysis should be adopted which examines in detail the *ways* in which change *occurs*. Such a level of analysis is often overlooked in scholarship on penal transformation. By contrast, this thesis proposes that looking at policy processes offers a valuable insight into the factors which cause, facilitate and resist change.

This research draws on theoretical frameworks from the political sciences as well as from criminology. Kingdon's three streams theory (1995) is found to provide the most plausible explanation for why rapid change occurs at specific points in time, and is used to explain why change occurred in my case study following devolution. This is expanded to include institutional theory (see for example March and Olsen 1984; Immergut 1992; Weaver and Rockman 1993; Surel 2000) which provides an overarching explanation for what leads to, escalates and impedes change. The starting point for my research, however, is the literature which contends that over the past forty years or so, punishment throughout much of the Western world has undergone a process of penal transformation in which the old values of penal modernism were replaced by new and often contradictory practices including expressive and punitive punishments, a marked escalation in rates of imprisonment, the dominance of risk and managerial discourse, and a rapid politicisation of the crime control arena (see for example Feeley and Simon 1992; Bottoms 1995; Garland 2001a; Loader and Sparks 2007). These trends do not play out uniformly across the world, and looking at the variations behind these policies can shed as much light on the process of change as

looking at the forces behind trends in general, because it alerts us to factors that may escalate, impede, and shape these processes. Some of the explanations for local variations have highlighted the role of different ‘cultures’ (see Garland 2006), be it their ‘political cultures’ (Sparks and Newburn 2004), their ‘attitude towards the excluded’ (Cavadino and Dignan 2006), their differing experiences of religion and history (Melossi 2001; Savelsberg 2004), or their different political and legal institutions and the way they mediate policy (Savelsberg 2001; Jones and Newburn, 2007a).

Within the context of penal transformation, the example of Scottish criminal justice proves especially interesting for several reasons. Firstly, the literature suggests that key parts of the criminal justice system operated along a distinctly more welfarist ethos than that of many other penal systems, notably England and Wales, at a time when other countries were undergoing degrees of penal transformation (Duff and Hutton 1999; Garland 1999; McAra 1999, 2005, 2007, 2008) and secondly, because the process of penal transformation seems to have intensified with the creation of the new devolved Scottish Parliament in 1999 (Croall 2005, 2006; McAra 2005, 2007, 2008). As mentioned above, this raises a number of interesting questions including: what were the reasons that Scotland managed to resist changes undergone by some other jurisdictions prior to devolution, and what was it about the creation of the new Scottish Parliament which appeared to have escalated the process of change? It also raises interesting questions about the role of democratic processes in the construction of penal policy: should political processes be welcomed in formulating an approach to crime and punishment, as suggested by Loader (2006) or should politics be kept out of this arena, as argued by Tonry (2007)? This raises questions of legitimacy and accountability on the one hand, and the dangers of populism and volatility on the other.

There is broad agreement within the existing literature that devolution did change criminal justice in Scotland, but there is less agreement about why this may be or the long-term implications of these changes. Explanations for change range from the view that criminal justice was used to build political capacity (McAra 2008:500); that old networks who used to make policy were displaced (McAra 2007:116, 2008:494); that Scottish culture which used to underpin policy had become eroded with devolution (McAra 2007:125, 2008:493); that Scotland’s politicians were following the New Labour orthodoxy (Croall 2006:592; McAra 2007:108) or that

change simply occurred because of the creation of new democratic structures and closer political scrutiny (Munro et al. 2010:296). As well as providing different explanations for what happened in Scotland, these accounts are also offering different theories of penal change. This thesis hopes to contribute its own answers to these questions and in so doing, to contribute towards the construction of a theoretical understanding of penal transformation.

## **1.1 Research Questions**

This research is about what factors influence penal change, taking post-devolution Scotland as a case study. The questions which framed my research are:

- What were devolution's effects on criminal justice?
- Why did devolution affect criminal justice in the ways that it did?
- What are the factors which resist and facilitate change?
- What can the process of penal change in Scotland tell us about penal change more generally?

## **1.2 Analytical Approach and Methodology**

Munro et al. argue there is a need for a more detailed 'history of the present' (2010:262) of key events in Scottish criminal justice, in order to highlight the role that individuals and networks may play, as well as wider social contexts. This thesis hopes to form a contribution to 'a history of the present' by using detailed empirical data to understand the micro level forces which may create broader changes.

### ***1.2.a From the Macro to the Micro***

As discussed above, this thesis takes a detailed level of analysis to look at broader patterns of change in the belief that this method can extend current understandings of penal change in valuable ways. There will always be a tension between the micro and macro approaches in the analysis of any broad pattern of social phenomena. As Garland notes (2001a:vii):

In our attempts to make sense of social life, there is an unavoidable tension between broad generalisations and the specification of empirical particulars. The standard response to any wide-ranging social or historical interpretation is to point to the specific facts that don't fit, the variation that has been missed, or the further details that needed to complete the picture ... But the detailed case studies called for by this critical reaction suffer from exactly the opposite fate when they face up to their critical audience. Now the problem is not one of simplification but of significance.

Many of the theories of penal transformation are grand in scale and far removed from the particulars of national criminal justice institutions. Although these studies certainly do contribute to an understanding of broad patterns in punishment, they also overlook many of the particularities and processes which this thesis suggests have a great deal to say about penal change. Because this thesis is concerned with how penal change occurred in Scotland around devolution, it adopts an approach which allows observable particulars to be examined in order that wider conclusions can be suggested from these findings. It employs an approach proposed by 'middle range theory', which attempts to make the link between 'grand theories' that are too remote from particular phenomena to account for what is being observed, and, 'orderly descriptions' of particulars that are not generalisable at all (see Merton 1968:68). This approach also believes that a truer and more nuanced picture will emerge from taking such a level of analysis. By talking to people involved, by reflecting on processes which may not be visible from reading policy documents or other academic research, a richer account will be gathered. Some may argue that this approach falls into the trap that Garland identified above, namely that although it will tell us a great deal about this particular example, it does little to illuminate broader patterns or consistencies, it is not 'generalisable' (Bryman 2008:55). This thesis hopes to demonstrate that taking such a micro level of analysis *does* contribute to the construction of broader theories of penal change by means of the middle range approach discussed above, and indeed that looking at the 'bigger picture' is fundamentally enhanced by taking a smaller scale detailed level of analysis. The purpose of this research is not to produce generalisable findings; rather it is to illuminate factors which may have resonances in other jurisdictions, which together help us to understand something about the processes of penal change.

All the existing research about penal transformation in Scottish criminal justice draws on official policy documents, personal observations, and other research

(see McAra 1999, 2005, 2007, 2008; Croall 2005, 2006), or draws on empirical research into specific criminal justice practices or institutions (see Tombs and Jagger 2006; McNeil and Whyte 2007; Fyfe 2010; Tata 2010). Existing research therefore addresses either the *content* of legislation, policy documents, ministerial speeches etc, or the *consequences* of changes in institutions or practices. I argue that a fuller understanding of what drives change, and what may resist it, can be garnered from looking at the *processes* of change, as well as the content and consequences of change. As Newman argues (2002:353):

But it is not possible to ‘read’ the substance of social policies from the contents of White Papers, the manifestos of politicians, the guidance flowing from government departments, nor even the allocations of budgets across different programmes. A concern with the dynamics of policy process itself, set in the context of contemporary theories of governance, power and the state, is essential for those seeking to analyse and understand what is going on in social policy.

Given that so much of the penal change literature details the changes to criminal justice policies in different jurisdictions (they are after all, one of the key indicators of penal practices), it is perhaps remarkable that there has been little scholarly attention which examines policy processes behind on penal change. This thesis therefore adopts a micro level analytical approach to penal change, which views this phenomenon through the *processes*, as well as the content and consequences of policy. This method is adopted with the belief that this level of analysis can meaningfully contribute to the construction of broader theories of penal change via the middle range approach proposed by Merton. Partly for this reason, this thesis has reached for theoretical frameworks, beyond those traditionally concerned with penal change, which focus on policy processes and policy analysis.

### ***1.2.b Case Study Approach of Policy Process***

Taking such a detailed level of analysis requires clear boundaries to be established around the research project in order to make it manageable, and for this reason a case study approach was adopted, which allows a single phenomenon (place, organisation, person, event etc), to be studied in relative detail. A particular Scottish



criminal justice policy<sup>1</sup> was chosen as the case study for this research. It was traced from initial inception through its processes of formulation and implementation, through to how its legacies currently operate. Choosing an item of policy as a case study was decided on for a number of reasons. Firstly, it will give shape to eventual practice, it may create or change existing institutions and it attempts to mould subsequent behaviour. It is therefore an ideal vehicle to examine the current state of affairs of Scottish criminal justice in terms of its institutions, its practices and its cultures. Secondly, looking at a piece of policy that was created in the years following devolution will shed light on the effects of devolution on criminal justice. Finally, looking at the whole process of policy, from inception, formulation, implementation and operation, will allow the competing forces on policy to be examined, forces which both create and resist change. For these reasons, focusing on the processes of an item of penal policy around this time will facilitate a closer examination of the question of penal change in the Scottish case.

The policy chosen for this research culminated in a piece of legislation passed in 2005, the Management of Offenders etc. (Scotland) Act. This Act was created to reform the way that offenders are managed with an overall aim of reducing the rate of reoffending. This particular legislation was chosen for a number of reasons. Firstly, it was created at a time when there was a marked increase in the political involvement in criminal justice. Looking at a piece of legislation made in this time would therefore illuminate the motivations and processes behind this activity. Secondly, this legislation was seen by many as being heavily influenced by the law and order agenda taking place in England and Wales at the time (specifically, the development of the National Offender Management Service), and was therefore a clear example of possible ‘policy transfer’ or ‘detartanisation’<sup>2</sup> which forms part of the theoretical backdrop to my research. Thirdly, this legislation changed significantly throughout its process, thus providing a useful vehicle for examining the nature of the competing pressures creating these changes. Fourthly, this legislation involved two of

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<sup>1</sup> The definition of ‘policy’ is broad and contested. I have found Jenkins’s definition useful however: policy is ‘a set of interrelated decisions... concerning the selection of goals and the means of achieving them within a specified situation’ (quoted in Hill, M. 2005: 6). Here, policy is seen as many decisions rather than just one, and it implies a series of choices, decisions and actions. Hogwood and Gunn (1984: 21-22) also argue that any definition of policy needs to account for the fact that policy involves inaction as well as action, and that policies may have consequences which are not foreseen.

<sup>2</sup> A term coined by McAra (2008:494) to explain the process of Scottish policy becoming more ‘English’.

the key criminal justice agencies, namely the Scottish Prison Service (SPS) and criminal justice social work (CJSW) who carry out probationary work with offenders. Furthermore, the Act created eight regional Community Justice Authorities (CJAs) across Scotland, which brought together the SPS, CJSW and other agencies concerned with offender management, including the voluntary sector (who play a large role in service provision in Scotland), the police and others. CJAs are therefore a 'nodal point' of the criminal justice system, allowing for a broader view of the system to be gleaned. These agencies are also still in operation, so they provide a means of viewing how criminal justice is faring in the new political climate following the change in administration in 2007.

Using a case study approach clearly provides certain advantages: primarily it allows detailed examination of a delimited phenomenon. However, such an approach also has limitations which must be recognised. As mentioned above, detailed empirical research, including a case study approach, means that the results from this research are not generalisable in any 'scientific' way beyond this particular example. However, the purpose of a case study approach is not to provide statistically significant and replicable findings, rather it is to test or generate theory from a particular phenomenon (Bryman 2008:57). Furthermore, as I have argued above, detailed examination of a delimited case can in fact provide a valuable contribution to the construction of general theories, and can illuminate factors that can be missed by taking a macro level approach.

### *1.2.c Data Collection and Analysis*

Data collection took place in two stages: firstly, analysis was carried out on policy documents including Government consultations and their replies, copies of the Bill and the eventual Act. Transcripts of the debates and scrutiny that took place in Parliament were also analysed. This analysis helped me to become grounded in the data, to begin to map out the individuals' and the groups' stances during the process and provided a framework from which to base interview schedules around. I was also able to sit in as an observer on a number of CJA meetings, which formed part of my case study.

The second and more substantial part of the data collection took the form of face-to-face interviews with thirty-five individuals between September 2009 and

March 2010. These included ex-ministers, their advisors, other MSPs, local government councillors, civil servants, senior officials within SPS, CJSW, the police, the voluntary sector, and other experts in the field involved with this policy. Please see Annex 1 for a breakdown of interviewees. These individuals were selected using a variety of methods. Firstly, there were a number of obvious candidates, the higher profile individuals who made speeches in parliament, who gave evidence to parliamentary committees, and who submitted signed responses to consultations etc. All this information was publicly available and these individuals were easy to identify. However, there were a number of other individuals who worked more 'behind the scenes' and were thus harder to trace. Their names were gathered through exploiting the networks that exist in the policy world and asking for further contacts at the end of interviews. Securing access was not a straightforward affair and often required a degree of persistence. Having some contacts in the criminal justice policy world undoubtedly helped, though did not by any means guarantee access. As Richards noted 'by definition, elites are less accessible and are more conscious of their own importance' adding furthermore that in elite interviewing 'it is the interviewee who has the power' (1996:200,201), an inversion of the more traditional social science research in which it is assumed that it is the interviewer who holds the power (Neuman 2000:345). Policy elites in particular, may be reluctant to discuss the inner workings of policy-making (Dukes 2002), either because this is something they would prefer to keep under wraps (civil servants in particular seemed to embody this attitude), or because they were simply too busy and too important to bother helping with some PhD research. Criminal justice practitioners were the group which were most happy to grant interviews, perhaps because they too seemed bemused by the rapid changes which occurred with policy following devolution and wanted to contribute to research which sought to understand this. Although I did my best to speak to everyone I wanted to, there were a number of individuals who evaded me. No one expressly declined an interview; rather it was a story of unreturned phone calls and stonewalling secretaries. Therefore, there was a small degree of self-selection in the sample who finally granted interviews, although I would stress this was marginal as I spoke to the majority of those I wanted to. Please see Annex 2 for a sample access letter.

Interviewing powerful groups ('researching up' as opposed to 'researching down' (Smith 2005:643)) posed its own challenges and obstacles. As mentioned

above, by far the most difficult group to talk to, both in terms of securing access and in terms of having a meaningful discussion during the interview, were civil servants. This is perhaps because their work takes place behind closed doors, or because of their nominally impartial approach (James 1997:17-18) which means they may not want to talk about their own preferences. Politicians were much more forthright, partly because they were eager to justify their position and also because they are used to publicly defending their decisions. However, they were also very keen to portray a certain story and make sure this was the story I left the interview with. I was interviewing individuals from a small policy community, most of whom had worked together in the past or the present. They therefore knew each other and there was certainly a degree of ‘getting their story straight’ behind the scenes. This was confirmed to me when, in the middle of an interview with an individual they received a telephone call with someone who I had interviewed a few days before. The present interviewee seemed flustered and mumbled something on the phone about “wanting to discuss the interview with you, but I’m in the middle of it now”. This was certainly one of the more memorable moments of interviewing! I therefore had to accept that there was an element of impression management in the accounts provided to me, not surprising in a highly contested and politicised policy process in which they had played key roles. This required a degree of critical reflection to be used when analysing interview transcripts, thinking about what motivations some of the actors had for their accounts and checking whether other interviewees corroborated what they were saying.

There were certain questions that were asked of all respondents, regarding, for example, their opinions on criminal justice policy at the time, their opinion of whether devolution had been a positive or negative force for policy, and their account of the chronology of the Bill. However, interviews were semi-structured, so questions were tailored to suit individual respondents and the structure of the interviews allowed respondents to deviate if and when appropriate. Please see Annex 3 for a draft interview schedule.

I assured anonymity to those whom I interviewed, by which I meant that I would do ‘everything reasonable’ to anonymise their data including not referring to them by name and keeping my data secure. This was clearly easier in some instances than in others. If I am referring to an ‘ex Justice Minister’ in my transcripts, it will be fairly obvious who I am speaking about. However, I made it clear to those I

interviewed that I would refer to them by their professional title and if they were uncomfortable with this to indicate to me that this was the case. Thus, although I anonymised all my respondents, it may be not be too difficult for anyone with sufficient knowledge of Scottish scene to identify who a few of them are in some instances. An added difficulty in this regard is that the criminal justice community is a very small world and all the actors know each other. Therefore, if they read my research, they may also be able to guess the identity of a particular individual. It is difficult to see a way around this if direct quotations are used, however, so my approach was to be honest with respondents about how their data would be used and how they would be referred to, and then to maintain this promise to them.

Data analyses began by transcribing all recorded interviews into individual word processing documents and taking notes from the official documents / transcripts of Parliamentary debates etc. Different themes or topics which emerged from the data were then identified in these files and compiled into separate documents. For example, files were created for ‘the effects of devolution on agencies’, and ‘the changing relationship between central and local government’, and appropriate excerpts from interviews were copied and pasted into them. This technique enabled coherent and distinct narratives and perspectives to emerge from the data.

### **1.3 Summary of Thesis Argument**

This thesis seeks to examine and to contribute to the development of theory on the process of penal transformation, using changes in penal policy in post-devolution Scotland as a case study. It draws on detailed analysis of the evolution, passage and implementation of the Management of Offenders etc. (Scotland) Act 2005, including interviews with key players at each stage of the process (politicians, civil servants, practitioner groups) and documentary analysis.

This thesis analyses policy processes as a way of understanding penal change, and drawing on theoretical frameworks from the political sciences as well as from criminology to explain penal change. Kingdon’s multiple streams framework (1995) is used to explain how rapid changes in policy can occur. Kingdon argued that the greatest changes occur when a policy window is opened which allows three independent streams which run through policy at any one time: politics, problems and policies, to become joined. However, it is the incorporation of institutional structure

into the analysis which provides the most compelling explanation for the factors which lead to, escalate and impede change. Nonetheless, this thesis also demonstrates how both structure and agency are important in penal transformation: institutional structure formed the parameters in which political choice was made.

Whereas pre-devolution, policy-making was carried out in partnership between civil servants and agencies with an incremental rate of change, devolution thrust policy-making into a volatile and politicised environment, where it now answers to political expediency and the political cycle, although this has varied under the different administrations thus far. The primary reason for the very rapid rate of change that occurred following devolution was because of the creation of new democratic structures which provided the means and the incentives to create rapid change but it also involved explicitly political choices by key members of the Scottish Executive. Somewhat paradoxically, once change was instigated, the structure of post-devolution political institutions became critical in mitigating the pace and rate of change. The existence of PR electoral arrangements together with the relative decentralisation of power (in relation to the ownership of criminal justice services) meant that change had to be achieved through negotiation and compromise. Institutional structure was also important in the extent of the Parliament's ability to form any meaningful veto point on executive power. Overall it was new democratic structures *combined* with a political capacity-building project *and* the availability of a politicised approach to law and order from England and Wales which could be easily translated to Scotland, which together, explain the period of rapid change in Scotland during this time.

#### **1.4 Thesis Overview**

This chapter concludes by providing an overview of the structure of this thesis. This chapter has (very briefly) introduced the topic and the research questions, and then discussed the thesis's analytic approach and methodology. The second and third chapter are two literature reviews which together provide the theoretical frameworks for the thesis. As discussed above, this thesis proposes that an examination of policy processes will shed light on penal transformation which occurred around devolution, and this thesis therefore draws on literature from criminology and the political sciences. These groups of literature have overlapped

increasingly over recent years as criminologists have sought to make sense of the rapidly changing penal terrain and to understand the differing developments in different jurisdictions (see Cavadino and Dignan 2006; Lacey 2008; McAra 2005; Tonry 2007), although none of these authors have looked in detail at policy processes. This thesis hopes to further illustrate the overlap between the different literatures, arguing that they each illuminate gaps in the other. Chapter two is a literature review on penal transformation, which will discuss theoretical approaches from criminology and the sociology of punishment which are useful to this thesis, and chapter three is a literature review on policy analysis and processes, again, maintaining a focus on those theories which are most relevant to this thesis. Chapter four is a context chapter which ‘sets the scene’ for my findings. It details what the existing literature says about Scottish criminal justice, how it changed with devolution, and discusses the different explanations given for both Scotland’s resistance to change prior to devolution and its rapidly changing nature following devolution. This chapter also sketches out the rise of the New Labour project which was taking place in England and Wales around the same time, as this was to have some bearing on Scottish developments during the time of this case study. Chapters five to nine report findings from my fieldwork, which chart the ‘journey’ of the policy which comprises my case study. These chapters will draw on the theoretical concepts outlined in chapters two and three and will support the emergence of my argument about penal change in Scotland. Chapter ten will pull together the strands which emerged from my fieldwork, drawing on the theoretical frameworks outlined earlier and illustrating my original contribution.

## **Chapter Two**

### **Literature Review 1 – Penal Transformation**

The prison population in America rose from 313 per 100,000 of the population to 756 per 100,000 of the population between 1986 and 2009, a staggering rise of 141% in just twenty-three years (Cavadino and Dignan 2006:45; Walmsley 2009), a rise which is not explainable by levels of crime alone. The rising prison population in many jurisdictions is just one manifestation of a broader set of changes which have occurred in penal systems throughout the Western World over the last forty years including new forms of expressive and punitive punishment, penal systems marked by managerialism and actuarialism, a sharp politicisation of crime, and the valorisation of ‘the victim’ and ‘the community’ within discourse (see Feeley and Simon 1992; Bottoms 1995; Garland 2001a, 2001b; Armstrong and McAra 2006; Simon 2007; Loader and Sparks 2007). Together, these changes have been termed ‘penal transformation’, and there has been a burgeoning literature over the past decade or so which has attempted to explain and understand these developments. Although there is agreement that many systems throughout the Western world have undergone often rapid changes over the past 40 years or so, it is also true that the shape and extent of these changes has been far from uniform. Ever since Garland published his provocative and influential ‘Culture of Control’ in 2001, authors have been keen to emphasise the extent to which their jurisdiction has not followed this thesis, and to offer explanations for why this might be. Ten years later, the consensus is that there are ‘multiple cultures of control’ (Nelken, 2009:294), and there has been a growth in the literature which seeks to explain the factors which have accelerated or mitigated change in different jurisdictions, with authors keen to emphasise a drift towards US style mass incarceration is not inevitable (for example Cavadino and Dignan 2006:10).

This chapter is the first of two literature reviews in this thesis. This chapter is about penal transformation which it will examine from ‘three levels of analyses’ which put primacy on different explanatory variables for penal change. There is some overlap between these three levels of analysis, but for the sake of analytical order they have been separated under these three categories. This chapter will argue that whilst



all illuminating different aspects of penal change, many of the theories discussed fail to look at the *processes* by which change is effected and is resisted.

This chapter will firstly discuss the changing nature of political involvement in crime and how the ownership of criminal justice policy-making has changed. This analysis will be macro because it understands the causes behind changing political involvement to lie in social and cultural changes which emerged in the late 20<sup>th</sup> Century. Secondly, this chapter will examine theories which take a meso level of analysis, placing an emphasis on institutional structure and its role in influencing crime and punishment, firstly, with a focus on voting arrangements and veto points, and secondly on whether a system is ‘bureaucratised’ or ‘personalised’. Finally, micro level analysis will be taken which looks at policy transfer and how local particularities mediate broader factors. Together, these approaches shed light on a broader canvass of factors which influence the patterns of criminal justice practices. This literature review is necessarily selective, there is certainly other literature on aspects of penal transformation which could fit under the macro / meso / micro categories, however, the topics for this chapter have been chosen because they all illuminate aspects of my thesis.

## **2.1 Politicisation, Populism and Public Engagement**

This thesis is concerned with the consequences of the changing nature of political involvement in crime. This literature review therefore begins with an overview of some of the reasons and consequences of why political involvement in crime and punishment may have changed over the past forty years.

Firstly, it is necessary to briefly discuss what we mean when we talk about political involvement in crime. As Loader and Sparks (2011:60) argue, crime and punishment are inherently matters of political concern: the ability to declare what is right and wrong and to punish wrong-doing is part and parcel of what it means to govern. Therefore, to argue that politics should play no role in the organisation and enforcement of crime and punishment is misplaced. However, the claim that crime has become in some way ‘politicised’ is altogether different from accepting that it has a legitimate role in the political process. Loader and Sparks argue that such a claim implies that crime and punishment have become used politically ‘for higher stakes’ (ibid:61), with the perception within governments that their very legitimacy rests or

falls on how they handle this issue. The notion of ‘politicisation’ also implies that crime has become a ticket to electoral success, and therefore that policy is created for reasons of political expediency rather than for reasons based on evidence or a sincere belief it may ‘work’. In this climate it is safer for politicians to act tough against marginalised groups who do not attract public sympathy. The authors argue that the political prizes for ‘assuming the requisite ‘voice’’ can be high (ibid). This encapsulates the essence of what it means to say that crime has become ‘politicised’.

The following sections discuss different aspects of the politicisation of crime, firstly analysis which understands changing political involvement in crime as a result of a crisis of legitimacy in governance, and secondly, analysis which focuses on the reasons and way that the governance of crime has moved into a more open and public arena. These two sections naturally overlap, however, for the sake of analytical order they are discussed here separately.

### *2.1.a Penal Change in Response to a Crisis of Legitimacy*

Many of the analyses in the following section share the same understanding of the *causation* of penal transformation, in that they lie with the social structural changes that began around the 1970s in Western jurisdictions. Arguably the most important analysis comes from David Garland (2001a) in his book ‘Culture of Control’, though his argument was outlined earlier (1996). He argued that penal welfarism was able to flourish in the United States and the United Kingdom until the late 1960s because of support from key groups of society, most notably the professional middle classes, who were insulated from direct experiences of crime largely because of the success of the welfare state and informal social control which kept levels of crime low. This resulted in a relative consensus which supported the modernist penal agenda, which placed primacy on rehabilitation and viewed the state as having a role in dealing with the aftermath of crime and poverty (2001a:44-51). However, transformation that emerged with the social structural changes with late modernity resulted in increased levels of crime combined with rising general anxiety about crime, and a concurrent feeling on behalf of citizens that the state could no longer provide security for its citizens (ibid:ch.4).

Faced with the problem of rising levels of crime, and an inability to do anything about it, the state is faced with a difficult position, for the provision of

security for its citizens is one of its foundational duties. Garland argued that the state reacts to this problem in two contradictory ways. Firstly, it adopts a pragmatic reaction, whereby it seeks to employ a range of policies which will divert minor offences away from the criminal justice system, devolve the responsibility for crime onto non-state actors, and redefine success and failure so success is now based on a range of organisational goals rather than social outcomes. The second response is the expressive and symbolic assertion of the state's continued ability to provide security to its citizens. Thus, politicians and policy makers engage in punitive grand gestures, either as a way of asserting their ability to provide security, or simply as a way of sharing public outrage by expressing public sentiment (ibid:ch.5). This crisis of governance has resulted in a 'culture of control', whereby social anxiety is intensified and penal policy is punitive, contradictory and irrational.

Another important account of the contemporary political and social salience of questions of crime and punishment comes from Jonathan Simon in his book 'Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear' (2007). Similar to Garland, he traces the genesis for change back to a crisis of legitimacy in governance beginning in the 1960s. Although the focus of his book is not so much the *cause* of change, but its *effect* (ibid:25), he argues that the reason that crime became the central governing rationale was because of the collapse of public faith in the New Deal political order in the 1960s, and the resulting scramble to find a new organising principle for governance. He argued that for a variety of 'largely independent and accidental reasons' (ibid:26) relating to constitutional structure of the US, weak unions, court decisions rendering the civil rights movement powerless and the rise of the conservative movement, crime provided the least resistance to be taken up by government as a governing principle and used to address the new risks and concerns that emerged in the 1960s (ibid:26-31).

The result of this is that the state (though his argument is confined to the United States), now 'governs through crime'. In this environment, crime has also become *the* issue around which political institutions have developed and it has gone on to infiltrate the whole sphere of government action, affecting the way that all social problems are managed, not just crime. He argues that crime has now become solidified as a central strategic issue, it is used by everyone seeking to achieve or maintain power: if an individual is addressing crime, then they are regarded as acting

legitimately, and this applies to professionals from all areas of life. He charts the way that crime has been used by political actors from local district attorneys to presidents to further their cause, and as such the use of crime becomes a central strategic tool in political campaigns.

Both Garland and Simon's account explain how governments have reacted to a crisis in their legitimacy (in Garland's account due to increasing levels and fear of crime and the state's inability to do anything about it, and in Simon's account because of the collapse of the New Deal political order), by placing crime at the centre of the political stage. This analysis is shared by John Pratt in his book 'Penal Populism' (2007), which traced changes in the way that crime is handled politically back to a number of social changes that began in the 1970s. This period saw a 'decline of deference' with the automatic authority which was accorded to criminal justice officials and political figures beginning to be questioned (ibid:37-49). This has resulted in a public which is more insistent on having *its* say in public affairs because support for politicians and the political process has become tarnished. Globalisation has also left states with diminished power (ibid:57), and crime, insecurity and social change have led to an increase in ontological insecurity (ibid:60). These developments have prompted a 'new axis of penal power' (ibid:24), with political circles attempting to find new ways of communicating with the public in order to regain some of its lost authority, and a simultaneous desire on the part of the public to find new ways of ensuring its voice is heard. Pratt's argument is similar to Garland's, in that these developments have left states with the predicament of a public who no longer afford them the automatic respect they once had been accustomed to, who have lost faith in the institutions of modern government, and yet who are searching for a means of securing political expression.

Pratt argues that states engage in expressions of popular punitive expression in order to re-engage with a disenfranchised public. Penal populism expresses feelings of anger, disenchantment and disillusionment with the criminal justice system, for example, the rights and needs of victims and 'ordinary decent citizens' are subjugated in favour of those of criminals and prisoners (ibid:12). Penal populism is expressed in tabloid press and phone-in radio shows (the mainstream media are seen as too closely aligned to the political establishment, who are thought to have colluded in this betrayal of the 'law-abiding majority'). For Pratt, penal populism is more than the securing of political support through the promise of punitive actions because it is

believed that this is what the public desires, although this is certainly one of its key manifestations. It is in fact a result of a wholesale shift in the relationship between the citizen and the state, which has seen governments attempting to find new ways of connecting with its citizens, in the face of declining respect for its authority and belief in its legitimacy.

### *2.1.b Ownership of Policy and the Public's Role in it*

The following section develops the discussion about the consequences of the reconfiguration of the political governance of crime and punishment caused by states' reaction to a crisis of legitimacy, discussed above.

Pratt's analysis of penal populism leads on neatly to the ideas of Mick Ryan who also wrote about the way that politicians engage with the public via crime control policies (1999, 2003). Looking at New Labour in the UK, he also argued that populist rhetoric should be understood as being more than simple manipulation of fear for political ends; rather it is an attempt by the state at reengaging with a disenchanted public, and as a way of mobilising consent. What his analysis adds however, is a discussion about the ownership of policy, specifically, who makes it, and how.

Similarly to the authors above, he charts the history of penal policies and politics over the 20th century in order to understand recent changes in context. He argues that during the post war period from 1945 to 1970s, policy was made by an elite who made policy behind closed doors in a spirit of cross-party consensus, and public opinion played a marginal role in the decision making process (1999:1-5). Drawing from classic liberal fears of mass democracy, the elites viewed the public's views on crime and punishment with suspicion and believed they had to be kept out of the penal making sphere as much as possible. This consensus broke down with the declining faith in rehabilitation within the penal system and a decline in faith of the post war welfare consensus generally (ibid:6-7). Also drawing on Garland's arguments, Ryan argues that the social structural changes that occurred during the 70s and 80s meant the state was reaching for other ways to assert control. During this 'authoritarian moment', penal policies became more punitive and the old elites who had previously exercised control were gradually sidelined or forced to make policy in a more public arena (ibid:9). Ryan argued that Labour's approach was more than just manipulating fear or being opportunistic (as he views the Conservatives as having

done), it was also about managing loss and re-engaging the public's voice (ibid:14). The preceding decades of penal policy had put decisions and expertise in the hands of experts, the public had been shielded from the process and their opinions sidelined, leading to a feeling of public 'loss' and exclusion. New Labour were acknowledging and addressing this loss, which accounted for both the content of policies (i.e. their populist hue), but also the process in which they were made which continued to sideline old elite structures (ibid:12). Policies were made *on behalf of the every day citizen* and ministers communicated to the public via tabloids. The public, in this model, are not passive 'rhetorical backcloth'(1), they are re-engaged as active citizens.

Another important analysis of how the governance of criminal justice has changed over the past forty years has been carried out by Ian Loader (2006). He describes the role of what he terms 'the platonic guardians' who had ownership of policy during the middle part of the 20th century. Drawing on interviews with key individuals involved in penal policy-making, Loader reveals that this close-knit group of professionals (the 'elites' as identified by Ryan above), were aware of their elitism and exclusive ownership of policy, but they viewed this as necessary in order to ensure the continuation of a liberal approach criminal justice policy (ibid: 565). During the years of the post-war penal welfare consensus, this group made policy in close co-operation with criminologists and other experts when required. Although aware of public opinion, there was a feeling that it should be guided or managed, rather than followed, and similarly, that it ought to be kept out of the realm of partisan political exchanges. He details successful threats to their dominance including the advent of the 'nothing works' orthodoxy and the Thatcher government's commitment to 'authoritarian populism' and desire to open up the hitherto 'cosy consensus' that previously existed (though he also notes some behind the scenes continuity (ibid:577)). However, the biggest break came around 1992 when a weakened Conservative party sought to regain support on the back of the Bulger murder which captivated the nation. Since then policy-making has been taken out of the hands of civil servants (who were not trusted since the progressive Criminal Justice Act 1991) and their role was limited to 'doing what they were told' rather than acting in a more autonomous capacity. They have moved from a culture in which platonic guardians rule, to what Loader terms a 'culture of impatience' (ibid:581).

Interestingly however, Loader does not recommend a return to the days of the platonic guardian. He argues firstly, that it is sociologically impossible for this mode of governance to be reinstated. The social, economic, and cultural changes that have occurred over the past forty years mean that crime is now more prevalent and it also occupies a larger part of our common imagination. Changes now mean there is less deference to authority (including government) and greater ontological insecurity. The world in which the platonic guardians operated no longer exists and this mode of governance would not 'fit' into this changed cultural milieu. Apart from this more pragmatic problem however, Loader also identifies a more normative barrier to their reinstatement which is its 'profoundly undemocratic' nature (ibid:582). Open and involved dialogue will inform the public and also result in better decisions being taken.

This view is shared by Johnston (2000) who agrees that the post New Labour criminal justice policy climate has put policy into a more public arena away from the closed world of elites that existed previously. Although he also argues against a return to the old elite model of policy-making, he is critical of New Labour's mode of public engagement because it offers no 'insulation' from public punitive sentiment (ibid:162). He argues that the best way to prevent a drift towards populist and punitive policies is to *further democratise* the policy-making process, which would foster the public's 'capacity for tolerant, intelligent, rational and moderate decision making' (ibid: 163).

The argument by Loader that the 'platonic guardian' model of policy-making was undemocratic and is no longer possible, has been questioned by Tonry (2007:31-33). He argues that the public are usually misinformed, seeing things in black and white and therefore that raw public opinion should not be allowed to feed into policy. He points out that in many countries throughout the world, the views accorded to professional or expert voices are valued and play a role in policy-making, and that although the public's views should be able to influence general policies to a certain extent, they should not be able to influence specific policies or reactions to cases.

True democratic participation may be an ideal, but it is certainly problematic, as the above discussion shows. Claims to be making policies on behalf of, and for citizens, often mask ulterior political motives.

## *Conclusion*

This section discusses some theories which explain how and why penalty has changed over the past forty or so years. Its analysis is macro, in that it argues that as a result of social and cultural changes taking place in the latter part of the 20th century, states have been reaching for other ways of asserting control, connecting with citizens, organising the governance of crime and punishment. One result of this is that the ownership of criminal justice policy has changed: it has moved from the closed world of elites into a more volatile and politicised arena.

The first groups of literature in this section are useful for explaining how macro level structural shifts in culture affect the relationship between politics and society which in turn affects penal policies. This type of analysis *is* macro, so it is perhaps unfair to criticise it on this very point. However, these approaches do not explain variation between different jurisdictions, nor they draw on empirical enquiry, which, I argue, can provide as much explanatory power as looking at broader patterns. This is partly rectified by the analysis offered by Ryan and Loader, which is also located within the literature on changing governance of criminal justice, which views policy as a way of mobilising consent similar to that discussed above. Both Ryan and Loader draw on empirical research to understand these processes further. However, what this analysis misses is how the changes outlined above might be influenced by structural factors in different jurisdictions. Would the same pressures towards public engagement play out in different locations and what might the reasons for possible variations suggest? This is a gap in the literature on political involvement in crime and justice policies discussed above. The following section will take a meso level analysis of penalty, focusing on the structure of political institutions, and will go some way to addressing these gaps.

## **2.2 Political Institutional Factors**

This part of the chapter will examine literature which argues that penal change is shaped by the structure of the political institutions in a particular jurisdiction and as such takes a meso level of analysis. Again, this is not a hermetically sealed category from the literature discussed above, (for example, Simon argued (2007:26) that the structure of the political institutions in the United States made it particularly



vulnerable to being ‘governed through crime’), and this section will discuss how different arrangements allow for differing levels of public involvement in matters of crime and punishment. However, the following section places primacy on explaining how different configurations of institutional architecture creates different incentives for the actors within them to behave in certain ways. This perspective is often used in comparative analysis as a way of understanding why patterns of punishment vary from place to place.

### *2.2.a Voting Arrangements and Veto Points*

A recent body of work within criminology which borrows from the social and political sciences is that which attempts to explain patterns of punishment in terms of a country’s political structure (see Cavadino and Dignan 2006; Lacey 2008; Tonry 2007). For example, Michael Tonry distinguishes between ‘conflict’ and ‘consensus’ political systems, arguing that the existence of one or other of these will have a direct bearing on the country’s punishment levels (2007). Conflict systems are typically found in English speaking countries (UK, US, Australia, New Zealand etc), and commonly operate a first past the post (FPTP) electoral system with two major parties, with discontinuous policy as parties define their positions in opposition to each other. Consensus systems on the other hand, typically operate with numerous political parties, proportional representation (PR) electoral systems meaning that coalitions often prevail, and they tend to dominate throughout Europe. In these systems there tends to be greater policy continuity because parties may continue to be part of the power sharing executive even if one of the other parties changes (ibid:18-19).

Tonry argued that countries with ‘dispersed political power’ (i.e. in broad multi-party coalitions) will have lower rates of imprisonment rates than those with ‘concentrated political power’ (i.e. in single party majority cabinets). He also made the distinction between ‘centralised authority’ (i.e. unitary and centralised governments, uni-cameral legislatures, rigid constitutions, the absence of independent central banks and judicial review), or ‘decentralised authority’ (i.e. federal and decentralised, bicameral legislatures, flexible constitutions, independent central banks etc). He argued that the dispersal of political power (i.e. multi-party versus majoritarian systems) is a far better indicator of imprisonment rates than whether

authority is centralised or decentralised, as high imprisonment rates are equally characterised by centralised and decentralised authority systems (ibid:21).

In her book 'The Prisoners' Dilemma' (2008) Lacey shared the same analysis as Tonry in respect of the importance of the configuration of political structures, specifically the electoral arrangements, in determining patterns of punishment in different jurisdictions. Her argument is that different arrangements will moderate public opinion and / or have the incentives to create or exacerbate more punitive public sentiments. Lacey argued that countries which operate systems of PR which means that executive power is constrained by checks and balances and the need to compromise, tend to have more co-operation and incorporation of broader interests into the process. Because of the need to compromise across a broader political divide they are more insulated from swings in public opinion (ibid:65-66). Systems operating a PR electoral system will tend to give greater deference to the expertise of the bureaucracy, partly because they are less politically polarised and so therefore more likely to seek more moderate advice than that sought from for example political advisors (ibid:72). FPTP systems on the other hand typically have two main parties who compete, and policies tend to be much more adversarial. There is a need to continually strive to attract the increasing numbers of floating voters (ibid:66), and, counter-intuitively, these systems are more prone to the influence from single issue pressure groups, which may run on punitive criminal justice issues (ibid:70-71). In contexts in which there are two main parties who are relatively ideologically close to each other, criminal justice can be used to differentiate one party from the other (ibid:76). When both parties adopt the law and order agenda a punitive arms race develops which she calls the 'prisoners' dilemma', because both parties cannot afford, electorally, to give up their stance on crime, but everyone loses.

Lacey later modified her argument by acknowledging that in jurisdictions in which PR is essentially grafted onto a society and political system which is otherwise a liberal market economy, then its effects will not necessarily result in more moderate penal policies (forthcoming). Instead, where PR exists as part and parcel of a more consensual style of policy-making (as in Germany for example), this will be the case. Although PR will have an effect on policies (because it implies the need to negotiate and for consensus), whether this results in more moderate penal policies is heavily contingent on other factors such as the existence of single issue pressure groups or public referenda (ibid).

Cavadino and Dignan also argued that countries in which politicians stand on a comprehensive party platform, and therefore have to align themselves with well established policy stances, are more likely to act in accordance to their parties, and are less prey to following the whims of public opinion. This is contrasted with the US for example, where politicians are less aligned to particular party platforms and are therefore more likely to chase the popular vote (2006:32).

A related point is the extent to which there are constitutional checks and balances in the system. For example, the American political system exhibits multiple checks and balances in order to fragment executive power, and public figures are required to stand for re-election regularly in order to keep them accountable which has led to a widespread belief in the value and place of the public voice in the political process. The UK on the other hand is much more centralised, the House of Lords offers little meaningful ability to prevent the House of Commons from achieving its will meaning there are fewer constraints on executive power (Tonry 2007: 24-27).

Lacey also argued that the distribution of veto points in a political system has bearing on penal policies (2008:91-93). In highly federalised states such as Germany and Canada for example, there are multiple checks and balances on the executive (see Cavadino and Dignan (2006:108) for a discussion about Germany in this context). Although the United States also has a highly federalised system, in practice, the federal level has little scope to inhibit state level policies (Lacey 2008:92). In his examination of the death penalty in the United States, Garland also argued that the reason for certain states' continuation with the death penalty is because of the American tradition for local democracy and autonomy at state level. Where other jurisdictions throughout the Western world have been able to impose abolition from above, this has been impossible in the United States where individual states continue to form a veto point on Supreme Court or federal government decisions (2010:185). Therefore, the distribution of veto points in a political system will have direct bearing on the patterns of punishment it produces by its ability to constrain executive power.

### *2.2.b Bureaucratised/ Personalised*

The issue of who it is who makes policy has already been discussed, but in the context of constitutional architecture, it is important to note that different systems allow for differing degrees of political involvement in criminal justice.

Savelsberg was one of the first to note the importance of political architecture on the decisions taken within it (1994, 1999). He argued that the more that systems of 'knowledge production' and the political institutions in which decisions are taken, are bureaucratized, the more they will act as a buffer between policy and swings in public opinion. He compared the United States with the Federal Republic of Germany (FRG) and argued that the 'personalised' system of knowledge production in the US (comprised of specialised interest groups which are likely to pursue strong and extreme stances, the ubiquity of polling which is likely to exacerbate public opinions, and the privatised media which rely on sensationalism), produce more incentives for harsher policies than in the 'bureaucratized' system of knowledge production in FRG (comprised of large neo-corporal groups who have more moderate views in order to accommodate their broad interest base and more publicly owned media) (1999:53). The extent to which all these factors actually affect political and legal decision making is dependent on the extent to which the institutions in which decisions are taken are susceptible to ideological impulses and the pressures of politicisation and populism, hence the bureaucratized / personalised dichotomy. Thus, in the United States, many prosecutors and judges are publicly elected, whereas in the FRG they are life-tenured civil servants. Furthermore, political parties in the FRG are more likely to follow strong party platforms and have strong faction discipline, and the chancellor is voted not directly by the public, but by the majority factions in the legislature, in direct opposition to in the United States, where the political institutions allow for a stronger reflection of changing public moods and therefore a more dynamic and reflexive political system. Thus, a greater bureaucratization of both the institutions of knowledge production, and of political and legal institutions, contribute to greater ideological stability and greater stability in legal and political practices (ibid:55). However, it has been pointed out that a higher degree of bureaucratization alone is not enough to ensure more stability in punishment. For example, while Holland has a strongly bureaucratized polity, this has only had a stabilising effect on levels of punishment if the bureaucratic elite are themselves stable in their penal philosophy (Cavadino and Dignan 2006:123)

Systems which allow more personalised control therefore create incentives for more populist interference. For example, the UK government reserves the right to rule against the recommendations of the parole board, although this happens rarely. In one notorious recent case, the Home Secretary even increased the sentences imposed on

two pre-teen boys convicted of a notorious murder (only to be later overruled by the European Court) (Green 2007:272).

### *Conclusion*

The discussion above shows how the configuration of a political system creates incentives for actors to act in certain ways by moderating or exacerbating public opinion and sentiments. Relatedly, the extent to which decisions are taken in a personalised or bureaucratised system will also have bearing on patterns of punishment. What this analysis misses however, is a discussion about human agency which is exercised within these institutional constraints. Although the analyses discussed above argue that institutional arrangements create incentives for certain types of behaviour, they provide no explanation for why certain choices may be exercised at some points in time or place, or why they may not. The role of individuals is under theorised within the literature on penal change, which is one of the reasons why a second literature review was sought in this thesis, which will be the next chapter. To conclude this section however, the different constitutional arrangements also have bearing on a different aspect of punishment, namely, how policies can ‘travel’ between jurisdictions. This is a micro level of analysis, and will be discussed next.

## **2.3 How Policy Travels**

Although the practice of importing ideas from elsewhere that may work in a domestic context is hardly new in criminal justice practices, in the era of globalisation this question takes a new resonance (Newburn and Sparks 2004:3). This has triggered a flurry of criminological attention concerned with this issue. Over the past fifteen years or so, criminologists have sought to explain the apparent similarities of criminal justice practices across the world, with a great proportion of them concerned with the apparent dominance and consequent spread of US style practices to different jurisdictions (see for example Christie 1993; Wacquant 1999; Jones and Newburn 2007a). However, while there do certainly appear to be signs of convergence of both practices and language of crime control (Garland 2001a; Young 1999), it is also true that the analysis of such apparent similarities and claims of ‘policy transfer’ are more

complex than they initially appear and they are often poorly theorised and empirically tested within criminology (Newburn and Sparks 2004:3). This final part of the chapter will discuss policy transfer, not only because it tells us something about how punishment is organised across the world, but also because it allows us to take more of a micro level analysis at how penal policy is shaped.

First of all, it is necessary to underline exactly what is meant by ‘policy transfer’, as ‘lesson drawing’, ‘policy convergence’ and ‘policy transfer’ are often used interchangeably (Dolowitz 1998:2). Policy transfer has been referred to as ‘a process in which knowledge about policies, administrative arrangements, institutions etc. in one time and / or place is used in the development of policies, administrative arrangements and institutions in another time and / or place’ (Dolowitz and Marsh 1996:344). This is sufficiently broad to account for both ‘lesson drawing’ which implies a less coercive form transfer, and ‘policy convergence’ which implies structural social and economic forces (Newburn and Sparks 2004:4) perhaps without the involvement of human agency.

A set of questions and issues for an examination of policy transfer was developed by Dolowitz (1998: 7-35) and later adapted by Jones and Newburn (2007a:30-31), and they form a useful toolkit for operationalising this concept.

The first question is the degree to which the transfer is voluntary or coercive. Voluntary transfer implies that solutions are only sought once a problem emerges (although the existence of a ‘better’ system elsewhere can also be used post hoc to justify a decision already taken), while coercive transfers may come about through multilevel governance structures, or conditions applied to loans or aid. A second question is who is ‘doing’ the transfer. Drawing on Hudson, Jones and Newburn point out that ‘‘economic forces’, ‘social structures’ and ‘cultural sensibilities’ do not lobby for penal innovations, frame legislation, pass sentences or vote in elections; people do’ (2002:178) (see also Edwards and Stenson 2004:212). Transfer may be carried out by elected officials, civil servants, policy entrepreneurs, think tanks, and so forth. This underlines that policy transfer puts primacy on human agency and eschews deterministic, more structural theories (Newburn and Sparks 2004: 4-5).

A further issue is precisely ‘what’ is transferred because policies, institutions, ideologies, and attitudes that can all be transferred, and ‘degrees’ of transfer can include copying, emulation, ‘mixtures’ and ‘inspiration’ (Dolowitz 1998:27). In this vein, Jones and Newburn identify three ‘policy levels’. On the broadest level, there is

firstly ‘policy ideas, symbols and rhetoric’, secondly, there are more solid forms of policy in terms of policy content and instrument, and finally, there is the actual iteration of the policy, how it is implemented (2007a:23). It is important not to assume that just because policy is claimed to be the same, or indeed, that it may initially seem to be the same, that it necessarily is the same.

Where policies are transferred from, is the fourth salient issue. Most literature has focused on international transfer, but policies could also be transferred from regional or local governments, or even from the past (Dolowitz 1998:26). As noted above, much of the criminological literature focuses on the influence of American style policies (e.g. Edward and Stenson 2004; Jones and Newburn 2002a, 2002b, 2005a, 2005b, 2006, 2007a, 2007b; O’Mally 2004), however, the American case, as Sparks put it, may have a ‘distracting sway ... as a pole of attraction’ (2001:165). The rise of restorative justice throughout the world sprang from indigenous practices in Australia and New Zealand, there is also much policy transfer within Europe, and it is clear that many jurisdictions are both an importer and exporter of policies (Karstedt 2002:113; Pantazis and Pemberton 2009).

Which different factors constrain or facilitate the policy transfer process is the sixth issue to consider, and which will have particular resonances for this thesis. These factors may explain why some policies travel and others do not, and furthermore, why policies travel from and to certain jurisdictions, and not others. Suggested factors here include how complex a policy might be (if it is more complex it is less likely to be transferred), past policies and their interaction with existing policies (this draws on some of Kingdon’s ideas which will be outlined below), institutional and structural constraints (if systems have similar institutional structures, or the size of political majority, or the extent to which an organisation is hierarchical and able to impose change), feasibility constraints (including shared political ideologies and cultural proximity), and language (which although not a major factor, is not negligible) (Dolowitz 1998:31).

In their analysis of three major criminal justice policies which were said to have ‘travelled’ from the US to the UK, Jones and Newburn argued that there are two major constraints against successful transfer. Firstly, there is the influence and actions of key political actors working within these contexts, and the contingent nature of events (2007a:157). The second constraint on policy transfer noted by Jones and Newburn is the political institutions and structure within which policies are

formulated (2007a:154), for example the decentralised US system which gives it more points of entry for lobbying versus the more centralised system in the UK which allowed elites much greater control, and the extent to which the British Parliament is able to exert its will over the Government. The importance of local political structures in mediating imported crime policies has also been noted by Lacey and Zedner in their analysis of crime prevention initiatives in Germany and the United Kingdom, though they also noted the importance of political culture and ideology (2000:163-166). Similarly, Edwards and Stenson have also noted the effects of local governance structures in the UK to hamper and resist the development of US style local crime control (2004). They argue the importance of social context and its effect in ‘filtering, if not blocking’, crime control practices from elsewhere (ibid:228).

While Dolowitz and Jones and Newburn argue the importance of institutional structure, it is also important to note the importance of local cultures and practices as a constraint of transfer. As Karstedt argues ‘crime policies ... are decisively local and national. Specific values and meanings are as much part of them as a particular institutional designs’ (2002:115). Many authors have therefore argued that local cultural specificities will mediate broader global trends and attempts at transfer (for example Edwards and Stenson 2004; Muncie 2005:44; O’Mally 2004:41), and Melossi even argues that ‘translation ... strictly speaking is impossible’ because ‘any term will be embedded within its cultural milieu, that gives it its meaning’ (2004:80). Edwards and Stenson argue against such an extreme view however, arguing for a position between the belief that policies can be transferred neatly from one jurisdiction to another, and the view that transferability is completely blocked by local peculiarities (2004:227). They argue that political, economic *and* cultural factors and the way they mediate any transfer, must be taken into consideration in analysis (ibid:229).

In some of the most extensive empirical work on this issue, Jones and Newburn (2002a, 2002b, 2005a, 2005b, 2006, 2007a, 2007b) argued that the process of policy transfer is far from being rational and a straightforward outcome of policy-makers’ aims and objectives. Instead it is often the ‘messy result of unintended consequences, serendipity and chance’ (2007a:18). They highlighted how policy outcomes are affected by the lack of parliamentary time for legislation to be amended, or as a reaction to a high profile crime (both factors in the formulation of mandatory minimum sentences in the US and the UK). Their analysis also highlighted the



operations of political and legal institutions; cultural factors, such as the strength and role of public opinion, and the willingness of the judiciary to follow political demand; and also the important role that individual actors play in the process. Their analysis places institutional structure at the centre of analysis and portrays the often chaotic and unintended outcome of policy (2007a).

The literature on policy transfer is an attempt to put 'agency' back into the debate on penal transformation. Much of the existing literature has tended to put a greater focus on broader structural and cultural explanations (Jones and Newburn 2007a:18), perhaps undermining the important role of individual actors or institutions. While broad structural theories offer accounts which set the social and cultural context in which policy-making takes place and makes some types of policy more likely than others, they do not explain the processes by which some policies are adopted and adapted. However, as Simon has pointed out, the focus on actors and institutions (agency) does not mean the focus on deeper structural or cultural aspects is unimportant either (2008:251). A further distinction is between policy transfer and policy convergence, and although the two can be connected, they should not be confused. Thus, transfer implies human action and choice (though not necessarily in a neat and rational manner), while convergence implies comparable political and cultural conditions in different jurisdictions which may prompt similar policies to be employed without any communication or action between them (Simon 2008:251).

The literature on policy transfer is useful for several reasons. Firstly, it alerts us to some of the factors which may facilitate or impede transfer, which will be of relevance to this thesis. Secondly, it places an emphasis on the 'local', be it institutional structure, cultural sensibilities, or individual action. Relatedly, it allows a micro level analysis of penal change to be taken, which requires a detailed examination of practices on the ground, including the agency of individual actors. It forms a vehicle for exploring how some of the broader structural changes, described in the first part of this chapter, and the institutional variables, described in the second part of the chapter, actually play out at ground level. This micro level of analysis with a focus on policy processes is similar to that adopted by this thesis, though it will also draw on the theoretical ideas outlined in the rest of the chapter.

## Conclusion

This chapter has discussed three approaches to looking at penal change which all shed light on different aspects of my thesis. They are all necessarily partial in their explanatory gaze, though I argue that the micro level approach which looks at policy processes together with an understanding of the institutional constraints in which they operate, provides the most compelling explanation for penal change, and this is a similar approach to that adopted in this thesis.

This chapter firstly discussed some of the reasons and consequences behind increased political involvement in questions of crime and punishment over the past forty years in many Western countries. The analysis given by authors argued that this adaptation is in response to a crisis of legitimacy felt by the state. In this climate, policy-making has moved into a more volatile and public arena and the old ‘elites’ who used to make policy have been sidelined. This level of analysis is macro: it focuses on ‘the state’ and its reaction to a perceived loss of control due to social cultural global shifts. This chapter argued that a failure to account for why these broader patterns may vary in different jurisdictions or to draw on empirical enquiry was a weakness of this research, whilst accepting that this is perhaps inevitable in macro level analysis. This was partly addressed by the next section of the chapter which discussed the importance of the configuration of political institutions in determining or at least, heavily influencing, patterns of punishment in different jurisdictions. This took a meso level analysis in that it looks at institutional architecture. However, although this analysis is useful for explaining variation and also how different systems create incentives for certain decisions to be taken, it fails to explain the role of individual action within these institutional constraints. Finally, the literature review took a micro level analysis by looking at how policies may ‘travel’ between jurisdictions. Although this approach takes institutional architecture into account, it also highlights the agency of individual actors and further highlights the serendipitous and often messy process of policy transfer. This analysis takes institutional structure and human agency into account whilst also underlying the serendipitous nature of policy-making and therefore penal change. This analysis shares much with that taken in this thesis, though it will draw on all the ideas discussed throughout this chapter.

Together, the theories discussed above help to shed light on different aspects of penal change and use different explanatory variables. However, I argue that these approaches nonetheless fail to theorise the *processes* of penal change in great detail, though the work on policy transfer comes close. This is especially important as one of the features of change outlined above has been the changing nature of penal policy, both in its content and the way in which it is made, which makes this oversight even more remarkable. This thesis argues that a focus on policy process forms an important means of viewing penal change by highlighting the reasons why policies are created and the factors which may shape them along the way. Furthermore, although the roles of individuals and of serendipity and chance have been mentioned within the literature above, they have not been placed within an overarching framework. Although there has been work on how ‘change from above’ has been resisted by actors ‘on the ground’ (for example Newman and Nutley 2003; Halliday et al. 2009, Gregory 2010) this has not been placed within any theoretical frameworks relating to power. For these reasons, a second literature review which focuses on different theoretical approaches to policy analysis and policy formation is required, which will follow next.

## Chapter Three

### Literature Review 2 – Policy Analysis

Why is policy-making during certain times relatively stable and settled, and during other times is volatile and unpredictable? Which is the more important determinant in how policy is made, people or institutions? How is power exercised in the policy-making process? And why do policies turn out very differently when they are implemented to the way that those who made them, had hoped? These are crucial questions for any research involving policy, and are important for this research which seeks to view penal transformation from the level of policy formulation and implementation. The previous chapter concluded by arguing that the literature on penal transformation could be enhanced by an analysis which included a greater focus on policy processes, and this chapter hopes to address that deficit by providing another set of analytical concepts in order to understand penal change more fully.

As with the previous literature on penal transformation, this following literature review will be necessarily selective, discussing only those issues which are relevant to this thesis. As with the penal transformation literature review, there is no neat way to categorise these theories, but this literature review will group the discussions into theories of *policy analysis*, which make claims about broad determinants of how policy arises, is shaped and is implemented, and then theories of *policy processes*, which make more specific claims about the policy-making process including its implementation. *Policy analysis* will begin with a discussion of ‘power’ in the policy-making process, then go on to discuss institutional theories which place institutions at the centre of analysis, and finally, group and network theories of policy analysis. The chapter will then discuss *policy processes*, firstly, differing accounts for how and why policy is made during times of stability, and then some approaches which explain how policy is made in a more volatile and chaotic manner. Finally, some theoretical approaches to implementation will be examined. Together, these will shed light on the different factors which shape all aspects of policy and which will illuminate different aspects of Scotland’s experience of penal transformation.

### 3.1 Theories of policy analysis

Different theories of policy analysis offer differing accounts for the shape, processes and changes to policy. Some authors use just one approach in their explanation of policy, but more commonly, one approach is dominant while the others assume a lesser role (John 1998:17). The following theories discussed here all provide some analytical use to different aspects of my thesis.

#### 3.1.a *Faces of Power*

This thesis is about what occurs when a new set of power structures are created, thus displacing the existing power structures. The policy process involves politics, compelling groups to act, and the organisation and control of resources, and therefore a discussion about ‘power’ is essential in this context. As Hill argues: ‘the study of policy-making is essentially the study of the exercise of power in the making of policy, and cannot therefore disregard underlying questions about the sources and nature of the power’ (2005:26).

Discussions about power begin with ‘pluralism’ which is the idea that power is widely dispersed throughout society. This is linked to the democratic ideal whereby every citizen has equal participation in contributing to how they are governed (Hill 2005:28). Pluralists point to the important role that interest and pressure groups have in formulating policy, meaning that decisions are no longer taken solely by a self-contained executive. This theory argues that this is the way that politics should work, regarding it as open and democratic. (Lukes 2006:6).

The most famous exponent of this theory is Dahl in his book ‘Who Governs?’ in which he studied local politics in New Haven in the 1960s. He specifically analysed situations in which there was open conflict between groups, and subsequently analysed who ‘won’ in these conflicts (Hill 2005:29). Dahl’s understanding of ‘power’ therefore was: “A has power over B to the extent that he can get B to do something that B would not otherwise do” (Dahl 1957:203). This viewed power as something visible and obvious, and was subsequently criticised for being complacent, inaccurate and for taking too narrow a view of either ‘democracy’ or ‘power’ (Lukes 2006:6)

These criticisms were taken forward by Bachrach and Baratz (1962) who argued against both the pluralist ideas of democracy, but also Dahl's conception of 'power'. They argued there is a 'second face of power', in which power is more than just forcing one party to do something they would not otherwise do, it is also confining decision making to 'safe issues' or 'non-decision making', which is a more subtle agenda setting process (1962:948). They argue that

'power is also exercised when A devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration of only those issues which are comparatively innocuous to A' (ibid).

Hay (2002:185) defined power as 'conduct shaping' and 'context shaping'. 'Conduct shaping' is direct power which is visible and immediate (ibid:186), and 'context shaping' is indirect and mediated by structures. Hay describes context shaping as 'emphasising power relations in which structures, institutions and organisations are shaped by human actions in such a way as to alter the parameters of subsequent action' (ibid:185-6).

This thesis will draw on ideas identified in the second face of power, arguing that with devolution, the new local locus of power was able to exercise its power in not only overt displays of power, but also and more frequently, by more subtle agenda setting processes. Power, of course, does not operate in a vacuum and the following section highlights some of the institutional constraints in which power can be exercised.

### ***3.1.b Institutional Approaches***

Institutional theory examines the way that policy is structurally determined by institutions (usually state institutions such as the legislature, the executive, the civil service etc). Traditional or 'old institutionalism' focused on how state structures influenced political decisions, whereas 'new institutionalism' and its derivative 'historical institutionalism' take a broader understanding of institutions, arguing they are not only formal apparatuses of government and structures which mould and constrain behaviour, but they also incorporate the norms and conventions of behaviour, values and ideologies (John 1998:41-42).

In the new institutionalist derivation, it is argued that state institutions are actors in their own right, rather than simply being an institutional shell that influences and constrains behaviour. As March and Olsen argue:

‘Political democracy depends not only on economic and social conditions but also on the design of political institutions. The bureaucratic agency, the legislative committee, and the appellate court are arenas for contending social forces, but they are also collections of standard operating procedures and structures that define and defend interests. They are political actors in their own right’ (1984:738)

Institutions do not determine policy in a straight causal fashion, rather they act as the parameters which define subsequent action, they establish the ‘rules of the game’. They therefore do allow for human agency, albeit within a structural constraint. Thus, Surel (2000:498) argues that institutions embody ‘cognitive and normative frames’, which ‘construct “mental maps”’ and ‘determine practices and behaviour’. March and Olsen (1984:740) draw on Bachrach and Baratz’s ideas about the different faces of power (see below) and the idea that power is also the ability to exclude certain ideas, making sure they don’t appear on the table in the first place. They argue that ‘rules’ also embody implicit assumptions and exclusions. Constraints can develop within the political institution.

Perhaps of most value to this thesis however, is the contribution made by institutional theory in its account of comparative policy analysis and the differing trajectories of policy, and this analysis shares much with some of those discussed in the previous chapter. This approach is often used in comparative studies, where for example, the effects of the distinction between systems with separated patterns of government and those with unified executives, or between European states with their strong bureaucracies and weak legislature, are examined. In this approach, the effect of institutions on differing policy outcomes can be explored. For example, Weaver and Rockman examined policy-making in the United States in their book ‘Do Institutions Matter’ (1993), in which they contrasted parliamentary systems with strong parties and weak executives, with presidential systems with weak parties and weak executives. They argued that institutions create veto points in different political systems thus giving them considerable power (1993:ch.1). Immergut (1992) also highlights the role of shifting veto points within political systems in her analysis of countries’ differing vulnerability to the influence of lobby groups. She argued that ‘by

making some courses of action more difficult and facilitating others, the institutions redefined the political alternatives and changed the outcome of specific policy conflict' (1992:83).

Historical institutionalism also uses a number of useful concepts. One such concept is 'critical junctures' which explain how policies in different jurisdictions diverged at certain crucial moments sending them on divergent paths. Work using this concept emphasises sequence and timing, political processes are not viewed in isolation, rather the temporal sequencing and interactions influence outcome (Thelen 1999:378). Related to this is the concept of 'punctuated equilibrium', in which institutions are characterised by long periods of stability which are 'punctuated' by external 'shocks'. Following such a moment of punctuated equilibrium, the old institutions break down followed by intense political conflict about the emergent new institutions (Steinmo et al. 1992:15). The concept of 'punctuated equilibrium' is developed further by Kingdon in his agenda setting model (see below). Another useful concept from historical institutionalism is path dependency, which explains how, once set on a certain path, it is difficult to diverge from. In this way, the trajectories of policies are constrained by past trajectories. As Hall and Taylor put it (1996:941) historical institutionalism

'rejects the traditional postulate that the same operative forces will generate the same results everywhere in favour of the view that the effect of such forces will be mediated by the contextual features of a given situation often inherited from the past... institutions are seen as relatively persistent features of the historical landscape and one of the central factors pushing historical development along a set of 'paths'.'

It is clear that some of the literature in the previous penal change chapter draws very heavily on institutional approaches, though mostly on the more 'traditional' version of institutionalism. This analysis will be central to my thesis, along with some of the concepts outlined above from new institutionalism. Although institutionalism does allow for human action within structural constraints, it, along with the discussion of power, above, does not provide an account for the dynamics of action or the importance of actors within the process. This is addressed by the following body of literature.



### *3.1.c Groups, Networks and Communities*

Group, network or policy community theory stresses the importance of the interactions between groups during the policy process. Network theory is the term used most frequently and the one which will be adopted here. The rise of the network approach coincides with, and in some ways is part of, the rise of 'governance' both as an empirical trend and as a theoretical perspective (Cope 2001:2). Governance refers to the way in which states are no longer governed from one place, but from many; policy is not made by government but negotiated within society (Keating 2010:30). There are now many more actors and institutions involved and the old hierarchical Westminster model has been challenged as a result of globalisation, Europeanisation, privatisation and decentralisation (Cope 2001:3). Rhodes argues that governments can now choose between three modes of governing: hierarchies (i.e. the bureaucracy), markets, and networks (1997:47). Therefore, in the context of a shift from 'government' to 'governance', the analysis of groups which cut across different interest groups and who vie for control and influence becomes of central importance.

Network theories view groups as being not only important, but as defining the policy process: policy is primarily about associational relationships. It is networks which formulate policy and set the agenda, they try to influence the legislative and executive direction, they also play part in the decisions about and the process of implementation (John 1998:66). Networks are important because they limit participation in the policy process, they define the roles of actors, they decide which issues will be included and excluded from the policy agenda, they shape the behaviour of actors through the rules of the game, they privilege certain interests, and they substitute private government for public accountability Rhodes (1997:9-10).

In the literature, policy networks are defined both by their structure (which organisations or individuals are included, how exclusive are the groups, how stable are they?), and by their function (the formulation and implementation of policy) (Marin and Mayntz 1991:16), and this division will also be used in this chapter.

Turning firstly to their form and structure: different types of networks have been identified ranging along a continuum from tightly integrated 'policy communities' which have stable and exclusive membership, a high degree of vertical interdependence and a shared responsibility for delivering services. These communities can be diluted with the introduction of new members however, and as

such their membership is highly prized. On the other end of the continuum are 'issue networks' which are loosely integrated, and comprised of an open and shifting group of actors (Rhodes 1997:38). Communities are therefore stronger versions of networks, but they can blend and morph into each other. Similarly, more specific communities will often be 'nested' within larger networks. It has been argued that if unified organised policy communities are allowed to dominate, then the policy agenda will be more organised and stable (Hill 2005:72).

Turning now to networks' function within the policy-making environment, this approach argues that governments and bureaucracies need groups, because they are the repositories of ideas and expertise. They can make policy legitimate, and they also ensure that a policy is implemented to the desired standard. Governments may come into office with grand ideas about policies they wish to implement, but they will be reliant on the knowledge and expertise contained within networks in order to achieve this (John 1998:66).

The state has an interest in fostering networks and communities. Smith (1993:66) identifies four reasons why this is the case: firstly they facilitate a consultative style of government, secondly they reduce conflict by depoliticising policy and make reaching a decision possible, thirdly, they make policy predictable because governments know the groups involved and what they are likely to demand. A policy community will 'routinise relationships' by incorporating all the major interests into a closed world. Fourthly and finally, they fit in with the way that departments are organised in governments, therefore extending the department's ability to exclude other actors who would make the process more difficult. The existence and involvement of networks will also help implementation, and any attempts to sideline networks make the likelihood of policy failure more likely (Smith 1993:53). Groups play an important role in the 'incremental' theory of policy formation (see below), and these theories are good at explaining policy stability, though not so good at explaining change (John 1998:91).

## *Conclusion*

This first section of the chapter discussed theoretical approaches which account for the shape of policy, or, in the case of the first section of the chapter, how 'power' is exercised throughout the policy process. Similar to the theories discussed

in the previous chapter, their explanatory gaze is partial, and thus they compliment each other, each shedding light on a different part of the ‘policy canvass’. Thus, institutional theories help to explain the factors which frame action, and group and network theories explain how interaction takes place within these constraints. Institutional and group approaches both place the primary explanatory factor for the shape of policy in profoundly different places however. This thesis will highlight the role of networks within policy formation and their importance to the policy process, however, it is institutions which provide the most compelling dominant explanatory variable in this thesis.

### **3.2 Theories of Policy Process**

The preceding section of this chapter discussed theoretical approaches which propose an overall model for the way in which policies evolve out of political action. The following section examines some theoretical approaches which claim more modest explanatory powers, those which are specific to the policy-making process. This thesis argues that penal change can be meaningfully studied from the level of policy processes, which, as argued in the previous chapter, is largely absent from the literature on penal change. Therefore, the following body of literature was found to be extremely useful in this thesis.

The theoretical approach to policy process has emerged out of a debate between ‘top-down’ theorists, who view policy in a sequential and ordered manner, and ‘bottom-up’ theorists who view policy-making as more haphazard, in which policy is shaped and re-shaped in an iterative process in line with local circumstances (Newman, 2002:348).

#### ***3.2.a Rational, Stable and Incremental Policy-Making***

Early accounts of how policy were made was dominated by the rational model, associated with Herbert Simon writing in the 1950s, who argued that policy is made in a sequential way, in which decisions are taken which are ‘conducive to the overall aims and goals of the organisation’ (Simon 1957, quoted in Hill 2005:146). However, although this is the way that many people may like policy-making to be, in practice it is rarely the case. Policy is rarely made in such a sequential and rational

manner, it is almost impossible to know and consider all the alternatives during formulation of policy, and to evaluate all the uncertainties. Furthermore, it avoids the issue of whose values should be taken into account in the policy-making process and it is impossible to separate facts from values (Hogwood and Gunn 1984:48). Furthermore, this account emphasises the role of the individual rather than describe a complex interactive process out of which policy tends to emerge. The desire to understand policy emerging out of interaction led to the emergence of the 'incremental approach' in the 1960s and 1970s.

This approach is associated with Lindblom, who argued that policy-making is not rational, rather it is unplanned, disjointed and incremental; it is, as he memorably called it 'muddling through' (1959:79). He argued that policy makers avoid thinking through or spelling out their objectives, because they are aware that this may precipitate conflict and provide a standard against which they are judged. Policy makers will tend to make smaller incremental changes, rather than ones which are wholesale and sweeping, in a manner which suggests caution not risk. Policy is made not by a central co-ordinator, rather it emerges out of the interaction between different independent decision makers who adjust their desired outcome through bargaining, negotiation and compromise in a process termed 'partisan mutual adjustment'. In this way, decision makers adjust to the situation around them, actors act in a way they know will enlist a desired response from the other decision maker. Although it need not be so, 'partisan mutual adjustment' tends to produce a slow rate of change. Because value is placed upon consensus, what emerges is not necessarily the best policy, rather it is the one that most groups will agree upon. In this approach, decision making proceeds in limited and incremental steps, and facts, values, means and ends are not differentiated because decisions are taken on all of them (Hogwood and Gunn 1984:52-53).

John (1991:35) claimed that this approach describes policy-making in most systems throughout the world, although he acknowledged that it does not account for why some policies are chosen at one time and not another. Although the incremental account is a beneficial development of the rational account in that it accepts the 'muddled' nature of policy formation, it fails to offer an explanation for when policy changes. As Hill argues: "the rational / incremental debate is beside the point when it is party-political commitment or ideology rather than either rational planning or 'partisan mutual adjustment' that drives the policy debate" (2005:152). As such, the

incremental account may offer a useful analysis for how and why policy is made during periods of stability, but not for periods of rapid change.

### *3.2.b Chaotic and Messy Policy-Making*

If the discussions above portrayed policy-making as stable and with at least a modicum of organisational rationale (however limited, as in the incremental model), then later work emerged which seriously challenged these assumptions

In a paper in 1972, Cohen, March and Olsen argue that organisations operate a ‘Garbage Can’ method of decision making. This model assumes that problems, solutions, decision makers, and choice opportunities are separate streams running through a system. When these streams come is a matter of sequence only, solutions are linked with problems only because they arrived at the same time. Their theory therefore argues that problems and solutions are not reached by any linear way. As they say:

‘an organization is a collection of choices looking for problems, issues and feelings looking for decision situations in which they might be aired, solutions looking for issues to which they might be the answer, and decision makers looking for work.’ (1972:2)

This model was developed further by John Kingdon in his influential book first published in 1984, ‘Agendas, Alternatives, and Public Policies’ (1995). He identified three ‘streams’ running through policy at any one time: problems, politics, and policies. These all operate autonomously from each other, each developing according to its own dynamics and rules. However, at certain critical moments they come together allowing for the greatest changes to occur (1995:19).

‘Problems’ may be brought to the attention of people in and around government by systemic indicators (relevant examples may include levels of reoffending or the prison population, although of course the definition of these indicators is rarely a neutral decision). Problems may also be brought to the attention of policy makers by ‘focusing events’ (such as disasters or crisis) or from ‘feedback’ from existing policies (when an existing policy has not been implemented as it should, or a programme that has not met its stated goals) (ibid: 90-103).

'Policies' come from the accumulation of knowledge amongst specialists, a new policy 'fad', or the emergence of new technologies which make new policies possible (ibid:17). Policies float around in the 'primeval soup' and whether they are successfully joined to politics or problems often depends largely on the presence of 'policy entrepreneurs' (ibid:134-4). Policy is seen as chaotic and unpredictable, and the generation of policy proposals is described as similar to a process of biological natural selection. There is a policy 'primeval soup' in which only some ideas that 'float around' are developed and become successful.

The third and final 'stream' is 'politics' which in Kingdon's definition refers to electoral, partisan or pressure group factors (ibid:145). This includes swings in public mood (swing to the right/ left, anti government sentiment, etc.), and political elites, pressure or interest group support, or a lack of opposition. He argues that a change in administration is a key variable in influencing the policy agenda (ibid:145-164).

Kingdon acknowledges that slower and more gradual change can occur through action in just one of the streams (and he acknowledges that the incremental account of policy-making does offer a plausible explanation for periods of stability, 1995:79). However, the greatest changes are possible when 'policy windows' are opened and the three streams become joined. Policy windows are opened either by compelling problems or by events in the political stream (though he argues that probably the biggest cause in the opening of a policy window is a change in administration (ibid:168)). Windows come and go; they may open briefly and then close again.

'Agendas' are therefore established by problems and politics and 'alternatives' are proposed by policies. His analysis allows for the distinction to be made between problems and policies. Previous accounts of policy-making saw policies constructed in order to address problems, but we know of course that problems are themselves socially constructed (Hill, 2005:154). He therefore argues that there may be policies which are searching for problems, and he identifies 'policy entrepreneurs' who are like 'surfers waiting for the big wave' of problems and a political desire to do something about them, that they can pin their policies to (Kingdon 1995:179). He also identifies 'feedback' from existing policies and 'spillovers' which may impact future decision. Hill argues (2005:154) that feedback

and spillovers may go some way to explaining what seem initially seem like incremental changes which then go on to have major consequences.

Kingdon borrows a number of concepts from institutional approaches, but paints a picture in which policy-making is very much less institutionally determined. He does draw on some institutionalist ideas, for example recognising that older ideas impact on current ideas, with 'feedback' and 'spillovers', and he also draws on ideas of 'punctuated equilibrium' with his descriptions of 'critical moments' in which policy windows open and rapid change can occur. John argues that the approach offered by Kingdon is "as close to an adequate theory of public policy as has been surveyed in [his] book" (1995:173) and his theories will emerge throughout this thesis.

### *3.2.c Implementation: Top-Down or Bottom-Up?*

The literature reviewed so far has been about policy *formation* which forms only half of the picture, as the way in which policy is *implemented* is arguably as important to its overall eventual shape as the manner in which it was initially made. There has, however, been much less written about policy implementation than formulation, partly because it was initially assumed that it was carried out in an unproblematic and neutral way by administrators (Hill 2005:175).

It is firstly necessary to state that the argument has been forcefully and persuasively made over recent years that it is false to paint a clear cut division between 'policy formation' and 'policy implementation'. This stems from a critique of the rational sequential model of policy-making in which policy progresses through a number of distinct and relatively unconnected stages. As mentioned above in relation to the rational model of policy formation, this is rarely the case, and policy often proceeds in a more haphazard and continuous manner. As John says: 'there is no beginning, middle, and end to public policy; for the most part, there is only the middle' (1998: 26). Despite this, policy formulation and implementation are written about as being distinct in most books about policy analysis perhaps aided by the fact that policy makers themselves make this distinction (Hill 2005:175).

This debate has led to a division within implementation analysis between those who are 'top-down' and those who are 'bottom-up'. Top-down implementation analysis is more routed in the 'stages' model, it tends to view implementation from

the view of those involved in its formulation rather than those involved in its implementation, and this approach will tend to focus on the factors which get in the way of a policy delivering its intended outcomes. Bottom-up theorists however, view formulation and implementation as an iterative process and therefore resist placing 'implementation' in a distinct category (Newman 2002:348).

John argues strongly against the 'top-down' approach to implementation analysis, though he actually regards the analysis of 'implementation' as a distinct field as flawed, arguing that policy-making, including implementation, should be viewed in the round (1998:30). He argues that it is not always possible to specify clear relationships between policy intentions and outcomes, and that there is often no clear sequence in decision making as policy problems and their solutions are reconsidered over time. Decision makers may not want to have detailed control over implementation and they may not have devised clear outcomes at the outset. Lower-level bureaucrats have a role in deciding policy outcomes and policy may 'drift' as intentions change. (1998:29).

However, there are pragmatic reasons for the division between 'policy formation' and 'policy implementation'. First of all, this division is reflected in the organisational and institutional process of policy, the tasks are frequently given to different people, organisations and departments, and secondly, it imposes a sense of order on the research process. As will be demonstrated throughout my findings chapters (which are indeed categorised into 'formulation' and 'implementation'), formulation very much continued into the implementation stage and latter actors played a large part in shaping earlier intentions. Therefore, although adopting the 'formulation', 'implementation' division for sake of organising this research, it is recognised that the two phases overlap and influence each other.

Furthermore, the 'top-down' approach, as John himself also acknowledged, *can* be useful in situations in which there is a clearly identifiable 'beginning' and 'end' to policy and if the policy-makers identified clear objectives (ibid:30). Although this may be rare in the 'real world' of policy in action, this approach suits this thesis very well, as my case study is clearly bookended by the announcement which precipitated the creation of a particular piece of legislation, with the interviews with those who were implementing it three years after it was enacted (although it could be argued that this was not the 'end' of the policy, rather the 'point' at which I was measuring the policy until, and the policy will have continued beyond it and be



recreated by all participants as I write). However, this ‘end point’ of autumn 2009, no matter how artificial, formed a useful heuristic device, allowing me to analyse the policy up until that point. Furthermore, there were a very clear set of objectives set by the Minister at the time against which progress could be monitored. For this reason, this thesis adopts more of a top-down approach in that it views the processes which prevented this policy from being implemented as the original decision makers intended. But it also recognises that formulation continued throughout the implementation stage and that the policy continued to be shaped by the continual interaction between the key players during these stages. This is consistent with an approach that attempts to move beyond the top-down/ bottom-up divide, it is clearly not difficult to recognise that implementation will involve elements of both. As Hill (2005:185) puts it:

‘the issue for discussion about ways to move beyond the top-down/ bottom-up divide is about recognising that there will be various ways in which actors will attempt to exercise prior control over the implementation process. The concern is with the variety of issues about the extent to which actors impose rules over others. The other side of this is about how discretion is structured, about how easily actors can exercise autonomy [and] in the last analysis there are questions about hierarchies and their legitimacy.’

### *3.2.d Some Implementation Theory*

One of the earliest examples of implementation analysis was taken by Pressman and Wildavsky in their book ‘Implementation’. Adopting a top-down approach, they sought to understand why there might be an ‘implementation deficit’ in the way that federal programmes are implemented across different states in the United States. They created a model in which there are different stages in an implementation chain, and with each stage of this process the likelihood of the policy being carried out according to the wishes of the policy maker decreases. If co-operation between all the links in the process is not absolute, then small deficits will cumulate to form larger ‘implementation deficits’ (Pressman and Wildavsky 1973:147).

Hood (1976) also developed a model based on the ideas of cumulative deficit if there is not perfect co-operation. He defined ‘perfect administration’ as

being a 'condition in which 'external' elements of resource availability and political acceptability combine with 'administration' to produce perfect policy implementation' (1976:6).

A similarly top-down approach was adopted by Hogwood and Gunn, who formulated a range of recommendations to policy makers about how to achieve 'perfect' implementation. These included recommendations such as that there needs to be a single implementation agency that is not reliant on other agencies, and that there is complete agreement about the objectives to be achieved, and that those in authority are able to demand 'perfect obedience' (1984:206).

Authors working from a bottom-up approach stress the importance of the activity of those carrying out the implementation. A paradigm of this approach is Lipsky's 'street level bureaucracy', his term for front line policy delivery staff. He argued that these staff adopt practices and routines to help them cope with the pressures they face, and that these practices and routines 'effectively become the public policies they carry out' (1980:xii). Adopting a similar approach, Barret and Fudge (1981) argue that implementation should be seen as a 'policy/ action continuum', in which much depends on the compromises between actors in different organisations. They conceptualise policy as 'property', ownership of which is contested. They argue that policy will not be constant, 'it will be mediated by actors who may be operating with different assumptive worlds from those formulating the policy, and, inevitably, it undergoes interpretation and modification, and in some cases, subversion' (1981:251).

Hill attempts to bridge the top-down/ bottom-up divide by developing a 'policy rule framework', which refers to the rules that policies contain once they are passed out of the legislative process. When these rules are clear then the identification of deficits are easier to manage (2005:187). These can be contrasted with other examples where there has been a much more complex relationship between rule structures and their interpretation. There are examples of policies in which practitioners are told to proceed on a 'trial and error' basis, and to report back to the policy makers in the process of implementation as rules became more and more stabilised. In this instance, the formulators and the implementers make it up between themselves (ibid:190).

Regardless of whether implementation theories are top-down or bottom-up all the theories listed above provide useful ways to think about implementation. Top-

down approaches alert analysts to the different factors which may ‘get in the way’ of ‘perfect’ implementation, i.e. if there are too many ‘links in the chain’, or if the rules for implementation are not clearly defined at the outset, or the authority of those in command is questioned. Bottom-up approaches show how those implementing the policy will shape and determine it, depending on the constraints they are under and the different ‘assumptive worlds’ they may inhabit. Both approaches will illuminate aspects of my thesis.

### *Conclusion*

This section made the distinction between policy-making which was slow and stable and policy-making which was messy and chaotic. This thesis argues that policy-making in Scotland moved from a stable and incremental model to one that was fast changing and volatile, and arguably, then back again to something more stable. The analytical concepts discussed above will be central to explaining these changes, especially Kingdon’s three streams framework. These concepts therefore form a very valuable addition to the literature on penal change. Finally, implementation was looked at, arguing that an approach which analyses how and why policy was not implemented in the way intended by the original policy makers, can still be consistent with an approach which views this process from the view of those who are ‘doing’ the implementing.

### **Conclusion**

This chapter has discussed another set of concepts which help with the analysis in this thesis; they also help to explain the factors which precipitate and shape policy change or how policy stays stable, and thus form another way of viewing penal change. It was argued in the previous chapter that that the literature on penal change could be greatly enhanced by including more analysis of policy processes and this chapter has provided these concepts. This thesis hopes to demonstrate the value of both groups of literature in the analysis of the factors which lead to, shape and resist, penal change.

This chapter began by looking at theories of policy analysis, which provide broad explanations for the factors which shape all aspects of policy. This thesis will

show how the new set of power structures created with devolution exercised power in manner suggested by the ‘second face of power’, as well as through the more ‘obvious’ manifestations of power. This chapter then discussed institutional theories, which argue that the primary explanatory variable in how policy arises and is shaped is the structure and function of state institutions. The ‘political institutional approaches’ part of the penal change literature review borrows heavily from this group of theories, though this chapter also included a discussion of some useful concepts from historical institutionalism, often used in comparative policy research, which will provide some analytical hooks in this thesis. Group and network approaches were then discussed, which argue that it is the function of groups which is the most important determinant of policy. The operation of key groups within the criminal justice policy world in Scotland, and particularly how they contribute towards policy stability and how they manage to make policy in ‘deadlock’ situations, will be explained by these approaches.

This chapter then went on to discuss theories of policy process, which deal more with the specifics of the policy-making process. It firstly spoke about rational, stable and incremental theories of policy formation, arguing that the incremental approach provides a good explanation for policy-making during periods of stability, which will have some resonance for my explanation of policy-making in Scotland prior to devolution. It then went on to talk about chaotic and messy policy-making, arguing that Kingdon’s three streams approach provides an extremely useful conceptual framework for understanding how and why policy changes and especially when it changes rapidly. It then concluded with a discussion of some theories of policy implementation, arguing that, although policy ‘formulation’ and ‘implementation’ clearly overlap and run into each other, for the sake of analytical clarity they will be discussed separately in this thesis. The top-down approach is mostly adopted in this thesis, because it is examining how and why an ‘implementation gap’ emerged in my case study, however, it views this process very much from the perspective of those who are ‘doing’ the implementing, thus also sharing much with the ‘bottom-up’ approach.

Together, these theories explain different aspects of my thesis and complement the theories of penal change outlined in the previous chapter. They will be returned to throughout this thesis.

These last two chapters have provided the theoretical underpinning for the rest of the thesis, and we now move on to begin to look more specifically at the case study which forms the basis for this research. Before launching into the findings from primary research however, it is necessary to have a brief chapter to provide the context in which the case study is situated in order that it is understood in the round. The following chapter will therefore provide contextual information on two separate issues: firstly and primarily, on what the literature says about Scottish criminal justice and how it changed with devolution, and secondly, and more briefly, about how policy was evolving in England and Wales during the same period of time.

## **Chapter Four - Context**

### **Scottish Criminal Justice and New Labour in England and Wales**

A story makes more sense when the background is understood and this chapter seeks to provide some context for the findings from my case study. Much has been written about the ‘Scottish approach’ to criminal justice, both prior to and post devolution, which has spanned not only descriptive accounts of different component institutions but also discussions about its ‘nature’, whether it is distinctive, and the different reasons this might be. There has also been scholarship about devolution and its effect on criminal justice, which has offered differing explanations for why and how it changed policy and practice. It is this latter body of literature that this thesis hopes to contribute to, drawing on the theory outlined in the previous two chapters. This context chapter will therefore give an overview of the existing literature on Scottish criminal justice, both prior to and following devolution, which will provide the context from which my research questions arose.

There is another necessary component of context for this thesis, however, and that is a description of the New Labour project which was developing in England and Wales around the same time, a variant of which also dominated the early days of Scottish devolution. This discussion will set the scene for demonstrating how similar political agendas played out in different ways in different jurisdictions throughout the rest of the thesis.

The main part of this chapter, however, is devoted to a discussion about Scottish criminal justice. This will firstly discuss the existing literature on penal transformation in Scotland, including a discussion on the different explanations for these changes (or lack of them). It will then discuss what the existing literature says about devolution’s effect on criminal justice and some of the different explanations given for why it changed in the way that it did. The last part of the chapter will discuss the emergence of New Labour’s brand of justice policies, paying particular attention to their ‘managerial revolution’ and offender management reforms. We begin, however, with penal change in Scotland.

## 4.1 Penal Transformation in Scotland

This research is located within the broader literature on penal transformation, which was discussed in detail in chapter two. This research seeks to understand how penal transformation occurred in Scotland, and believes that looking at this particular example will shed light not only on the Scottish case, but it will also highlight broader issues about what causes and resists penal transformation in general. In order to scrutinise arguments about penal change in Scotland, it is firstly necessary to analysis what is known about the nature of criminal justice in Scotland, both prior to, and following change.

### *4.1.a Overview of Scottish Criminal Justice*

The literature contends that there is a distinctive Scottish approach to criminal justice (see Croall 2005, 2006; Garland 1999; McAra 1999, 2007, 2008; Young 1999), though it would be wrong to say the whole system is unique (Young 1997:4). These differences lie not only in institutional structures, but also in a unique ‘criminal justice culture’ (Duff and Hutton 1999:1). Scotland’s distinct criminal justice system emerged a consequence of Scotland retaining its own legal system (along with its own education system and church) following the Union with Scotland Act (1707), in which the formally independent Scotland joined with England and Wales to form the United Kingdom. The decision that Scotland should retain its own legal system in 1707 reflected the fact that Scotland had a distinctive legal system and set of legal institutions which had developed independently of England and Wales (Young 1997:5). In the nearly 300 years between the Act of the Union and devolution, Scotland’s legal institutions operated independently with different structures and practices, although during this time all laws relating to Scotland were made by the UK Government in Westminster. A number of key institutions, namely CJSW who carry out community services, and the Children’s Hearing System which deals with young people who offend, embody a unique approach which it is claimed exemplifies a particularly Scottish way of ‘doing’ criminal justice which is more aligned along welfarist values (McAra 1999, 2005, 2007, 2008). However, this claim has recently been challenged by authors who argue that a ‘broader evidential base is required’, highlighting that Scotland’s persistently high rate of imprisonment hardly indicates a

more ‘welfarist approach’ to criminal justice (Munro et al. 2010:266). There is an interesting discussion to be had about the ‘welfarist’ (or not), nature of Scottish criminal justice, but it must be put to one side as it is questions of penal change in Scotland which are more important to this thesis.

#### *4.1.b Change in Scottish Criminal Justice*

The literature contends that Scotland managed to withstand many of the pressures for change which permeated many other western jurisdictions, most notably England and Wales until at least the mid 1990s (McAra 1999, 2005, 2007, 2008; 2006 in relation to youth justice; McNeil and Robinson 2004 in relation to CJSW; and Tata 2010 in relation to sentencing). As will be discussed below and indeed throughout this thesis, these changes occurred rapidly with devolution; however, the evidence shows that devolution merely escalated a process which was already underway when it occurred.

For example, there had been a marked increase in managerial discourse and practices in the police, in CJSW and the prison service, with a move towards ‘outputs’ rather than ‘outcomes’, and a reliance on targets and key performance indicators (Duff and Hutton 1999:5). McNeill (2005:34) noted a shift towards public protectionism in criminal justice social work during the 1990s, and McAra (1999:364, 2005:290) also noted a sharp increase in managerialism, although she argued that this only existed in order to ‘facilitate’ the delivery of welfare practices. In the case of the Children’s Hearings System, the existing tension of welfare and public protection had begun to swing back towards a greater emphasis on public protection, although McAra argued that this had not superseded the welfarist approach (ibid:288). On the eve of devolution however, the effects of these changes still appeared relatively limited. Duff and Hutton argue that there was relatively little evidence for populist punitiveness in Scotland, although this should be recognised alongside the rising prison population occurring at a time of decreasing levels of crime (1999:7; see also Cavadino and Dignan 2006:231). McAra (1999, 2005) in particular, argued that welfarism continued to be firmly embedded in Scottish criminal justice practices.

Although relatively immune from politics prior to devolution, during the dying days of the Conservative Government, the Crime and Punishment (Scotland) Act 1997 was passed in Westminster, following on from two years of a relatively hard



line Scottish Secretary, Michael Forsyth (McAra 1999:371). This legislation sought to toughen a number of community penalties and also introduce a life sentence for a second serious, sexual, or violent offence (the so called 'two strikes' policy). This legislation was as close to punitive populism as Scotland had so far come, although McAra argues that once you moved beyond the headlines of the legislation, it had potential to continue to promote many of the penal welfare strategies that were embedded in Scotland (ibid).

Thus changes to the system began during the mid 1990s, in the shape of increased managerialism, and an increasing concern about public safety at the expense of the welfarist tradition of the system previously. Although there was relatively little evidence for populist punitiveness, on the eve of devolution the UK Government passed a piece of Scottish legislation which had definite populist overtones. Overall however, Scotland had managed to withstand the pressures for change to a much greater extent than the English system (which will be expanded on in the latter part of this chapter).

#### *4.1.c Different Explanations for Resistance to Change*

If it is true that Scotland managed to withstand many of the pressures for change, then why might this be? McAra argued that one reason why Scotland was relatively immune from the changes happening elsewhere is because of the administrative 'gap' created by Scotland being run by civil servants in the Scottish Office (a department of the UK Government), effectively at arms length from the Government in Westminster (2005:293). Indeed, Scotland had such a high degree of independence over criminal justice it operated much as a 'quasi state' during this time (2008:493). This governance 'gap' provided the opportunity for networks comprised of civil servants and senior representatives from agencies, to effectively make policy together, behind closed doors (2005:293, 2007:106). Keating also argued that in a number of key policy domains, notably law and education, a distinctive civil society and network of policy elites operated in this time (2010:19,27), arguing that 'Scotland was governed by an elite, albeit an enlightened one' (ibid:28). The Scottish Office operated with relative autonomy, although this began to be challenged under the Thatcher years (ibid:24,27), and policy networks were able to mould their own institutions (even if not change them through executive authority) to tailor a

distinctive policy delivery (ibid:91). The small geographical size of Scotland also meant that it was easier to sustain networks which are more likely to share ‘cross institutional working cultures’ which contribute towards overall policy coherence (McAra 2005:293). McAra argues further that weak governments rely more strongly on networks for policy formulation and especially in order to achieve effective implementation, and in the decades running up to devolution, the established policy networks were able to exert their authority over the direction of policy (ibid).

McAra argues that the second reason that Scotland was able to preserve a distinctive approach is because of the existence and role of Scottish ‘civic culture’ (1999:378, 2005:294, 2007:125, 2008:493). She argued that this culture stems partly from the democratic traditions of institutions such as the Church and education, which, like the legal and justice system, have become the ‘cultural carriers’ of Scottish identity (2005:294). This culture also stems from a strong socialist tradition, which became entrenched in Scotland throughout the 20<sup>th</sup> Century, especially at a local government level. This Scottish identity was further bolstered by the disjuncture between the politics of Scotland and England which increased during the Thatcher and Major years, leading to a rise in Scottish identity which was based on being ‘other to England’ (2007:125, 2008:493). Taken together, these factors have contributed to the creation of a civic culture which ‘valorises community, public provision of welfare and mutual support’ (2005:294), and which became inextricably linked to broader Scottish identity. This culture provided a ‘conceptual locus’ and ‘cultural anchorage’ (2007:125; 2008:498), in which penal welfare values could flourish.

In painting a picture of Scottish civic culture as being supportive and inclusive, McAra was aware that this may jar with some of the social realities that exist in Scotland. She argued that although there has been increased polarisation and social fragmentation linked with the structural socio economic changes of late modernity, the existence of Scotland’s civic culture continues to operate on an ideological level (1999: 377, 2005:294). She acknowledged that there is a ‘strain’ between the civic culture which exists on an ideological level and the economic and social reality of Scotland, and acknowledged that at some point this strain may become too great to be sustained. However, in the short term this would be mitigated by the post-devolution institutional arrangements which may support and strengthen the civic culture because it became aligned with identity politics (2005:ibid).

As we have seen above, some authors disagreed with McAra over her claim that Scottish criminal justice is more welfarist though they recognised that some institutions are unique. It therefore follows that the same authors also disagree with some of the reasons cited by McAra that the system has managed to withstand change. Although they do not comment on the existence of networks, they disagree with the notion that Scottish culture is based upon more egalitarian socially democratic values and therefore that this culture would provide ‘anchorage’ for more penal welfare policies in the face of pressures for change. In supporting their argument, they highlight similar evidence to that was heralded against the ‘Scottish criminal justice as welfarist’ arguments outlined earlier, namely, the high rate of imprisonment, the material effects of Thatcherism, and the social divisions which still mark the country (Munro et al. 2010:267).

Perhaps the opinions of McAra and Munro et al. are not as opposed as they initially seem. McAra does also recognise the social inequalities that exist in Scotland and changes brought with the economic and social changes since the 1970s. Her argument, however, is that Scottish civic culture operates at an ideological level rather than a material level, it exists in the minds of key decision makers, and this ideology then replicates itself within institutions. She also acknowledged that there is a strain between this ideology and the social and economic reality and that at some point this may become unsustainable.

Although Munro et al. (2010) do not agree with McAra about the extent and nature of past welfarism in Scottish criminal justice, and therefore that this could be a factor which withstands change, they do agree that Scottish criminal justice prior to devolution was different from other jurisdictions and that it had managed somehow to withstand change. Their explanation is much more simple, however, arguing that it was a ‘conservatism of neglect’ (ibid:269) rather than any progressive penal values which accounted for distinctive pre-devolution policies. They argued that there was a democratic deficit in the governance of criminal justice prior to devolution which meant that policy-making was ‘restrained and contained’. Prior to devolution, there was not enough time in Westminster for Scottish policies and the distance (geographically and politically) meant there was little scope for innovation and public scrutiny (ibid). It was the absence of democratic structures and democratic scrutiny which accounted for criminal justice policy pre-devolution, not the existence of welfarist values.

#### *4.1.d Devolution and Criminal Justice*

As we can see from the discussion above, much of the literature argues that changes to several key Scottish criminal institutions began in the mid 1990s. These changes took the form of managerialism in particular, but also the ascendancy of public protection discourses, and in the days just before devolution the first signs of popular punitivism. Even at this early stage, these developments were viewed as an incursion into the Scottish approach to criminal justice and there was hope that the creation of the Scottish Parliament would allow Scotland to regain its distinctive style of policy once again. As Garland (1999:xiv-xv) notes:

‘One of the major arguments for political ‘devolution’ and for the Scottish Parliament that will be established in the very near future, was that Scotland had need of its own political forum and legislature in which its distinctive voices could be directly expressed and its own policies controlled. It will be interesting to see whether this will further widen the gap between Scottish criminal justice and that of the rest of the UK.’

However, five or six years into devolution, authors began publishing accounts of developments in different justice institutions which painted a different story from the tentative optimism expressed by Garland above. Croall argued that Scottish criminal justice had undergone profound changes accompanied by a more punitive discourse. Institutions were ‘modernised’, a range of new agencies were established, and controversial pieces of legislation were passed, particularly the Antisocial Behaviour Act (2005:177). McAra also noted what she calls ‘hyper institutionalisation’, with estimates of approximately 100 new institutions created, many with overlapping competencies and overlapping boundaries (2008:494). McAra argued further that although many of these institutions were created in order to nominally enhance local powers, they actually functioned to significantly increase ministerial control (2007:109-110). The tension between localism and central control has led to the creation of complex bureaucratic structures for planning and delivering with little attention paid to how conflicts between the two would be addressed. She also noted (ibid) an increase in central control with a significant increase in national strategies for various areas of the justice system, with a myriad of national targets established which organisations must work towards. The extent of the pace of developments has led to the existence of a complex and often contradictory range of

practices and rationales of the system, which are ‘variously punitive, incapacitative, managerialist and restorative in orientation, as well as retaining some of the vestiges of older style welfarism’ (McAra 2007:108). This led to what McAra has termed ‘welfarism in crisis’ (2007). Croall argued that although at that point there were concerns that Scotland’s welfarist approach was under threat, Scotland continued to operate along more welfarist lines than the rest of the UK, and that the ‘strong Scottish criminal justice culture’ would not disappear over night (2005:193).

Within in juvenile justice, McAra (2004:32) argued that, although many of the same institutions remained, the ethos and ideology of the system had changed, and the system had now become underpinned by similar themes to those of the system in England and Wales. There was an increase in managerialism and accountability, new structures were created and ambitious and unrealistic targets set. McAra (ibid) also noted a shift in the underlying ethos of the service towards one of public protection, a shift away from a focus on the ‘needs’ of the young people towards their ‘deeds’ and the introduction of a range of ‘fast track’ hearings. The Minister reaffirmed this shift by stating that “punishment was now a key part of the youth justice process” (McAra, 2004:34). There was also a rise in contradictory messages, with the introduction of measures aimed both at social inclusion, such as the promotion of activities to divert vulnerable young people away from offending, at the same time as policies which were clearly exclusionary in nature, such as the extension of ASBOs to the under 16s. She also noted the Executive’s failure to act over the age of responsibility and an increase in the responsabilisation of offenders and their parents.

McAra argued (2007:111) that the Executive created a moral panic of youth crime and antisocial behaviour, and Croall (2006:599) argued that the elision of the antisocial behaviour agenda with the youth justice agenda represented a high moment of penal populism in Scotland. Indeed, juvenile justice can be regarded as the most politicised area of justice policies following devolution, and McAra argued that the political ‘heat’ in these areas was probably responsible for a sharp rise in the public perception of rising levels of youth crime in the face of limited evidence during the years of 1999 to 2005 (McAra, 2008:486).

CJSW also underwent changes during the first years of devolution, with a wholesale attempt at merging the service together with the prison service to form a ‘single correctional agency’, which was clearly an attempt to move the service in a correctional direction (McNeil 2004:425). There were calls for increased

accountability and reform of the service, with the First Minister repeatedly saying that the status quo was no longer an option (McConnell, 2003:11). However, as McNeil (2004:426) points out, although there was a renewed determination to put the responsibility of the offender back into the centre of policy, there was a continued commitment, if rather more quietly stated, towards inclusion and reintegration. He also noted that unlike in England and Wales, CJSW in Scotland continued to be viewed as a means of reducing the prison population (McNeill and Robinson 2004:283).

Less has been written about devolution's effect on the prison service, perhaps because it is an arm's length government organisation and is regarded as having little scope for developing policy beyond 'containing' those who are sent to them. This was not an inconsiderable task in the years following devolution, given the rapid rise in its population during this time: in the nine years between 1999 and 2008, the prison population increased from 6,000 to 7,800, a rise of 30% (Scottish Government 2011:1). By 2004/05, there was growing disquiet about the new highs of the prison population with offences more likely to attract a custodial sentence and custodial sentences being longer than previously, a trend which was not connected to the seriousness of the crimes appearing before the courts (SCCCJ 2006:9). Particularly concerning was the exponential rise in the female prisoner population, which almost doubled between 2000 and 2010 despite political declarations attempting to reduce it (Tombs and Piacentini, 2010: 246). All together, since devolution the service has had to cope with new levels of overcrowding bringing the service under heavy pressure. As the Chief Inspector of Prisons for Scotland wrote in 2006 'Nothing has been more frustrating in the writing of annual reports in 2003, 2004, 2005 and now 2006 than finding new ways to express the damage done to Scotland's prisons by overcrowding'(HMCIPS 2006:1). There was also controversy over the service's plans to significantly increase the use of private providers in the system. Under plans brought forward in 2006 to build a second private prison in Scotland (the first one opened just before devolution, in early 1999), Scotland would, by 2009, have more than 20% of all its prisoners in private prisons. This would be highest level of any country in the world and continued to be of significant controversy (Tombs and Piacentini, 2010:248). In 2003 the service which transported prisoners between courts and prisons was also privatised. However, the prison service continued to maintain a

commitment towards the rehabilitation and social inclusion of its prisoners, albeit through a managerialist ethos (Croall 2006:596).

Turning finally to courts, in a comprehensive study of sentencing trends and patterns since devolution, Tata found that the traditional ‘due process’ model, whereby a defendant is presumed innocent until proven guilty, has been under a degree of pressure to yield to demands for greater efficiency, although the results have meshed with existing practices in interesting ways which may run counter to increased efficiency (2010:211-212). Furthermore, although there has been an increase of risk discourses into sentencing (specifically into pre-sentencing reports) on a law and policy level, this has not resulted in a wholesale shift away from the welfare model, rather a rather complex hybridised system has been implemented on the ground. Finally, attempts to curtail sentencing discretion began before devolution, although this was very limited in its potential, only providing additional information to the judiciary with no compulsion to act on it. Following devolution, both administrations have sought to introduce measures to curtail discretion in some way, either through punitive measures (mandatory minimum sentences), or through penal reductionist measures (presumption against custodial sentences of three months). However, these have been limited in their capacity because of the judiciary’s ability to mobilise its dissatisfaction (ibid:208-211).

We can see therefore, that in the areas of CJSW and juvenile justice in particular, the impact of devolution seems to have resulted in a sharply politicised arena with an often populist agenda. The changes in the prison service were less populist and more managerialist in the shape of increased private involvement, and in the case of sentencing, new pressures for increased efficiency and reduced discretion have had limited success.

#### *4.1.e Why Did Devolution Lead to Change?*

Croall blames the trends outlined above on the failure of the Scottish Executive to depart from the ‘Blair orthodoxy’ of New Labour (2006:592) highlighting the similarities between the developments in the two jurisdictions, and McAra also argued that these developments were a product of the failure of the Executive to depart from the New Labour law and order agenda in England and Wales (2007:108) (see also Keating and Cairney 2009:38-39, Keating 2010:42). All in all,

the literature argues that the first eight years of the new Parliament represented a period of convergence with policy in England and Wales, leading to what McAra memorably termed a period of ‘detartanisation’ (2008:494).

But can these developments be ascribed solely to policy transfer aided by the fact that there were the same administrations in charge north and south of the border (albeit in coalition in Scotland)? McAra (2007:125, 2008:493) argued that there have also been other more profound reasons. She argued that Scottish culture, which prior to devolution was based partly on an ‘other to England’ sentiment in the context of political polarisation between the two jurisdictions, weakened in the post-devolution years. Now that Scotland had its own parliament, there might be less reason to create policies which were so strongly ‘not English’. Scottish civic culture which ‘valorised public provision’ may have gone into a period of drift, thus weakening the cultural anchorage enabled by previous welfare institutions.

Secondly, the new forms of governance have resulted in a weakening of existing networks which, prior to devolution, were able to exert such strong control over policy. They have struggled to make their voices heard in the new managerial structures, which have increased political control, and their input has been subordinated to one of giving advice rather than exerting control (2007:116, 2008:494). McAra notes that it is unclear whether the weakening of the networks was a deliberate ploy on the part of ministers, or simply an unintended consequence (2007:116).

Finally, she argued that the amount of political activity in criminal justice may be because it was used to build political capacity. She argued that there was disillusionment with the Scottish Parliament in its early days due in part to the controversy over the cost of the new parliament building, and that criminal justice policies were used in order to shore up and create fledgling public support. This is seen in the hyper-institutionalisation which occurred, and the attempt to build social solidarity via the crime control agenda (2008:500).

Munro et al. (2010:296) agree with McAra that Scottish criminal justice does seem to have undergone a period of detartanisation, if that is defined as a change from the way in which policies were prior to devolution. However, they dissent from McAra’s view that devolution has ‘allowed in’ forces which are somehow ‘un Scottish’. Instead, as mentioned earlier, they argue that the reason for the distinctiveness of the situation prior to devolution, was to do ‘benign neglect’ rather



then progressive penal values; the democratic deficit meant that Scottish penal policy was not subject to the same democratic scrutiny (with all its consequential problems). The changes that occurred with devolution were simply because of the creation of democratic structures which could allow local punitive values to be articulated which are very similar to those held in England and Wales (ibid) (although as Beckett has illustrated (1999) democratic processes do not only *reflect* public sentiments, they also play a strong role in *shaping* them).

### *Conclusion*

The key questions which emerge from the discussion above relate to why and how devolution led to change in Scottish criminal justice policy. For example, was it simply a case of policy transfer because of a ‘failure to depart from the New Labour orthodoxy’ as both Croall and McAra suggest? Or was it because Scotland’s ‘civic culture’ and national identity was weakened due in part to a diminished need to be ‘other to England’? Was it because the old networks had been eroded, or was it an attempt to use criminal justice to build political capacity? Or was it simply to do with the existence of a new democratic structure whose existence facilitated the same punitive values to be expressed in Scotland that exist throughout the rest of the UK? Or were there other factors at play? And has devolution eroded a Scottish ‘approach’ to criminal justice (albeit one that is disputed)? These are questions which will be returned to and addressed throughout this thesis.

## **4.2 And Meanwhile in England and Wales...**

Although it is certainly true that Scotland can ‘tell its own story’ without an endless comparison with reference to England and Wales, it would also be somewhat pig-headed to argue that developments in England and Wales had no bearing at all on what happened in Scotland. This is particularly true during the early days of devolution, outlined above, when there were many claims about the ‘detartanisation’ (and here we might read ‘re-Anglicisation’) of penal policy amidst claims that a large part of this was due to a failure of the Scottish Executive to depart from the New Labour political agenda in Westminster. It is therefore necessary in this context chapter to outline the development of New Labour’s ‘brand’ of justice policies that

began in England and Wales in the 1990s, paying particular attention to their ‘modernisation’ of services and their offender management reforms. As will become apparent in the rest of the thesis, this would have considerable bearing on what was attempted in offender management services under Scottish New Labour in the post-devolution years.

#### *4.2.a New Labour as the Party of ‘Law and Order’*

It is firstly necessary to understand the genesis of New Labour’s brand of justice policies because it goes a long way to explaining their content and tone. By the time of their election in 1997, New Labour had successfully managed to reposition itself as a party which could be ‘trusted’ on law and order (Newburn 2003:264; Downes and Morgan 2007:208). This was not an inconsiderable feat considering the years in which this had been the domain of the Conservative party following the collapse of the post war consensus on the political handling of questions of crime and punishment. Labour’s transformation began after the 1992 election, with the new Shadow Home Secretary, Tony Blair, keen to create a different approach to law and order. In what closely follows the ‘arms race’ model outlined by Lacey in FPTP electoral systems (2008:76), from the early 1990s onwards, the two main parties sought to ‘out-tough’ each other on law and order issues, and the politics of law and order became ‘inherently and increasingly punitive’ (Downes and Morgan 2007: 214-215; Newburn 2003:258).

In opposition, Tony Blair distanced himself from his party’s previous record on law order, cementing the new approach with the phrase: ‘tough on crime, tough on the causes of crime’ (Downes and Morgan 2007:205). New Labour’s approach to crime and punishment was classic ‘third way’: it meant “no longer meant having to choose between punishment and prevention, between ... personal and social responsibility” (Blair 1993). Blair chastised the left for having traditionally been afraid to take on the issue of crime because it was linked to social deprivation, arguing that while the social context had to be addressed, so too did individuals’ personal responsibility and the public’s right not to be victimised. At an early stage, Blair signalled an ease with the prospect of a growing prison population by dismissing his party’s previous policy of penal reductionism by arguing that “you don’t pluck a figure out of the air and say ... that’s the prison population we want, you’ve got to

have a criminal justice system that deals with people in a fair, but firm way. And that is what produces your prison population or not” (ibid). He also emphasised the importance of “dealing with a criminal justice system ... in the way that the public understand” (ibid), signalling the party’s desire to connect with the public, in the way that Ryan has outlined (1999, 2003).

The New Labour 1997 manifesto promised ‘fast track punishment’ for persistent young offenders, increased parental responsibility for their children’s behaviour, a focus on ‘antisocial behaviour and disorder’, to create a ‘drugs czar’, greater protection and information for victims, and new responsibilities on local authorities for crime reductions together with targets which they must work towards (Labour party 1997). By 2001, New Labour had launched ‘the most comprehensive reform of the criminal justice system since the war’, with their ‘ten year goal’ to ‘modernise the criminal justice system’ (Labour Party 2001). This was part of a broader public sector reform, which promised to ‘decentralise power within a clear framework of national standards to increase the quality and diversity of public service and meet the challenge of rising expectations’ (ibid). They also made tackling ‘persistent’ offenders a top priority in order to ‘close the justice gap’ (i.e. the growing numbers of offenders not being caught or convicted) (Solomon et al. 2007:16). The manifesto in 2005 continued to pledge more powers to tackle antisocial behaviour, fixed penalty notices, a pledge to tackle reoffending and increase the monitoring and support of post released offenders in the new National Offender Management Service, more policies to ‘back the victim’ (Labour 2005) and a new ‘respect agenda’ (Solomon et al. 2007:13).

After initially sticking to the previous Conservative Government’s spending plans, New Labour dramatically increased spending on criminal justice. After ten years in power, the UK spent proportionately more on law and order than any other country in the OECD (Solomon et. al 2007: 10), and the whole system had been subject to review and reform. So substantial was this overhaul, that, midway through their third term, Downes and Morgan argued that their ‘panoply of legal and institutional reforms’ had been so substantial as to be ‘completely irreversible’ (2007:210), and that while ‘tough on crime, tough on the causes on crime’ was initially hoped by liberals to mean target hardening along with tackling poverty and inequality, in reality, what this meant was to be ‘tough on the *criminal*’ (authors’ italic) (ibid:215). Their drive to prove they were indeed ‘tough on crime’ meant the

second part of the equation, 'tough on the causes of crime', was smothered (McLaughlin et al. 2001:304). The need for social intervention was shifted from structural to community and family levels, and the responsibility for offending was placed 'emphatically on the perpetrators' (Downes and Morgan 2007:218-219, see also Brownlee 1998:314). Although New Labour introduced some progressive policies as well, the overall balance of New Labour's criminal justice policies have been 'at the punitive end of the scale' (Downes and Morgan 2007:216, see also Tonry 2003:3). The new climate resulted in a 'self-confirming penal expansionism at the expense of due process and civil liberties' (Downes and Morgan 2007:216), with Tonry even claiming that the New Labour policies were 'the most repressive criminal justice policies of any western country's since the Second World War' (2010:338). New Labour's 'rational' and 'scientific' reliance on 'evidence based policy' often fell foul of the need for image management and a snappy headline grabbing policy (Tonry 2003:1-2, 20). New Labour used the criminal justice system to address what are ultimately social and economic problems and, despite a decade of 'substantial extra investment' and 'major changes', levels of crime and victimisation continued to be high (Solomon 2007:13).

The discussion so far has focused around New Labour's policies and their success at positioning themselves as being as 'tough' as their opponents. However, this punitive turn in New Labour's policies has been accompanied by another, somewhat contradictory and some might say counterproductive, trend, namely their managerial revolution (Brownlee 1998:327, 329).

#### *4.2.b Managerial Revolution*

The 'managerialism' of public services began under the Conservatives when they introduced the principles of 'new public management' (NPM) into the criminal justice system in order, in part, to rationalise the growing cost of the punitive turn in policy during the 1980s (McLaughlin et al. 2001:302; Newburn 2003:258). NPM included a move towards 'results' rather than processes, the domination of targets and audits in order to increase efficiency, league tables, the focus on value for money, a purchaser provider split, the encouragement of inter-agency co-operation and the reframing of 'clients' as 'customers' (Brownlee 1998:234; McLaughlin et al. 2001:302-303).

There were early hopes within criminal justice that New Labour's agenda would be incompatible with the NPM reforms initiated during the 1980s and 1990s (ibid: 305), however, managerialism actually fitted in well with New Labour's political philosophy, and their 'relentless quest for 'modernization'' (ibid:306), indeed, 'modernisation' became *the* model for reform across all public services (Newman 2001:46). Modernisation promoted a 'joined-up' approach to policy across government portfolios (both in the policy-making process as well as the management of public services (Newman 2001:52)), an 'end to inefficiencies', and reforming unneeded practices and structures with a particular emphasis on providing incentives to encourage 'joined-up' partnerships with strong leadership (Newman 2001:50-58; McLaughlin et al. 2001:307). New Labour also embraced privatisation within criminal justice, particularly within the prison system (Newburn 2003:259)

Part of the New Labour managerial reforms included increased pressure on local authorities to prove that they were providing 'best value', which included a requirement on them to demonstrate their delivery across a range of indicators, consulting with local service users, comparing their service with other providers and requiring services to be delivered in the spirit of competition (McLaughlin et al. 2001:306). This was accompanied by the requirement of criminal justice agencies to publish business plans with a range of aims, objectives, outcomes, efficiency targets and performance measures (McLaughlin et al. 2001:307). The tension between promoting partnerships, devolving power and maintaining local flexibility were often in contrast to the countervailing government tendency to exert strong central control. Strategies to continue central control included the establishment of rigorous centrally set standards, the publication of local bodies' performance, the creation of new bodies to monitor and regulate performance, and threats against organisations who fail to meet central standards (Newman 2001:50-51). Within criminal justice, when all else failed the solution was to centralise the service; the aim to devolve more powers to local partners has been superficial and in fact masked a continual increase in central control (ibid:260-262).

#### *4.b.c Reducing Reoffending and Offender Management under New Labour*

One of the features of modernisation outlined above, which draws heavily on NPM, is the proliferation and use of targets within public services. It is, of course,

easy to set targets and not so easy to meet them, and this has been particularly true of the six separate targets to ‘reduce reoffending’ set by the UK New Labour Government over its three terms. Two of these targets specified a 5% reduction, another two set a 10% target and two more did not specify a number (Solomon et al. 2007:41). Every single one of these targets has been modified, missed or dropped (ibid:40). While the biggest reason for this is undoubtedly the unrealistic nature of such a target, these targets were also made more difficult by the fact that the Government did not clarify whether they were talking about reoffending or reconviction, the vast majority of offending (and reoffending) taking place without the knowledge of criminal justice agencies (ibid:42). The reducing reoffending targets were inspired in part by the government’s belief in the ‘what works’ programmes to reduce reoffending (ibid:41), which were to feature prominently in the broader reforms taking place to offender management services in England and Wales during New Labour’s rule.

One of the areas which has been most prey to the reforming whims of managerialism under New Labour in England and Wales, was the probation service whose recent history has been dominated by managerialism and centralisation (Newburn 2003:155-6). This was partly because of the dominance within the service at the time of the ‘what works’ paradigm in which rehabilitation programmes for both probation and prisons were established by a central joint committee (ibid:153). The managerial onslaught on probation gathered pace in 2001, when, with very little consultation, all the 54 local probation departments were disbanded and a National Probation Service for England and Wales was created in its place (Nellis and Goodman 2008:207). The initial Home Office plan had actually been to combine the probation service with the prison service, amidst claims that the two organisations had differing aims and objectives, different cultures and a lack of awareness about each other’s roles (Whitehead 2009:28). The fact this did not occur was due to the significant opposition from the probation committees and particularly from the influential magistrates who sat on them, and even from the prison service (Burke and Collett 2010:233).

Although the idea of joining the service with prisons did not happen at this time, it remained very clearly on the political agenda within the Home Office (Newburn 2003:154). Previously, local authorities were stakeholders in the old Probation Departments and local magistrates also played a key role, however, the new

service was now solely answerable to the Home Secretary (Raynor 2007:1078). Although there was a nominal Tripartite governance structure, in practice the service was highly centralised (Newburn 2003:154). It was also notable that the first of the aims of the new service was to ‘protect the public’, and the last (out of five) was to ‘rehabilitate offenders’ (Newburn 2003:154). The changes brought by centralisation combined with a very short roll-out period for ‘what works’ programmes put enormous pressure on the service, which, combined with industrial action by probation officers in 2001, left them vulnerable to further calls for reform (Raynor 1998:1083).

Following recommendations in the Halliday Report in 2001, a review was established to examine the future for probation. This was given to a health entrepreneur, Lord Carter, who carried out his review within the Downing Street Strategy Unit, famous for public sector ‘blue skies thinking’ (Nellis and Goodman 2008:209; Raynor 2007:1086). Carter’s review was motivated by the principles of NPM and modernisation, the need to address the burgeoning prison population, and the perception that prison and community services had to be brought closer together (Hough 2006:2). His report, published in 2003, listed what he perceived as the problems of the service: overcrowding, the lack of support for short-term prisoners and no one agency having full responsibility for reducing reoffending. His solution was ‘end to end management’ and a single agency to carry this out (Whitehead 2009:28; Burke and Collett 2010:236). Along with combining the prison service with the probation service, he also recommended the introduction of contestability (privatisation) into probation, and provisions aimed at capping the prison population (which were quietly ignored as the rate exceeded it two years later) (Nellis and Goodman 2009:214). Nellis and Goodman argued that it was the plans to introduce contestability which really lay behind the proposals: they were what could not be achieved without structural change (2009:210). However, plans for contestability would massively fragment the service running counter to increased partnership working which the reforms were proposing (Nellis and Goodman 2009:211; Raynor 2007:1087; Hough 2006:6). The Government published their response announcing the creation of the National Offender Management Service (NOMS) in 2004. Incredibly for such dramatic changes, the initial review and the Government’s response were published following no consultation at all, the only consultation which did eventually

take place was over the implementation (Nellis and Goodman 2009:210; Burke and Collett 2010:236).

NOMS was put on statutory footing retrospectively in 2006, by which time the service was struggling to adjust to the seismic changes it had undergone. Its running costs grew wildly and the growing prison population ate up the lion's share of resources (Nellis and Goodman 2009:217). Between 2004 and 2006 there were three Home Office Ministers who had differing degrees of support for NOMS, and the Home Office itself also underwent restructuring in 2007, which created yet more instability for NOMS. The new Justice Secretary created a revised 'slimmed down' NOMS, which, despite increased funding, has struggled with an increase in legislative responsibilities and a severe shortage of experienced staff (Burke and Collett 2010:241).

The discussion above shows that the experience of the reform of offender management services under New Labour in England and Wales has not been a happy one. It has been one of the parts of the criminal justice system which has been most prone to reform, not necessarily through New Labour's populism or punitivism which have marked other areas of policy, but rather through its managerial 'modernisation' which has seen restructuring, centralisation, and privatisation. As we shall see, these reforms were to have considerable bearing on what was attempted in Scotland around the same time.

## **Conclusion**

This chapter has provided the context for two important components of my research. Firstly, it discussed Scottish criminal justice and how it changed with devolution. The most important elements of this discussion were the features of change and the different explanations given for them, and these questions will be returned through throughout this thesis drawing on the analytical concepts outlined in the previous two chapters. The latter part of the chapter outlined what occurred in England and Wales during this time, describing the emergence of the New Labour approach to crime and punishment. Although the populist and punitive elements of this are not irrelevant to my thesis, the most important parts of the New Labour agenda for this research lie in its managerialist reforms of offender management



services. This thesis seeks to explore how a similar political agenda played out in the context of post-devolution criminal justice reforms in Scotland.

The next chapter begins to tell this story drawing on my empirical research, and is the first of five ‘findings’ chapters which describes my case study. It will show how the agenda was set for the offender management reforms attempted in the second term of the new Scottish Parliament, drawing on the theories outlined in chapters two and three.

## **Chapter 5**

### **Agenda Setting**

As discussed in the Introduction, this thesis uses a case study approach to examine penal change in Scotland. The case study is a particular piece of legislation, the Management of Offenders etc (Scotland) Act 2005, which was created at a time of particularly rapid change in criminal justice in Scotland. Chapters five through to nine will discuss the evolution of this legislation and use this as a means of drawing wider conclusions about penal change in Scotland and beyond. This chapter will discuss how the agenda was set for this particular piece of legislation, drawing on Kingdon's multiple streams theory, which effectively explains how rapid changes in policy can occur. The period up until the election for the Scottish Parliament in 2003 will be mapped out using Kingdon's framework, which identified three independent streams running through the policy process at the agenda setting stage: politics, problems and policies (1995). At certain critical times a policy window is opened, a problem is recognised, a solution is available, and the political climate is right. Kingdon has shown how this allows for the greatest possibilities for change to occur.

This chapter will draw from my fieldwork to show how the beginning of the New Labour ministry of the justice portfolio provided the 'policy window', and how specific political circumstances towards the end of the first term of the new Scottish Parliament created a political climate that was ripe for a particular brand of policy to arise. These events took place against a backdrop of already growing concern about the rising numbers of prisoners and levels of reconvictions and the performance of criminal justice social work (hereon referred to as CJSW). These factors allowed a particular policy entrepreneur with specific ideas about how criminal justice services should be run, to bring these ideas to the table and for them to be listened to. This chapter argues that the 'politics' stream is by far the most important in determining change in policy. This chapter will firstly discuss the 'politics' stream, then the 'problem' stream and finally, the 'policy' stream. What occurred when these three streams came together following the 2003 election will be discussed in subsequent chapters.

## **5.1 Politics: Devolution and the New Labour Project**

This section will map the governance of criminal justice prior to devolution, and how this changed following the creation of the Parliament at Holyrood. The extent to which this change was an inevitable consequence of devolution or a political choice will be explored by looking at the particular political circumstances of the first two sessions of parliament, and the emergence of New Labour's brand of justice policies.

### *5.1.a The Governance of Scottish Criminal Justice Prior to Devolution*

As explained in chapter two, prior to devolution, criminal justice policy was made relatively free from political involvement. Because of the administrative arrangements which meant that large parts of Scottish policy were formulated out of the political glare by the Scottish Office in Edinburgh, those involved in criminal justice policy, both agencies and civil servants, experienced relatively little political interference in their work (see also Keating 2010:28). The little political involvement there was came from a Secretary of State for Scotland and his junior ministers who came to Edinburgh for one or two days a week to discuss issues with civil servants in Saint Andrew's House, the Scottish Office headquarters. Because justice was just one of a range of portfolios that the Secretary was responsible for, a great deal of the decisions on the management of services was left to the civil servants to devise and implement in close partnership with the agencies involved. As I was told by a civil servant working in justice at the time: "Scotland just governed itself essentially".

Although the Scottish Office had a relatively large degree of autonomy over how it managed services, it did not have free reign over the creation of policy by means of creating its own legislation, because it was part of the UK Government and all laws concerning it had to be passed in Westminster. This was felt by the police in particular to hinder an individual Scottish approach to policy creation in criminal justice.

A former senior member of the Association for Chief Police Officers in Scotland (ACPOS) told me that he felt there were strong links between the Scottish Office and the Home Office, and there was a tacit understanding that the Scottish Office would not create policy that was counter to the direction from London. There

was also the feeling that although the Scottish Office controlled the day to day operation of the service, a lot of overall policy direction was being driven through by the Home Office because of specific issues and problems in England which were not reflected in Scotland. Another senior police officer told me that prior to devolution, there was a feeling that Scotland was just ‘tagged on’ to the end of English legislation, tucked away in a clause somewhere, despite being underpinned by a different legal system and set of legal institutions (see also Keating and Cairney 2009:37). As he said:

“there was frustration pre-devolution that we were marginalised and forgotten about – an after thought. And although we would be consulted in the normal paper consultation exercise, there was a real feeling that the views that we submitted in response to that weren’t given much weight. If they needed police witnesses to give evidence in a home affairs select committee – they inevitably came from England and Wales – there needed to be something really particular to Scotland before they would ask anyone from here to go ... that’s really remarkable in a way!”

The Scottish Office steered policy within the legislative framework created in London. Those wishing to influence that framework expressed a feeling that the British legislative process did not have the time or inclination to take much heed of the Scots who had their own systems and demands. As Himsworth (2009:57) commented: ‘the forms of accountability in the Westminster Parliament were distant, limited and inadequate’. One senior CJSWer and member of CoSLA remarked that when the Scottish criminal justice professionals went down to Westminster to lobby or give evidence, he felt as though they were “obviously only a drop in the ocean”. Another reported frustration with the lack of time for Scottish legislation, which meant getting changes to laws in Scotland was difficult. One example has also been noted by McNeill and Munro (2010:220), who describe how the proposals to implement a unit fine system in Scotland in 1990 were dropped because of a lack of parliamentary time in Westminster.

The extent to which the situation pre-devolution was regarded positively or not seemed to rest to a large extent on whether individuals or agencies wanted to make any significant changes to policy. If this were the case, then Westminster seemed far away and inaccessible and the ability to make any radical changes would depend on changing the legislative framework in London, which was difficult. This

no doubt partly accounts for why the Scottish Office displayed a preference for organising the delivery of services rather than making new policy during this time (Keating 2010:117). However, if agencies' work was more a case of keeping ones head down and getting on with the job without the desire to make radical change, then agencies seemed more positive about criminal justice prior to devolution. One CJSW manager described the policy arrangements prior to devolution as "ticking along nicely", and other CJSW managers painted a picture in which policy was made in co-operation between civil servants in the Scottish Office and agencies.

There was a close relationship between the civil servants in the Justice Department and the heads of agencies who operated as an organised policy network during this time. These networks closely mirror the description of 'policy communities' described in the policy analysis literature review. To the extent that no radical changes were sought, they were able to continue with their work with relatively little political interference.

The operation of this network of policy elites portrayed by my respondents corroborates McAra's description of the operation of policy elites prior to devolution (2005:293; 2007:106), which no doubt accounted for the stable nature of policy-making during this time, as depicted in chapter four. As discussed in the policy analysis literature review, when policy is dominated by unified and organised policy networks, then the policy agenda is indeed more likely to be organised and stable (Hill 2005:72). The policy-making environment pre-devolution also very much mirrors the account of the 'elites' portrayed by Ryan (1999, 2003) or the 'platonic guardians' described by Loader (2006) who dominated policy-making in England and Wales until the 1970s/80s. The political forces which ended the reign of the elites in England and Wales were clearly absent at this stage in Scotland, arguably because the pre-devolution institutional structure shielded it from these forces.

### *5.1.b Devolution's Effect on Scottish Criminal Justice Institutions*

During interviews, respondents expressed the view that devolution resulted in a very different style of policy-making than that which preceded it. Ministers and government were now more accessible, more immediate and more involved. Instead of rare meetings with the Secretary of State for Scotland in which he was unlikely to know your name, heads of organisations now received personalised letters signed by

the Justice Minister and there was a step change in political involvement. All of my respondents experienced changes with devolution; however, some were more insulated from its effects than others.

The Scottish Prison Service (SPS) is an executive agency operating at arm's length from the government. This means that ministers should not be involved in the day-to-day operation of the service, although they set the budget and the overall policy direction and are ultimately accountable for it. Despite its executive agency status, there was a lot of concern within the SPS that with the creation of the Scottish Parliament, the 'length' of the 'arm' might become shorter than it had been, and the service did indeed note a sharp increase in political and public interest in its operations.

The creation of the Parliament, and the creation of a Scottish ministry charged solely with justice, gave a new forum for questions to be asked, and members of the SPS board did feel increased interest from this closer body. As I was told by an SPS Board member:

“In the past, prior to devolution, they were much more able to say ‘that’s an operational matter and it’s for the chief executive to deal with’. Now that doesn’t wash with the Parliament, as far as they’re concerned, the Secretary’s responsible, and they’ll use any sort of operational work as capital.”

For other agencies, the experience has been somewhat different. For example, a member of ACPOS at the time expressed the view that with devolution, policy for Scottish police was finally being driven by the needs of Scotland as opposed to being tagged onto the English agenda. He also expressed the view that the smaller size of Scotland meant ensuring co-operation between forces became easier, and in general terms it was easier to ‘get things off the ground’ than it had been prior to devolution.

As well as noting the improved ability to ‘make things happen’, there was also a feeling of excitement that agencies were now given an opportunity to influence the agenda. Politicians were much more accessible than they were prior to devolution, it was easier to ‘get their ear’, and it was similarly easier to make your views heard in Parliament (see also Johnston 2009:29; Keating and Cairney 2009:41; McMillan 2009:67). The Parliament’s subject committees particularly, created an opportunity

for agencies to get their voices heard which was a welcome change to before devolution. As I was told by a social work manager:

“if you look at the scale of Scotland, there were two criminal Justice Committees and they’re taking forward things in quite considerable detail and you just wouldn’t have that opportunity prior to devolution in Scotland. I mean, I was involved in quite a few of these committees quite often and there’s no way that I would have been called to a committee in the UK. But in Scotland you are able to have that ... the scale of Scotland allows that.”

This was somewhat of a double edged sword however. Although agencies now felt as though their views were being sought, it also significantly increased their work as they sought to respond to all the consultation documents sent their way (see also Keating 2010:97). Some agencies expressed frustration at the increase in workload that was suddenly expected of them and took a strict line on how many consultations they could answer. Other agencies who were perhaps more eager to have their voices heard put a great deal of effort into engaging with this new body who was suddenly interested in what they had to say. The head of a large criminal justice voluntary sector agency at the time told me:

“At that time under New Labour, newly under devolution, there seemed to be a constant stream of documents that we had to respond to, and we had to draft in very senior staff who were expert at doing that ... No doubt other voluntary agencies felt the same thing – that at last! We were being asked! So we were desperate to give our view, but it was a burden. ”

The creation of the devolved Parliament did not just create additional strains and changes for agencies, it also created significant upheaval for civil servants. Importantly, the majority of the staff who had dealt with criminal justice prior to devolution in the Scottish Office continued to work in the Justice Department once it became the Scottish Executive. There was a continuation of staff, and agencies held meetings with many of the same personnel. However, civil servants now suddenly had to deal with a massive escalation in political interest and involvement. They went from a position in which they were able to regulate their own affairs to a much larger degree (Keating 2010:28), to suddenly being micro-managed in a way that was new to them. As Keating observed, ‘they went from being the least ministerially controlled in the UK to perhaps the most... the experience was often jarring’ (ibid:117).

An expert advisor<sup>3</sup> for the Scottish Executive who worked closely with the civil service over many years explained the difficulties of this adjustment for the bureaucracy:

“Scottish civil servants went from a position quite quickly where ministers were these people who came up in a car and you never saw them, and MPs were people who wrote in to you about their constituents and then bad mouthed you when you never answered them. And in some ways, a quite unpressured existence. To in another situation where you had ministers for your department, and deputy ministers, you’ve MSPs who are in Edinburgh so many days of the week and they’re all over you like a rash and all of a sudden you’ve got an organisation where access to the Minister and ministerial involvement is no longer confined to the top one or two people in the department... So you’ll have quite a significant and profound change after devolution, in the contact between elected members and ministers and civil servants, and for many civil servants both senior and junior, that is not comfortable ... when someone asks an awkward question, it’s harder to duck.”

Everyone agreed that devolution had ratcheted up the tempo of criminal justice reform. There were more people asking questions, a greater expectation that things get done sooner, greater scrutiny of operational matters and a greater demand for accountability if things were felt to be underperforming. There were also greater demands on agencies if they wanted to contribute to the new opportunities that were presented to them. Although those I spoke to recognised the pressures that these changes had brought about, many were positive overall about them. From ACPOS’s perspective:

“the general consensus was that ... having a parliament in Scotland clearly helped in terms of policing, because you were a bigger fish a smaller bowl.”

Although agencies have now been given the opportunity to have their voice heard, this was not in some ‘neutral’ way, it was clearly through the prism of party politics, which moulded the views it solicited according to its own agenda. This was felt clearly by those I spoke to. As Keating (2010:97) also noted, just because people

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<sup>3</sup> An ‘expert advisor’ is different from a ‘special’ or ‘political advisor’. A political or special advisor helps politicians with all policy areas, and is a political appointment who tends to be employed for the duration of the politician’s spell in power. An ‘expert advisor’ is employed because of their expertise in a specific policy area, and tends to be drafted in for specific pieces of legislation.



were consulted, it does not mean they were listened to. As I was told by a CJSW manager who spent many years attempting to influence policy:

“if you compare [policy-making pre-devolution and Westminster] to devolution and the Scottish Parliament, there’s just no comparison at all, anyone’s views in criminal justice system is now heard. You can give written and oral evidence [to] committees and that’s a massive step forward... although they then of course just go and ignore much of the evidence that’s presented in committee, but that’s politicians prerogative to do I suppose.”

There was also a feeling that now for the first time, legislation was being passed for the benefit of the headlines the next day, as opposed to addressing a specific policy problem. Anti-social behaviour policies were cited as examples of this trend by representatives of both the police and CJSW and were regarded as one of the most populist pieces of the legislative explosion round this time. Suddenly there was at least one criminal justice bill a year, rather than every four or more years prior to devolution. New bills arrived before those passed the previous year had a chance to bed down or take effect. As I was told by one agency head:

“there was a lot more thought and planning went into legislation before devolution. And I’m not against devolution! But the problem is that it’s created all this legislative time and they’ve used it and the easy and sexy way to use it is on criminal justice. And you get a new theory every year and you can shove it into legislation, or a bad case every year, and the immediate response is to change the lot in order to respond to this and that’s not a good way.”

Despite creating another Justice Committee in the second term in order to create more capacity, in practice this just resulted in the ability for a greater volume of legislation to be processed through the Parliament. According to one of the committee clerks at the time, they felt as though they were on a “legislative treadmill”, and they had no time to initiate their own inquiries, instead they spent all their time scrutinising government legislation (see also Johnston 2009:32-33). This was despite the fact that the parliamentary committees were created with the intention of being more powerful and with greater ability to set the agenda than committees in Westminster (Carman and Shaphard 2009:23-24).

The volume of legislation being passed meant that more and more agencies were created with overlapping remits and complex lines of accountability, what McAra referred to as ‘hyper institutionalisation’ (2008:494). There was a feeling that things were not being given time to bed down before new structures were created. Drugs policy, for example, was now dealt with by thirty-two local authorities, fourteen health boards, forty-four community health partnerships, eight community justice authorities, and thirty-two drug action teams, (now renamed as thirty-two drug and alcohol partnerships). These do not all overlap and are not all co-terminus. A parole board member who had a long career in various criminal justice agencies, expressed the view that this immense bureaucracy is difficult to co-ordinate and makes it very difficult to know where the impact is being made.

However, there were other examples of policies made in this time which were not so politicised and more broadly welcomed, such as the reforms that happened across the courts, and the bringing the police and social work together more closely in areas such as managing violent offenders. It was also pointed out however, that the principle of combining resources and rationalising services to make them more efficient was happening anyway before devolution occurred. Although it could be argued that this was a UK wide policy trend which the Parliament could then facilitate and take credit for, it could also be said that the Parliament’s existence allowed these changes to occur faster and more effectively.

Some were very pessimistic about the legislative explosion, saying the Parliament was operating along the principle that changing the law can make changes to crime and offending, which was, in the view of some that I spoke to, misplaced and in fact dangerous, because it creates unrealistic expectations of what can be achieved, and a particular negative short-termism. Asked whether criminal justice did indeed need this amount of legislative attention, after having ‘sat on a dusty shelf’ and been ignored prior to devolution, no-one from criminal justice agencies that I spoke to answered with an emphatic ‘yes’. Politicians and their advisors however, were much more certain of the requirement for this legislative attention (see also Steel 2009:17). Rather, devolution’s effect on criminal justice was portrayed as rather a ‘mixed bag’, with some beneficial elements and some detrimental. There was, however, an overwhelming feeling that there was too much legislation without enough consideration, too much populist short termism with a frenetic pace of activity which meant it was difficult to take stock and evaluate the best way forward. As I was told:

“That’s really the problem with this huge amount of legislation. Instead of thinking, ‘well what are the really key things we do need to do if we are going to make the difference’, we keep on getting more and more laws based on a political reaction to ‘we need to do something’ ... So, calm down. What could you actually do to make the difference?”

Although the commentary so far has been relatively pessimistic about devolution’s effect on criminal justice in these early years, many were eager to take the rough with the smooth. Everyone I spoke to was broadly in favour of devolution and the existence of the Parliament, although they recognised that it brought with it increased political involvement and items of legislation which were probably not required or desirable. However, the view was that that was simply the consequences of devolution and thus should be accepted. As I was told by a civil servant:

“We chose to have devolution and the consequence of that is that we do now have much closer scrutiny of everything that happens... What ministers had was the opportunity to change things and they took that opportunity and I think that most governments would take that.”

The picture painted above is one of massive and rapid penal change and we can say that devolution arguably represented a period of ‘punctuated equilibrium’ in which long periods of stability are ‘punctuated’ by external ‘shocks’ (Steinmo et al. 1992:15). Within the first two terms of the Scottish Parliament, both the content of policy and the policy process changed rapidly. It moved to being a situation outlined under the stable and incremental model of policy-making to that of the chaotic and arguably messier mode described in chapter three. The system moved from one that was ‘bureaucratised’ to one that was ‘personalised’ (Savelsberg 1999). It moved from being made by elites ‘behind closed doors’ as described by Ryan (1999, 2003) and Loader (2006), to a more public and volatile forum. The same process that took place gradually in England and Wales from the 1970s onwards occurred rapidly in Scotland with the creation of new democratic structures. Continuing to detail the ‘politics’ stream of Kingdon’s agenda setting theory which helps to explain policy-making in times of flux, we now go on to discuss whether this increased political activity in criminal justice portrayed above was an inevitable consequences of devolution, or a political choice.

### 5.1.c An Inevitable Consequence of Devolution, or a Political Choice?

Although an overwhelming majority of Scottish people were in favour of devolution (Denver 2002:829), there was nonetheless a feeling within the Parliament and the Executive, that this governing body now had to prove itself in order to legitimise its existence. After all, Scotland *had* been managing to ‘run itself’ relatively successfully up until that point. Therefore, in order to prove the need for this new parliament, there was a perception within the Executive that there had to be action and it had to be noticed.

Criminal justice is largely governable by Scotland, it belongs to Scotland, and it was therefore an area in which the Scottish Executive could act, with the relative freedom that the devolved arrangements allowed. It therefore provided a potential benchmark for devolution. Scotland is an old nation with a young form of democracy, and in those fledgling years it had an impatient government wanting to prove itself. This was explained to me by the then First Minister’s chief political advisor:

“[the First Minister] was very keen that devolution *proved itself*, in that, the Parliament has power over what were always called domestic issues. So it needs to prove that it can actually improve people’s life on those domestic issues, health, education, justice.”

Whereas before devolution, most change was slow and incremental and done without primary legislation, primary legislation suddenly became *the* means of achieving change. This was because it is not only the easiest way to make larger and more rapid changes, but because it in a sense it also legitimised devolution.

This implies that the rapid politicisation of criminal justice was simply an inevitable consequence of devolution, and this could indeed be the case. However, I argue that it was also a matter of political choice, as it was only really in the second parliamentary session that significant changes in criminal justice took place. Indeed the third session of the Scottish Parliament saw a marked reduction in the tempo of criminal justice policies under a new administration as will be discussed in chapter eight. Although this thesis places institutional structure at the centre of its analysis, these only determine the parameters for behaviour, it is not a straightforward

deterministic theory. Thus, the creation of the Parliament provided the means and incentives for penal change, but change also involved explicitly political choices.

There were particular political circumstances of the years surrounding the second term of the new Parliament that made the use of criminal justice legislation in this term more attractive. This relates to the arrival of the third First Minister in 2002, three years after the beginning of the Parliament. In the preceding years, the Parliament had lost one First Minister who died suddenly from a brain tumour after only eighteen months in office, there was a row about MSPs awarding themselves medals, and perhaps most importantly, there was growing and clamorous row about the escalating cost of the new Parliament building. Taken together, round about this time there was a great deal of bad press with the commentariat wondering just what they were getting for their money (Hassan 2002:11, McCrone 2009:93; McNair 2009:121-122; Keating 2010:106). This was exacerbated in 2002 when the second First Minister, Henry McLeish resigned his position in connection with a scandal about his expenses (McNair *ibid*). When Jack McConnell took over, he was eager to make his mark and for devolution to finally prove itself. He stuck closely to the UK New Labour political agenda (Keating 2010:111), moving away from his predecessor's grander and more international vision to focus more on bread-and-butter issues in the run in the run-up to the next general election in 2003. As his advisor told me:

“And then along comes Jack, [and] he saw very clearly that he had a job to do ... So steady the ship, focus on what matters, which was his thing ‘do less, better’, which was a really bad phrase, but what he meant was, we’ve had all those grandiose things, embassies here and do this and do that and the next thing, which is very Henry, very visionary stuff. Meanwhile, the weans aren’t getting washed, naebody’s getting fed, and who’s made the beds... So Jack thought – to hell with that. We’ll do the housework and get that sorted... So that was his thinking and that’s why so much of the manifesto focused on domestic.”

“Doing the housework and getting it sorted” nicely illustrates the focus on ‘bread and butter issues’ which it was hoped, the public would really notice. It also shows how crime moved to the centre of the political stage in response to a type of crisis of legitimacy, similar to that portrayed in chapter two. Although a series of minor scandals and the growing cost of a new Parliament building may not constitute a ‘crisis of legitimacy’ in the same vein as that portrayed by Garland (2001a), Simon

(2007) and Pratt (2007), it is similar in that it was seeking to build public support for a political institution and how crime policies were used as a way to re-engage with citizens whose support was felt to be lacking. The use of crime within political discourse and action as part of a political capacity-building project and to re-engage with the public, similar to that described by the literature in chapter two, is one of the key reasons for explaining the emergence of crime as a political force at the beginning of the second session of parliament. This was a critical moment for criminal justice policy in Scotland. Prior to this stage during the first session of parliament (1999-2003), criminal justice had featured in the Executive's legislative agenda, although it did not form the 'key plank' that it went on to do in the parliament's second session. While elements of the New Labour law and order agenda can be seen in this first session, they were diluted and the legislation seemed to proceed to a larger extent based on consultation and consensus than in comparison with what was to follow.

During the first session of parliament, from 1999 to 2003, the Justice Department was led by Jim Wallace, the leader of the Scottish Liberal Democrats, who as well holding the justice portfolio was also the Deputy First Minister. Jim Wallace was personally associated with managing to form and sustain the coalition between Scottish Liberal Democrats and Scottish Labour, the first time that UK politics had embarked on such a task. As leader of his party, much of his time was spent managing this aspect of affairs, and the fact that the Executive had him fill these two roles perhaps shows that justice was not at the top of the list for political attention during this first session. Jim Wallace was also happier to work in partnership with agencies, and where it suited him, keep political involvement at arms length. A member of the parole board at the time gave me an example of this:

“when I [became involved with the] Parole Board, it was still under the old Prisons Act, where the Parole board ‘made recommendations’ to ministers for life sentence prisoners, and the one thing I had in mind when I became [involved] was that I wanted it to be a powerful Parole Board that could make decisions. And Jim Wallace who was the Minister at the time was very amenable to that. Within a year the Parole Board had full judicial authority in relation to all the cases. And it was also a no-brainer from their point of view. As Jim Wallace said, ‘we could get only trouble from this, whereas we could now say that this is a Parole Board decision and we have nothing more to add’.”

This illustrates the view of the Justice Minister at the time: work together with the agencies and decentralise responsibilities to them where there was a good case and it was sensible to do so. However, there were some frustrations within the Labour party about this approach and there was a feeling that being in coalition was pulling the justice agenda too much towards the Liberal approach (see also Keating and Cairney 2009:38). This was felt strongly by the new First Minister's political advisor, who was to have a key role in formulating the party's justice policies. As she told me:

“[up until then] it had been Jim Wallace as the Justice Minister as part of the coalition. And Jim's a lovely guy, but he's a liberal! So he's always going to do the poor soul number. Plus he'd been a lawyer, so he was part of the legal world and that thinking and there was a bit of that thinking that said 'this is how it is, and this is how it'll always be'. Resistance to change in their world. So it just pootled along.”

#### *5.1.d The Character of Scottish New Labour*

In the run up to the 2003 elections, as the Scottish Labour party's manifesto was being written and it was becoming apparent that law and order policies were going to form a significant part of what the party wanted to take forward, Labour decided they wanted one of their own ministers in the justice portfolio. Although it would also depend on the mathematics of the election results, they agreed with the Liberal Democrats that if they were to form the next administration once again, a Labour Justice Minister would be something that they would negotiate into the agreement. The beginning of Scottish Labour's tenancy of the justice portfolio was to provide the 'policy window' which allowed the three streams identified by Kingdon to come together (Kingdon 1995:168).

Cathy Jamieson was an obvious choice for the position of Justice Minister. She had been appointed as the Minister for Education and Young People by Jack McConnell when he had been made First Minister, and in the intervening year she had successfully steered through a piece of legislation which would set up a list of people unsuitable to work with children, as well as seeing through a number of education reforms. Her professional history was in social work, and prior to becoming an MSP she had been the principal social worker for an advocacy organisation for children and young people in care. She therefore had the background knowledge of services for vulnerable people who feature in the criminal justice system. She was seen as having

political nous and track-record and was also very well regarded by Jack McConnell and his team.

Cathy Jamieson's professional history may have given her insights that would be useful to her role as the Justice Minister, but it also gave her a deal of respect from those working in the field who she would later have to work with. The fact that her background was in social work was mentioned to me by very many of those I spoke to, who either saw her later attempts to reform CJSW as a betrayal of her social work background, or as providing legitimacy for her claims that there was a need for reform.

Those who I spoke to painted the picture of a Minister who was strong-minded, determined and tough, of being sometimes quiet "but with a backbone of steel". She was a 'details person', and much more operationally involved than her predecessor or her successor. As the same parole board member quoted above told me:

"when Cathy Jamieson became minister, she was much more keen to be involved in some of our decisions and I had to make it clear to her that was unacceptable ... so at that stage she and I kind of fell out. And I started out having a quarterly meeting with her and in the end I thought there's no point in this because she's going to ask about individual cases and I'm going to say – we can't talk about individual cases ... so we stopped having those meetings and that was the end of my formal involvement with that one."

She also took a very hands-on approach in Saint Andrew's House, taking closer attention to the drawing up of policy documents than civil servants had previously been used to. In meetings, the agenda was 'her' agenda, and although this may include time for others to give their views, this would only be if it fitted in with her plans. However, she could also be pragmatic when it was called for.

Cathy Jamieson's background also exhibited another feature of the New Labour project which moulded policy around this time, namely, she went to a comprehensive school and her professional background was in local authorities. She was not a lawyer or a member of a 'woolly elite', as other justice ministers before or since. She fitted in with Jack McConnell's drive to focus the political agenda on domestic bread-and-butter issues and to make the Parliament connect with the people.

This was observed by a civil servant working at the time:



“what civil servants found was with Labour in Scotland in Government and in the Parliament, they were very much rooted in their own communities and they very much reflected the views of their own communities. So that things like antisocial behaviour, that the leafy estates in Scotland didn’t understand, they had the measure of people and what mattered to them. And their view was that justice was elitist and needed to make more of a connection with ordinary folk ... I think therefore, certainly when Cathy Jamieson became minister, there was a whole reform going on from start to finish of the justice, making it more accessible, more understandable.”

The majority of this fresh batch of MSPs in the first sessions of parliament did not have experience in national government before, though some came from local government. Large numbers of the new MSPs came from professional backgrounds from the public sector (Keating 2010:129) and there was a feeling amongst the civil servants I spoke to that fewer of them were the lawyers or professional politicians that the majority of MPs in Westminster were (although Keating has argued that politicians in the Scottish Executive are actually as likely to have come through the political machine (ibid:137). It could be that it was just in the Justice Department that this feeling prevailed). In keeping with Jack McConnell’s populist agenda to ‘bring the Parliament back to the people’, to connect with the electorate on issues that related and mattered to them, so ‘justice’ was also to be ‘taken back to the people’. As Labour’s political advisor explained to me, for too long it had been seen as the province of elites that had not taken the concerns of victims of crime seriously. Furthermore, the victims of crime are those who Labour was supposed to be representing, their working class core voters, and therefore, by ‘reclaiming’ justice Labour would once again be reconnecting with its core voters. As she explained:

“there was a forceful drive around which was, justice issues are *our* issues because the people they affect are ordinary working people, they’re the people we’re supposed to be representing.. we shouldn’t *seed* justice issues to some woolly liberal view or the right wing, Labour should have clear philosophical views on what happens with justice issues, that tries to marry punishment with the chance to change and we need to articulate that really clearly and we need to own that, because that’s part of representing the folk that Labour are supposed to be there for.”

It was decided that justice would form a key part of the next session of parliament, after all, this was now an area in which they could act, and there was also

a belief that a difference could be made within the next political cycle. As the same special advisor told me: “there were lots of boxes getting ticked there”.

The more populist focus on crime and the victim is one of the hallmarks of the New Labour project and the adoption of these policies was a difficult break for Labour to make both north and south of the border. When Henry McLeish started using words like ‘punish’, he got a negative reaction from his Labour colleagues who regarded this sort of language as too right wing. But Jack McConnell pursued it further and made a stronger case for making this issue something that Labour had a philosophical right to talk about. As the political advisor who wrote the speeches for both Henry McLeish and Jack McConnell told me:

“So you always had this tension in Labour, and it was a confused thing. Because the majority of people who commit crime are working class and because a lot of their circumstances were poor and chaotic and deprived, somehow they weren’t to blame for what they’d done, it was society’s fault. So they went down that track, forgetting that the majority of victims were working class too, and you know what? They were pretty poor and deprived as well! But they hadn’t committed crime ... people who offend *chose*. They make a choice ... So all of that had been a tension. And for Jack, it was ‘let’s capture this back, this is ours ... the people who are damaged by crime, are our people’.”

This illustrates one strand of Labour’s justice policies, namely, the more populist desire to bring policies back to communities, to make policies connect with the everyday (working class) person. This was in order to bolster legitimacy for a parliament perceived by some within the Executive as not having proved itself, and because it could provide clear political capital for the Labour Party who were able to connect the law and order agenda back to a philosophical debate about what values Labour should be speaking to.

The discussion above shows how the Scottish New Labour project mirrored that of the creation of the UK New Labour agenda described in chapter four, particularly the aspects relating to not being afraid to ‘take on’ the issue of crime and punishment because of the ‘old Labour’ unease of the ‘crime question’ because it was a ‘class issue’. As the political advisor quoted above said, it was time to ‘capture this back’. However, the motivation for adopting these policies in Scotland was not so much in order to out-flank the Conservatives on the right as it was in Westminster, rather it was the adoption in Scotland of an pre formulated UK wide agenda which

suiting Scottish political motivations which were to do with building legitimacy for a new institution. This account does not portray the New Labour 'law and order' agenda as an 'English imposition' which had no connection with Scottish politics. Many of the Labour ministers in the first Scottish Executive had previously sat in Westminster, and many of the members of the UK Labour government had roots in Scotland, and these close links continued following devolution (McLean 2004:153-154). Therefore, it was less a case of 'English' policies 'travelling' to Scotland, and more a case of what was arguably a UK wide political agenda which was now given a new forum in which to locate itself because of the creation of new political structures with devolution.

Although the New Labour project began in England and Wales and then 'travelled' to Scotland, it was not an 'imposition' rather it was embraced by key figures in Scottish Labour partly because they had been part of its construction in Westminster and because it suited their agenda too. However, it is nonetheless undeniable that this political philosophy towards crime and justice policies did indeed 'travel', and here the key role of close policy networks, the same political ideology, and geographical proximity discussed in chapter two, all aided the process of transfer.

A further feature of New Labour's justice policies in Scotland at the time was to engage in 'end to end reform'. Their vision was macro, there was no point in focusing on one aspect of the system without seeing how it impacted and related on other parts. New Labour, joined by their coalition partners in this instance, argued that this was needed not just because there is always value in taking a holistic approach to looking at policy problems, but also because prior to devolution Scottish criminal justice had been so sorely neglected. Although this argument was made by the Scottish Executive at the time, the concept of 'end-to-end' reform was also a cultural facet of New Labour in the UK, which had similarly embarked on grand public sector reforms in Westminster since they came to power (Newman 2001:46-58) as discussed in chapter four. Thus, eighteen months after Scottish Labour took control of the justice portfolio, the Scottish Executive published the Criminal Justice Plan, which did propose such 'end to end reform'. As the Justice Minister at the time explained:

“what I wanted to do was to give people the joined up picture – because for too long I felt as though people came along and did discrete bits of legislation – and they didn't see how the whole approach was to try and change a culture and a system and I was very keen that everything we did,

whether it was the reform of the courts, right through to how we delivered community service orders, was all seen as part of a continuum.”

One could argue that the criminal justice system is particularly prone to fragmentation and need for an overall macro approach to be taken. Indeed, there is debate about whether or not it can be called a ‘system’ (see for example Zedner, 2004:20). The fact that this debate exists shows the extent to which this is an inherent problem, or at least, an inherent ‘issue’, with criminal justice systems. They are comprised of multiple agencies all working towards their own objectives and rationales. However, they deal with the same people and in some sort of linear process, and to have a degree of co-operation and common purpose is therefore desirable.

When the Labour tenancy of the justice portfolio began in 2003, the disparate nature of the system was not acceptable to an administration which was controlling, centralising, and wanted to leave its mark. That is not to say that the need for a strategic overview was entirely a political creation, most of the professionals I spoke to in the field of offender management, also bemoaned the lack of co-ordination between agencies, and the seeming lack of overall coherence in the workings of the system. However, it is unlikely that there is any sphere of public policy or indeed, any large bureaucratic organisation which would not voice concerns about fragmentation and co-ordination. Organisations always need to reform, they are dynamic institutions, but the question is the extent to which reforms are needed and the way in which that reform is carried out.

This section details the ‘politics’ stream of Kingdon’s three streams theory to show how the agenda was set for rapid policy changes which this thesis’s case study details. It argues that change occurred primarily because of the creation of new democratic structures which created the means and the incentives for creating change. However, this was combined with a context in which the Executive reached for crime control policies in order to build legitimacy for this fledgling institution and the availability of a law and order agenda from England and Wales which could be adopted in Scotland.

The domination of a close-knit group of elites contributed to policy stability prior to devolution, and policy-making followed the vein depicted in the ‘incremental’ model in that it was made without a central co-ordinator and change was slow. It was

the absence of political structures which created the condition in which this could occur. The pace of change altered dramatically with devolution, and policy-making was rapid and felt to be chaotic by those on the ground. To use Savelsberg's distinction, Scottish criminal justice moved from being 'bureaucratised' to be 'personalised'. A combination of factors created a political context which was ripe for action. Firstly, there was a desire on the part of the Executive at the beginning of the second term especially, that devolution 'prove itself'. This was because of an uncertain first term in which there had been a succession of First Ministers and minor scandals and growing disquiet about the escalating and unforeseen costs of the new parliament building. Therefore, there would be a greater focus on 'bread and butter' domestic policy issues which would resonate with the public. This shows how criminal justice policies were used as part of a political legitimacy building project in order to bolster support for the new parliament. The use of primary legislation also allowed greater changes to be made whilst at the same time providing the Parliament with activity and therefore legitimising its existence. This was combined with a change of administration (in that the justice portfolio was handed over to Labour) which opened a 'policy window', and a New Labour programme which embraced the law and order agenda and which wanted increased central control, a forceful Minister suited to this role, and which had a macro vision of public service reform. Although this political agenda originated from Westminster, it was readily embraced by the Scottish Labour party, key members of which had been involved with New Labour in London prior to devolution. Together, this maps out the developments in Kingdon's 'political stream' trichotomy and shows how a fertile political context was created for future policy development.

## **5.2 The 'Problem': Reducing Reoffending and the Management of Offenders**

The following section will detail the policy 'problem' that later developments sought to rectify. Ascribing something as a 'problem' is not of course, a neutral decision, and in policy terms will depend on the social and political environment, as this chapter demonstrates. However, this section will chart the recent histories of the agencies that later policies sought to reform, and show the context in which questions about performance and efficacy emerge.

The management of offenders<sup>4</sup> is carried out primarily by two agencies in Scotland, CJSW, who are responsible for the supervision and probationary work carried out with offenders following their release from custody or for overseeing their community sentence, and the Scottish Prison Service (SPS). The two organisations have historically worked relatively independently of each other, but over recent years there has been a greater impetus towards partnership working through the development of throughcare, and the prison service's move to working with more community based services in general. This section will begin by looking at the recent history (from the late 1960s to early 2003) of the key agency charged with managing offenders, CJSW.

### *5.2.a CJSW in Scotland*

Probationary work with offenders was set on a distinctive path with the Social Work (Scotland) Act 1968, which disbanded the old Scottish probation service and placed it within the organisation and control of a generic social work service. The overall rationale of this service was to 'promote social welfare', with the idea that offenders should be viewed as requiring care and attention in the same way as any other group who received services from social work departments (McNeill and Robinson 2004:280). These reforms took place due to ideological motivations in the wake of the Kilbrandon Report of 1964 which promoted the ideal that offending should be seen as a symptom of wider social need (although there were pragmatic reasons for the move as well (McNeill and Whyte 2007:24). However, the reforms would also have long-lasting implications for the service because they put its control and organisation into the hands of local government, who are responsible for administering social services in Scotland. This is arguably an example of a 'feedback event' identified by Kingdon: what initially seemed like a minor event was to have significant future consequences (see also Hill 2005:154). It is interesting to note that a

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<sup>4</sup> The term 'management of offenders' is disliked by some commentators. McNeill and Whyte (2007: 143) signal unease with the use of this term for three reasons. Firstly, it suggests that the offender is a 'unit' that has to be 'managed' rather than an individual in need of guidance and advice; secondly, it suggests that the practitioner is engaged in a 'technical' task, rather than something containing a moral element; and thirdly, it is pessimistic because it suggests that the task at hand is concerned with managing the risk of offenders rather than encouraging good behaviour. While these reservations are noted, because it is a useful term for describing the work that is carried out by professionals in prison and in the community and is widely used within the literature, it shall be used in this thesis.

similar move was mooted for the probation service in England and Wales at the end of the 1960s, but was heavily resisted by the service backed up by the powerful magistrates who were involved in it (Nellis and Goodwin 2009:205). Although this was regarded as a victory for the probation service of England and Wales at the time, the Scottish experience tells us that such a move may have in fact insulated the beleaguered probation service in England and Wales from future reforms. The decision to put CJSW within the bosom of local authority social services arguably represented a critical juncture with the service in England and Wales, setting Scottish CJSW on a divergent path which would determine its future outcomes.

Social work with offenders proceeded this way throughout the 1970s, but concerns began to emerge during the 1980s which precipitated reforms in the early 1990s. There were concerns about the funding arrangements for community service (McAra 1998:39), and the skill set of generic social workers to deal with offenders (McAra 2005:298) which resulted in a fear that sentencers' confidence in community sentences was being undermined (McIvor 1999:200). There were also increasing concerns about the increase in the prison population, which had shown a rapid increase over the 1980s. This resulted in an explicit policy of 'penal reductionalism' being expounded in Scotland in the late 80s by the then Scottish Minister, Malcolm Rifkind, (McNeill and Whyte 2007:3). Finally, it was also felt that the service was losing out in a highly politicised local government environment. Many within CJSW believe that in a generic social work service, criminal justice will always come at the bottom of the priorities, below services for children and elderly people: As I was told by a voluntary sector chief executive who worked closely with CJSW during this time:

“it was a recognition that when it came to prioritising, this was the late 80s, early 90s, there wasn't a whole load of public funding around and it was a recognition that when local authorities had to prioritise what they should spend their money on, then frankly offenders were pretty way down the pecking order in terms of what the public thought you should spend your money on and also where the councillors thought they could secure votes. And so there was cautious little money to spend on criminal justice by local authorities.”

A convenor of social work at the time described the service as “the orphan” of social services, that did not attract the best staff, did not attract public sympathy and

therefore local authority councillors were not keen to ear-mark money to it when other parts of the service were calling out for money too.

There were therefore multiple reasons why central government might have good reason to intervene in the governance of the service. The response to all of these concerns from the Scottish Office was interesting, and is testament to the continuation of the wefarist ethos of CJSW at this time. Instead of removing CJSW from the social work services, it was decided that it would remain within social work (and under the control of local authorities), but it would become a distinct branch within it, requiring specific training for social workers and working towards its own nationally set standards and objectives. Furthermore, the funding for this newly specialised service would come 100% from central government and would be ring-fenced to be spent on CJSW alone. In return for this, local authorities would have to draw up three year strategic plans and be subject to a national inspection regime (McNeil and Whyte, 2007:4).

These changes were introduced in 1990 and 1991, and represented a significant increase in the funding and attention given to the service, whilst at the same time opening the door to a much greater degree of central control. From now on, CJSW was to have a key role in bringing down the prison population: the first objective as laid out in the National Objectives and Standards (from hereon called the 'National Standards') was 'to enable a reduction in the incidents of custody ... where it is used for lack of a suitable, available community based social work disposal' (SWSG 1991). This was making explicit for the first time that probation and community service was viewed as an alternative to custody and was therefore providing a standard against which its success would ultimately be measured.

The introduction of ring-fenced funding together with National Standards meant that greater focus was now made to professionalise the service by having specific criminal justice training for this new specialist service. Those that I spoke to were positive about the ring-fenced funding and the National Standards, with a feeling that it increased their status and they were no longer seen as the 'runt of the service'. It also resulted in a marked increase in the standard of work carried out and temporarily silenced those who were calling for the whole service to be centralised into a national agency (McIvor 1999:200).

Several years later, there was an unrelated political development which was to have major consequences for the future of the delivery of CJSW. Where previously



there had been nine regional authorities forming local government in Scotland, the Local Government etc. (Scotland) Act 1994 created thirty-two local authorities in their place. Although the Conservative Government at the time stated this was to enable a more effective system of local government, the real purpose of this legislation was to break the stronghold that Labour held over local government in Scotland, which was creating an almost impossible opposition to the Conservative power-base in London at the time (Paddison 1998:110; Hassan 2002:40). The legislation was implemented in 1996, creating thirty-two unitary authorities, or councils, each one with their own administrative structure and unit of social services.

The ring-fencing arrangements meant that the central government, via the Justice Department, were responsible for distributing funds to each of the regions, and later authorities, for their CJSW allocation. This involved a degree of negotiation between civil servants and social work managers, as each area had their own specific provisions for offenders which had to be included into calculations as block grants were distributed. When regions changed to authorities, this significantly increased the workload of the Justice Department, who now had to negotiate with thirty-two separate authorities, where they previously negotiated with only nine. It was felt by many senior social workers at the time that the Justice Department found this difficult to handle. As I was told by a CJSW manager at the time:

“I was involved in [19]95 and [19]96 ... that was individual meetings with civil servants in the Scottish Office discussing your individual budget. And everyone had a project, everyone had a new local project, everyone had a new local deal on finance. People didn't get enough money here, but they got more money there, and when you try and do this across the country, it just couldn't be done.”

One civil servant in post at the time denied that this change had been a burden, although she did acknowledge that it had resulted in an increase in administrative work. Although the need to remove the administrative burden on the Justice Department was never openly stated, what is not in doubt, is that it fragmented the service nationally, which would certainly have implications for how the service was to evolve.

And thus it was that in August 1998, one year after New Labour came to power in London, the Scottish Office published a consultation paper ‘Community Sentencing: The Tough Option’, which proved to bear remarkable similarity to the

future calls for reform that this thesis is concerned with. It shows the first attempts and fledging stages of an idea that would repeat itself with far greater force five years later. The Review was commissioned in the summer of 1997 by the Minister for Home Affairs in the new government, a number of months after coming to power. This Minister was none other than Henry McLeish, who was go to go on to become a future Scottish First Minister in the new devolved Scottish Executive, and who already at this stage had an influential advisor working for him who was to go on to play a significant role in future proceedings. Thus, the beginnings of a New Labour reform of CJSW had begun in the very opening stages of the new UK Government, even before the creation of the new Parliament in Edinburgh. It is also worth noting that this review took place one year after a similar review in England and Wales which also sought to join the prison and the probation service together (Whitehead 2009:27).

The Scottish review wanted to find out how to maximise the use of community penalties, how to make them more effective in terms of handling breaches and addressing offending behaviour, to map out the comparative costs of custodial and community disposals and how to raise the public's confidence in community sentences. One of the major themes in the document was the need for improved communication and partnership between the key players in the criminal justice system, and the last and key point of the consultation, was the possibility of restructuring the provision of CJSW in order to 'maximise effectiveness, efficiency and quality' (Scottish Office 1998:23).

The review argued that the current structure of CJSW provision over thirty-two separate local authorities with hugely differing scale and budgets was not the most efficient way of operating services, and it argued that by organising services into larger units, more money could be shifted to front-line services and greater consistency of provision could also be achieved. The consultation proposed three options for reform: for CJSW service in each authority to develop closer working relationships with each other and with voluntary sector partners; to create 'around 6' 'CJSW Agencies' based on geographical areas that could be aligned with Sheriffdoms or Police Force Areas, and which would therefore possibly not be aligned with local authority boundaries; or finally, to have a single national CJSW service. Noting the controversial nature of this proposal, and perhaps also sensing the impossibility (at

this stage), it stated that this proposal was only included in the review in order ‘to allow for a discussion of the complete range of options’ (Scottish Office 1998:23).

The message was clear: the new government in Westminster was not prepared to let CJSW continue in its present fragmented and inefficient way. Now that central government were involved in the administration of ring-fenced funding, this state of affairs was clearer than ever, and it was no longer tenable. The third option mooted by the Review proposed a single CJSW service, which would presumably be taken out of the control of local authorities, and there was a strong feeling within local authorities that this was the new Government’s intention and preference all along (Maybee, 2006:378). The review was redolent of New Labour managerial reforms of increasing efficiency, ‘joining-up’ and restructuring (Newman 2001:52). It had been launched by the Minister for Home Affairs at Westminster in consultation with the Scottish Office, who would have the final decision on what should emerge from it.

However, devolution occurred seven months after the Review was published, and the new Scottish Justice Minister took over the formal responsibility for making that decision. One year later in 2000, in the face of implacable opposition from CoSLA and ADSW, the Minister in question, Jim Wallace, was persuaded that CJSW should retain its place within individual local authorities, and that they would instead opt for second option in the review, namely for local authorities to group together into twelve national groupings of CJSW teams, who would each be obliged to create strategic plans to monitor the performance of services across the included authorities. There was also an expectation that resources would be moved between authorities if there was an area with differing levels of need and that each grouping would appoint a single responsible person as a ‘point of entry’ for other agencies to deal with.

Although this review was politically instigated, there was nonetheless a feeling within the Scottish civil service at the time that CJSW needed to ‘up its game’ and that this could be achieved if authorities, some of which were very small, grouped together in order to increase their stature and share best practice. According to a civil servant in the Justice Department at the time, the groupings were introduced in order to improve the performance of CJSW by “increasing the status of the service”. It was comprised of too many little services which by themselves were not able to have the levels of innovation and good practice that their ‘bigger siblings’ in community care and children’s services had developed.

CJSWers on the other hand claimed that this was taking place against a backdrop of hardly any inspection regimes and no proof that services were underperforming. They could not see how the groupings would improve services and they believed the real reason they were being introduced was to ease the administrative burden on the Justice Department. This would be achieved by giving a block grant to each grouping which they would distribute amongst themselves, rather than negotiate funding for each of the thirty-two authorities. The review did also admit that one of the reasons some reform was required was in order to rationalise the administration of funding, which was 'complex and not fully transparent'. (Scottish Office 1998:24)

However, these groupings were flawed, and this is admitted even by those in the service now. The governance arrangements were very informal, meaning that as long as the participating local authorities agreed with each other then there were no difficulties, but as soon as there was disagreement, then each council reverted to doing their own thing, and there was no mechanism to enforce co-operation. Because they were so informal, some councils even opted out of them altogether without any repercussions. Groupings were supposed to move resources from areas where there was less demand to areas where there was more demand, and this was to be organised by each grouping themselves without the involvement of the Justice Department. However, in practice it was very difficult to get agreement from any council to release any of their funds to another, and money tended to be allocated on an unchanged historic basis. Some groupings were better than others, with the more successful ones operating in areas in which good co-operation had already existed. However, while there were examples of good practice, the real 'thorny issue' lay around the redistribution of resources between authorities, and the groupings were not equipped to deal with this problem. This failure to 'take the bit by the teeth' would be seized on in future years to justify more stringent reforms.

One unintended consequence of the introduction of the ring-fenced funding arrangements was that the control of CJSW was in effect taken away from the rest of the local authority. As someone who works closely with local authorities told me, they had good business models in place for other services such as education and community care, but the introduction of ring-fenced funding meant that local councillors became removed from the organisation of the work with offenders. He told me:

“I was called into [a council meeting] to talk to them about CJSW and ... I had to say to them that this was a service that was tucked away, as it were, in the corner of their responsibilities and it’s a piece of work that’s delivered very quietly, and as a consequence, it’s not seen as being a mainstream element of local government responsibility ... And as a consequence, there are some practices which aren’t to do with the service delivery, but to do with governance, certainly financial governance, they’ve actually taken their eye off the ball, because it’s not important to them.”

While they became divorced from local authority governance, conversely, social workers in CJSW had a much closer relationship with the Justice Department than any other branch of social work. They were able to pick up the phone and discuss strategic and operational matters with senior civil servants in a way that other branches of social work never could. CJSW therefore sat in an awkward place between central and local government. Their situation within local government was important for those who were proud of the location of their service within a broader social work profession. For them, this underpinned the fact that their work took a holistic view of offending, placing it in a broader context of social need. There was also a strong feeling amongst many I spoke to, that services had to remain *local*, there could be no ‘one size fits all’ approach that removing locally based provision would result in. While there were strong reasons for being proud that CJSW sat within local authority social services, it was also subject to a great deal of involvement from central government due to the ring-fencing arrangements and National Standards, that other parts of local authority were just not subject to. These had been put in place because central government now had a vested interest in ensuring that their money was being spent well and that it produced desirable results. These results would be measured in two tangible ways: the levels of reoffending, and the prison population (despite protestations from CJSW that this was not something that they could be directly accountable for).

In the early 00s, there was a perception within the criminal justice world that CJSW still were not delivering, which was shared even by senior people in social work at the time. As an SPS employee at the time told me: “[there was a feeling] that social work needed to be shaken a bit, modernised, needed a bit of reinvigoration”. Even an academic who was commissioned by CoSLA to write a report for the Executive and who was very sympathetic to social work, said that the delivery of

CJSW had to improve, they had to “up their game”. This was against the backdrop of increased spending on the service for the past fifteen years, and not enough perceived ‘results’. As I was told by a civil servant at the time:

“I know that when we got into this, local authorities said that they had changed and they were doing things differently, but at the national level, people were saying – well, what are we getting for all the money that we’re investing? And probably the two measurements that counted most were – bringing down the prison population and reducing reoffending – and they really weren’t showing that they were working.”

The history of CJSW shows that the decision to put the service within the wider social work department (and, crucially, under the ownership of local government) in the late 1960s, created a path dependency for the service which would have profound consequences for its future. As future chapters will argue, this ultimately protected it from future, politicised, reforms. Although the service was owned by local government, it was nonetheless subject to a large degree of central control due to the introduction of central government ring-fenced funding and centrally set National Standards in the early 1990s. Concerns about the rising prison population (which CJSW now had an explicit role in reducing), together with worries about the fragmentation of the service (related primarily to unrelated local government reforms), prompted central government concern. The newly elected New Labour Government in Westminster issued a review which sought to reform the service by centralising it and increasing efficiency, which were heavily redolent of New Labour style managerial reforms. This decision was then given to the new Justice Minister following devolution, who was persuaded by local authorities that they could manage a greater degree of co-operation without major restructuring, however in subsequent years, authorities did not radically change their working practices. By 2003 in the face of still increasing numbers in prison, not to mention the levels of reconvictions which were first published in 2001, there was a growing feeling throughout the Justice Department, the SPS, and indeed CJSW, that the status quo would be difficult to sustain.

Continuing with the ‘problem’ stream of Kingdon’s trichotomy, the SPS is now examined in order to complete the policy ‘problem’ which the later policy sought to address.

### *5.2.b The SPS*

Although the Management of Offenders Act was primarily perceived to be about CJSW, the SPS were also heavily implicated because one of the primary functions of the legislation was to integrate the community and custodial components of punishment together. This chapter will therefore give a brief recent history of the SPS in order that the following developments can be seen in context. This section will focus on the way the SPS is organised, its ‘administrative personality’, and the SPS’s relationship with other agencies, because these are what are relevant to my research.

The SPS is an executive agency, which means it operates within, but at arms length from, the government. Ministers are not involved in the day-to-day operations of the service although they control its budget. The SPS board decides policy direction and individual prison governors have leeway to organise their prison according to the types and needs of prisoners within it. However, the SPS is ultimately part of the government; they are accountable to it, and have to do what the government tells them to.

It is a national hierarchical organisation with a single headquarters and chief executive who has regular meetings with ministers and the Justice Department. Those who worked closely with the SPS and the Executive during the first two terms of the Parliament were aware that there was a close relationship between these organisation, and a civil servant within the Justice Department expressed the view that the SPS were politically astute and had the ear of ministers. In large meetings involving many of the key criminal justice agencies involved in offender management, the Minister would prize the SPS’s opinion on matters above those of other organisations, perhaps partly because they had a central research unit and were able to give a consistent line representing the whole organisation, unlike the smaller voluntary sector organisations or the fragmented CJSW.

It is a large organisation, with a budget nearly 20 times as large as that of CJSW (Scottish Government 2009:91). It employs around 4000 staff, although it operates a strict top-down structure with a strong chain of command. A senior SPS manager told me: “we were a pretty hierarchical organisation, we said jump, and people did so, and we expected that the rest of the world should do so in that way”. It operated a tight ship in terms of its financial controls, having very little overspend and

keeping within its budget. From a civil service point of view they were reliable because they got things done once agreement had been achieved.

Throughout its recent history, the SPS, like many other prison services throughout the Western world, has been forced into a position where its primary preoccupation has been managing the ever rising numbers of prisoners and the pressures of overcrowding, leading to the service becoming what McManus called 'a fire fighting organisation' (1999:231). Overcrowding was to become one major factor in a series of riots which took place during 1986-8, which were to prompt wide ranging reforms throughout the system, although other factors including the uneven liberalisation of regimes throughout the estate, and the combination of categories of prisoners in certain prisons, also played a part (SPS 2000:19-22).

The riots led to a realisation within the SPS that it needed to engage in a profound change in the management and the ethos of the service. Beginning in the late 1980s, these changes began within the organisation itself, which had the benefit of a group of senior governors who shared both contemporary penological thinking and modern management techniques and who set the tone for a new strategic direction (McManus 1999:233). This began with the publication of 'Custody and Care' in 1988 and was cemented by 'Opportunity and Responsibility' in 1990, recognised by commentators as a significant moment in the SPS's history (Coyle 1991:268-271; McManus 1999:234; Young 1997:122). Opportunity and Responsibility was published to address the particular issues of the management of long term prisoners, i.e. those serving four years and over. It also established a new 'vision' for the service, which stated that while the first and primary role of the service must be to provide custody for those it incarcerates, during this time prisoners must also be given the opportunity to take advantage of a range of possibilities for self improvement and rehabilitation (SPS 1990: 18).

Part of this new approach also meant a greater co-operation with other services, most notably with CJSW, whose services would now be made generally available to prisoners. In 1990, around the same time that National Standards were being introduced for CJSW, the SPS, together with the Social Work Services Group of the Justice Department, published a document entitled 'Continuity Through Cooperation', which laid out a framework in which social work services in prison can be better integrated into the prison and also with community based provision for



prisoners once they are freed (Young 1999: 123). The new National Standards also now include standards for throughcare in prisons.

Throughout the 1990s, prisons throughout the SPS were encouraged to develop a range of programmes and interventions to help prisoners eventually reintegrate back into society, heavily based and inspired by the What Works movement (SPS 2000:11). By 2000, the SPS had embraced partnership working with both social work and a myriad of voluntary sector agencies, who played their role in the SPS's new mission to provide 'inclusion' to prisoners in custody. The new requirement for co-operation between the prison and other agencies, led to a steep learning curve for both the SPS and community organisations who for the first time had to learn to co-operate, leading to a, sometimes messy, collision of cultures. Because of the size of the SPS, there is likely to always be a power imbalance between it and the other organisations: the SPS is a 'big beast' that would always come out on top. Described by two voluntary sector organisations' chief executives as a "closed institution", with "dysfunctional cultural practices" and as being "institutionally arrogant", one of them told me the process of working together with the SPS has been a difficult process:

"because all the way along, there's a sense that 'this is a partnership, but we want you in the voluntary sector to work differently to suit us', whereas it's not about that! We've all got different agendas, but we'll have to compromise and get something out of it. SPS don't understand that language, they want complete control."

Another voluntary sector chief executive said that the SPS "procured services in the same way that they procured building materials", which did little to 'oil the wheels' of partnership working. Possibly the lowest point for the SPS in terms of its relationship with other organisations was in the handling of procurement contracts with CJSW in 2001. Widely considered to be a debacle by everyone concerned (including some working in the SPS), this resulted in what was described to me as "lower than rock bottom relationship" between the two organisations. A subsequent Justice Department commissioned report into the issue, found that as a result of the commissioning process, services within the SPS and social work were disrupted in the short-term, morale in both agencies was greatly impaired and well-established trust was undermined (Homer, 2002:i). The contracting incident resulted in a stand-off

between the two organisations, with neither talking to each other and relationships becoming evermore frosty, and it was only with the intervention of the Justice Department that relationships began to improve again. Spurred on by a Deputy Justice Minister at the time, a well regarded civil servant was given the unenviable task of finding a way to bring the two organisations back together once again. The solution was to form the Tripartite Group, consisting of the Justice Department, CJSW and the SPS. Together this group worked on provisions for improving throughcare services, and by 2003 the relationships between the organisations was showing tentative signs of recovery, although there was still considerable distance between them. The relationships formed on the Tripartite Group were to have a profound effect on the formation of criminal justice policy into the future.

The forthcoming reforms were set in motion in order to ‘reduce reoffending’, and we could therefore assume that they would target both CJSW and the prison service in equal measures. After all, both are tasked with dealing with offenders, with punishing them as well as helping them to reform. However, the SPS was less vulnerable than CJSW to the temptations of political involvement for a number of reasons. Firstly, they were more organised in their structure and their administration, and it is therefore less easy to say that organisational change would lead to an improvement of ‘outcomes’. Secondly, they are closer to government, and therefore more able to influence the policy agenda in their favour, and thirdly, because the SPS’s primary role is to keep prisoners in custody. This is a clear ‘outcome’ that their performance can be measured against: if prisoners are kept securely under lock and key, they can be said to have ‘achieved’ their role, whereas for CJSW, their remit is much broader, including notions of reform and rehabilitation. Although the relationship between the SPS and social work had improved, there was still considerable scope for improving the co-operation between the agencies, as the fall-out from the contracting failures continued.

Meanwhile, as the 2003 election loomed, and the prison population reached a new high of 6,500. This, along with the fact that since 2001 the Justice Department had begun to publish figures on reconviction rates, further highlighted the ‘problem’ to be solved. Although no similar data had been collected for Scotland previously and it was therefore difficult to know whether rates had increased or decreased, the annually published statistical bulletins now showed the rate of reconvictions in stark relief. Although the civil servant I spoke to cannot recall whether data was collected

as a response to ministerial requests, it is uncertain whether this data would have been collected and published had devolution not occurred. The circulation and availability of the figures thus provides an example of how the creation of the parliament compelled action to be taken by and of itself.

This section has concluded the description of the policy ‘problem’ that later political reforms sought to address. The SPS is a well organised central organisation which was close to government by virtue of their executive agency status. Its place within government meant it was far less vulnerable to politicised reforms than CJSW, because it was centrally organised and already part of central government. Partly as a response to disturbances in the 1980s, it began to work in partnership with community service organisations, both CJSW and the voluntary sector. This led to a clash of working cultures and at the beginning of the 2000s, it experienced a major falling out with CJSW, although this had begun to improve with the creation of the important Tripartite Group by around 2003. The relationships in this group would influence the unfolding of this policy. Around this time the Scottish Executive had begun to publish figures on reoffending, which further increased the spotlight on this issue.

Concluding Kingdon’s multiple streams framework, the following section will outline the ‘policy’ stream and the all important individual who introduced it.

### **5.3 The Policy and its Entrepreneur**

The preceding sections have detailed the political context of the 2003 Scottish election, showing how a combination of the creation of the devolved parliament, the desire on the part of the new First Minister that devolution begin to prove itself, and the ascendancy of the New Labour project which sought to reclaim law and order issues, created fertile political ground for action to be taken in this area.

The background to the policy ‘problem’ was then outlined, showing how CJSW had come to sit in an awkward place between central and local government, with strong ideological reasons for its place within social work provision delivered locally, but concurrent pressures from central government that it begin to ‘deliver’ in the form of reduced reconviction and prison population rates. As the focus on these two issues began to increase, there was also a focus on how the prison service and CJSW could co-operate better.

The next part of this chapter will detail how a policy response to these issues was constructed out of the political and criminal justice contexts.

### *5.3.a Introducing the Policy Entrepreneur*

Policy emerges out of institutions and politics, but it is formulated and implemented by individuals. Sometimes those individuals are merely ‘bits in the system’, they are part of something bigger than themselves, if they were not in place then someone else would be, and the policy outcome would be much the same. Sometimes however, individuals play a larger role. They are pivotal to influencing the policy, they lead the way, and we could say that if it were not for them then that policy would have quite a different outcome. Of course, like all structure/ agency debates, most behaviour takes place in the space in between these two extremes, although in the creation of policy both structure and agency are important (Simon 2008-251). However, in the case of policies which are sudden, contested or controversial, the role of individuals who are able to drive the change forward, is likely to be especially important. This next section will describe the role of a particular individual without whom this policy would not have taken the direction that it did.

This was the then First Minister’s chief political advisor, who had worked with the Labour party since their election in Westminster in 1997, and then moved with the party to Edinburgh following the creation of the devolved parliament in 1999. She played a central role in drafting Scottish Labour’s manifestos, deciding strategic direction, and writing the First Minister’s speeches. Prior to her involvement with politics, she had been in charge of one of Scotland’s largest criminal justice voluntary sector organisations, which she had established and run for thirteen years. This voluntary sector organisation received the bulk of their business from contracts with CJSW, thus she had had a long professional relationship with both CJSW and local authorities, together with a working knowledge of the rest of the Scottish criminal justice system.

Although her work with the Labour party encompassed the whole portfolio of policy issues, it was in the criminal justice portfolio that she was able to put her years of professional experience into proposals for practical policy change. She was at the helm of Labour’s preoccupation to ‘bring justice back to the people’, and was central

to the inclusion of the antisocial behaviour policies and the single agency proposals. She continued to retain strong links with New Labour colleagues in Westminster and very much bought into the party's approach to crime and punishment. However, although the antisocial behaviour policies were strongly influenced by the policies of England and Wales, the single agency proposals were a Scottish creation and grew out of existing concerns about CJSW and rates of reconviction and custody (the issue of 'policy transfer' will be discussed below). The proposals were also strongly influenced by this individual's own experiences in the justice system. One senior social worker who worked with her when she was in post at the voluntary sector organisation, felt as though she "had a pretty dim view of social workers" at the time, and this indeed proved to be the case.

The political advisor had worked alongside the previous Home Affairs Minister in London who had launched the Tough Options Review, which in retrospect can be seen as bearing remarkable similarities to later developments and we could therefore speculate about her involvement in these early attempts at reform as well. However, devolution, and in particular, the beginning of the New Labour tenancy of the justice portfolio, provided new and specific opportunities for influence.

The proposals which were to later become the Management of Offenders etc. (Scotland) Act 2005 began in a small paragraph in the Scottish Labour Party manifesto for the election in May 2003, entitled 'On Your Side'. Amongst a raft of other measures relating to crime including provisions on anti-social behaviour, services for victims, sentences for knife crime, increased number of police, community reparation programmes and youth justice, stood the pledge:

'we will set up a single agency – the Correctional Service for Scotland – staffed by professionals and covering prison and community based sentences to maximise the impact of punishment, rehabilitation and protection offered by our justice system' (Scottish Labour 2003).

The accompanying press release stated that the Scottish Executive would publish a white paper 'within weeks of an election', and that they would 'consult generally' with those involved with services to put the service in place (Maybee 2004:378).

Although, as discussed earlier, civil servants working in the Justice Department may have had some concerns about the performance of CJSW, this

announcement came out of the blue for them, and they were keen to emphasise to me that they played no role in the formulation of this policy. The announcement was also a surprise to members of the Labour Party who had contributed to policy forums which were feeding into the manifesto, this had not ‘bubbled through’ the party in the normal manner. Rather it had been included in the manifesto by the First Minister’s special advisor who had persuaded her boss and his colleagues it was a good idea. So, what was the rationale behind these proposals?

As the advisor saw it, there were two fundamental problems with CJSW, which were the catalyst for these proposals. Firstly there were philosophical problems about the role of CJSW within criminal justice. She argued that there was an inherent contradiction within the role of a CJSWer, which had implications for the delivery of the service overall. Her view was that it was “unfair” to have social workers supervise community penalties, because their job is both to “empower and be an agent for change”, but also to have power over offenders by asking them to police the breaches of their order if they fail on parts of it. Her view was that this inherent tension within the role of a CJSWer amounted to an irreconcilable contradiction that was unsustainable. The solution was therefore to have a service which was not staffed by social workers, although workers would need to have some sort of criminal justice experience or background. Their primary job would be to supervise the court order, ensure it was carried out as required and be prepared to breach them if this were necessary. This was a clear attempt to ‘de-social work’ the service, a trend which had occurred in England and Wales, and which Scotland had so far successfully resisted (McNeil and Robinson 2004:278).

The advisor’s vision did not mean, however, that the offender would not at the same time have access to a range of social services which may help them stop offending in the future. There needed to be the correct balance between punishment and the chance to change, and although there needed to be a greater swing back towards ‘punishment’, giving offenders the opportunity to change still had to be part of the service. She acknowledged that that there was a significant amount of social need which lay behind the majority of offending which also had to be addressed (adding that ‘the public’ was in favour of this as well). Therefore, it would be the job of those supervising the order to ensure that the offender got access to services such as help with alcohol, drugs, illiteracy skills and employment. However, the staff in

this new service would act as ‘sign-posters’ to social services rather than being a social services employee themselves. As she explained:

“the core professional delivery people within a single agency are not professional social workers ... They need to have a criminal justice qualification and experience and the right attitude, and they need to be able to deal with the individual that they’re working with, on the basis of dealing with their behaviour and not condemning them as a human being, so, when you walk in the door and you have court order, the first thing I need to do is make sure that you fulfil that court order. But I’ve got an assessment here that says you’ve got major family problems, I don’t think you can read and write very well ... So let’s start working out how you’re going to work out all of those. Because when you’re finished that court order, I really don’t want to see you again.”

The other, more practical problem which lay behind the announcement concerned the delivery mechanism for what this new service would look like. If this was to be a nationally driven and revamped service, then it would be impossible to try and deliver it through thirty-two local authorities who are all democratically elected and have the right to say they can do it their own way. Hence it would have to be a ‘single’ correctional agency. The ‘single’ being as much about joining up the local authorities as it was about joining it with the SPS. There are clear resonances with the New Labour modernising orthodoxy with its centralising tendencies as described in chapter four.

Along with the reasoning that a single agency would be better facilitated to carry out a ‘national’ strategy, this would also mean taking the control for this new service out of the hands of social work, and therefore local authorities. However, because of the contradictions the special advisor believed were contained in the role of social workers, outlined above, this new service would be delivered by professionals without a social work qualification, hence there was no need for this service to have anything to do with local authorities. Therefore, although what was being proposed was a structural step, it was partly in place in order to deal with what was regarded as a fundamental problem with CJSW, (although the fact that it also facilitated a centrally delivered national service was also of major benefit). This was not to be seen as tinkering with the structure, rather it was a fundamental change to a service in need of updating.

These proposals were rooted in the advisor's belief about what shape probationary and supervision work with offenders should take, and they contained what she believed would deliver an improved service. However, political considerations played a large role in these proposals as well. For starters, the use of the term 'correctional' was deliberate, to signal to the public that this was not a 'soft option'. Furthermore, the idea that these proposals represented a 'toughening' of community penalties tied in with other Labour manifesto commitments on crime, notably on antisocial behaviour and youth justice, both of which were prominent in the manifesto and certainly prominent in the rhetoric surrounding the manifesto and in the run up to election (Croall 2005:177). However, 'a single correctional agency', is not an automatic headline grabber, it doesn't have the same populist ring that other justice policies of the time had, and it didn't attract the same media attention as anti-social behaviour or youth justice stories did. It seemed therefore to be based very strongly around the special advisor's beliefs about community penalties based on her values and her experiences and the New Labour vision of modernising public services.

But was she a sole rider on this policy or did she have the backing from others within her party? She was certainly backed to the extent that her policy was included in the manifesto. The First Minister agreed with her although he did not have in-depth knowledge of the justice system. And although the Labour party did not yet have one of their MSPs in the justice portfolio role, the future Justice Minister, waiting in the wings, was aware of these proposals and was happy to have them included as well.

The First Minister's political advisor had had these ideas about CJSW and the way that offender management services should be organised, since her days working in the sector. She expressed a frustration of the never-ending cycle of debate about how to improve criminal justice, how to reduce the prison population, how to help offenders stop reoffending. She had already worked with the Home Affairs Minister when an earlier attempt at reforming CJSW had occurred, but had not held the same influence with the first Scottish Justice Minister, a Liberal Democrat, who had opted to listen to local authorities and not force them into any radical change. Following the apparent failure of the Tough Option groupings to fully 'grasp the nettle' and with concerns about reoffending and the prison population escalating, by 2003 she was "heartily fed up with it", and she had the opportunity to do something about it. The coming together of these policy ideas with the political environment and the criminal



justice policy ‘problem’ together with the ‘policy window’ of Scottish Labour’s tenancy of the justice portfolio, thus provided the joining of the three streams depicted by Kingdon, and show how rapid changes in policy can occur.

This section has emphasised the key role of individuals in the creation of policy. Although this individual had long held her views about CJSW and criminal justice, this thesis argued that the creation of the new parliament in Scotland together with the circumstances outlined in the ‘politics’ stream above which provided the ‘policy window’ for her ideas to flourish. It also argued that the twin drivers behind these announcements were a desire to ‘de-social work’ community service with a concurrent desire to centralise the service. These were related, in that it would be easier to create a new public service if it were driven from the centre and they were both rooted in a belief in local authority’s inability to deliver. They both shared similarities with reforms of the probation service in England and Wales around the same time in terms of the removal of the social work ethos and centralisation, and as we have seen, there were close links between the British and the Scottish Labour party. The question of policy transfer will therefore now be addressed.

### *5.3.b Policy Transfer?*

During my interviews, which were conducted around six and a half years after the policy announcement was first made, many respondents expressed the opinion that the announcement had been strongly influenced by the policy agenda in England and Wales around the same time. As one CJSW manager at the time put it: [the single agency proposal was a] “particularly English development”. This was because of the publication of the Carter Report in England, which precipitated National Offender Management Service (NOMS), around the same time, (though a number of months *after* the Scottish single agency announcement) and because it was taking place in the context of English tinged justice policies in Scotland at this time generally (the antisocial behaviour and youth justice agendas in particular) (Croall 2006:592; McAra 2007:108). Furthermore, a previous attempt to centralise the service in the Tough Options Review of 1998 took place just one year after a similar attempt to centralise the probation service in England and Wales (Whitehead 2009:28; Burke and Collett 2010:233). The context, both in community justice and wider criminal justice, was therefore one of similarity between the two jurisdictions.

However, we can see from the discussion about the policy entrepreneur above, that these proposals were actually a very Scottish development which had emerged out of specific concerns to do with CJSW and in particular, its place within local authorities. This was emphasised to me very strongly by the Minister at the time, who said she was “amused” that “everyone assumed” the Scottish idea came from England, claiming in fact that Lord Carter’s proposal came from Scotland. The ex Minister claimed, both to me and also later in speeches to parliament and policy documents (Scottish Executive 2004:5; Jamieson 2004), that there was evidence that a single agency would reduce reoffending from similar models in Scandinavia and North America, and as will be described in the following chapter, the Executive did send a team to Sweden during the forthcoming consultation in order to examine their single correctional agency. However, as the discussion about the political advisor above demonstrates, this was very much a post hoc rationalisation for a single correctional agency which had British roots. As discussed earlier in this chapter, these proposals had already been attempted five years previously by the New Labour government in Westminster (when the political advisor discussed above worked closely with the Home Office Minister in charge of those reviews), and thus it had been on the backburner within Scottish political circles, waiting for the correct moment to arrive (or as Kingdon would put it ‘waiting for the big wave’ which would provide the context in which their policy would flourish 1995:179).

However, although this was therefore not a straight forward policy transfer from England and Wales as many at the time assumed, nor was it a policy transfer from Sweden or America as the Executive claimed, it is undeniable that it shared many similarities with the New Labour policies emanating from Westminster and this is undoubtedly due to the very close links between the two parties during this time. Furthermore, it may have been ‘unfinished business’ from the previous attempt at reform, which *had* emanated from London and which was also likely to have been influenced by similar moves in the probation service in England and Wales attempted one year earlier. Therefore, although the single agency proposal in the 2003 Scottish election manifesto was a Scottish Labour party creation and not related to the proposals for NOMS (unless, if we are to believe the ex Minister, it was in the other direction and the NOMS proposals in fact came from Scotland), it was made very much in a New Labour context of ‘modernisation’ and public service reform, the centrality of law and order within public policies, and the fact that such a move had

been attempted in both Scotland and England and Wales by Labour a number of years earlier so the idea was in the 'body politic'. There are therefore elements of policy transfer which are applicable in this case, though not perhaps those which were initially assumed by those I spoke to a number of years later. Drawing on the list of questions drawn up by Dolowitz, we can say in that in this instance, policy transfer was political, it was voluntary (see also Keating 2010:165) and we can say that it was ideology rather than specific policies which were transferred at this stage (at least in the direction of from Westminster to Holyrood) although it may have been influenced by the previous calls for reform which did come from London. Therefore, there may have been degrees of policy transfer in that there was human agency in the appearance of similar policies in Scotland and England and Wales in the New Labour era, but not the straightforward one which was later assumed to be the case.

However, this period also undoubtedly represents a period of convergence, implying deeper structural forces rather than human agency as a driving force, both in terms of managerialism and the move away from penal welfarism which the penal change literature highlights (Feeley and Simon 1992; Bottoms 1995; Garland 2001a; Simon 2007; Loader and Sparks 2007). This again highlights how it was changes in the 'politics stream' together with the opening of the 'policy window' which opened Scotland up to the broader forces of penal change which were affecting jurisdictions elsewhere. Conversely, we can also infer that it was the absence of political structures combined with a political will to use them, which had shielded Scotland from these pressures until this time.

This section has argued that the Scottish single agency announcement was not a direct transfer of the NOMS policy of England and Wales as many at the time and subsequently assumed, it was created to solve a specific problem in Scotland which related to the location of CJSW within local authorities and their failure (in the eyes of the Executive) to have adequately reformed following an earlier review. However, it was nonetheless influenced very powerfully by the UK New Labour agenda due to the close links between the two jurisdictions. Although there were elements of policy transfer in this proposal, we can also say that the political changes which occurred around this stage arguably made Scotland vulnerable to the same forces of policy convergence driven by broader structural factors which have been affecting other jurisdictions including increased managerialism and a move away from penal welfarism.

## Conclusion

This chapter argues that the primary reason for penal change around this time in Scotland was due to the creation of a new political institutional structure, which provided both the means and the motivation for change. However, there were other factors apart from simply the new parliament, and this relates to a political capacity-building project and the availability of a particular brand of crime and punishment policies from England and Wales.

This chapter has drawn on Kingdon's multiple streams framework to illustrate how the agenda was set for a subsequent policy to emerge, which forms the basis for the rest of this case study. Although this chapter explains the agenda setting process for this particular policy, I argue that this theoretical approach can explain rapid changes in other areas of criminal justice policy, and extrapolating further, penal change more generally. This chapter argued that prior to devolution policy was made in a way similar to that which the incremental model of policy-making describes, and that the absence of political structures meant that networks of policy elites were able to make policy 'behind closed doors' producing relatively stable policy. The opening of a 'policy window' occurred not only with devolution, but more specifically with Scottish Labour's ownership of the justice portfolio, which provided the context for the three 'streams' to come together, effecting rapid policy change. The 'politics' stream proved to be the most important of the three because problems of some sort are always likely to exist in criminal justice as are policies to address them. This chapter has illustrated how particular concerns within the Scottish Labour party in the run up to the second Scottish election fuelled a desire to create political capital by using 'bread and butter' policies to connect with voters and build legitimacy for the new parliament. This draws on some of the penal change literature which argues that governments reach for crime control policies when they find themselves in a position of weakness in order to reconnect with citizens again (Garland 2001a; Pratt 2007; Simon 2007). Primary legislation became *the* policy instrument of choice because it affected the greatest change and also because it legitimised devolution. The political context was heavily influenced by the UK New Labour agenda which had a more

micro-managing, centralising and macro vision of public sector reform than Scottish Labour's coalition partners, who held the justice portfolio in the first term. Meanwhile in the 'problem' stream, the history of CJSW showed how increasing anxiety about the rising prison population and concern about its organisation, resulted in increasing central control over the service although it remained located within local authorities. CJSW experienced a very poor relationship with the SPS due to their different cultures and organisation structures, though this was beginning to improve by the time of the single agency announcement through the strong relationships formed on the Tripartite Group. Threats to centralise CJSW began prior to devolution with the New Labour Government in London, but the proposals escalated significantly with devolution and the Labour ownership of the justice portfolio. Finally, in the 'policy' stream, the important role of individuals was outlined. A forceful and well placed policy entrepreneur with roots in Scottish criminal justice but who had also worked with New Labour in Westminster, was 'in the right place at the right time' to put forward her ideas about reforming CJSW. These proposals sought both to centralise and also to remove the social work ethos of the service and thus shared trends which were occurring in England and Wales around the same time (Nellis and Goodman 2008). Although there were clearly elements of policy transfer, in that these proposals were born from a New Labour agenda and were no doubt influenced by the previous calls for reform which had emanated from Westminster, they were not a Scottish variant of NOMS, which was later assumed. Although these reforms were driven by individual action through the close connection between Scottish and UK Labour, I argue that the creation of political structures in Scotland also facilitated policy convergence, which implies deeper structural forces, which was now able to influence policy in a way it had been unable to do before due to the protection that the pre-devolution constitutional arrangements allowed.

This chapter has showed how the agenda was set for the following case study to evolve, but in doing so, showed how penal change can occur. The following chapter will show how the policy which began in the manifesto announcement evolved throughout the policy-making process. It will underline the importance of institutional structure in mitigating the extent of penal change.

## **Chapter 6 - Formulation**

### **From Announcement to White Paper**

“You can try and win hearts and minds but at the end of the day, you can win all the hearts and minds you like, but if you’re not going to get the legislation through then there’s no point.”

– ex Justice Minister

“Am I prepared to have a big fight with local authorities when at that point, they’re almost all Labour? These people are those who go and chap on doors for me when I want to get re-elected? I’ve already signed up for a big fight with them on PR, how many more big fights can I have?”

– ex First Minister’s political advisor

This chapter will show how a number of political institutional factors meant that the Labour party had to compromise on their plan for a single agency. This analysis therefore underlines the importance of political institutional architecture in affecting penal change. The factors in this case study which effected these particular policies relate first and foremost to the constitution of the Scottish Parliament, which meant that Scottish Labour were in coalition, although the fact that CJSW was owned by local government, making these reforms perceived as a political attack rather than simply another piece of public sector reform, was also very important.

One of the arguments of this thesis is that the policy-making environment, certainly during this time in Scottish criminal justice history, is messy and inherently political and this will be demonstrated in this chapter, which will detail how the proposals discussed in the previous chapter were received and how they evolved into concrete policy. It will argue that a combination of political factors, meant that the Executive compromised on the single agency idea. However, the compromise arrangement nonetheless represented a far greater degree of central control than there hitherto had been. Those drafted in to make the policy relied heavily on the relationships and expertise contained in the networks which existed between the bureaucracy and agencies which had been in place since prior to devolution. In this heavily politicised context, evidence was sought in order to legitimise the pre determined political direction.

## 6.1 The Single Agency Fallout

The single agency announcement in the election manifesto in April 2003 was made for the reasons outlined in the previous chapter. Scottish Labour insiders later admitted these proposals were made with relatively little awareness of the opposition this announcement would receive. This following section discusses this reaction in more detail highlighting the importance of Scotland's networks of criminal justice professionals and the fact that CJSW was located within local government.

### *6.1.a Reactions to the Single Agency Announcement*

It was nearly two months until the election, and in this time, local authorities were quick to establish their opposition to the plans. Shortly after the publication of the manifesto, ADSW and CoSLA published a letter in a national newspaper stating that they would 'fight tooth and nail' against these reforms (ADSW and CoSLA, Scotsman newspaper 9.5.2003), and in the forthcoming months they proved true to their word.

One of the reasons for their eventual 'success' in reversing these plans, was the organised and unified nature of their opposition, which brought together local government, CJSW and the majority of the voluntary sector who provide many criminal justice services, usually contracted out from local authorities. The coming together of these groups and the solid opposition they were able to mount, says something about the tight-knit criminal justice community that exists in Scotland, closely mirroring the 'issue networks' identified in the policy analysis literature (Rhodes 1997:38). Aided no doubt by the small geographical size of Scotland and the relatively limited number of actors involved, they all knew each other, shared the same understanding of community justice and it was therefore easy to mobilise them into action.

ADSW and CoSLA were at the helm of the opposition, and although they were united, there were nonetheless different motivations behind them. ADSW was concerned for the future of the service, it was determined that the social welfare tradition which placed it within social services should remain, and it also believed that services should remain locally run and organised. They were joined by their 'big brother' CoSLA and although welcomed by those in ADSW because of CoSLA's

clout and resources, there was also a feeling that this concern about the loss of CJSW was rather disingenuous. There was a perception that CoSLA's primary concern was with what they perceived as creeping centralisation from an Executive which wanted increased control. Although, there was significant cross-over in the membership of ADSW and CoSLA, the ferocity of the opposition to these plans was due in large part to local government's opposition which was motivated by political concerns.

This was an especially difficult time for local government. The majority of councillors at this time were from the Labour Party (Hassan 2002:40) and they were faced with the uncomfortable position of knowing that their own party was proposing changes which sought to remove some of their power. This represented the increasing tension between central and local government at this time, as the (new) Labour dominated Executive attempted to modernise the (old) Labour dominated local government (McConnell 2006:81). Although following devolution the Executive had promised to consult local government on any proposals which would significantly undermine their power or role, the single correctional agency was but one example around this time in which they had not been consulted at all (McGarvey 2009:126-127). The next section discusses the sequence of events during the Executive's first year in power, showing how their proposals softened during this time.

### *6.1.b Moving Forward and Staking Out Territories*

The extent of the opposition to the single agency announcement took those in Scottish Labour party aback, and shortly after the election the Executive softened their approach. Two weeks after being returned to power, Scottish Labour and the Scottish Liberal Democrats signed the Partnership Agreement, the coalition agreement which laid out their proposed legislative agenda for the next fixed four year term. The Partnership Agreement contained an ambitious set of proposals relating to criminal justice across a range of areas, including plans to 'publish proposals for consultation for a single agency to deliver custodial and non-custodial sentences ... with the aim of reducing reoffending rates.' (Scottish Executive 2003a:36).

The proposal had therefore moved from an initial promise to publish a white paper 'within weeks of the election', and to 'generally consult with those who work in the service and with experts in the field to put this agency in place' which



accompanied the manifesto (Maybee 2006:378), to now promising to ‘publish proposals for a consultation’, with no mention of white papers and two week cut off dates. Also notable is the appearance of ‘reducing reoffending’, which had now become the stated rationale for single agency reforms. In the manifesto, the single agency had been justified in order ‘to maximise the impact of punishment, rehabilitation and protection offered by our justice system’ (Scottish Labour 2003).

Following the signing of the Partnership Agreement, it was antisocial behaviour which dominated the Minister and her team’s time in the initial period after the election. The single agency idea was allowed to drift and it was not until September that year, four months after the Partnership Agreement was published, that the Executive came back to the proposals again.

This occurred in a major speech by the First Minister at an annual lecture hosted by a large criminal justice voluntary sector organisation. This speech was written by the First Minister’s political advisor, who had been responsible for the original manifesto proposals. This speech signalled the beginning of the Executive’s serious attempts to move these policies forward after a period of drift following the election. This was also the first time that they had clearly articulated the reasons behind the single agency announcement, and also placed it within the context of the broader reforms they were planning. The speech was imbued with a sense of impatience, the language was unequivocal in its call for change.

The overall message was twofold: firstly ‘look at all the resources that have been invested over the past decade and what do we have to show for it?’ and secondly: ‘it is now no longer acceptable to blame other people: everyone must pull up their socks and take responsibility for making this better.’

After detailing the increases in spending on offender management over the past decade, the First Minister said that levels of reoffending would become a key indicator of the success or failure of the whole range of the agencies involved in offender management. He argued that now was the time for change:

“now, each of us can throw up our hands in horror and cry ‘that’s not fair, we’ve done this or we’ve done that’. We can turn to our neighbour here tonight and say ‘it’s not me, it’s your fault’.. or we could even get together and say ‘the public don’t understand.. it’s more complex than that.. you can’t change things overnight.. there’s not really more crime, it’s the media making people more afraid.. Well I have to say to all of us tonight. No more. That is not good enough.” (2003b:10)

This speech showed that ‘reducing reoffending’ now dominated the Executive’s rationale for these reforms, indeed, levels of reoffending would become *the* indicator upon which agencies’ success would be based. A further justification for a single agency had changed at this point to providing a ‘seamless sentence’ in which there were no ‘gaps’ that offenders could fall through (the language of ‘seamless sentences borrowing very heavily from the Halliday Report and the soon to be published Carter Report in England and Wales (Nellis and Goodman 2009:207), illustrating again the close connections between Edinburgh and London); the concerns that prompted the manifesto proposals five months ago about changing the fundamental nature of CJSW and removing it from local authority control, were not mentioned at all. The First Minister concluded his speech by saying that he “welcomed here all the views and importantly, the ideas that many of you have”. This indicated a willingness to engage that agencies had been waiting for in the months following the manifesto proposal, and everyone waited to see what form this engagement would take.

By the autumn of 2003 the Executive had made its case for change, but had not formalised the policy process further. The civil service had not been instructed to move into gear, or been given any firm proposals to work with, and the ball seemed to lie in ministers’ court. Finally, in November 2003, six months after the election, and seven months after the idea was first proposed, the Executive held a round-table event with the key agencies involved, in order to try and move forward with the proposals.

This event was attended by all those who would be affected by the single agency proposals including local authorities, SPS and the voluntary sector. This was the first time agencies had the chance to formally respond to the Executive’s ideas and by this time there were significantly entrenched positions against the idea. I spoke to several individuals who attended this meeting, and they all described a day-long torrent of opposition to the Executive’s plans. The feedback from this event was taken back to the Executive, and it was to be four months later, in March 2004, before they proceeded further with this policy and published a consultation. This was nearly one year after the election and the Executive were already one year into a set four year term. The following section discusses the reasons behind the softening of the proposals and the delay in moving forward with the plans.

### *6.1.c Choosing Political Battles*

The intervening year had seen a significant softening of the proposals. From ‘creating a single correctional agency’ in the manifesto with a press release promising to ‘publish a white paper within two weeks of an election’, to ‘consulting on a single agency’ in the Partnership Agreement, to ‘welcoming the views and ideas’ that agencies had on the idea (whilst at the same time maintaining that the status quo was no longer an option) in the First Minister’s Apex Speech, to holding a round-table discussion to garner agencies’ views. In this time, views had become entrenched, opposition had hardened, and there was feeling within the Minister’s team that it was now up to them convince their opponents. So, what accounted for the softening of the tone and the delay in getting things off the ground over the year-long period before a consultation was published?

Reflecting back on events, local authorities perceived the climb-down of the policies as evidence of their lobbying and level of opposition. However, although agencies’ opposition did play a role, there were arguably other more important factors involved. Firstly, the most significant reason why the proposals were changed to the more conciliatory ‘plans to consult on a single agency’ in the Partnership Agreement, was because Labour were in a coalition, and they therefore had to negotiate all the proposed inclusions with the Liberal Democrats. A Liberal Democrat MSP made it clear to me that the single idea was a Labour proposal and not supported by them, and although they agreed that levels of reconviction were too high and the ever rising numbers in prison were problematic, they did not favour such a radical structural solution. They felt as though the recently introduced CJSW groupings should be given more time to prove themselves, and they also tended not to favour large central agencies preferring devolved localised control. The Liberal Democrat spokesperson also said his party disapproved of the word ‘correctional’, finding it too punitive.

The process of drawing up a coalition programme of government involves horse-trading and compromise. Both sides had to give way, but both also had key things they wished to see included. For Labour, the key items they wanted were a raft of law and order policies including provisions for antisocial behaviour and youth justice, and the Liberal Democrats wanted PR for local government elections. Those were the ‘red lines’ and everything else could be negotiated around (BBC news 14.5.2003; Keating 2010:111). The agreement reached on the single agency was a

classic fudge: Labour got the proposal included, but on the Liberal Democrat condition that there would be a consultation prior to a white paper, that it would be called a 'single agency' and not a 'single correctional agency' and that the Liberal Democrats could abstain from voting on the proposals.

The second reason for the softening of the tone was in response to local authority and agency opposition. Local authorities were well organised and committed in their opposition, and during the intervening year they rallied other organisations to their cause, lobbied civil servants, and made as much public noise as they could. This group was called 'a coalition of the damned' by the Executive's expert advisor: although these agencies may have distrusted and disliked each other previously, they were now united in opposition.

Away from the specifics of this legislation, the broader legislative timetable also affected this policy. The Executive entered the second session of parliament with an extremely heavy legislative timetable: in the first year following the 2003 election, the Executive had already introduced three major justice bills, the most important of which was the Antisocial Behaviour etc. (Scotland) Act 2004, and there is naturally a limited amount that a ministerial team can handle in any legislative cycle. Because of the particularly heavily legislative load, the Executive proceeded with the items of legislation it knew it could count the votes for, and the single agency proposal was therefore pushed to the background during this first year.

A further possible reason for the lack of progress in this first year, was that (according to those working with the Minister and also some senior CJSWs), the civil service was not completely behind the idea, and the lack of political leadership over this first year gave them the signal to 'back-pedal'. Although civil servants claim to just be 'following orders', their job is also to spend time laying the ground for what may be coming in the future, and to pre-empt what their political bosses may ask them to do (Hill 2005:166). This item of legislation would involve taking on local authority social work, with whom they had been working with in partnership over the past decade. Although the Justice Department were unhappy with aspects of CJSW, their proposed solution would not have been a single agency. A policy requires leadership, either from the political or the administrative arm of government and in this first year there was neither. It is likely that if key members of the civil service were in favour of this proposal then there would have been more progress with them. While it is certainly true that the role of the civil service is a complex one, and that it may be

impossible for them not to retain their own idea about how policy *should* be (James 1997:20), those working with the ex Minister complained that there was a mentality in the Scottish civil service at this time which says that if they keep quiet on specific policies which they do not particularly favour, then they may just disappear, and this very much reflected the civil service's attitude towards this policy during this initial year. This illustrates how the bureaucracy, arguably one of the displaced power structures following devolution, was able to continue to exert its power, albeit in subtle 'non-decision making' ways.

Therefore, there was a constellation of factors which meant the Executive (or rather, the Labour Justice Minister) did not move forward with their manifesto pledge over this first year. Firstly, they could not secure the support of their coalition partners, secondly, the organised and unified nature of the opposition they faced, thirdly, the very heavy legislative timetable for other justice legislation, and fourthly, because the civil service were also not keen on the idea and did not drive the idea forward themselves. The following section discusses how the Executive nonetheless pushed forward with these proposals amidst all these difficulties.

## **6.2 Framing the Problem: the Re:duce, Re:habilitate, Re:form Consultation**

The following section will discuss how, despite being in a relatively weak position for all the reasons outlined above, the Justice Minister was still able to retain a large degree of power by framing the way that the 'problem' was articulated.

### ***6.2.a Consultation Document***

The Scottish Executive published their consultation on offender management, called 'Re:duce, Re:habilitate, Re:form' in March 2004. Although of concern for anyone worried about the (ab)use of grammar, the title nonetheless signalled the tenets of what the consultation was seeking to bring about: a reduction in the use of imprisonment through better rehabilitation and a reform of the system.

The consultation document broke the overall issue (how to reduce the prison population by reducing reoffending) into five 'issues' which it invited responses on. The categorisation of these 'issues' shows how the overall problem was being

understood and ‘solved’ in policy terms. Although it could be argued that in order to synthesise the responses to a question as complex as ‘how to reduce reoffending’, there was a need for some sort of categorisation at the consultation stage, it is also true that by framing the problem in the way they had, the solutions they would receive would naturally fall within an already narrowed range of possible answers. By placing parameters on the debate, the Executive were able to control the subsequent conversation.

The Justice Minister and her advisors took a very hands on approach to the construction of the consultation document, it was they, not civil servants, who chose how to frame the issues and to present the text. The ‘issues’ around which the consultation was framed were: ‘roles and responsibilities in reducing offending’ (there are many agencies all working towards their own objectives and no one is accountable for reducing reoffending), ‘the purpose of prison’ (short prison sentences do not reduce reoffending), ‘addressing reoffending’ (there needs to be better co-ordination and more standardisation of offender programmes), ‘an integrated approach’ (more integrated IT systems and the possibility of a single agency), and finally, ‘effectiveness and value for money’ (imprisonment is not used effectively and there is no reliable data about rehabilitation programmes’ efficacy) (Scottish Executive 2004a).

The most common strand through all of these ‘issues’ was to do with the lack of co-ordination/ integration/ consistency/ communication/ shared objectives between component parts of the criminal justice system. This was a problem because it resulted in duplication and inefficiency, differing levels of quality of services throughout the country, and if agencies were not joined-up offenders could ‘fall through the cracks’ (Jamieson 2004). There was also a degree of frustration about the lack of accountability for reduced reoffending and reduced rates of imprisonment, reflecting the Executive’s desire for results and control, and a particular New Labour love for accountability (Newman 2001:50-51).

So far the debates around these proposals had taken place behind closed doors within the justice division of Saint Andrew’s House (the home of the bureaucracy), and the Minister’s rooms in the Parliament. The next section describes the beginning of the ‘public’ part of the process, the involvement of the rest of the Parliament.

### *6.2.b Parliamentary Debate*

The Executive held a debate in the chamber to launch the consultation led by the Minister. Her tone was combative: figures on reoffending were “not acceptable”, and “minor changes for minor improvement” were “not an option”. There were echoes of some of the language emerging from the SPS at the time, with future management of offender services having to be a “system of excellence”, which was prioritised towards the sole goal of reducing reoffending. She painted a bleak picture of the state of offender management services, saying that although people were working hard, there was a “systems failure” which prevented them from achieving positive results (Jamieson 2004).

The Minister argued that a single agency might work to remedy the situation because there was evidence from other countries this would be successful at reducing reoffending, but there were other options such as a national probation service, or even the administration of sentences by a central Government department, as happened elsewhere in Europe. Her speech contained both language addressed to the criminal justice professionals, and also populist phrases such as “I want a service that’s on the side of the many, not the few, I want a service that is on the side of the ordinary, decent people”, and “I have never been in the business of giving offenders more excuses than too many of them can come up with themselves.” And on the issue of the rationale for these changes, the populist temptation won out once again: “This is not about being soft on offenders, but about reducing crime and increasing safety in our communities” (Jamieson 2004).

During opposition speeches, opinions on the single agency for the most part fell along party lines. Although there was one dissenting voice from a Labour member, all the other members from that party spoke in favour of a single agency, and members from all other parties spoke against the idea. The Liberal Democrats trod a difficult line in the debate, because their opposition to the single agency idea was well known, but they formed the other half of the Executive and did not vote against the Justice Minister’s parliamentary motion. However, everyone believed that greater agency co-operation would be beneficial, even if the suggested means of achieving this were of course varied. One of the greatest concerns with proposals to form a single agency was the need for local accountability and flexibility.

Meanwhile, the consultation process was getting underway, which will be described next.

### *6.2.c Consultation Process*

Many working in criminal justice agencies were cynical of government consultations, during interviews they were called ‘pseudo process’ by one CJSW manager or referred to as ‘the veil of consultation’ by an SPS board member at the time. However, this consultation appeared to confound the expectations of many by being comprehensive and lengthy (though this may be also coloured by the fact they felt as though the Executive eventually ‘listened’ i.e. they ‘backtracked’). The consultation ran for four months, and it reflected the New Labour policy process of public engagement (Ryan 1999:12-13). This approach was considered by one of the civil servants working at the time “a unique approach for justice”, the practice of conducting such ‘full’ consultations had not been conducted before.

The four month long consultation involved the active participation of the Minister and her officials as well as the civil servants and key agencies involved. As well as inviting written responses (138 of which were received), the consultation also involved 14 public discussion events (each meeting attended by between 30 to 100 people, and attended primarily by representatives of the key agencies involved); 16 face to face meetings (again with key stakeholders); 34 focus groups involving a total of 213 participants (who might not respond to a written consultation, but whose views were nonetheless deemed to be relevant – i.e. prisoners, offenders serving community sentences, offenders’ families, victims); and finally, a survey was also carried out with members of the public (which comprised of 500 ‘on street interviews’ and 8 ‘discussion events’) (Scottish Executive 2004b). This was therefore an incredibly broad consultation, and no-one could criticise the Executive for not at least giving everyone the opportunity to have their say. A parole board member, who was amongst the most critical of the Executive’s justice policies at this time, acknowledged that this had been a “good and thorough consultation exercise”.

Conducting this consultation was a significant exercise in its own right, and by this stage the Justice Department had established a specific team, the ‘reducing reoffending division’ whose specific duty was to carry out the consultation and see the bill through. The reducing reoffending division was separate from the community



justice division in the Justice Department, who had worked closely with all the offender management agencies over the preceding decades. However, although the reducing reoffending division was in charge of the consultation process, it relied very heavily on the knowledge and relationships that the community justice division held, and there was therefore close co-operation between the divisions during the consultation and indeed throughout the rest of the legislative and implementation process. This reflects once again the importance of groups and networks within policy-making, as discussed in chapter four.

Although not part of the official consultation, (it was not mentioned in any of the consultation documents), the Executive also went on a visit to Sweden to see the example of a single correctional agency that was in operation there. This trip was also attended by members of ADSW and CoSLA, who felt as though this ‘jolly’ was somewhat of an olive branch from the Executive who wanted to get them onside. I was told by the Minister that the idea for a single correctional agency had come from similar agencies in North America and Scandinavia, though as discussed in the previous chapter, this is likely to have been a post hoc rationalisation of an idea already arrived at. The Executive wanted a single agency (because of their New Labour flavoured modernisation and managerial revolution and their criminal justice agenda), and they were subsequently trying to ‘find’ evidence that a single agency would ‘work’. The example of the single agency in Sweden was not heard of in any of the accompanying policy documents, so it is likely that once the single agency became untenable for the reasons to be explained later in this chapter, the Swedish single agency model was quietly dropped.

At the same time as this was occurring, behind the scenes in the Justice Department, the justice analytical division was also being asked to do research to find international evidence for a single agency similar to the model being proposed in Scotland. The researcher who was employed on this task felt a degree of pressure from senior people in the reducing reoffending division who told them to look for evidence in North America, Australia and Sweden. Although there were models of single agency in these jurisdictions, nowhere was there anything resembling the model they wanted to introduce in Scotland, and the researcher reported that this was not the answer that her colleagues in the reducing reoffending division were looking for. After one particularly fraught meeting in which she reported the difficulty of finding a single agency model that would work with the institutional architecture in

Scotland, she was told by an irate colleague from the reducing reoffending division to go back and “look harder”. This again reflects that this was a politically driven agenda, and that policy led evidence not the other way around.

#### *6.2.d Consultation Responses*

The official response to the Executive’s consultation was published in October 2004, four months after the consultation had closed. The document is a no-holds-barred catalogue of everything that was right and wrong with offender management at that time. In many ways the responses that were received could have been anticipated by the questions that were asked. For example, by asking for responses about the use of imprisonment and how resources should be used more efficiently, it was not surprising that a majority of respondents thought the use of imprisonment for less serious offenders did little to reduce reoffending and was an inefficient use of time and money. Similarly, when questions were asked about the fragmented nature of service provision, it was not surprising that many respondents also bemoaned a lack of an overall strategic approach, with differences in policy, priority and practice between organisations detailed by many. What the document did do however was to provide ‘proof’ of the problems that the consultation had hinted at. Although hardly telling the Executive things it did not already know, having everything corroborated by others would provide legitimacy for subsequent action.

Most responses agreed with the Executive’s arguments in the initial consultation, i.e. that much could be done to improve the communication between agencies, that too many non serious offenders are sent to prison, community sentences needed to be made more credible in the eyes of the public and that there was a need for a more holistic view to be taken with regards to rehabilitation i.e. involving more social factors, not just the availability of programmes. There was also strong support for shared objectives between agencies, and some form of national oversight (Scottish Executive 2004b)

There were two main areas in which the respondents disagreed with the consultation suggestions. The first was the issue of holding agencies accountable for levels of reoffending, because this involved so many factors which lay beyond the criminal justice system and because of the belief that ‘accountability’ meant ‘responsibility’ or worse ‘blame’ (ibid:26). The other main disagreement laid with the

single agency proposals. Although a minority of responses were in favour of this idea ('a small number of voluntary sector organisations; SPS; the Prison Governors Association'), a large majority of responses were against them. Responses argued that a single agency might not necessarily tackle reoffending, would create additional problems, and would be unable to reconcile the perceived difference in the value base and focus between the organisations (ibid:42).

Although CoSLA's opposition to the plans was resolute, there was also an acknowledgement from some working with CJSW that there needed to be improvements within the service, or at least that they needed to evidence their good work better, not least given the ring-fenced funding. They were therefore willing to concede that changes had to be made, but they disagreed that they had to be so radical. One of CJSW's key arguments was therefore that more could be done to improve the existing groupings formed following the Tough Options Review of 1998. They argued that the desired objectives could be achieved by enhancing the existing structures and processes which they now admitted had been too informal. The SPS on the other hand, were in favour of the single agency. They argued that its creation would lead to a more integrated and consistent approach, which would lead to continuity and greater joined up working between prison and the community, and would lead to increased mutual respect and confidence between the agencies. This was no doubt motivated by the fact that the SPS is a central organisation with a single headquarters, thus a centralised CJSW would fit their structures. What is striking about the differences between the responses from the two agencies is the extent to which the proposals seemed not to matter too much to the SPS, while this was a matter of extreme and urgent importance to local authorities. This was no doubt a recognition of the fact that were a single agency to be created, it was much more likely that CJSW would be subsumed by the much larger and centrally controlled service than the other way around.

The consultation responses thus provided the Executive with the evidence they wanted that the system needed improving in that there was a shared understanding amongst players that there needed to be better integration and a different approach to reducing reoffending. However, there was less agreement over the two 'solutions' posed, namely to increase accountability for reducing reoffending and to have a single agency structure. The following section will describe how, a year and a half after the

initial announcement, the Executive finally reached a decision on how to proceed with their plans and the different reasons behind their decision.

### **6.3 The White Paper and a Compromise Decision**

There was a high level of expectation within those who had been involved in these proposals, about what the Executive's 'answer' would be to the prolonged period of discussion. The following section discusses this response.

#### **6.3.a *The White Paper***

Less than two months after the publication of the consultation responses document, the Scottish Executive announced what they were going to do in light of all the discussions that had taken place over the previous 18 months, with the publication of the white paper. This was a glossy 70 page document entitled 'Supporting Safer Stronger Communities: Scotland's Criminal Justice Plan' (hereon referred to as The Plan) (Scottish Executive 2004c). In the ministerial forward, there was a sense of impatience from an Executive who felt as though they had listened for a long time, the time for discussion was now over, these were the proposals and it was now time to get on with the job which everyone must engage with: '[the] Plan is not a consultation document. It is a plan of action and its achievement will require continuing commitment and hard work by many different people' (ibid:1).

The stated purpose of The Plan was the same as the earlier consultation document, which was to reduce reoffending, and all parts of this document were 'united in that common purpose' (ibid). Although this document was a white paper taking forward the issues raised in the consultation, it also contained other criminal justice proposals which were not directly reflected in Re:duce, Re:habilitate, Re:form. Out of the five sections of The Plan, the first three concerned what the Executive were doing to tackle drugs, how they were reforming Scotland's courts, and how they were tackling wider social inequality (ibid:15-41). A cynic might also argue that the inclusion of these other elements was the way that the Executive could legitimately connect their plans to reform offender management with their 'vision' to reduce reoffending. By including these broader elements, critics who argued that changes to the way that offenders are managed alone would not reduce reoffending, could be

silenced. However, the majority of the document was concerned with the reforms of the offender management services: the Executive's plans to reduce reoffending were always likely to be structural.

The fourth section of the document addressed 'sentencing and intervention', and the majority of this was concerned with dealing with the numbers of short term prison sentences and the associated costs and burdens this placed on the system (ibid:42-52). The solutions it proposed were to introduce more community sentences to discourage bail and short sentences, a consultation on suspended sentences would be issued, intermittent custody would be 'looked at', and structured deferred sentences would be piloted. A new throughcare strategy would also be developed and, facing the realities of the situation, two new prisons would also be built to alleviate overcrowding. Taking a longer view of changing sentencing patterns, the Executive would establish a judicially led Sentencing Commission whose first task would be to look at bail and remand and early release. However, in order to deal with the problem of overcrowding in the shorter term, The Plan announced the introduction of Home Detention Curfew (HDC), whereby prisoners are released from prison early on an electronic tag, subject to certain conditions. This would 'aid reintegration and therefore reduce reoffending', and would be a 'demanding option, requiring commitment and self-discipline on the part of the offender'. Tellingly however, the document estimated that with HDC the prison population would reduce by around 250-300, which would have a 'significant impact on overcrowding' (ibid: 49-51).

The largest section of this document by far was the final section, entitled 'integrated services for managing offenders' (ibid:54-68). The Plan stated the need for shared objectives between agencies which would break down the cultural barriers between agencies and ensure national consistency. There would therefore be new requirements which would allow the Minister to 'set the direction', seek effective performance, and hold service deliverers to account. Co-operation between agencies would be ensured by the creation of regional Community Justice Authorities (from hereon referred to as CJAs), which would bring together groupings of local authorities and who would also be responsible for ensuring consistent delivery of CJSW across their area. CJAs and the SPS would also be required to develop area plans for offender management in the area covered by the CJA (ibid:58-66).

The Plan announced the creation of the 'National Advisory Body' (NAB) which would be there to 'advise on national strategy for offender management' which

could be understood and supported by all the key agencies (ibid:12). Finally, The Plan stated that it would give ministers the powers they needed to ‘allow intervention where necessary in the interests of safeguarding local service delivery both in prisons and in local government’ (ibid:65). These proposals were heavily redolent of the New Labour public sector reforms taking place in England and Wales at the time, described in chapter four, relating particularly to increased central control, creating new structures, new pressures on local authorities to prove their performance and the threat of sanctions and further centralising should partners not meet their required standard (Newman 2001:50-51).

The Criminal Justice Plan certainly delivered its promise to be radical and far reaching, which, whilst not proposing the wholesale structural change, was nonetheless introducing new governance structures, new demands for accountability with far greater central control and the threat of even greater central intervention if the local agencies did not meet their centrally set objectives. However, it is undeniable that the Executive did not achieve their ‘first choice’ of a single agency, and the following section will discuss why this was.

### *6.3.b Single Agency Compromise*

It was six months in between the conclusion of the consultation and the publication of The Plan. In this time the Executive had moved from expressing a view that their desired goal was to establish a single agency (although by this point they had also softened their line, saying ‘but we want to hear your views on this and other possible alternatives’ (Scottish Executive 2004a:19), to announcing a different structure, the CJAs. Although CJAs were proposing structural change and introducing a new degree of central control, CJSW was nonetheless being kept within local authority control and there would be no single agency. The single agency proposals were described to me by someone from local authorities as “a battle”, which “we won”, and there was a feeling from many involved in the consultation that the Executive had ‘listened’ to them. But what actually accounted for this apparent climb down?

There were several reasons the single agency could not be created in Scotland at this time and they relate to the institutional structure of Scottish politics. Firstly, and most bluntly, Labour did not have the support of their Liberal Democrat coalition

colleagues. Because the commitment in the Partnership manifesto had only been to ‘consult’ on a single agency, the Liberal Democrats were not under any obligation to support their Labour coalition partners and they had indicated that this was not a policy which they would support. At the end of the day, any eventual legislation would need to secure votes in order to get passed. As the Justice Minister at the time told me:

“if you’re a Minister you also need to think about what you’re going to be able to get through parliament, so you weigh up votes, it’s as basic as that. You can try and win hearts and minds but at the end of the day, you can win all the hearts and minds you like, but if you’re not going to get the legislation through then there’s no point.”

This analysis shares that of Tonry (2007) and Lacey (2008), who argue that the presence of PR in a political system is more likely to lead to moderate penal policies, primarily because of the need to compromise and to incorporate wider interests. The Scottish case is a very clear example of a jurisdiction whose penal policies were moderated by this fact. At a time when there was a very clear desire amongst Scottish Labour to instigate similar reforms in crime and justice that were being attempted in England and Wales, the structure of the Scottish Parliament did not allow this.

Another reason why the Executive was unable to get its way at this time which also relates to political structure, is that CJSW was owned by local government. Although clearly especially related to this particular case study, we can say that the decentralisation of power in relation to the ownership of public services, is more likely to hamper penal change.

This chapter has illustrated the massive opposition to the single agency idea from CJSW, who felt as though this represented a threat to the ethos of their service, and a broader feeling within CoSLA that this represented a takeover by central government. Opposition did not just come from local government however, there was also strong opposition from the voluntary sector, the other key players in the delivery of criminal justice services. If the Executive had managed to secure the votes in parliament, it may technically have been possible to implement a policy in the face of such serious opposition from agencies, but it would have damaged any trust that had been built between them, and therefore made any future dealings with them much

more difficult. This corroborates the arguments from network theory: no matter how powerful a government, they will continue to require the good will and co-operation of those who deliver their services (John 1998:66). However, although it is preferable to keep agencies ‘on side’, it is not necessary, and there have been many instances when local partners do implement a policy they are opposed to (see for example the discussion about poll tax in Hill 2005:188). There was a more fundamental reason why the Executive did not want to take on local government at this time, and this was because at this stage, prior to the introduction of PR into local elections at the 2007 election, local government was dominated by Scottish Labour. The Labour arm of the Scottish Executive relies heavily on their local political support when it comes to election times, they are the army who knock on doors and help to distribute leaflets. This does not mean that the Executive are unwilling to take them on at all, as we have seen, but rather that they chose the battles with them very carefully. One of the main proposals in the 2003 Partnership Agreement was to introduce PR into local government elections, one of the key Liberal Democrat demands of the coalition Partnership Agreement (although, as McConnell argues (2006:81) this also fitted in with a New Labour desire to ‘modernise’ local government who were viewed as being run by ‘old Labour’ cronies). The introduction of PR into local elections was naturally strongly disliked by Labour councillors because it would result in a reduction in their number, but this was a firm commitment in the partnership agreement, so this was an area over which the local authorities were already going to be taken on. By the time the reducing reoffending consultation had finished, it was over one year into a four year term, local councillors would be needed in the election again in under three years time and in the mean time there was also going to be another significant battle over PR. It was therefore decided by Scottish Labour that taking on local authorities on two fronts was just not worth it, and as the single agency was by far the most precarious out of the two proposals, it was this policy over which compromise was reached.

Behind the scenes and away from the realpolitik being considered by Scottish Labour, the Minister and her team also felt as there was opposition from parts of the civil service to these proposals. The Minister’s expert advisor who was drafted in during the consultation told me that several senior civil servants had felt “ambushed” by these proposals. To the Minister and her team, this represented the way in which the civil service had become too ‘big for its boots’ prior to devolution. As he told me:



“From their point of view, a couple of managers in the senior civil service felt as though they had been ambushed as well. I mean, this is a democracy, so how can the elected representatives ambush the civil service with an idea?! It’s a bit like – who are you?! It’s your job to deliver this; it’s not your job to decide.”

Although the civil servants I spoke to were all reluctant to say whether they were in favour or against the proposals, reiterating that they merely advise the ministers as to what is possible and then carry out the minister’s wishes, a senior social worker who was ‘drinking buddies’ with a number of the civil servants in the community justice division also confirmed that there was “little encouragement” from the bureaucracy for the single agency idea. This opposition was more tacit than explicit however; it was more a case of not facilitating the process than stating out and out opposition. Again, this illustrates the subtle exercise of power by the bureaucracy at this time.

In spite of this reluctance on the part of sections of the civil service, they still had their job to do, and the reducing reoffending division and members of the community justice team were nonetheless working hard on the consultation and researching whether there was any evidence for a single agency model that could work in Scotland. However, as the consultation progressed, this search was also not yielding any fruitful results. There were examples where community and custodial sentences were managed by the same agency, but there was concern within the civil service that all the money in a single agency would simply get subsumed by the prison service, leaving the community services marginalised once again.

Therefore, as the consultation drew to a close, the Executive were faced with the following situation: there was opposition from Labour’s coalition partners which meant that getting something passed through Parliament would be difficult, if not impossible; there was opposition from social work who felt as though the ethos of their service was under threat and a fear within local government that this represented a central government expansion. Furthermore, there was a reluctance within the Executive to take on Labour dominated local government when their support would be crucial for the next election and they had already signed up to take them on over PR reforms. Policy was therefore shaped by events completely outwith the immediate policy environment. As the special advisor commented:

“It’s a really interesting environment. Because, although you can have policy ideas, and major radical changes that you want to deliver that is soundly based philosophically, whether you agree with it or not, is soundly based and evidence based, the word of politics kicks in, and the decisions are not made in that nice clean way, they’re made for all sorts of reasons.”

There was also a reluctance within parts of the civil service to ‘make the policy happen’ although it would not have been stated as out and out opposition, and on top of that, civil servants were having a difficult time actually finding a single agency model that would work in the Scottish context.

Faced with so many problems, the question should perhaps be how on earth the Executive managed to construct any legislation out of this situation at all? There were several reasons why any policy arose out of this maelstrom: Firstly, there was an Executive which did not have the personality of backing down, especially not from something which had been so controversial thus far. A lot of political capital had been staked on the reducing reoffending agenda and there was a feeling within the Labour party that *something* had to come out of it. The other reason why something was able to emerge from this situation was because the responses to the consultation had shown that there was substantial room for improvement in the way that services were organised and delivered. As I was told by the expert advisor:

“The reason why something was able to emerge from [the situation] was that there was one common factor which could not be denied by any of the parties and that was that what was there was not working. So that generated the degree of ultimate consensus ... and *that* became the pivot point which ministers used or applied in order to get people focused on trying to change things.”

There was a final reason why the Executive decided to compromise and let local authorities keep a hold of CJSW, and this was a ‘show us what you can do then’ message to local authorities. Local government got a shock with the single agency announcement, they thought that with the formation of the Tough Options groupings a number of years earlier, they had done what they had to in order to stave off further demands for reform. They now realised that they had not done enough and since the single agency announcement had lobbied furiously to say that they could do better, they could co-operate more, and they could try and provide more value for their

money. This led to a feeling within both the political and the civil service arm of the Executive that the CJAs could be a way of saying to them, ‘show us your cards then, over to you now, show us what you can do’. As a civil servant who helped to draw up the plans told me: “in some ways that’s what we said to them ‘ok, if you want it, you can have it! You said you can deliver – now show us you can!’”

The political advisor described the prevailing feeling within the Executive as willing to give the local authorities the benefit of the doubt. As she said:

“I think some [people] thought, they might, having stared the single agency in the face, and knowing what’s at risk, they might just knuckle down and deliver on this, because they don’t want that.”

There was an implicit threat within this however: if local authorities did not prove themselves now, then they would have absolutely no leg to stand on if they were not able to deliver reform. They had been given a chance, but it was very conditional on results.

Therefore, the reasons that policy was made out of such unfavourable circumstances was because of the amount of political capital which had already been invested in these reforms, and a political personality which did not favour backing down; an undeniable fact that there was room for improvement in the way that services were organised; and an ‘over to you’ attitude to local authorities to ‘put their money where their mouth was’ and be able to reform as they claimed they could without the radical structural solution.

## **Conclusion**

This chapter detailed the ‘behind the scenes’ journey from manifesto announcement to white paper proposals ready for legislation, showing how the policy appearing in the white paper had changed considerably from the original manifesto pledge. This was due to a number of political institutional factors relating to the fact that Scottish Labour were in coalition (because of the constitution of the parliament which had a PR voting system), and because of the relative decentralised political power which meant that local government had ownership of the service central government wanted to reform. The rationale for change moved to being about structural change, efficiency and accountability, rather than a wholesale change in the

ethos of CJSW. The compromise which emerged from the single agency proposals left CJSW in control of local authorities but with a far greater degree of central control. Although the Executive were in a weak position for the reasons just discussed, they retained a significant amount of power by being able to set the terms of the debate, by framing the way the consultation was laid out and ultimately by making the solution of how to address reoffending a matter of structural reform and increased accountability. This, together with the language of ‘seamless sentences’ was influenced heavily by the New Labour agenda originating in Westminster. The networks which existed in this close-knit world of Scottish criminal justice contributed the organised level of opposition to the Executive’s plans, and the expertise and relationships which were held in parts of the civil service were heavily relied on by the team drafted in to see these policies through. In this heavily politicised environment, evidence was sought to suit the pre-determined agenda and not the other way around.

The following chapter will detail how the legislation was drawn up and how it was affected by the parliamentary process.

## **Chapter 7**

### **Formulation - The Bill Process**

This chapter is about the negotiation of power and about institutional veto points. It will firstly discuss the process of power renegotiation between central and local government which took place over the drawing up of the CJAs, a power battle in which central government ultimately retained the upper hand. This chapter is also about veto points, and argues that, despite providing a valuable role of scrutinising and another forum of accountability, the Scottish Parliament is ultimately unlikely to veto the administration in the context of a ruling majority.

This chapter will be in two main sections: the first will outline the ‘behind the scenes’ process of putting the Bill together, including a discussion of how the CJAs were constructed, and a discussion about Home Detention Curfew (HDC), which underlines the haphazard short-termism and messiness of policy-making. It will secondly discuss the ‘public’ part of the bill process which takes place in parliament, detailing first the committee process and then the debates in the chamber. The chapter will conclude with a short section about the policy framework which underscored a particularly New Labour love of targets and central control, which shows how, despite the institutional barriers described in the earlier chapters, the Executive were nonetheless able to institute relatively significant reforms of offender management policy.

#### **7.1 From White Paper to Bill: Bargaining and Compromises**

The previous chapter illustrated how the need to keep Labour dominated local government ‘on side’ was one of the reasons why the single agency proposal was shelved. Arguably, for the same reason, the Executive proceeded on the following part of the process very much in the spirit of compromise, although both central and local government fought their corner hard. This process was part of the renegotiation of power between central and local government following the creation of the new power structures with devolution. This section will begin by outlining the content of the bill, how policy networks were crucial to getting ‘buy-in’ from all the key players and finding a solution, the process of negotiation which took place over the CJAs and

the rationale for naming them, concluding with a look at the ‘short term fix’ reasons that HDC was introduced.

### *7.1.a The Bill, as Published*

The Bill was published three months after the white paper. The key sections of the Bill will now be described. There is a short section entitled ‘duty to co-operate’ at the very beginning of the Bill, which frames the entire legislation and addressed one of the Minister’s key desires which was to make the system ‘more joined up’ by placing the need to co-operate (by, for example, sharing data) on statute (Scottish Executive 2005a:1).

The largest part of the Bill concerned the creation of CJAs. In the white paper, they had only been referred to in very loose terms, and although the Bill provided many more details (those relating to its structure which required legislative footing), the accompanying documents also stated that the finer details of the authorities would be finalised outwith the legislative process at a later date and in consultation with those involved. The process of drawing up the CJAs therefore took place over a lengthy time, reflecting a significant difference with the development of NOMS in England and Wales at the same time (Nellis and Goodman 2009:210; Burke and Collett 2010:236). This emphasises once again, the importance of the political institutional structure and the fact that CJSW was under local government control. Were it not for the fact that local government needed to be kept on side, it is very possible the Executive would have simply imposed something upon them, however, the Executive *were* willing, within certain clearly established boundaries, to work in co-operation with local authorities.

The CJAs as laid out in the Bill represent a growth of accountability structures and ministerial control refracted through new local structures. CJAs would have a dual role of ensuring co-operation between the constituent local authorities and partners (the SPS and relevant other organisations involved in offender management), and of monitoring these agencies’ performance. Ensuring co-operation would be achieved by the CJA’s obligation to draw up an area plan in co-operation with relevant agencies which would then be the template for subsequent work by agencies. These plans would be drawn up with reference to guidance from the Minister, to whom the plans would also be submitted for approval. The Minister would also have

the power to inspect and assess the arrangements in each CJA as well as the delivery by local authorities (Scottish Executive 2005a:2-4).

Each CJA would also have the role of monitoring the performance of the local authorities and the SPS in meeting their obligations as laid out in the area plan (ibid:4). The Bill also provides each CJA with the power of intervention should it consider that the performance of CJSW does not meet the requirements described in their area plan, and to make recommendations to ministers where it considers that the work carried out by the SPS is unsatisfactory. The Bill would also take away a degree of local authorities' fiscal autonomy, as each CJA would now distribute the money for CJSW to each authority in their area. The funding for CJSW would remain unaltered in total amount, but it would be allocated directly to CJAs who would distribute it to local authorities based on their area plan. The CJAs must also share and promote best practice in offender management in reducing reoffending between partners in their area, and also establish information sharing processes between all the agencies in their area. Each CJA would appoint a Chief Officer, who would be responsible for the co-ordination and monitoring of its work. Chief Officers also have to report to the Minister were they to believe there had been a failure by a CJA, local authorities, or the SPS. The Chief Officer would be accountable to both the CJA and to ministers (ibid:5-7).

The Bill would also give ministers considerable power to intervene if CJAs were found to be lacking. This would occur when a failure of the CJA was reported to ministers, who would have power to intervene if they were still convinced that the CJA was not exercising its duties after initial warnings. Finally, it also provided that the functions of local authorities could be transferred and that CJAs may eventually be able to start to deliver social work services themselves, and the Minister would also have the power to transfer functions in this way if they chose (ibid:7).

The financial memorandum to the Bill shows that CJAs were restricted to a structure only. Their annual costs just cover the salary of the Chief Officer together with accommodation, admin support and running costs. The requirements of the SPS to co-operate with the CJAs would be expected to be met within their existing budget. Voluntary sector agencies which provide offender management services would continue to bid for contracts, but would do directly to CJAs not CJSW (Scottish Executive 2005b:19-21).

Although not included in the Bill because it did not require primary legislation, the accompanying literature states that ministers will have been assisted with the drawing up of the guidelines for CJAs by the National Advisory Board (NAB), which would allow key criminal justice bodies a ‘high level’ input into the strategic shared objectives for the management of offenders (Scottish Executive 2005b:2-3).

The Bill also introduced the provisions on Home Detention Curfew (HDC) which had also been outlined in the Plan. HDC could be given to a prisoner serving a sentence of less than four years (and for a long term prisoner at the discretion of the parole board). This would allow the prisoner to be released from custody ‘a short time’ before the end of their sentence, and their release would be subject to curfew conditions which would demand that the offender remain within a specified place for at least nine hours each day, to be monitored remotely using an electronic tag (Scottish Executive 2005a:9-13). The accompanying Financial Memorandum estimated that the introduction of HDC would result in around 310 prisoners at any one time being released on the curfew, a total of around 2,100-2,250 prisoners each year. It also states that the reduced costs associated with the running of HDC would significantly mitigate the costs of the rising prisoner population and would also allow prison staff to better carry on with their existing duties (Scottish Executive 2005b:27-28).

Overall, the Bill showed that the Executive were sticking to their plan of introducing greater controls and accountability on local authorities, via new localised structures which had a dual role of organising, planning and monitoring.

### *7.1.b Making the Bill: Behind the Scenes in the Justice Department*

As discussed in the previous chapter, the civil service had created the ‘reducing reoffending division’, who had expertise in drafting legislation and seeing it through parliament, who worked closely with the ‘community justice division’, who were responsible for the on-going work with agencies involved in the management of offenders. It was in both divisions’ interests that the knowledge and expertise of the community justice team was used: for the reducing reoffending team because it would make better legislation, and for the community justice team because they would be the ones who had to help the agencies implement the policy and take it forward once it



was complete. This again highlights the importance of groups within policy-making: policy makers will always rely on the expertise and relationships contained within these groups (John 1998:66).

Following the consultation, this policy had almost reached stalemate: local authorities would not move from their position, yet the Executive still insisted on reform. In this climate, a 'reference group' was created in order to try and find a way forward. This group was headed by the civil servant in charge of the community justice division, because she was the one who had the relationships with the key players, and, crucially, was very well respected and trusted by them all. This group comprised representatives from CoSLA, ADSW, the SPS and the Justice Department, most of who also knew each other from the Tripartite Group which had been formed a number of years earlier. The reliance on the expertise contained in this group shows how policy formulated out of political diktat still relies on trust and relationships. The Minister and her team were very closely involved throughout the process as well, and discussions took place in parliament as well as within the bureaucracy.

Everyone involved in making this policy (ministers and advisors, civil servants, CoSLA and ADSW, and the SPS), was approaching the Bill from different angles and had started the process in positions of fierce opposition to each other. However, they were all committed to trying to create something that worked, both because this was the 'right' thing to do (because as public servants they had the duty to enact the wishes of elected politicians), and perhaps more importantly, because they wanted to ensure that their interests were best represented in the final policy outcome. Although they may have disagreed with each others' positions, they proceeded nonetheless in discussion and willingness to compromise. This reflects the argument that policy-making in Scotland is particularly likely to fall back on the professional expertise contained within groups and that there is more of a consensual style of policy-making due to a number of factors including the smaller size of Scotland (Keating 2010:203,204,209,257).

Discussions over the Bill took place within a relatively tight timescale, and considerably tighter than civil servants were used to: the Minister reportedly wanted this piece of legislation introduced one whole year before the civil service were planning. The political cycle places time constraints on policy formation, and the pressure to find a solution perhaps accounted for the rather confused 'product' that emerged at the end of the process.

Therefore, the role and function of networks which contain knowledge and expertise was invaluable during this process and, in this instance, helped to find a policy ‘solution’ in a context where the main players all wanted something different. The following section will describe the process of putting together the CJAs in more detail.

### *7.1.c Building CJAs*

When it was published, the Bill only gave a broad outline of what the CJAs would be expected to do and how they would function. The process of firming up the details on CJAs was a relatively long one and was carried out very much in collaboration with agencies, albeit while sticking within the Executive’s red lines.

The dialogue that was taking place in the Reference Group and other behind the scenes meetings ran alongside an official consultation which sought views on the finer details of the CJAs. The consultation and its responses mirrored many of the discussions that were happening behind the scenes, and it highlighted many of the issues and tensions inherent in the proposals which were to go on to influence them throughout their years in operation. The consultation (Scottish Executive 2005c) sought views on the CJAs overall, how many there should be, the role of the Chief Officer, and the partner agencies to be involved.

The responses to the consultation showed how perceptions and views of the CJAs as a whole fell very clearly along organisational lines. Unsurprisingly, all of local authority and social work responses were unhappy with the creation of CJAs, whilst other responses either welcomed them, or expressed no opinion either way (Scottish Executive 2005d). It is immediately apparent whose interests were felt to be at stake. All local authority responses agreed with the intentions of the reforms, but disagreed that structural reform was the answer, arguing that the Tough Options groupings should remain and be strengthened. The SPS said they were ‘fully committed to the concept of the CJAs’, and that they ‘looked forward to building an effective partnership with them’. For them, one of the key benefits of the authorities would be that there would be fewer other agencies to deal with, as they currently had to deal with the 14 CJSW groupings on top of the myriad of voluntary organisations. Voluntary sector organisations, both those concerned with the criminal justice system and beyond, welcomed the creation of the CJAs, because of an increase in national

co-ordination which would be placed on a statutory footing (ibid). There was therefore a mixed reaction to the proposals. However, even those who were opposed to them accepted they were inevitable, and they indicated a pragmatic commitment to try and influence the form and function of them as much as possible.

The consultation proposed that CJA boundaries be based either on four Scottish Court Service areas, or on six Sheriffdoms. The SPS wanted four CJAs, but the majority of other respondents opted for six CJAs, saying this model would make them more responsive to local needs. However, a third option of eight CJAs was suggested by a group of respondents which included all but one of the local authorities, all of the CJSW responses, and, importantly, their umbrella organisations, CoSLA and ADSW. The 8 option model followed the six authority model but added two extra. They argued that these would be the right size for balancing effective strategic planning with effective service delivery, and would also build upon existing partnerships (ibid). The fact that the eight CJA model was suggested by nearly all of the local authorities and also the Howard League, suggests the existence of close knit criminal justice community.

The Bill also gave more details about the role of the CJA Chief Officer, who would be appointed to ‘support the day-to-day discharge of its functions’, be accountable to both the CJA and ministers for the co-ordination and implementation of the plan, and who will monitor the delivery of services by local authorities. The Chief Officer will have specific personal duties to report to ministers if either the CJA, local authority, or the SPS was seen as failing to deliver (Scottish Executive 2005a:4). Clearly already aware of the strange position of the Chief Officer and their role of holding local authorities to account, the consultation document says that ‘there is no intention that there should be any conflict between the work of the Chief Officer and that of the Chief Social Work Officer’ (Scottish Executive 2005c:14). The consultation also explained that a large part of the running costs of the CJA would be spent on the Chief Officer’s salary (ibid).

In many ways the contentious issues surrounding CJAs (who is gaining control and at the expense of whom), are crystallised in the role of the Chief Officer, and local authorities were all too aware of the possible ‘tensions’ that this post might bring about. Every local authority and social work response argued that this post should be filled by a chief social work officer and rotated between the local authorities on the CJA. They argued that this would remove the problem of any

possible conflict between the posts and would save a substantial amount of money which could then be reinvested in frontline services. Local authorities also felt as though the role of the Chief Officer would simply be adding another unnecessary tier of bureaucracy into the management of offenders, which CoSLA argued was ‘going against the imperative of modernising government’ (Scottish Executive 2005d). However, concerns about the role of the Chief Officer and the chief social work officer were raised by more than just local authorities, with the voluntary sector and the police also raising questions and arguing that this post required greater clarity in respect of issues of accountability and responsibilities. Although not all the responses were negative about the need for a Chief Officer, nearly all who commented on this issue said the post required further clarification. The one singular response to be positive about the Chief Officer was from the SPS, who perhaps viewed this post as a means of keeping the local authorities in check and ensuring their participation (Scottish Executive 2005d).

The other area which the consultation sought to clarify was which partner bodies should be included within CJAs. Partners would be entitled to be consulted on the area plan and on annual reports on area performance, and they will also be expected to be brought within an information sharing framework within each area. However, none of them will sit on the CJA or have any voting rights (2005c:16-17). In response to these questions, local authorities and CJSW emphasised that the responsibility for reducing reoffending must be shared beyond a wider number of agencies than just local authorities and the SPS, and that if partnership working is to have any sort of meaning, then it must involve other agencies to a greater extent than to simply be consulted on area plans. There were also questions about whether or not they would be held accountable for the delivery of services in the way that local authorities were (2005d).

The ministerial response to the consultation stated that the Minister had ‘been persuaded’ that the eight CJA option would allow for the best opportunities for sharing resources and expertise, strategic planning and monitoring, and for allowing for effective communication between agencies. (Jamieson 2005b) This was clearly a concession that the Government was willing to make and represented a clear victory for the local authorities who proposed the eight CJA model. Regarding partnership bodies, the Minister said that the key agencies which would be entitled to be consulted on the area plan and on annual reports and be included in the information-

sharing framework, would be: the relevant police forces, local health boards, voluntary agencies which operate within the CJA, the Scottish Court Service, the Crown Office and Fiscal Service, and Victim Support Scotland. Housing services would also be involved, but the Minister would consult with CoSLA so as to find the best way of managing this. Regarding the slippery issue of the Chief Officer, she said that this post was ‘crucial to the success of CJAs in driving forward good partnership working’. She acknowledged that some respondents ‘expressed reservations’ about the need for this role, though she argued that ‘others emphasised the importance of strong leadership in enabling CJAs to fulfil their strategic potential’ (ibid). Given that this latter view was massively outweighed by the former, this was clearly not an area over which the Minister wished to compromise. However, although the Minister got her way, and Chief Officers were included in the Bill as it stood, local authorities were able to retaliate by successfully arguing that the salary level of the Chief Officer should be repressed. As someone who was closely involved in the negotiations around the CJAs told me:

“I think that politics was maybe being played here. My view would be – and I was at a meeting with [a civil servant] and people from ADSW – we were discussing the role of the Chief Officer and the salary level, and I think ADSW were very keen to ensure that the salary level was suppressed so that senior social workers would be more senior or have greater clout than Chief Officers of CJAs.”

This process illustrates the extent to which the CJAs were drawn up together with local government and other agencies in a process which represents the process of power renegotiation between the two levels of government following devolution. Although there were certain red lines that the Minister would not cross (i.e. that CJAs would be created and that there would be a Chief Officer), there was nonetheless a recognition that central government could not impose anything on local government. The process was one of ongoing compromises and bargaining and even when decisions had been taken, attempts to retain control and further influence continued. This illustrates the contested nature of this renegotiation, which continued to be resisted at every turn.

One question which emerges at the end of this process of compromise and negotiation is whether CJAs were simply a messy compromise solution or if they were agencies that could actually meet the objectives that had been given to them.

The Minister was adamant that CJAs were more than simply a compromise, arguing that they had been designed in order to meet the requirements that each of the parties involved had of them. She wanted better partnership working between CJSW and the SPS, better co-operation between local authorities and better accountability and control. The SPS wanted better connections with agencies at a local level, and local authorities wanted to retain control over their services. The CJAs were, she argued, therefore able to fulfil all these requirements. However, although the Minister denied that the CJAs arose out of messy compromise, it is arguable whether that is indeed the case. CJAs were the lowest common denominator that would meet everyone's objectives. If the starting point is that a single agency is untenable, and that local authorities need to be the ones who are taking the new agency forward, and that you couldn't have an agency which pooled the money for both social work and the prison service, then CJAs, with local authorities represented by their councillors, was the best available solution. They represented a 'half-way house' which would be least disagreeable to as many people as possible.

#### *7.1.d Home Detention Curfew*

As described above, the CJAs formed the main plank of the Bill, but the other notable part of the Bill was the provisions for Home Detention Curfew (HDC). The public rationale for this legislation as put forward by the Minister to parliament and in press releases was to aid prisoner integration back into the community by allowing them to be released before the end of their sentence. As the Minister said during evidence to parliament (Jamieson 2005a):

“we can see [HDC] as an opportunity for low-risk prisoners to return to the community, to access some of the services there and to make the transition within a structure. At the moment, people are sometimes released without any structure.”

However, during questioning in committee, it was revealed that HDC would not offer any 'structure' either, in the form of additional support or help with access to services. Nonetheless, the Minister maintained that for some prisoners, HDC would help to aid their integration back into the community because they could begin to rebuild relationships and become involved in training or begin seeking employment.

The financial memorandum to the Bill hinted at other motivations behind the inclusion of HDC in the Bill, saying that its introduction would result in significant savings and benefits to the prison system because of its immediate ability to ease overcrowding (Scottish Executive 2005b:27-28). Civil servants were reluctant to divulge this, however, and one civil servant (who was still in post when interviewed) insisted that HDC had been introduced in order to aid prisoner integration. However, two other civil servants no longer working in the service, admitted otherwise. As one of them said:

“it was part of this work we were doing of joining up local authorities and SPS and.. me.. I think.. there was a thing around the prison population and how we were going to manage that ... So that building new prisons would take time and there were real pressures around the prison population. And anything that we were doing around the policy, if we managed to reduce reoffending or the prison population etc – it wasn’t going to happen over night! ... it was just a case of the pressures that we were under at the time.”

This was also articulated to me as the reason for the introduction of HDC by senior people within the SPS, the parole board, and senior social workers. A research specification created in order to analyse the extent to which HCD would aid reintegration was created within the civil service, but it was never implemented. The Executive was faced with the difficulty of trying to reduce the prison population, especially short term sentences, in order to stem the flow of the rising population and the pressures and costs associated with overcrowding. However, the policy solutions they proposed would take time and their outcomes were never certain. Other ways of reducing the prison population (sentencing reforms for example), were considered politically impossible by this administration. Therefore, HDC was introduced as a more immediate solution to the problem. This further highlights the chaotic and messy nature of policy-making: the tension between long and short term solutions and the political feasibility of choosing some paths over others. Therefore, in this context, a quick fix was sought.

This first part of the chapter has shown how the behind the scenes process of compromises continued following the construction of the white paper, in a process representing the contested nature of the power renegotiation taking place between central and local government following devolution. There was considerable

bargaining and negotiation, but ultimately, there were a number of ‘red lines’ that the Executive would not move from and it retained the upper hand. Networks helped to facilitate the process of constructing this legislation even though many of the players involved were opposed to the proposals, and the realities of the policy-making environment meant that short term fixes were sought.

The second part of this chapter details the public part of the policy process which took place in the Parliament.

## **7.2 The Public Part of Policy Formation: the Parliamentary Process**

The creation of the new Parliament in Holyrood was supposed to make policy-making more accountable to the people of Scotland (Himsworth 2009:58; Keating 2010:31). One of the features of a parliamentary democracy is to have a body which is able to keep the executive in check, by testing legislation and passing it, or not. As discussed in chapters four and five, this process was not afforded to the majority of policy-making in Scotland pre-devolution when decisions were taken behind closed doors by groups of policy elites (Keating 2010:27,28). The new parliament would thus provide accountability through representative scrutiny. In theory, this new institution forms a set of veto points on executive power; it is another layer of accountability through which (most) policy has to pass. This section will argue that the Scottish Parliament does not provide any meaningful veto points on executive power, certainly in the context of a ruling majority, although it does perform a thorough process of scrutiny.

The parliamentary process is the most public part of the Bill process. Although parliamentarians may think differently, what occurs prior to this stage is the most important part of the Bill process, it puts together the blocks that can be tinkered with or modified at a later stage. This part of the chapter will begin by providing an overview of the parliamentary process, then go on to discuss what occurred when this the Bill was scrutinised in committee, and then its process in the chamber.

### ***7.2.a Overview of the Parliamentary Process***

The legislative process takes place in a number of stages. Firstly, detailed scrutiny takes place in Stage 1 in the relevant subject committee, who take evidence



on a Bill and write a report making various recommendations and who will endorse, or not, the ‘general principles’ of the legislation. There will then be a Stage 1 debate in the chamber which will be influenced by the findings of the committee report. If a Bill passes its Stage 1 vote, it will progress to amendments in Stage 2 which take place both in the committee and then again in the whole chamber. Following amendments at Stage 2, there will be a final Stage 3 debate on the final version of the Bill by the whole chamber. If passed, the Bill will then go on to become an Act of the Scottish Parliament.

The chamber is the most public part of the parliamentary process; speeches are often marked by posturing with an eye on the headlines the next day. Although this part of the process is needed to secure a Bill’s legitimacy because it is voted on by the whole of the parliament, votes tend to be along party lines and parties agree their positions before hand (McMillan 2009:66). In terms of substantive scrutiny of the legislation, it tends not to add a great deal to the actual substance of the Bill.

The place where detailed scrutiny of legislation takes place is the subject committees which scrutinise legislation on the parliament’s behalf. Because the Scottish Parliament is a unicameral system, the committees take on the role that is performed by revising chambers elsewhere (Johnston 2009:29). Committees are comprised of cross party members, and their make-up reflects the political constitution of the parliament (i.e. each committee in the second term would be constituted with a Lib/ Lab majority). They are also more of a non-political arena than the chamber, committee members are there to scrutinise the legislation, not represent their party, and their questioning is more technical than political (Cairney 2006:205). As a committee clerk commented:

“[the committee are] quite good at taking evidence in a relatively neutral frame of mind and by and large they wouldn’t allow party political stuff to cut through that – and I think the fact that they are quite willing to just park any disagreement and sort of footnote that and then move on ... and then when you get to the chamber you can make big speeches about how outrageous this that or the other is, but they don’t tend to do that grandstanding in the committee.”

However, although there is indeed much less politicking in committee, when it comes to the lines of questioning and the final votes that are taken, party politics usually dictates whether committee members will agree to the general principles or

pass amendments (Carman and Shephard 2009:25; Keating 2010:135). The parliamentary process thus provides both detailed scrutiny of legislation and the opportunity for ‘politicking’. If these are two sides of a continuum, then the place where there is most scrutiny and less politics is the Stage 1 committee process, which will be discussed next.

### *7.2.b The Justice 2 Committee*

As discussed above, the key scrutiny of legislation takes place in Stage 1 of the committee process. During the second session of the parliament, the seven Justice 2 Committee members were comprised of one conservative MSP (the convenor), three Labour, one Liberal Democrat, one SNP and one Scottish Socialist Party (SSP) MSP. There was therefore a 4-3 Executive majority on the committee. Detailed evidence is taken by the committee from experts and those affected by the legislation, including the Minister and a team of civil servants. Much of the evidence that was received by the committee in relation to the Management of Offenders Bill reiterated what had been said by the different agencies during the Re:duce Re:habilitate Re:form and the CJA consultations and the arguments that had had been taking place in the reference group. However, there was a need to make them again in the committee, because this was a different forum and it was a chance to get things put on public record. It was much more difficult for a Minister to renege on something said in the parliament, which is recorded and transcribed and publicly accessible, than something said in a meeting in a back office in Saint Andrew’s House. It was also making the arguments to a different body, the parliament is there to hold the executive to account, and parliamentarians had not been party to all the previous discussions that had been taking place. Because this was a different body who also had the power to mould legislation, agencies also felt that they had another chance to put forward their case in the hope that it might affect the legislation. As I was told by a civil servant:

“One of the big issues you will get from the likes of local authorities and in fact from all agencies, is resource implications. And that they’re not convinced that what’s in the financial memorandum is enough. And that’s why we’re called to account for that [and it’s] open to them to go and say that.”

The questioning of witnesses in the Stage 1 scrutiny of the Management of Offenders Bill was carried out in a relatively non-political way, similar questions were asked to all witnesses and specific points were followed up with relevant ones. Regarding the first section of the Bill, the ‘duty to co-operate’, all of the witnesses welcomed this, though some were cautious about its ability to bring about a real reduction in reoffending (Scottish Parliament Justice 2 Committee 2006). The sections on CJAs were naturally more divisive, and evidence here mirrored evidence taken as part of the CJA consultation detailed earlier, namely local authorities insisting there was no need for radical structural change and others, most notably the being SPS in favour of the proposals (ibid). The Minister naturally defended the proposals, saying that this Bill was ‘breaking new ground’ and in response to claims by local authorities that there was no need for institutional reorganisation, she argued that current evidence showed that co-operation was not working and that the CJAs would build on the existing structures, not dismantle them. She accepted that there would be ‘creative tensions’ between the Chief Officer and the chief social work officer, but that this would not be a problem given that they were doing two different jobs (Jamieson 2005a).

The other main section to be commented on was HDC. The majority of the witnesses thought it would only aid prisoner reintegration (and in theory thereby also reduce reoffending) if it were accompanied by some sort of additional support, rather than solely the ‘standard condition’ of being required to stay out of trouble and stay in a specified location, usually the home (Scottish Parliament Justice 2 Committee 2006). The Minister on the other hand defended HDC, saying that around a quarter of those released would be eligible for some sort of additional support whilst on curfew, but she was quick to emphasise that at some point offenders needed to take responsibility for themselves, and therefore thinking about automatic entitlement was the wrong approach (Jamieson 2005a).

The information that was received and compiled demonstrated a thorough process of scrutiny which was exemplary in its care and detail. However, the committee then had to make decisions that were based on the reading of the evidence, and it is at this point that political considerations come into play. As I was told by an advisor to the Justice 2 Committee:

“the committee will listen to the evidence, they’ll engage with it, but then it comes to the stage at the end of the Bill when someone above suddenly cracks the whip and they all jump into line.”

Decisions on whether to support certain elements of Bills are influenced both by a genuine belief about the merits of the Bill, and also by political considerations. However, the Management of Offenders Bill was regarded by those I spoke to as one of the least politicised justice bills going through committees during that session.

The key points of the Justice 2 Committee’s report were as follows: The committee welcomed the new strategic direction of the Bill (with one member, the Conservative chair, dissenting). Regarding the need for structural change, the committee agreed overall that there was a need for CJAs, although two Members dissented on the basis that the case for structural change had not been made (again, the Conservative convenor, and the SSP Member). There was also overall agreement that structural change would not, in and of itself, reduce reoffending, although (somewhat contradictorily) the committee considered the Executive’s belief that this Bill could result in a reduction in reoffending of 3% to be reasonable. The same stance was taken regarding the role of the Chief Officer, so that, while the views of Local Authorities were noted, the committee (with one dissenting vote from the conservative convenor) agreed that their role was crucial. The committee report also noted and welcomed correspondence from the Minister regarding ministerial powers of intervention, which clarified that these powers would be exercised in respect of CJAs only, and not directed towards Local Authorities (Scottish Parliament Justice 2 Committee 2006).

Regarding HDC, the committee noted the different views about the potential efficacy for HDC. Overall however, they believed that HDCs was a ‘welcome option’, as long as the appropriate risk assessments are carried out to decide on eligibility (the Conservative convenor dissented, based on the view that as long as automatic early release applies, then HDC would not be appropriate). The committee said that it would be desirable to have a wider package of support available to all those on HDC in order to address their offending, but that these need not necessary be expressed as ‘conditions’. The committee recommended by a majority (the conservative convenor and the SSP member dissenting), that the parliament agreed to the general principles of the Bill (Scottish Parliament Justice 2 Committee 2006).

As we have seen, the main opposition to parts of the Bill came from one conservative member and one SSP member. The other opposition member who was also on the committee was an SNP member, and he voted with the Liberal Democrat and Labour members on this Bill. This suggests that the divisions within the committee were not based solely on party politics, although they were clearly strongly influenced by them. The Conservative opposition was based firstly on the fact that the member did not think the case for structural change had been made, although it is unlikely that this was enough for her party to oppose the whole of the Bill as they did. Her overall vote against the ‘general principles’ were influenced largely by the provisions for HDC, which tied in with the Conservative distain for automatic early release. As the committee clerk pointed out: “the Conservatives have been banging on about early release for years, so they didn’t need anyone to give them an excuse to take that up again.” The SSP member’s disagreement was based on his view that the case for structural change had not been made. The dissent on the issue of structural change was, however, not based on party politics so much as a reading of the evidence. As the committee clerk pointed out:

“on HDC – yes, the way that that policy was tied in with the early release issue, that was never going to get Conservative support. I think the structural change one was, I wouldn’t say a more ‘genuine opposition’, but was more of an emerging opposition, and the fact that it was [the Conservative convenor] and [the SSP member] who have very little in common - I think that that was less political and more just analysis of the issues ... It was just one where they looked at it and thought – nah, this just isn’t right.”

Even though the parliamentary process is nominally there for parliamentarians to scrutinise legislation and to hold the Executive to account, the committee process and the debates in the chamber were also watched very closely by civil servants. They recognised that legislation is rarely introduced which is perfect first time round, and no matter how many discussions you have with stakeholders or close private scrutiny of the Bill, the parliamentary processes often throws up something that they had not spotted and which needed to be ironed out. Asked if she found the evidence given in committees useful, one civil servant replied:

“oh yes! Oh yes ... Because when you start looking and drilling down, it might be, you know, a stakeholder’s come forward and you actually realise that what you’ve got wont deliver what you want.”

The committee process therefore offers the opportunity for those affected by legislation to comment on it to a body who is charged with holding the executive to account, and if committee members are convinced (and it is politically possible for them to do so), they will suggest amendments or disagree with its ‘general principles’. As Keating has argued “committees do mark an advance in scrutiny, control and accountability, providing mechanisms that did not exist before and forcing policy makers to anticipate criticism’ (2010:136). The committee process is also watched closely by civil servants, who also use this time as an opportunity to re-tune parts of the Bill which may not have been quite right the first time round.

However, although the committee does perform a fine role in scrutinising legislation, as the above discussion has shown, because the make up of the committees reflect the party composition within the parliament, in the context of an executive majority, committees are very unlikely to vote against an Executive Bill put before it. Partly because committee places are so prized and political parties will decide who can sit on a committee and who should be nominated for the position of convenor, the pressure to ‘toe the party line’ is strong, and there have been several instances in which MSPs who have spoken out against their party have been subsequently removed from their committee (Carman and Shaphard 2009:25). Therefore, although the committee offers a major advance in scrutiny and accountability, it does not form a veto on executive power (Johnston 2009:29). This could still occur in the other part of the parliamentary process, the more public one which receives most attention, in the chamber. This will be discussed next.

### *7.2.c The Chamber*

This section will argue that the chamber part of the parliamentary process is also unlikely to form veto points on executive power in a ruling majority context, and it also offers far less in the way of meaningful scrutiny than the committee process does. It does, however, provide legislation with a degree of legitimacy, because it is voted on by the nation’s representatives.

Following the publication of the Stage 1 committee report, the whole of the chamber has the opportunity to debate the ‘general principles’ of the Bill, and to vote on it. It is highly unusual for a Bill to be voted down by the chamber at this stage because, even if there are very serious reservations about it, opposition parties will hope that they can modify it during amendments at stage 2. In the chamber, party politics can flourish and members are also able to state their views in a way they cannot in a committee situation where their role should be restricted to testing legislation.

The Stage 1 debate for the Management of Offenders Bill took place one week after the committee’s report was published, meaning that in theory, all the MSPs will have had a chance to read the report and digest its findings. However, the number of MSPs who actually participate in the debate is so low that in practice very few of them need to have actually read the report, or indeed, be familiar with the Bill, but are told instead how to vote by their party whips. The reason that the parliament votes on legislation is to give it democratic legitimacy, and it could therefore be argued that this is diminished if only a small number of those who vote on legislation are familiar with it. However, although the votes are counted before the debate takes place, and the Executive will be pretty much guaranteed to have their legislation passed because of their majority, the speeches and votes in the chamber are still regarded by parliamentarians as an important part of the process. It forms another layer of scrutiny which illuminated holes or weaknesses in the legislation, and it also serves as a public declaration about what the Executive is doing.

In her opening speech in the Stage 1 debate, the Minister highlighted the nature of the problem relating to levels of reoffending and reiterated that the ‘the status quo is not an option’. The fact that this Bill was now published highlighted that the Executive have been listening, and were now acting, they were not sitting on the sidelines: “we are providing leadership and intend to provide national direction”. She announced that the Government would be introducing an amendment at Stage 2 which would make all sex offenders sentenced to six months or more subject to conditions on their release (currently, this only happens for all offenders sentenced to four years and over). The Sentencing Commission, established by this Minister to give advice about sentencing of sex offenders, was unhappy with this decision as they had not yet written their report for the Minister. She defended this decision arguing that “[we]

have a duty to protect the public and we believe that it is right to make these changes” (Jamieson 2005c).

Speeches from Opposition Members were largely supportive of this legislation (see for example Stevenson 2005; Purvis 2005), reflecting the fact that the main controversy surrounding it lay in central-local government relations rather than party politically within the parliament. Those speaking against the Bill were the Conservatives, who said they could not support it firstly because of HDC, arguing that any legislation which let offenders out even earlier could not be endorsed. They said they would introduce an amendment at Stage 2 which would seek to abolish automatic early release, and if this were not supported by the Executive then they would not vote for the legislation. They argued that the second reason they would not support this legislation was that the argument for structural change had not been made (Goldie 2005a). Although they did not contribute to the debate, the only other party to vote against the Bill, the SSP, also dissented on the basis that there was no further need for structural reform, (Scottish Parliament Justice 2 Committee 2005). During the ensuing debate, those in favour and against the legislation cherry picked evidence to back up their arguments (see for example Butler 2005; Aitken 2005), and the Executive cleared the final Stage 1 vote comfortably.

Stage 2 of the Bill consists of amendments passed and debated in the subject committee, and then in the chamber. This piece of legislation contained relatively few stage 2 amendments, which illustrates its broad political support. The amendments which were tabled fell into the technical and the political. The ‘technical’ were all put forward by the Minister and were essentially measures to refine aspects of the CJAs, including amendments to ministerial power of direction which had been worked on in consultation with CoSLA and ADSW. Plans to abolish automatic early release for sex offenders announced by the Minister in her Stage 1 speech were agreed unanimously by the committee. The ‘political’ amendments were the Conservative’s proposals to end automatic early release for all offenders, which were defeated in committee, although largely on grounds of resource and feasibility rather than ideological opposition. Not to be defeated on this issue however, the Conservatives continued their mission to abolish automatic early release into Stage 3 amendments, which are voted on by the whole chamber. Although the same points for and against these proposals were raised in the chamber as in the committee, they were put forward with sharply increased political rhetoric in the chamber. Although the Deputy Justice



Minister had been sympathetic to the cause in the committee, disagreeing on grounds of resources, his rebuttal in the chamber was party political. The amendments were again disagreed to, but the Conservatives once again succeeded in raising the profile of this issue and making a symbolic gesture. The final Stage 3 debate was passed comfortably in December 2005, with only the Conservatives and the SSP dissenting.

The chamber part of the process thus further highlights the lack of the Parliament's ability to offer any veto points on executive power when the executive has a majority. The amendment stages, both in the chamber and the committee, do provide a means of fine-tuning the legislation, but it is very much up to the Executive to decide when they will follow the suggestions of the committee report and when to ignore them, as their party is likely to vote according to the wishes of the whips. What the proceedings in the chamber do perform however, is an important symbolic function. They communicate the activity of the Executive to the public, and the Executive *is* held accountable by democratically elected representatives, even if in a rather imperfect manner, as argued above.

Overall, the parliamentary process offers the opportunity for helpful scrutiny and also for party politicking, though ultimately not the ability to act as a veto point on executive power in the context of ruling majority. As Johnston notes, the hope that the Parliament would share power with the Executive has not been realised (2009:29), and the Parliament remains strongly marked by party divisions and discipline (Megaughin and Jeffery 2009:13). Although the Management of Offenders Bill received broad political support, it was not supported by the Conservatives or the SSP, two very different parties. This opposition was therefore both 'genuine' (as in, not based on party politics), in the belief that the case for structural change had not been made, and political in the Conservative disagreement with HDC because it would 'let more prisoners out early'. In this context of executive majority however, power very much lay in the hands of the Executive, because they knew their legislation was largely guaranteed passage, and all the final votes in committee and the chamber were along party lines. Nonetheless, the Parliament does perform a valuable role in providing detailed scrutiny of legislation and also a symbolic one of communicating to the public.

These reforms encompassed more than just the legislation however, and the following section will outline the Executive's 'National Strategy' which accompanied the legislation.

### 7.3 The National Strategy

The legislation built the structure of the CJAs and was needed to make the necessary statutory obligation on agencies to co-operate. However, the reforms covered much more than the legislation and the broader picture was revealed with the publication of *Reducing Reoffending: National Strategy for the Management of Offenders* (referred to from hereon as the National Strategy) (Scottish Executive 2006), five months after the legislation was passed.

In keeping with the nature of the Executive throughout this process, this was not a modest document, it was unapologetic in what it expected from agencies, and it was ambitious in the results it was hoping to achieve. Stating that Scotland was ‘set on the most radical reform of the criminal justice system for more than a generation’, it announced that a target of a reduction of 2% in reconviction rates for all offenders had been set for March 2008, two years hence (2006:3), similar to many similar targets which were set for reducing reoffending in England and Wales around the same time (Solomon et al. 2007:41). The National Strategy was a blueprint plan outlining what was expected of all the parties involved in offender management, and was treated by agencies in the years to come as their manual, indeed, one CJA Chief Officer even referred to it as “his bible”. It listed what would be expected of the NAB, the Executive, the CJAs, local authorities, the SPS, and partner agencies. All in all it represents the Executive’s desire to co-ordinate the delivery of offender management from the centre.

The common theme running through the whole document was the need for increased and integrated working, with organisations working together towards a ‘vision’ and a ‘shared focus’ (Scottish Executive 2006:5). Following a theme begun in the *Re:duce Re:habilitate Re:form* consultation, organisations had to regard what united them as greater than that which divided them, and although primarily directed at SPS and CJSW, it also emphasised the need to include wider agencies, including those outwith the criminal justice system (ibid:16-18).

As well as identifying seven ‘offender groups’ which would be the focus of CJA’s efforts (ibid:11), the National Strategy also laid out exactly what was required of each of the agencies involved. CJSW, SPS and partner bodies would all contribute to the CJA’s area plans, and then align their services with it. CJSW units would have to promote standardized approaches and share best practice and the SPS and partner

bodies would have to provide early briefings of their work. CJAs would have to ensure their area plans are aligned to address the National Strategy Outcomes, which will be detailed below. The Executive would continue to provide central direction to the CJAs, and the National Advisory Body (NAB) would have the task of scrutinising area plans and providing advice on long-term strategy (ibid:16-17).

One of the most interesting parts of this document relates to the requirement of CJAs to engage in public communication about criminal justice, which is a further reflection of a New Labour desire to ‘bring justice back to the people’, to stop it being distant and the in the province of elites (Ryan 1999:12), as discussed in chapter two. CJAs would therefore now have the role of communicating ‘clear and simple messages’ about offender management at ‘local community levels’. CJAs would also be expected to communicate with victims, offenders and their families, and sentencers (ibid:24-25).

The document also listed the ‘outcomes’ that agencies must work towards, and around which their performance would be evaluated. These were under three banners: outcomes for communities, outcomes for offenders, and system outcomes (ibid:5-6). Outcomes for communities represented the Executive’s attempt to make the reforms tangible for communities on the ground, and they included increasing the public’s confidence in the effectiveness of work with offenders, improving the understanding of community disposals and the role of prisons (ibid:4). The outcomes for offenders were largely lifted wholesale from the ‘prisoner outcomes’ that had been outlined in SPS policy documents a number of years previously (Scottish Prison Service 2000). These outcomes included the need for improved physical and mental well-being, access to suitable accommodation, improved literacy skills, and improved relationships with families, peers and community. System outcomes represented what the majority of the discussions during the formulation of this policy had so far centred around: i.e. creating consistent provision, more integrated working, and involving greater partnership with other social services and reducing the prison population through greater use of community sentences.

The three sets of outcomes in the National Strategy illustrate the different directions that these reforms were pulling in, the different things they were seeking to achieve and the different ways in which they had been packaged and sold. ‘Community outcomes’ were a recognition of the fact that justice does not take place within a vacuum, and there is a need for community involvement in justice issues

‘Offender outcomes’ were regarded by many as the most direct way to reduce reoffending, a view which had been expressed throughout the process thus far. The inclusion of the ‘systems outcomes’ however, in many ways also demonstrates the real reasons behind the Executive’s reforms, namely, to improve community sentences in order to reduce the prison population. Although this aim could also be connected with reducing reoffending, this policy intention was more motivated by a desire to increase the efficiency and financial rationality of the management of offenders. These three sets of outcomes therefore illustrate the different motivations behind these reforms, and they also demonstrated how they came together under the ‘reducing reoffending’ banner. As a civil servant told me:

“System and community outcomes are not part of [the reducing reoffending] logic, but they were other things that.. some of the system outcomes ... were just a bunch of things that people thought had always been rubbish so let’s use the strategy to say the way in which we do things needs to be improved so let’s them, but those three domains, set of outcomes, were really quite distinct. Those two were less directly related to that overall aim, to reduce reoffending.”

The ‘reducing reoffending’ division had now been disbanded, and the community justice division in the Justice Department worked together with agencies and the Minister to put the document together. In keeping with the rest of the process so far, the Minister and her team were closely involved in writing this document, although they also held informal consultations with stakeholders. For civil servants, it was more crucial now than ever before at this implementation stage to have ‘buy in’ from the parties involved, because it was now in everyone’s interests to have a strategy which was workable. The outcomes would require integrated working between the criminal justice system and partner agencies, which was a policy direction few could argue with was considered desirable by agencies concerned. But concurrent with this was also a concern about what this meant for accountability and who would ultimately be blamed if outcomes were not met.

The National Strategy thus provided the policy framework which the legislation made possible. In keeping with the Executive’s personality (or rather, the New Labour part of it), it set out a number of prescriptive targets and outcomes against which performance from all the participating agencies would be monitored. One such target included a 2% reduction in reoffending over two years. It also

outlined the CJA's role to engage in public communication about issues relating to crime and justice, part of the Executive's drive to connect justice with the public once again. This document was the 'blue print' for the implementation of this policy, and represents the way in which, despite the institutional barriers posed by having to work in coalition and the power of local government, the Executive nonetheless were able to push through reforms which shared many similarities of those from England and Wales, and which represented a far greater degree of central control.

## **Conclusion**

This chapter has described a location of the renegotiation of power which occurred between central and local government following devolution. The Bill introduced a raft of accountability measures with the CJAs, which would both force co-operation between, and monitor agencies (primarily CJSW). It also introduced HDC as a quick fix to solve the pressures of overcrowding. The process of drawing up the Bill relied heavily on the relationships and expertise contained within the small group of individuals who worked together on other pieces of policy, and it is debateable whether policy could have been made without the involvement of this group. The process of drawing up CJAs involved bargaining and compromise between central and local government, there were some issues the Executive was willing to compromise over and some which it was not. Even when decisions had been made, however, local government were able to retaliate by diminishing the status of the Chief Officer.

This chapter then argued that, despite providing a valuable role of scrutiny (particularly in the committee stage) a symbolic role of communication and legitimacy by being voted on by democratically elected representatives, the Scottish Parliament is ultimately unlikely to form any meaningful veto points on the administration in the context of a ruling majority. The chapter concluded by illustrating how, despite the institutional barriers described in earlier chapters, the Executive were nonetheless able to push through reforms which were redolent of New Labour style public engagement, targets and central control.

This chapter concludes the story of the 'formulation' of the 'reducing reoffending' policy which began with the single agency announcement (though as will be discussed in the following chapter, there was not such a clear cut divide

between formulation and implementation). The following chapter will begin the story of how these reforms were implemented, illustrating the importance of following policy 'all the way through' in order to gain a real understanding of how penal change occurs.

## **Chapter Eight**

### **Implementation – Battles for Control**

This short chapter begins to discuss the implementation of the ‘reducing reoffending’ agenda, the formulation of which has been described in the previous two chapters. As discussed in chapter four, it can be difficult to make a clear distinction between ‘policy formulation’ and ‘policy implementation’ (John 1998:26). Although the policy process is often artificially divided into these phases, in practice, policy formulation and implementation often operate in parallel. Even once legislation has been ‘made’ (for example, an Act is passed by parliament, or a policy document is published), a policy will continue to be ‘formulated’ by those in the field, often in consultation with the bureaucracy. However, it can also be argued that ‘implementation’ is a distinct phase, because it brings another group of players into the picture. It also describes the process of starting to apply the ideas and proposals which had been so resolutely fought over in the previous time (Hill 2005:176-177). Separating ‘formulation’ from ‘implementation’ is also useful as a tool for analysis, and thus this distinction is used here.

Themes of power have run through this policy’s process described so far, in both its ‘obvious’ manifestations (i.e. in central government’s ability to force these reforms on local government, and local government’s ability to hamper the extent of the reforms), and also its more hidden ones (the Executive’s ability to ‘define the conversation’ during the process, ultimately making these reforms a matter of structural reform and increased accountability). The previous chapter argued that the process of creating the Bill, and specifically the CJAs, was an opportunity to view the renegotiation of power between central and local government following devolution. This process showed a process in which both ‘sides’ compromised, stuck to their ‘red lines’, and on occasion, were able to retaliate. This chapter makes a similar argument about the relationship between the two branches of the Executive: ministers and the bureaucracy, the latter of which were arguably another power structure which was displaced with devolution. It will show how power battles were fought over a number of areas of the implementation of these reforms, and how, following the change of administration, the bureaucracy were ultimately able to regain control once again.

This chapter will underline again the importance of political institutional architecture by looking briefly at the effect of a minority administration on policy.

This chapter will be in three main sections. Firstly, it will discuss the battles for control over implementation that occurred with the creation of the National Support Team, with the bureaucracy struggling to assert its authority in the face of a Minister who viewed it as part of the problem. Secondly, the way that expert voices are used in the policy process and the inherent tensions within the notion of ‘evidence based policy’ will then be discussed in the section about the National Advisory Board. Thirdly, and finally, the effects of the change of administration will be outlined, arguing that this gave the bureaucracy the opportunity to regain power once again.

### **8.1 The National Support Team**

This first section of this chapter will discuss the battle over implementation which occurred between the previous Minister and the bureaucracy, arguing this forms an opportunity to view the renegotiation of power between old and new power structures following devolution.

The legislation was passed in December in 2005, and the decision was taken by the Minister and her team, together with the Justice Department, that the Act be implemented in April 2006, only four months later, and one month before the National Strategy was published. I was told by the Minister’s team that this extremely tight turnaround would not normally be countenanced by civil servants, who prefer to lay the foundations for change and bring stakeholders along with them. The reasons for the timescale were political, not only on a national level, but also on a local one. On a national level, there was a desire within the Executive to move fast because they wanted the CJAs to be firmly embedded in practice before the Scottish general election in May 2007. This was also the date for local elections when a new raft of councillors would be elected, and there was a feeling that it would be better to begin CJAs with councillors who had experience of sitting on boards and co-ordinating services. The civil service would normally be in charge of helping legislation to bed in, not least given that they are the ones who would be working with the agencies following implementation. However, in this instance, a different group was created in order to help set the CJAs up. Their role and remit will now be discussed.



### *8.1.a National Support Team: Role and Remit*

This group was called the National Support Team (NST), it operated over an 18 month period from spring 2006 till autumn 2007, and it was created at the suggestion of the Minister's expert advisor. The National Strategy explained that this group had been created in order to 'facilitate the significant changes in culture and joint working practices which underpin the Management of Offenders etc. (Scotland) Act 2005' (2006: 22). The National Strategy also explained that this group would be headed by an independent chair who had worked with the Minister in the past and who had a distinguished career in criminal justice, and the members would be comprised of ADSW, CoSLA, the SPS and the Executive in order to 'reflect the integrated approach necessary to achieve the objectives set out in the strategy' (Scottish Executive 2006:22). Crucially, some of the key members on the NST had also sat on the Tripartite Group and the Reference Group and therefore had a very strong working relationship by this stage.

One of the most important tasks that the NST carried out was to work with the councillors who would form the CJA membership, and their elected convenors. Many of the councillors were unfamiliar with the management of offender reforms and general issues in criminal justice, and they also had to be educated about the strange role that CJA members had (which will be explored further in the following chapter). Therefore, a great part of the NST's energies was spent training the members about the governance of the CJAs, including what their role was, who they were accountable to, and how they should distribute funds. However, the hard work of training councillors was interrupted considerably by the local elections in May 2007, which brought in a whole new raft of members who then had to be retrained from scratch. This was the first local election with PR, which resulted in larger number of new councillors elected than previous local elections. The large number of new councillors not only required complete training in CJAs and offender management issues, but they were also new to local government and working on these sorts of bodies more generally. The NST also worked with Chief Officers, although to a much lesser degree than with the CJA councillor members. There was a staggered start to Chief Officers due to the difficulty of recruiting for this role, and they very soon became bogged down with operational demands.

The NST disbanded in October 2007, eighteen months after the CJAs had become operational. CJAs were extremely grateful for this support, indeed, as will be discussed later, they required additional support for a long time after the NST was disbanded.

### *8.1.b NST, the Justice Department, and Control over Implementation*

Establishing an external body to help implement a piece of legislation was an unusual step, indeed, it was hailed as ‘truly innovative’ by its chair in their final report (NST 2007:8). It was the expert advisor who persuaded the Minister there was a need for the NST, and he argued that the changes being proposed with the CJAs were so significant, for local authorities in particular, that there was a need for an organisation whose sole remit was to facilitate these changes. Furthermore, this should not be undertaken by those who are already steeped in their old ways of working, there was a need for an external and non-implicated body to take this forward. As the expert advisor told me:

“even if everyone agrees that the system is currently not working, that it has lots of short comings, that it’s not necessarily facing the correct direction, passing a piece of legislation and saying that you’re all now facing something on the glorious day one of this new piece of legislation, is like tying an anchor to its ankles and saying ‘physician, heal thyself’.”

An external body would be both offering support for those involved, and also acting as a pressure creating change by continuing to drive the reforms forward. He argued that if it were left up to one of the parties that were already involved, then it was likely that the progress of change would be “glacial”, or it would take the shape that suited one of the parties, or others would become disillusioned with it because it was seen as a vested interest of one of the parties involved. The expert advisor regarded the civil service as one of the vested interests. If implementation was left in their hands, it would not only take very much longer than the Minister and her team wanted, but it would also follow in their way of thinking, which resisted “bashing heads together”, and was seen as being rigid and inflexible.

For some civil servants, the creation of the NST was welcomed, because it gave them extra capacity when the task of implementing the legislation in such a short

space of time was so considerable. However, the creation of the NST was much less warmly received by more senior people in the Justice Department. They felt as though implementing policy was their role and they resented the involvement of an external body which they did not control, because the chair of the NST reported to the Minister, and not to them. The reticence from the Justice Department made the NST's task considerably more difficult, because they were required to work closely with the department. As the NST chair told me:

“But, I think the problem, in fact, I know the problem was at central Government level ... And the early problem was: who was I actually reporting to? ... but it took me time to get over to them that I wasn't reporting to them about what I was doing, because they were part of the problem also ... And my report went direct to the Minister with copies to them. So that was a problem. I don't know if it will happen again. It wasn't an exactly comfortable existence.”

In short, the Justice Department did not control the NST, they resented the fact that it was doing what they felt they should be doing, and they resented the implication that they were part of the problem. However, even though the civil service were being marginalised through the creation of the NST, they were also able to maintain the upper hand, because senior civil servants were able to veto an application for additional funding for the NST which would allow it to have a much broader role in training and supporting CJAs. This would have given the NST a more central role in helping the CJAs, and would also give it a more secure and long-term status. However, this bid was rejected, and the NST chair and his deputy continued to have to reapply for their funding every six months.

Due to the efforts of the Justice Department, the NST was, as the expert advisor put it “strangled at birth”. It operated largely on goodwill from those who sat on it, and the feeling from both its chair and the expert advisor, was that it did not achieve close to what it was capable of because of its limited budget and restricted role. The key tension between the civil service and the NST seemed to be the issue of who it was accountable to. The NST's final report noted (NST 2007:8):

“The NST did not apparently fit comfortably with the normal Scottish Executive/ Scottish Government departmental structures and systems and this coupled with our direct access to the then Minister for Justice resulted it would seem in a degree of reservation and caution regarding our activities.”

Although it charitably added: ‘This was understandable in the circumstances.’

As well as having “strangled the NST at birth”, the Justice Department also stopped it in its tracks. Its planned final stage of work had been to evaluate the contribution of the NST, and also to seek evidence of joint working and commitment to the CJA agenda. This was however, superseded by the creation of the CJA Programme Board within the Justice Department, which had a remit of ‘monitoring performance in relation to seven work streams’ (ibid:7). This would be a civil service controlled mechanism for helping the CJAs, and the external body would be dispensed with. A letter from the Justice Department to the NST stated that the NST’s role would be restricted to ‘ambassadorial and facilitative’ functions (ibid) and would then reach its natural conclusion.

The creation of an external body not implicated with any of the existing interests was partly because of the very quick turnaround time for implementation, and partly because of the dim view that the Minister and her team had of the bureaucracy, who they regarded as unable to see through rapid change and one of the vested interests which needed to be circumvented. This was disliked by senior Justice Department personnel who felt that this should be their job, and they were able to prevent this body from gaining a more prominent role during its operation, and then, as we shall see, to prevent it from continuing following the change of administration.

The NST was therefore a site where the larger battles for control which devolution created could be viewed. In this instance, although the bureaucracy was initially sidelined, it was able to, in the final instance, retain the upper hand. This was because of the departure of a forceful minister, the driving force behind the NST. The change of administration was to have profound consequences for the CJAs and the Reducing Reoffending reforms, and this will be discussed next.

## **8.2 The Change of Administration**

As we have seen from earlier chapters, the Labour ex Minister and her team were a very strong driving force behind the ‘reducing reoffending’ reforms. Although they were based in part on legitimate concerns about CJSW (concerning efficiency and consistency), these reforms were given particular force due to the political agenda of the Executive at the time which combined both their political capacity-building

project with the New Labour brand of ‘modernising’ public services, which favoured structural change and increased central control (Newman 2000). The reducing reoffending reforms and the CJAs were therefore very much a product of the New Labour led administration at the time. Because of the opposition faced from local government and the lukewarm enthusiasm of the bureaucracy, these reforms were driven forward very strongly by the Minister and her team who sought to retain control over all parts of the reforms who also strove to have them firmly integrated into practice before the next general election.

This all changed following Scotland’s third parliamentary election, which ended the Lib/Lab coalition and returned the SNP to victory without an overall majority. With the SNP Government began a new chapter for criminal justice which saw the pendulum swinging back from the New Labour dominated penal excess in which punitive rhetoric was in marked display and criminal justice legislation came thick and fast. The SNP on the other hand explicitly expressed a desire to reduce the short term prison population, spoke about the need not to demonise young people, and marked a new direction in the response to anti-social behaviour which favoured diversion over prosecution (Morrison and Munro 2008:1-3,6; Morrison 2009:2,4). Many of the issues that required addressing remained the same, but they were tackled from a different angle. At the top of the new administration’s list was the need to reduce the short-term prison population, and to make community sentences more effective, but rather than reach for populist, centralising and structural solutions, their new approach would be achieved by working together with CJSW in order to improve the speed and standards in which community sentences were delivered, by replacing all existing community penalties with a single Community Payback Order (CPO), and by legislating to end short prison sentences (Morrison 2009:2,4).

Policy-making during the SNP’s first term in office swung back much closer to the incremental model of policy-making, the pace of change was slower and policy was made in partnership to a much larger degree (Keating and Cairney 2009:41; Keating 2010:203). The SNP’s minority status meant that they had to be much more legislatively cautious than the previous administration had been, and this was evidenced in the relative paucity of criminal justice legislation produced in first term. During this time, the SNP administration had one flagship piece of justice legislation which they presented and got passed by a very narrow majority and only after making significant concessions to other parties (Morrison 2010:1-5). This legislation was

passed in the last of their four years, the previous three years having been spent trying to change the terms of the justice debate and take other parties along with them as much as possible. Those who I spoke to in the criminal justice ‘goldfish bowl’ very much welcomed the SNP’s relative legislative caution and also their general policy direction. However, their critics, opposition members for example, argued that you are never going to bring about change if you insist on doing everything in partnership with others and not take on the ‘vested interests’. While their cautious approach to legislation was no doubt due in large part to their minority status, their ideological position on crime and punishment was consistent with their approach while in opposition.

The minority status of the administration resulted in a ‘legislation lite’ approach to policy-making (Morrison 2009:1, 2010:1). While most in the criminal justice world would agree that this would make for better policy, it did also mean that parliament was marginalised whenever possible (Keating 2010:131). There is a great deal that can be changed without primary legislation and this is what the SNP administration chose to do, producing a range of reviews and frameworks which set new directions in anti-social behaviour and community penalties (Munro and Morrison 2008:2-3,6; Morrison 2009:1,3). These new directions were produced very much ‘behind closed doors’, by the Justice Department and in close consultation with agencies and local government (McGarvey 2009:129,131). After all, if there was no statutory mandate forcing agencies to change, then if the Government wanted to create new policy, it would have to do so in partnership with agencies rather than through force (*ibid*). Although a large part of the reason for this consultative approach must be due to the Government’s minority status, it may also be part of the SNP’s national building project to create policy in a way which is not divisive (Keating 2010:203).

However, while creating policy in this way may lead to slower and more considered policy, the parliamentary process also gives policy democratic accountability and legitimacy, and the process of scrutiny, not least in the committees, also means that potential problems can be ironed out (even in the context of a majority administration, as argued in the previous chapter) (see also Himsworth 2009:62). This latter point was put to me very strongly by a Liberal Democrat MSP who was a Minister in the previous Lib/ Lab Executive.

“what we have at the moment [is] a minority government where the position of the Scottish Government could sometimes perversely be stronger because it doesn’t actually legislate, it does a lot more within its own authority as far as executive power which bypasses parliament all together and there are no internal checks and balances ... and the worry is that Government can do quite a lot without legislating.”

However, while it may be true that ‘governments can do a lot without legislating’, rapid and major changes do require primary legislation. Therefore, the pace of change under the SNP’s first term was much more considered.

Perhaps because of the nature of the new political landscape in which policy had to be made in partnership with local government and with agencies, or perhaps because of differences in personality, the new Justice Minister had a very different approach to making policy than his predecessor. His approach was described to me as ‘broad brush’, he was more concerned with the big ideas than the small print, and many of the intricacies of operational delivery were left up to his civil servants. Although there was broad agreement with his views from within the criminal justice world, he did not wish to become embroiled in discussions about the finer points of policy. As I was told by someone who worked with the Minister on the National Advisory Board:

“it fairly quickly became apparent that he had his own very strongly held views, which he wasn’t particularly interested in arguing out or negotiating around. And that if anything he had a more impatient attitude towards niggly details or people who wanted to unduly complicate things. But in terms of his broad outlook, there was a strong affinity with what he fundamentally believed ... [but] he never did come across as a very details guy.”

Apart from the fact that this was a minority administration which necessitated a more cautious approach to policy-making, there was another very significant political event which took place in the SNP’s first year of power, which was to significantly change the way the Scottish Government was able to make and deliver many of its policies. This was the concordat which was signed between central and local government in November 2007. However, the concordat was not a strategically planned piece of policy, rather, it was the unintended consequence from a manifesto pledge.

The promise to ‘freeze council tax’ across Scotland was not particularly well thought out, because council tax is not controlled by central government but by each

local authority. In order to meet this pledge, central government therefore struck a deal with CoSLA that local authorities would receive a slightly increased lump sum from central government and much greater control over how to spend it by removing the large amounts of ring-fencing put in place by the previous administration, in return for a promise to freeze council tax (Midwinter 2009:65). Instead of a concern about finer level details of ‘inputs and outputs’, Government would instead be concerned about broad ‘outcomes’ which would be devolved to their ‘partners’ in local government. As the 2007 spending review stated

‘This “new relationship” would be based on “mutual respect and partnership”. Where local authorities and their partners, including the third sector, show they can deliver, the Scottish Government will stand back from micro-managing that delivery, thus reducing bureaucracy and freeing up local authorities and their partners to get on with the job.’ (2007:71)

In this ‘new relationship’, the ‘strategic direction’ from central government would come in the form of 15 National Outcomes which local authorities must demonstrate they are working towards, and Single Outcome Agreements (SOAs) which are signed between each local authority and central government. The concordat was initially signed for one year, with the possibility of its extension on an annual basis thereafter, and it has subsequently been renewed every year since.

In this environment, nearly all ring-fencing was removed, much to the delight of local councils who now had the freedom to spend money as they chose (McGarvey 2009:129-130). However, it was not welcomed by other agencies, most notably the third sector, whose previous guaranteed income was now over and who now had to negotiate with each authority in competition with other agencies. Within this context of much diminished central government control, however, one ring-fencing policy area remained, and that was the Section 27 grant that pays for CJSW. Several people told me this was an 11<sup>th</sup> hour decision by the Finance Secretary after significant lobbying from the Justice Department to keep it. Those working within offender management told me that the reason it was kept was because a key part of the government’s justice policies was based around the need to improve community sentences in order to help reduce the short-term prison population, and there was concern about the quality of services if ring-fencing were to be removed. It is significant that the concern about community sentences remained to the extent that it



succeeded in becoming one of the only services to remain ring-fenced in the new landscape of an end to central government ‘micro-management’. However, as we shall see, although ring-fencing for CJSW remained, the effect of the concordat continued to influence the way in which offender management policy was made and delivered.

CoSLA is now the big player in the formation and the delivery of policy. They have a seat at the top tables, and are at the top of charts mapping out policy direction; central government are now no longer involved in local delivery, as I was told, “they just don’t go there” (see also Morrison 2009:4). The new relationship between central and local government was indeed a break from the past. Local government felt very much less controlled and much preferred working under the SNP than they had under the Labour led previous administration, a painful thing for the Labour councillors I spoke to, to admit (see also McGarvey 2009:130).

The combination of the concordat between central and local government and the Government’s minority status, meant that both local government and partner agencies were involved more closely in the policy-making process than ever before, a pattern which was revealed in other policy areas as well as justice (see Arnott and Ozga 2010). As I was told by a police federation spokesman:

“[the] old administration thought that we were a thorn as they saw it. This administration has come in with an entirely different attitude. They are more consultative in a genuine way – that pre consultation consultation definitely happens... There has been a difference. Whether, given long enough, we become a thorn again, I don’t know... But the bottom line is that this makes for good legislation on the statute book. There is far less opportunity for someone to pick a subject out the air and deciding to run with it.”

The flip-side to greater agency involvement however, has been that the central bureaucracy now has less power, now that all the ring-fencing and micro-managing has gone, their task is restricted to ensuring that the obligations laid out under the National Indicators and the SOAs are met. Within this context, of course, there is the exception of section 27 money for CJSW, which, as will be discussed in the following chapter, allows central government to retain a great deal of control over elements of offender management. However, there is also another way that central government have less power now than they did before, and that is because they cannot ‘throw

money' at the service like it used to because there is less of it around. As I was told by an SPS official:

“So what you've ended up with is a group of officials in central government who are actually finding it very difficult to influence policy – and you're seeing that – they are quite anxious about some aspects of [policy] because they no longer have that sort of leverage. I don't know if they ever did have it with local authorities, but they felt they did because if they put some resources in then that would tip the balance in their favour.”

This section has argued that a new phase begun in Scottish criminal justice with the election of the SNP. Their justice policies took a radically different hue from those which preceded it, though their legislative caution was likely to be influenced as much by their minority status as their more moderate ideological position when it came to crime and justice policies. This also meant that parliament was sidelined more than before meaning that that layer of scrutiny, and perhaps also of legitimacy, was absent. The new Minister also took more of a hands-off approach than his predecessor had, and this seemed to be influenced by his personality as much as his party's preference for not micromanaging. The policy environment under the SNP administration was different in a number of key areas. Firstly, because of the Government's minority status policy was made in partnership with agencies to a much greater extent, and partly because of this policy has tended not to 'rock the boat' or challenge agencies. Secondly, the Government also has less money than it used to, so that other lever of control has gone. Thirdly, power has been devolved down to local government to a much larger extent because of the concordat, and CoSLA is now key a player in the formulation and delivery of policy. Within this broad context of diminished central control however, CJSW remains ring-fenced, indicating the continuing lack of trust of local government to deliver these services. This also indicates the continuing importance to central government that these services are delivered to their desired standard due to the concerns about managing the prison population, a pervasive indicator of central government involvement throughout these reforms. Although central control over CJSW remains, however, it does so in a climate in which dictation and coercion are no longer acceptable.

The discussion above again underlines the importance of political institutional architecture in the development of criminal justice policy. The constitution of the Scottish Parliament means that outright majorities are very unlikely (though as we

have recently seen, not impossible). Therefore, where in the first two terms the executive was comprised of a coalition, in the third, there was a minority administration which also had very significant implications for the type of policy which was feasible, as discussed above. However, this is not to overplay the role of institutional structure, party ideology is as important: both for the New Labour inspired reforms of the second term and the penal reductionism reforms of the third. However, the structure of political institutions forms the parameters in which party ideologies play out. This section also underlines the serendipitous nature of policy-making: the concordat signed between local and central government, due to an unrelated political development, would have major implications for the way in which policy-making unravelled.

As we saw with the discussion about the NST above, the effect of the change of administration had significant consequences for those who were tasked with the implementation of this policy. It would also have consequences for another part of these reforms, the National Advisory Board (NAB) which was established in order to offer expert advice to the Minister in offender management policy. The difficult history of the NAB will be discussed next.

### **8.3 The National Advisory Board**

This following section will illustrate the tensions inherent in the use of evidence and expert knowledge in policy in a politicised environment. It will further illustrate the shifting contours of control following devolution firstly, by looking at the way that the previous Justice Minister controlled the use of evidence in the policy-making environment, and secondly, by illustrating how the bureaucracy were again able to regain power over these reforms following the change in administration.

#### ***8.3.a Evidence and Expert Knowledge in a Politicised Environment***

Part of the New Labour approach to public policy involved a commitment to ‘evidence-based policy’ (Wells 2007:22), which has received substantial criticism from the academic community for its less than ‘neutral’ or ‘scientific’ approach to the way that research fed into policy (see for example Hope 2004; Maguire 2004; Mair 2005; Naughton 2005; Stevens 2007; Wells 2007; Hope and Walters 2008). This zeal

for ‘evidence-based policy’ within criminal justice in the Scottish Executive seems to have been more muted than in the British Government (see Croall in relation to the use of evidence within CJSW 2006:595), although it permeated discourse surrounding the youth justice agenda, one of the most politicised aspects of the Scottish New Labour led justice reforms of the second term (see Hope and Walters 2008:15-19). Although not calling it ‘evidence-based’, the previous Justice Minister nonetheless created a body which would allow ‘expert opinion’ (and presumably also ‘evidence’) to ‘help’ her develop a national strategy which could be supported by key agencies (Scottish Executive 2004c:64). Indeed, the Minister even said it would be the NAB who would be “*responsible* for setting targets [for reducing reoffending]” (Jamieson 2005d) (my italics). However, the actual manifestation of the use of evidence and expert knowledge in policy in the reality of a political setting in which there are power struggles and competing agendas, reveals a great deal about politics and the policy process.

The National Advisory Board for Offender Management, referred to as ‘NABOM’ or just ‘the NAB’ by those involved, was created by the previous Minister when the Bill was passed and the National Strategy was published. The official press release accompanying the publication of the National Strategy announced that the NAB would meet several times a year and play a central role in shaping long-term national strategy. It would have two main roles: firstly, to provide the Minister with advice on specific issues including an on-going review of the national strategy, and secondly, it would have a role in monitoring the performance of the CJAs by scrutinising and approving their area plans and annual reports (Scottish Executive 2006b).

This board would allow the views of those who knew and understood the issues to feed into policy. Unlike the NST, the NAB was not the brainchild of one of the advisors, rather it was created at the behest of the previous Minister who was personally committed to the idea of an overarching body which would feed into CJAs and offer advice. The Minister welcomed the NAB in her speeches (see Jamieson 2005d) and press releases (Scottish Executive 2006b), it had its own page on the Government’s website, and all its minutes were published online (no longer available). It was therefore a very public statement which said that this Government was prepared to listen and wanted to have external and ‘expert’ advice in the long-term formulation and delivery of offender management policy.

The NAB would be chaired by the Justice Minister, and officials from the Justice Department would also attend. There were twenty-five board members including representatives from the SPS, ADSW, CoSLA, and key voluntary sector agencies, and there were also several academics, both from Scotland and England and Wales. The inclusion of academics made this body very different from the Tripartite Group or any other group which might have been involved with the Government in policy formation or delivery, it meant that it potentially had the ability to stand outside the demands of operational delivery and offer advice about what research said or to discuss ideas and principles.

The NAB was created at the beginning of 2006, holding four meetings before the change of administration 15 months later. Partly because the previous Minister had established this body, the NAB was forcefully driven in this beginning stage, NAB meetings were used to hold people to account and to seek updates on the performance of the CJAs. The meetings were held over a whole day, with a lunch break at noon. In the mornings, the meeting was chaired by civil servants and following lunch they were joined by the Minister. Members reported very different types of discussions taking place before and after lunch. The confident chatter and exchange of ideas that occurred in the morning, gave way in the afternoon to more subdued contributions. This was partly because the Minister had a strict agenda to stick to, which allowed little scope for listening to the views and opinions of those around the table.

This is illustrated by the discussion that the NAB had about the Government's target to reduce reoffending by 2% within two years, announced in the National Strategy. This was similar to targets set for reoffending in England and Wales during the New Labour rule (Solomon et al. 2007:41), another example of the close links between the two jurisdictions. The Minister and her team wanted this target and the board was asked to endorse it, or to provide their own target (a far cry from the Minister's proclamations that the NAB would be responsible for *setting* the target). As usual, the meeting was divided into the morning and the afternoon, and in the morning NAB members had a lively discussion about how problematic such a target was for reasons of methodology (because it was measuring 'reconviction' and not 'reoffending') and also of principle (because there are so many variables which will influence whether or not an individual reoffends, and to use these figures as an indicator of government or agencies' success or failure was therefore misplaced).

However, when the Minister joined the Board after lunch and she was presented with the feedback from the morning's session, she made it clear that not having a target was just not an option, and the morning's discussions seemed to disappear into the ether. As I was told by a NAB member:

“And I said at the beginning of the meeting – let's make sure that our advice to the Minister says ‘I understand that you need this, but this is not a real figure that actually indicates any change, positive or negative.’ And that was agreed, but I don't think that actually happened, we just kept the 2% without the caveat. I didn't expect the caveat to be in public, but I wanted the Minister to know that it was there. And I don't think that happened.”

Instead, in the afternoon part of the meeting, the board was presented with a range of material from other jurisdictions about reducing reoffending, and they were asked to choose whether Scotland's target should be 2%, 3%, 5%, or even 10%. The NAB members' contribution was therefore left to somewhat formalistic discussions about which target number they should aim for, rather than any broader discussions about the principles of targets, or the merits of having a target at all.

Several NAB members told me about this particular meeting, it seemed to encapsulate many things that were wrong with the NAB. Some NAB members understood that politics dictates its own rhythm and that ministers may well disregard advice heard in the NAB if she had to do so for political reasons, the NAB was, after all, just an *advisory* body. But the real bugbear seemed to come from the fact that the NAB was not structured or operated in a way as to allow these views to be heard or discussed in the first place. This was partly to do with having a Minister who knew what she wanted, and who did not want to be diverted from her path by views which she disagreed with or which might confuse matters. She was undoubtedly interested in the issue of offender management, but that did not mean that she wanted to hear from those whose views would only complicate matters because they were different from her own. Instead, members of the NAB felt as though she was there to sermonise to them about what the government was doing, and to try to herald support from them. However, she *had* to have been committed to the notion of ‘evidence based policy’, otherwise this body would not have been created. As a NAB member observed:

“Once the policy was in motion it wasn't that [the Executive] didn't want it to be complicated or disrupted or challenged or hesitated over, they wanted a

certain *kind* of evidence, not too much, [and] they didn't want us to fall into what I think is an academic pathology of just telling everyone how terribly complicated it all is ... So I think there's an ambivalence there if I'm honest; on the one hand wanting endorsement and expertise on tap, but not wanting to be detained by it."

After a number of meetings, it became clear to the members of the board that a possible role of providing information to the Minister, or feeding into policy in any meaningful sort of way, was minimal. There was a very tightly controlled agenda, and their role seemed to be restricted to receiving reports about the CJAs, looking over their area plans, or receiving reports of progress from the Minister. As one NAB member told me: "as a member of that body, it became less and less clear to me why we were there".

This section shows how power was exercised in the policy-making process at this time in Scotland. Although the previous Justice Minister must indeed have been nominally committed to the notion of evidence based policy, (otherwise why would this body have been created?), she did not want to be diverted from her path and this involved not soliciting views which might 'complicate matters'. By controlling the agenda and the type of knowledge and advice on the table, the Executive was able to retain power in this context. The power relations within the NAB were to change once again, however, following the change of administration in 2007, which will be discussed next.

### ***8.3.b Power Regained Once Again***

This section will show how the negotiation of power between the administrative and the political wing of the Executive, discussed above in relation to the National Support Team, played out in the NAB as well.

Under the previous Justice Minister, the civil servants were able to deliver what she wanted, which was information which suited her agenda and which did not complicate matters. In this context, members of the NAB at least felt as though there was purpose to the meetings, even if their part in them was rather superfluous. However, when the new Minister arrived, it was evident to everyone that he did not know what to do with the NAB and that he did not have much desire to use it either. I was told "he looked like he was there only because he knew he had to be there", and

that he often left early. Even though there was a broader affinity with his ideas about crime and justice than there had been with the previous Minister, it soon became apparent that he had his own strongly held views which he did not want to be distracted from through discussions on the NAB. Both of the Ministers therefore, in their different ways, made the NAB a rather redundant body. The previous Minister because she wanted to sermonise to it rather than to elicit its views, and her successor because he did not know what to do with this body, and also seemed uninterested in hearing its opinions.

However, according to those I spoke to, it was the civil servants as much as the Ministers who stifled the NAB, preventing it from becoming a body which could influence policy. This was especially the case when there was a change in administration, and the new Minister arrived unsure what to do with the legacies of the previous regime. Although civil servants would claim that they were only taking their cue from their political masters, a dynamic civil servant would undoubtedly also allow the NAB to flourish if they wished to do so, by structuring the meetings in order to allow interesting discussions to take place because it was they who tabled the meetings' agendas. However, the issues that were chosen for discussion were restricted to safe subjects which left little room for real discussion or more abstract ideas or ways of thinking about issues. As I was told:

“There was a complete shift when there was a change in Government... civil servants clearly didn't want the [new] Minister to be influenced. The agenda was if you like – stripped down – safe stuff – it was controlled and I think there was a resistance to ideas coming in really.”

Meetings consisted of the civil servants giving presentations to the board, and when their views were sought, these were restricted to defining or clarifying a narrow range of issues already selected for discussion, rather than allowing any free discussion to take place on issues of principle. Several NAB members felt as though the reason why civil servants were so reticent in the NAB setting for other views to be heard was because they wanted to control the information that went to the Minister. In other circumstances, they operated much more as the buffer between the Minister and the 'outside world', whereas in the NAB, there were suddenly twenty-five individuals who may also be able to influence the agenda. The NAB members I spoke to were unanimous that it was the civil servants more than anyone else who had let the NAB



die. As I was told by a NAB member: “They killed it! It’s like ‘Yes Minister’ because the last thing you want as a senior civil servant is a Minister who actually takes decisions.”

The NAB also had the role of scrutinising the CJA’s area plans, which they would do by offering comments and suggestions. However, several NAB members were unsure whether any of their comments were eventually fed back to the CJAs, as they were all collated by the Justice Department. There was also frustration that their role was limited to looking over the CJA’s plans; there was a feeling the NAB could have offered meaningful additional support to CJAs, which as we shall see in the following chapter, they could have benefited from greatly.

During 2006 and 2007, meetings were held every four months, but throughout 2008 and 2009 they were held only every six months, and even then, meetings were increasingly cancelled and not rescheduled. The gradual diminution of the NAB led to its eventual demise in autumn 2009, nearly four years after it was established. It came as no great surprise to board members, who said the writing had been on the wall when at the previous meetings, people had gathered in order to discuss what they were going to talk about.

Many of the individuals sitting on NAB were consulted on the formulation of other bits of policy that were created round this time, but this was done on a myriad of different groups and meetings which were taking place alongside the NAB. In short, the NAB was not the place where people’s views were solicited, either from the Minister or from the Justice Department. The Justice Department did not like it because, on paper, they did not control it, the Minister did, and because other smaller forums existed in which they could address specific issues in a more controlled environment. Even though the Minister was supposed to chair and control the meetings, everyone I spoke to argued that it was actually the civil servants who controlled the NAB, which was easy in the context of a Minister who arrived new on the scene and did not know what this body was for. However, those I spoke to argued that the civil servants could have made this something that the Minister would reap some benefits from had they wanted to, but they chose not to for their own reasons. As a NAB member reflected:

“I have a feeling that senior civil servants were not saying ‘you know Minister, let’s put this on the agenda for the next meeting.’ [it was more a

case of] ‘I’d rather not have that meeting, because there is less control when you have this collection of academics or fruitcakes or whatever, that could challenge the status quo’. I’m being cynical, but I think that the civil servant did not encourage this body, they starved it.”

However, had the Minister been more strong-minded, he also could have made it into something different, so the blame cannot lie solely with the Justice Department. However, there was a strong feeling from those I spoke to that civil servants created or at least facilitated the Minister’s disinterest by ensuring that the NAB was as unadventurous as possible. It was a very depressing experience for those sitting on the board. One member called it “horrible” and “dismal”, another said the whole thing was “all rather dispiriting”. It was best summed to me by a NAB member thus:

“It could have done something useful, and it didn’t. It stumbled towards doing some things that were fairly helpful in the rather restricted range of things it was asked to do.”

The story of the NAB is one of power and control, and the legacies of previous administrations in new political climates. Control was sought over expert voices, and there was ambivalence towards the use of evidence in a politicised environment. Power was exercised through defining the parameters of the debate to ‘safe issues’ and closing down other avenues of discussion. This was carried out both by the previous minister and then latterly by the Justice Department, who also wanted to retain control of the agenda. Once again, in the context of the change of administration, the bureaucracy were able to regain full control and close down this body in favour of ones that were smaller and easier to control.

## **Conclusion**

This chapter is primarily about shifting contours of control, though it also discusses the importance of political institutional architecture. Power was exercised in subtle agenda setting ways in the NAB by the previous Minister and then latterly by the bureaucracy, by defining the terms of the debate and restricting the conversation that could be had in this forum. There was a more overt power battle over control for implementation seen in the creation of the NST. In both the NAB and the NST, the bureaucracy were able to regain the upper hand once again primarily because of the

change in administration. This event in and of itself would no doubt provide an opportunity for this to occur, but in this instance, the bureaucracy were aided by the new administration's move away from micro-managing which provided them with the space to step in and fill that void. The structure of political institutions was yet again shown to be important following the third Scottish election, when a minority administration were elected, which had significant bearing on the type and volume of policy they could create, although it is important to emphasise that the change in pace and tone of policy was also heavily influenced by a different party ideology. Policy-making in this new climate was slower and more considered, relying much more on partnership working, particularly with local government (although the place of local government at the 'top table' once again was as much to do with unrelated and unforeseen political events). The post-SNP mode of policy-making is much closer to that described in 'incremental' theory of policy formation, and also shares some similarities with the situation prior to devolution, in that there was little use of primary legislation.

How policy played out in this new policy environment will be discussed in the following chapter.

## Chapter 9

### Implementation - The CJAs

In order to fully understand the process of penal change, there is a need to examine the implementation of policy as well as its surrounding rhetoric or existence on statute books (Jones and Newburn 2007a:23; Tonry 2007:12). This thesis argues that an examination of penal transformation can be carried out looking in detail at the *processes* of an item of criminal justice policy, particularly one that was created during a time of rapid change, because it sheds light on the factors which cause, facilitate and resist, change and therefore contributes to a broader understanding of penal transformation. If we follow this logic through, then it is also true that for a real understanding of change to be gleaned, we must follow this policy to see how it is implemented: if a policy were not implemented according to its initial plans due to a number of factors then this would be relevant in any understanding of factors influencing change. Therefore, any discussion about policy, not least in relation to broader claims about change, should look at policies' genesis, their formulation and also their implementation. This chapter provides the final concluding segment of the 'story' of the reducing reoffending reforms which originated with the single agency announcement in 2003, and it discusses in detail the operation of the agencies which were created out of this policy.

The preceding chapters have detailed how the CJAs arose from a New Labour agenda motivated partly by a political capacity-building project and partly by their particular brand of public service reforms. However, although the 'reducing reoffending' agenda was undoubtedly political, it was also addressing an issue which many people could identify which was related to the organisation and management of CJSW across Scotland and its co-operation with other agencies. The previous chapters showed how the CJAs were drawn up in some haste and how they were a 'half way house' arrangement between the desires of local and central government. By the time CJAs became operational in April 2006, they had become slowly more and more developed from their initial paragraph in the white paper, through the Bill, the CJA consultation, and then the National Strategy. Following this, the NST also helped to finalise the structural details of the CJAs. As I argue in previous chapters, the final 'product' of the CJAs was born out of compromise at nearly every stage of the

process, between local and central government, and between the civil service and the Minister and her team. The CJAs therefore represented the birth of a very strange body which no-one would have designed from scratch.

This chapter will argue that, despite the fact they are compromised, the CJAs form a beneficial role, albeit with ‘one arm tied behind their back’. Were it not for the factors discussed in earlier chapters which prevented the previous Minister from pushing through with her original policy intention, (which I argue related to the structure of Scottish political institutional architecture), then there would have been a single agency. This would have arguably been a far ‘neater’ policy, and suffered none of the difficulties that CJAs face: this agency would have great power and effect great change. However, as discussed in earlier chapters, the single agency proposal was borne out of a New Labour managerial zeal and would have ‘de-social worked’ community justice in Scotland, and having taken a look at NOMS’ fortunes in England and Wales, we can be grateful that a single agency was not achieved in Scotland. Therefore, this chapter argues that the factors which impeded the rate of change in Scotland, have also contributed to a ‘better’ policy than that which there would have otherwise been, even if the resulting compromises have produced something which is muddled in places.

This chapter begins with a brief section outlining the constitution and function of CJAs and then goes on to discuss how the CJAs were operating in practice by the time I conducted interviews in late 2009. This section then outlines how the CJA area plans are written, the difficult role of the Chief Officer, the contradictory position of the local authority councillors who form the elected members sitting on the CJAs, and lastly, the task of distributing funds within the CJA. This chapter’s third section discusses the involvement of the participants of CJAs, and the fourth section of this chapter outlines how the change of administration affected the CJAs. The fifth and final section of this chapter reflects on CJAs overall, their strengths and weaknesses and some of the reasons for their varying degrees of success.

## **9.1 The Constitution and Function of CJAs**

This first section will outline the key tasks of the CJAs and their composition. As stated above, although these reforms were politically motivated, they were also addressing a weakness in the organisation of the management of offenders relating to

co-operation between local authorities and other agencies. Therefore, CJAs' key functions are to ensure co-operation and co-ordination between the different organisations involved in offender management, primarily between CJSW in different authorities and the SPS. CJAs also have to ensure that information is shared between agencies, that service provision is consistent across each of the authorities, and that best practice is also shared between them. CJA's business is largely dominated by their three year area plans which each CJA is required to draw up in consultation with their constituent partners. As detailed in earlier chapters, the CJAs were to have an important monitoring role of agencies' performance, with the possibility of reporting any 'failures' to the Minister with possible consequent sanctions. The area plans are therefore used to both plan and to monitor services taking place within the CJA. Connection with central government is maintained through monitoring the area plans and reports from the Chief Officer.

The other key function of the CJA is to distribute the ring-fenced section 27 funds for CJSW between the different local authorities sitting on the CJA, which was a function that the previous Tough Option groupings were supposed to have performed, but as there was no penalty if they did not, this tended not to happen. The CJA does not control funding for any of the other partners, though it can 'encourage' the development of shared resources between them. The CJAs are publicly accountable through their membership of local government councillors who are the only people on CJAs who are able to vote. CJA members select a convenor from its membership. Each CJA also has a Chief Officer, whose job it is to oversee the whole of the CJA. They are appointed by the CJA members and they are accountable to them, however, they are also accountable to the Minister for ensuring that everyone on the CJA is meeting their requirements. The statutory partners on each CJA are not members and are not allowed to vote, but they provide the expertise and can be held to account. Partners are representatives from CJSW units within the CJA (represented by the director of social work), the SPS (which is represented by a 'CJA liaison manager'), and representatives from health boards, the police, the Crown Office, the Scottish Court Service, housing agencies, and voluntary sector organisations.

In keeping with the 'public' aspirations of CJAs, they hold quarterly meetings which are open to the community, and many of their documents are published online. The quarterly meetings and the published information is only the 'public face' of the CJAs however, there are many more meetings which happen behind closed doors, and

this is where the real negotiations occur. However, the fact that CJAs are represented by elected members, that they operate within standing orders, that all documents are online and meetings are held in public, and that they are each subject to annual reviews by Audit Scotland, give CJAs a high degree of public accountability.

The CJAs bring all aspects of offender management into a new, more public, and politicised local government arena. They are forcing parties to co-operate who have not had a previous history of working well together, and they are holding them to account in a way they have not been accountable before, with the possibility of reporting on their failure to the Minister if necessary. There are therefore many reasons why the CJA's task may not be an easy one, and this has indeed turned out to be the case. The following section will discuss in more detail how they operated up until the time of interviewing, in late 2009.

## **9.2 CJAs in Practice**

CJAs became operational in April 2006, only five months after the Management of Offenders Bill was passed. Although recruiting the elected member (councillors) to form the CJA committees was a simple enough process, hiring Chief Officers proved rather more difficult and across the eight CJAs, there was a staggered start of the Chief Officers. Two Chief Officers who had been in post since the beginning of CJAs both admitted that CJAs got off to a shambolic start. They reported that nothing was in place once they started, they felt completely unsupported and as though they had to build the CJA from nothing. One Chief Officer spoke about giving many presentations to various organisations in order to raise awareness locally, with an emerging feeling that the Executive had done “no preparatory work whatsoever.” A councillor who had sat on her CJA since it began in 2006, also spoke of a “major PR problem”, with nobody in the police or the procurator fiscal's office having heard of CJAs at the beginning, and her fury when everyone kept referring to the CJAs as ‘*criminal justice authorities*’.

Part of the reason the CJAs felt so unsupported and that they had a great deal of ground work to do, was undoubtedly because they had been established in such a short space of time and because of the difficult nature of their role. Although the NST had been established to help CJAs particularly in their early days, it had been prematurely aborted by the bureaucracy who disliked its autonomy. Shortly after, the

CJAs collectively asked the Justice Department for additional help, which was duly provided in the shape of a private consultancy firm (this time answerable to the Justice Department). The CJAs were in the process of concluding their work with this firm when I conducted interviews three years later, which illustrates the degree of extra help they felt they required. The following parts of this section discusses the writing of the area plans, the role of the Chief Officer, the councillors who form the CJA elected members and finally the distribution of money within the CJAs.

### *9.2.a Writing the Area Plans*

As outlined above, one of the key roles of the CJAs is to plan and co-ordinate services across their area, and this sprang from a belief within central government that CJSW was unable to do this themselves due in large part to their fragmentation across thirty-two units in Scotland. Planning and co-ordination is carried out by CJAs in their three year area plans, which are then monitored in their annual area reports. CJAs spend a very great deal of time making and dealing with plans: there is a constant cycle of planning, area plans and progress reports are constantly devised, refined, consulted on, reformed, and updated.

The area plans state what each of the agencies is committed to in order to achieve the overall goal of reducing reoffending, which was the target that the authorities must work towards under the National Strategy. These plans form the template for the work that all the agencies are expected to subsequently carry out, and the benchmark against which their delivery is also monitored. The process of drawing up the plan is therefore something that Chief Officers and the constituent partners take a great deal of care over. Chief Officers write the area plan, but must do so in consultation with the partners on the CJA. Chief Officers are responsible for making sure that the area plan chimes with the national strategic priorities set by central government, and the local priorities then fall in underneath them. Because the CJA only really has power over CJSW, (because it is their money that they control), the Chief Officers need to use their powers of persuasion to get other partners to sign up to the plan as well. This can be done by trying to ensure that the priorities in the CJA area plan are aligned with the priorities of the other organisation, as one Chief Officer told me:



“So it’s a bit like shepherding people to your agenda and making that agenda meet their objectives. So you’re working towards shared objectives. So no-one feels as though they’re being pushed into anything.”

There are multiple planning meetings and consultations enabling partner agencies to feed into the process and see their priorities reflected in the plan. Ultimately however, it is the Chief Officer who drafts it and the CJA members who then vote at quarterly meetings on whether to pass it or not. Because of the onerous planning process of consultation and review, by the time of the quarterly meeting, most area plans have been agreed to already. This is not the case in all CJAs however; there are CJAs in which they have had public votes which resulted in very open disagreement. Factors which led to this were that there were poor working relationships between the authorities sitting on the CJA, because there had not been the appropriate processes of consultation in place during the plan’s construction, or because the Chief Officer had little authority or respect within the CJA.

If the area plan is agreed to by the CJA committee, it is then submitted to the NAB (up until late 2009) who scrutinised it, and then it is signed off by the Minister. Following the demise of the NAB, area plans go direct to the Minister (or in practice, the Justice Department). It would be fair to say that members of the NAB had mixed opinions about the content of the area plans. NAB members spoke of ‘pockets’ of good practice within them, but they were sceptical about any real overall strategic impact. One of the difficulties for CJAs is getting something that all the partners will sign up to, and this is addressed by ‘loosening’ the targets to make them broad enough to ensure that everyone will sign up to them. As an SPS liaison manager told me:

“There’s a lot of wriggle room, so you can have quite bland statements in your area plans. For example, the 8 CJAs, which is quite positive, recently liaised with the Scottish Government, the SPS and ADSW, in relation to having some broad strategic aims for the area plans, and they are very broad [laughs], and they’re so bland.. They sound good, but they’re quite bland. And you can interpret them and achieve them in many different ways as well.”

While the area plans do no doubt result in a greater degree of consistency than there was before and the plans do reflect the work that agencies are carrying out, it may perhaps be less clear whether or not they are *leading* that work, and in order to get broad agreement, targets are often loosened. This is because of the weak structure

in which CJAs operate: because of their compromised nature, they have few powers to compel, having to rely on persuasion instead.

### *9.2.b The Chief Officer*

As discussed in chapter seven, the role of the Chief Officer was heavily contested between local and central government. The Executive wanted this post to have status and clout so they could hold local authorities to account, while local authorities argued strongly there was no need for this role and they could appoint one of their own for the post. This battle continued until the bitter end; although the Minister created this position, ADSW successfully managed to suppress its salary level so that it would not have more authority than the directors of social work. This naturally had a very significant impact on the candidates that came forward to fill the post. As someone who was involved with CJAs in their early days told me:

“The other thing of course was the salary structure, which unfortunately has a bearing. The CJA Chief Officer was paid considerably less than the director of social work... what you got then was staff from the lower ranks for social work becoming Chief Officer in the area most of them had been in before ... so you didn't get the very senior people switching over and then you got the very senior people resenting the more junior person trying to tell me what I should do.”

There is a general feeling within the criminal justice fraternity that Chief Officers have struggled with their role and this is reflected in the very high turnover of this post and the difficulty of filling vacant positions. One voluntary sector chief executive called the post “a horrendous job”, and one Chief Officer admitted that: “three years in this post is a long time” (he has since left his post).

There are several reasons why this post is so difficult. There is firstly the difficulty of bringing together disparate agencies and forcing them to act collectively, but without really having much power over them, other than CJSW whose resources the CJA in theory controls. Then there is the problem with the lines of accountability. The Chief Officer has the very unusual role of both being employed by the CJA, indeed, they are recruited by the CJA members, but at the same time they also have a duty to report on the CJA to the Minister in the event of its failure. They are therefore accountable both to the CJA board members and also to the Minister. They are in the

position of potentially having a great deal of power, because they can report on the failures of a CJA and any agency within it, but they are also very vulnerable, because their life can be made incredibly difficult by agencies who can decide to be uncooperative. One NAB member commented that the Chief Officers had been left in a position of “responsibility without power”. One Chief Officer said that her job outline “was not particularly well developed”, speculating the role was so confused that “the legislation [which created it] must have been passed on the hoof”.

One of the most difficult relationships for the Chief Officer to manage is with CJSW, which was regarded as potentially problematic from the off. During my interviews, directors of social work continued to insist that this post was unnecessary, and that it could be filled by a director of social work on a rotational basis, and the money saved from the Chief Officer’s salary could be put back into front-line services. Some Chief Officers were disliked by the social workers more than others, and this seemed to depend on how much power they were able to wield over them. Social workers were also keen to emphasise that their power remained intact, despite the existence of Chief Officers. I asked one director of social work whether the CJA and Chief Officer’s role represented another layer of bureaucracy because all communication now needed to go through them and she was keen to emphasise that this was not the case:

“They might *think* that you need to go through the Chief Officer but that’s not actually the case - it’s important that people don’t focus on the structure and say.. I mean – normal communication rules still apply. I would still speak to the head of service in [neighbouring local authorities], we still have our own meetings and they’re very much *our* meetings ... that’s *totally* separate from what the Chief Officer does. I think at times they might actually think – but actually – when you stop and look at their powers, they’re very limited.”

What is certain is that the role of the Chief Officer is contested and unclear. Different Chief Officers have made the role their own in different ways, but many have also fallen by the wayside because of this post’s difficult nature. Because of the confused lines of accountability and their lack of real power, what has made the difference in different CJAs is the personality of the Chief Officer and the relationships that already existed between the local authorities. Because the role of the Chief Officer was so poorly defined and because they had relatively little support

from the NST or the NAB, they have been forced to try and redefine a role for themselves. As one NAB member commented:

“I think the Chief Officers became an interest group. To some extent they made something of their roles for themselves rather than because they had a very clear set of jobs or very much help ... And I think that being intelligent and committed people, they began to find some sort of role, but they probably had to think very hard about what it was because there was never very much clarity or very much support to do it.”

Few would argue that if you are going to have an agency such as a CJA, which sits over agencies and holds them to account, there would have to be a position such as a Chief Officer. However, their role has been significantly hampered by its compromised nature resulting in a position of ‘responsibility without power.’ This was undoubtedly the result of the process of compromise and power battles which were fought between central and local government. Had the Executive got its way, the Chief Officer would have had significant powers and status to hold local authorities to account. However, the need to keep local government on side throughout the process, combined with what was arguably a rather rushed legislative process, has resulted in the position of the Chief Officer often having little authority and with few and confused powers.

### *9.2.c Local Authority Councillors: the CJA Elected Members*

Another new element that the CJAs bring to offender management is the elected member oversight in the shape of the local government councillors who form the CJA committee structure. As discussed above, the councillors are also the only ones who are able to make the decisions on passing area plans and on allocating resources. The decision to have councillors form the central constituent of CJAs was one of the key stipulations from local government during the process of negotiation and compromise as the legislation was constructed.

Councillors, like most politicians, will have knowledge about crime and justice issues through contact with their constituents, crime and justice are after all, one of those ‘doorstep issues’. Some CJA members do have backgrounds in social work or policing, although that is not a stipulation, and many of the members do not. Those with a background in the issues tend to be nominated by their colleagues to be

convenors of the CJA; out of the current 8 CJAs at least half of the convenors are either in charge of social work in their council, or come from a policing background. Chief Officers and councillors were not too concerned that many of the members did not have a background in criminal justice issues, because each CJA has some form of induction and training programme for them when they start and some continue this on a rolling basis. However, councillors also maintain that their role is to bring political accountability, they make decisions based on consultation with others, they are not supposed to be the experts themselves. One CJA member told me his job was to bring “common sense and experience” to bear on decisions, though they will “generally” take the advice that is given to them by partners. The extent to which councillors make decisions based on sound advice and in an informed way, seemed to vary. The involvement of elected members has also introduced a new political element into offender management. One SPS liaison manager told me of the frustrations of councillors with “no interest in an extremely complex environment like criminal justice”, often espousing populist views and demands on services. Another liaison manager commented:

“I find the convenors of the CJAs well informed, very interested and very proactive and the vice convenors. I find their colleagues.. less well informed. In fact, some of them are not informed at all ... And they are again more focused on what their public want. They are politicising the criminal justice agenda again, which I suppose is there all the time, but if you do that, then the priorities change ... especially at this time when you’ve got elections coming up – it’s challenging.”

The key tension within the role of the councillors in the CJAs is that they are elected to sit on them not as a representative of their particular local authority, but rather as a CJA member, and are therefore supposed to act in the best interests of the CJA, and not their own authority. This tension can be difficult for councillors, and they are often pulled towards acting in what they perceive as the best interest of their constituency rather than on behalf of their CJA. As a Chief Officer explained to me:

“you are always trying to get a group of politicians to behave corporately – to put the immediate needs of their constituents or their constituent hats to one side, and to take a more holistic view in terms of how you use resources over a wide area like this. And you see some of that being played out in some of the meetings that you’ve been to. You’ve seen it being played out

by members who are being partial in terms of the way that money is being used.”

This tension within the role of the councillor acting as representative of the CJA rather than their own authority, led one voluntary sector representative to say that “the whole thing has a fundamental flaw”, and that the set up “was not designed to facilitate radical change”, because councillors are reluctant to potentially act against the best interests of their own council. However, a representative from CoSLA who also sits on his CJA strongly defended councillors’ involvement, arguing that there was a strong need for local accountability which could not be achieved any other way.

Much like the Chief Officer, but for other reasons, the role of the councillor on the CJA is an awkward one with inherent contradictions and difficulties built into it. The inclusion of the councillors on the CJAs is due to a condition that local authorities made during the process of negotiation over the legislative process. Prior to CJAs, offender management was organised by the directors of social work with no real political involvement, and the inclusion of this new political dimension, as we can see from the discussion above, has not been unproblematic, although, if stewarded by a good convenor and effective chief office, the worst elements of politicised interference can be mitigated. However, it is nonetheless undeniable that the inclusion of local councillors has introduced a political element into the management of offenders which was not there before. Even the Chief Officer who was most widely regarded as having successfully stood up to the elected members, said that “the involvement of politicians is new and frankly I wouldn’t say would be a positive thing.”

#### *9.2.d Sitting Outside Local Authorities: the Distribution of Money*

Along with the writing of the area plan, the other key task of the CJA is to distribute the section 27 funding for CJSW across the different constituent authorities. This is one of the most important functions that the CJA carries out: one of the drivers behind these reforms was a concern about co-ordination between authorities and the inevitable inefficiency that arises when you have thirty-two units, some of them very small, all running their own separate services without co-operating with their neighbours. This was one of the functions that the Tough Options groupings were

supposed to serve, but they failed because there was no compulsion on them to do so. The CJAs introduced this compulsion through the requirement for an external individual, the Chief Officer, to oversee the distribution of these funds.

Discussions about funding are, of course, discussions about power, and the distribution of funding between the authorities is one of the areas which the CJAs have struggled with the most, certainly in the early days. The picture is by no means unanimous however, with some CJAs being better than others, and what seems to make the difference in this regard is whether the authorities in question have a history of co-operating and pre-established good relations, but primarily, the personality and ability of the Chief Officer. There is one Chief Officer who many people regarded as having been effective at ‘taking on’ local authorities. He has managed to persuade authorities to share their money by asking them to carry out a rather basic level of financial management. For example, establishing a base cost for all the services that CJSW units operate and getting them to compare this money with the sums they receive. In the face of this evidence, authorities would then be compelled to share their resources if they were receiving more than they required. Similarly, this Chief Officer has also instigated a review of all purchased services that local authorities buy in from other service providers, usually from the voluntary sector, which had been dominated by monopoly provision by a number of large organisations. All the purchased services were thus being put out to tender anew.

Some CJAs have therefore managed to position themselves as a sort of financial auditor for CJSW, although, as mentioned above, if any changes are made, it will be with the consent of local authorities by way of the votes from the members. This level of financial planning is not something that authorities had been able to do themselves, and this is one of the ways in which CJAs can be effective. As the Chief Officer told me:

“And there’s something in [the CJA’s] objectivity, the distance, it’s about the ability to stand outside and look in, in the way that local authorities haven’t been able to until now and as a consequence some of those inequalities have come about.”

The largest problem with the distribution of the resources, is that is voted on by elected members who are supposed to act not as a representative of their own constituency, but as a part of a collective whole. While they may accept the principle

of sharing resources, doing it in practice may be another matter. This was acknowledged to me by a chief social work officer

“Because, let’s be honest, that’s what gets you right? We can all agree on the broad principles, but as soon as it comes to moving a bit of dosh between one authority and another, it’s a different story.”

Although the directors of social work do not have a vote, they will do their best to influence the member from their authority, who they will also have a pre-existing working relationship with. One director of social work admitted that if there were discussions about cutting one of her services the first thing she would do would be to “lobby my elected member who is on my CJA”. In one CJA in which there had been a successful reallocation of resources, this occurred because the member who would lose money accepted that he had a ‘meta responsibility’ and that councils must act corporately. However, this still does not make it an easy decision. As he told me:

“It’s just a matter of how I handle that politically... at the council. Because there will be – if I’m signing up for something that means less for [my authority], I will get some macho [opposition party] councillor saying how I don’t stick up for [my authority]. Well, I stick up for [my authority] all the time – but I’m not going to do it when it’s wrong – and that’s the trouble – people fight for things – it’s the pork barrel thing – even when they’re not entitled to things – they will fight for it.”

There were therefore varying degrees of success in moving resources. In some they have been more successful and in others, attempts at moving money have been far less successful. In at least one CJA money was just not moved at all, because a majority of the councillors voted down the proposals, but the more frequent tale was one in which councils dragged their heels and made the whole process laborious and difficult. One CJA had taken over a year to move a very small amount of money from one local authority to another, and even this was only achieved after an external consultant carried out an audit of all spending and the changes were rolled out incrementally.

The story on sharing resources is therefore mixed, with the ability of CJAs to do this heavily dependent on the efficacy of the Chief Officer and the existing relationships between councils. However, it also seemed that it was becoming easier to move resources by the time interviews were conducted: as the results of spending



reviews came in, it would be harder for councils to continue to claim unequal amounts in relation to their neighbour. Chief Officers also argued that as money became shorter in the years to come, it would become easier and arguably more necessary for CJAs to take this role on. The issue of sharing resources is thus one area where the CJA has most potential to make an impact, although this will be dependent on the factors outlined above.

### *Conclusion*

This section has argued that the compromised nature of CJAs due to the bargaining which occurred over this policy's process, has hampered the operation of CJAs, by emasculating Chief Officers, by giving elected members the sole power to vote on resources, and by introducing a political involvement to the management of offenders which was not therefore before. However, this section argues that the CJAs have, despite these difficulties, managed to improve the co-ordination and organisation of offender management services primarily by introducing a greater degree of financial management into CJSW. One of the key roles of CJAs was to bring the different agencies involved in offender management together, and this will be explored in the following section.

### **9.3 The Involvement of Agencies in CJAs**

It was recognised throughout the process of the Management of Offenders Act starting with the Re:duce Re:habilitate Re:form consultation, that the task of reducing reoffending had to be a shared responsibility across agencies. Therefore, a key part of the CJAs' remit is to involve a range of agencies in offender management. As we have seen in previous chapters, one of the key drivers behind CJAs was to improve the management and performance of CJSW as an end in and of itself, and another driver was also to improve the way that all agencies work together. The most important agency involved in CJAs is therefore CJSW, primarily because it is their money that the CJA distributes, but also because they are the ones who are most implicated in offender management. However, this leaves other agencies on the margins of CJAs to a much greater extent, thus running the risk of sidelining the possibility of any meaningful partnership working.

The fact that CJAs only control section 27 money goes a long way to determining the involvement of other agencies. One member of the NST called CJAs “talking shops with local authority money”, in which other organisations can negotiate their participation with CJAs based on what suits them and what they chose to provide. However, the CJA is responsible for the delivery of many targets over which it has no financial control, so it is therefore heavily dependent on agencies’ good will and the persuasive powers of the Chief Officer. Because other agencies are under no strict obligation to contribute, the Chief Officer will often seek to achieve contribution by aligning the CJA’s priorities with those of the agencies. One SPS liaison manager also said that the CJA targets worked best when the targets are the same for the CJA and the SPS. In these instances, there was (not surprisingly) a “remarkably high success rate”. However, this does rather raise the question of to what extent the CJAs are actually *changing* the behaviour of different agencies, or simply reflecting it.

The extent to which agencies have been meaningfully involved in CJAs has varied considerably from CJA to CJA however, although a common picture did arise from my interviews. A more detailed discussion of specific agencies’ involvement will now follow.

### **9.3.a CJSW**

As I have argued above, the key agency in the CJAs is CJSW. Not only because it is their money that CJAs control, but also because one of the reasons the CJAs were created was to better organise CJSW. As argued above, the battle over section 27 money has been one of the fault-lines of the CJAs because of the difficulty of potentially asking members to vote money away from their own authority. It is the only money on the table despite the fact that reducing reoffending is supposed to be a shared responsibility, and the directors of social work resent the power that the Chief Officer and the CJA have over their work through the control of the budget. However, a greater control over their services was the key objective of the reforms, it chimed both with the political branch of the Executive’s desire to ‘reduce reoffending’ and also with the civil service’s desire to improve the management and efficiency of CJSW. It was therefore inevitable that whatever structure emerged from the process would have the control over CJSW resources at its heart.

The directors of social work are the group within the CJAs who dislike them the most, and it would not be an underestimate to say that they positively resent having to sit on CJAs and have their control taken away from them. A common complaint is that they now have to defer all decisions through another layer of authority, which makes decision making more laborious and lengthy. However, it is no doubt because their power is taken away from them which accounts for their real problem with CJAs. The resentment felt by CJSW was even criticised by councillors, with one elected member commenting that CJSW needed to start “maturing” and working with the CJAs more productively. The directors of social work would have liked to stay in their own established groupings; indeed, one director of social work was extremely keen to emphasise that her grouping continued to operate; it was not a thing of the past. As the following exchange illustrates:

“KM - do you think that the grouping that existed before the CJAs came –

Interviewee 19 – why are you saying ‘existed before’?

KM – ok, are you saying they’re exactly the same? Ok, well, how was that grouping operating when -

Interviewee 19 – how *does* it work! Can I just emphasise, it’s not a past tense, that grouping, the arrangement of the three local authority continues to work and actually I would say it’s imperative that that continues to work and work well ... so don’t assume that that’s a thing of the past because of CJAs.”

This illustrates the extent to which directors of social work resent the imposition of the CJAs, and are keen to continue working in the model of their old grouping. They did recognise the need for greater co-operation between authorities and for developing services on a more strategic basis, they were simply of the view that this could be done without the CJA. This frustration was felt by the Chief Officers as well, with two of the three Chief Officers I spoke to saying that social work were by far the most difficult agency out of all those involved in CJAs, to work with. As one of them told me:

“CJSW has been most difficult. And I think that’s because of the money, and if you introduce money into anything.. and although they’ve worked to partnership in previous groupings, I’m the new person with a whole load of

expectations and legal requirements around the possibility of reporting to the Minister etc. So I suppose that has been surprisingly complicated.”

In a sense, the fact that CJSW have found this process so difficult, illustrates the extent to which the CJAs have actually been successful. Had the directors of social work not complained about these new structures, we could surmise that they had not changed their ways and were able to carry on as before. It is worth noting that the fact that the directors of social work did not want to change their ways should not necessarily be seen as a bad reflection on them. No agency wants to change, especially not if it means losing some of their power. However, the inevitable inefficiency which comes from being spread across thirty-two units in the small area of Scotland, combined with poor relationships with other organisations, most notably the SPS, meant that the bitter medicine of enforced co-operation has probably been a good thing.

### *9.3.b. The SPS*

Despite the fact that CJAs were created in order to deal only with CJSW funding, and that it is only local authorities who sit on them and have the right to vote, the intention within the Justice Department at the time the legislation was passed was for the CJAs to act as an equal control over CJSW *and* the SPS. However, as the previous section of this chapter has shown, the CJAs are to a large extent orientated around CJSW, and in this context, it has largely been up to the SPS to decide the nature and extent of their involvement in CJAs.

As demonstrated in earlier chapters, the SPS were in favour of these reforms from the start; their view was that community justice organisations were fragmented and difficult to co-ordinate with, and they therefore welcomed any moves which would organise services in a more strategic capacity. For that reason, the SPS created four senior management roles whose sole task would be to act as a bridge between the SPS and the CJAs. There is now a much greater degree of partnership working and understanding between the SPS and community organisations, but interestingly, most of this has occurred on the SPS’s terms. As a civil servant commented:

“But even the fact that the SPS set up these liaison managers – I think that the SPS were aware of, and clearly, they didn’t want to lose autonomy

either, so I think that they were aware of the risks to their status and in some ways the liaison managers were as much about watching their back.. as making the system work [laughs]”

There are four SPS liaison managers, each one working between two CJAs and the SPS headquarters, and their job is to represent the SPS in the CJAs. Liaison managers have desks in the CJA offices, which further facilitates communication between the CJA and the SPS (both its board and the local prisons). The CJAs have therefore greatly increased the dialogue that takes place between the SPS and community organisations. Although on paper, their position is to ensure that the SPS meets its obligations under the area plan, in practice, these obligations are primarily up to the governors in the relevant prisons to implement, the liaison managers’ role is much more about smoothing out difficulties and oiling the wheels between the SPS and community organisations. Two liaison managers described their role as being the person stuck in between two organisations which have historically not understood or trusted each other. As one liaison manager put it:

“But we’re very often piggy in the middle between elected members and the SPS or elected members and the local prison. Or the Chief Officer and the SPS. We’re in the middle of things very often. So there’s a level of tact required... sometimes we’re just playing peacemakers.”

The liaison manager’s presence in the CJA setting has helped to break down some of the previously held misconceptions between the SPS and community organisations, most notably CJSW, and it has been surprising for some to hear that the SPS also believe there are too many vulnerable people in prison, or too many short sentences. The SPS liaison manager’s position in the CJA also helped the SPS to communicate the complexity of moving money from the SPS into the community. Representatives of CJSW, the voluntary sector and CJA Chief Officers and convenors, all spoke about the very large budget overall that the SPS receives with a degree of envy which was tinged not only with their desire to have some of it, but also with the belief that spending money on repeated short sentences is not a good way to administer or ‘do’ justice. Although those I spoke to would comment on the fact that some of the SPS’s budget would be better spent in the community, they also all recognised that changing this would require a change in sentencing which was outwith the SPS’s control. There was a degree of resentment nonetheless about the

SPS's large budget, which remained, to the CJA, frustratingly untouchable. However, although there was understanding about the difficulty of transferring resources, there remained a strong feeling of mistrust about the SPS's finances with one Chief Officer telling me they were not "entirely convinced" about what the SPS do with all their money.

The liaison managers' job is also to make sure that the SPS's commitments in the area plan are being met and to report back to the CJA about that progress. In this respect then, the CJA does have a clear monitoring role of the SPS's activities; they provide another forum in which the SPS now needs to be accountable. This is a new thing for the SPS and not a terribly comfortable one. As one liaison manager put it: "we are part of the CJA, and that's an issue for us – because we don't like to be part of the CJA either, because they are effectively monitoring our performance as well – which is a bit 'ooh' you know?"

One of the areas in which the CJAs and SPS have tried to co-operate and which has appeared in their area plans is the issue of community prisons (i.e. with a greater proportion of prisoners coming from the surrounding area). Although the SPS may share this aspiration, the policy has not been signed off by the board, and the SPS reserve the right to move prisoners to a central facility if it suits them to do so. As an SPS official remarked "just because the CJA exists, doesn't make it the driver for everything that you do": although they may share the same objective, the SPS will do things differently if its own operational and managerial imperatives say so.

However, it would be too simplistic to portray a picture in which the SPS carried on doing their own thing with no regard for the CJA or community organisations. There is a desire to listen to the community and to develop more consistent ways of working with them, and to try and work together towards shared objectives. However, the SPS ultimately retains the right to do things their way, irrespective of community organisations who may not understand their position. Furthermore, although the liaison managers have greatly increased communication and co-operation between prison and community organisations, they are accountable to the SPS and report directly to them.

Although liaison managers allow Chief Officers to have better access to SPS governors and board members, and there is commitment for greater co-operation, it is questionable whether the CJAs have managed to influence the SPS's strategic direction more generally. The big questions relating to, for example, community

facing prisons remain very much the domain of the SPS, and CJAs feel unable to influence this. When it comes to broader issues of control, the SPS have, as one Chief Officer put it “put the umbrella up and are keeping themselves dry”. This is not accidental. One SPS board member told me that position of the liaison manager allows the CJA to be “kept more at arms length if it suits us sometimes”. The need for the SPS to put the CJA at ‘arms length sometimes’, springs from a general mistrust of local authority culture and management, which the CJA is seen to embody. This is one in which there is lots of waste, duplication, and inefficiency, very different from the centralised, top-down, ‘tight ship’ that the SPS feels they operate. This is embodied in a comment from a liaison manager:

“[t]his Thursday I’m going to the first planning day for [his CJA] – being held in the lodges of Loch Lomond! Again, that’s an awful lot of money! Why can we not bring our own lunches? Think of the cost of every area planning group! Just part of the culture of local government. Lovely sandwiches and pastries etc – it’s ridiculous.”

The SPS want to retain control over what they do before they relinquish any more to an organisation they see as wasteful and unorganised. The CJAs have resulted in a much closer working relationship and understanding between prisons and community organisations, but this has taken place to a large extent on the SPS’s terms.

### *9.3.c The Voluntary Sector*

If CJSW stand at the centre of CJAs, and the SPS more on an outer ring, then the voluntary sector organisations could be described as satellites circling the CJA, trying to get a look in, and managing that with differing degrees of success. Their position between CJAs varies considerably, and they have found themselves jostling for business in a new and unfavourable economic climate.

Historically, CJSW departments have contracted services from voluntary sector organisations which provide the more tailored and specialist services that local authorities have not had the skills or capacity to provide themselves. Prior to CJAs, voluntary service provision had been on a relatively ad hoc basis, it has been up to each CJSW service to decide who they wanted to contract from. Some of the larger

organisations had very solid relationships with individual local authorities and their contracts with them were secure and lasted for years, even decades.

Voluntary sector organisations are statutory partners in CJAs if they are in receipt of £100,000 of funding from either CJSW or the SPS. For voluntary sector organisations, the CJAs offered a new chance to try and influence local authorities and try and win some more contracts, they provided a ‘one stop shop’ where they can access a number of local authorities and other voluntary sector organisations in order to win new contracts. They can also participate in CJAs by holding one-off training days for the members, or by chairing one of the CJA working groups that they have the expertise on, even if they do not provide services.

As described above, although the Chief Officers have got limited powers, they have managed to change the way that funding is distributed by carrying out purchase reviews of all offender management services and then persuading members to make decisions based on the argument that it would be unreasonable for them not to. This has proved especially problematic for the voluntary sector, who admit that their services may not be the cheapest, but which they argue are of a much higher quality than that provided in-house by local authorities. Furthermore, many of them have been running their services for decades with little competition, and recently the field has begun to open up with more providers coming into the picture. This has left them in the first line of attack as local authorities try and save money as things become tighter. As one voluntary sector chief executive reflected:

“In [one CJA], the Chief Officer seconded someone to scope out who was doing employability within his area, and there was 70 odd organisations providing that kind of service ... and he can pick and chose, and if he’s not feeling particularly well disposed to an organisation then he will be part of the decision about where to award that contract.”

The advent of the CJAs has therefore provided a mixed picture for the voluntary sector. CJAs have provided new opportunities for participation for newer and smaller organisations. For some of the larger organisations however, the CJAs and the purchase reviews they are carrying out, mean that voluntary sector organisations who have provided a more expensive, though they would argue ultimately better quality, service, have fallen foul of the new fiscally straightened times. Although as money



becomes shorter, local councils would be cutting voluntary sector provision anyway, CJAs have given force to this drive.

#### *9.3.d Other Partners*

When the legislation was passed, the other statutory partners named by the Minister for involvement with the CJAs were local police forces and health boards, the Scottish Court Service, the Crown Office and Procurator Fiscal Service and Victim Support Scotland. Because housing services are located within local authorities and there are different arrangements from area to area, they were not named as statutory partners, but it was expected that CJAs would engage with them in a way appropriate for their authority area.

Out of all the agencies listed above, the most successful partnership in CJAs has been with health boards, although this has varied. This was partly because the NST was able to make good connections with health board in the early days and also because, if the CJA was able to pitch it well, they could persuade health boards that their targets could be aligned with the CJA's targets, to everyone's benefits. As one Chief Officer told me:

“[the local NHS board] have brought in many hundreds of thousands of pounds largely because it ticks their boxes anyway – they're around equality issues – so by working with offenders – particularly women offenders – they were able to demonstrate their compliance with various items of equalities legislation, which was good for them, good for us, and good for offenders, which is what matters.”

However, it has been a mixed picture throughout the country, with other CJAs reporting virtually no response from health boards. Health boards were described as “gargantuan bureaucracies”, making it difficult to “find the door in”. This is one obstacle, but the real issue about whether a CJA manages to secure health support depends on whether the CJAs are able to pitch it so it is in their interests to participate as well. The picture is one in which health services are only interested if it helps them meet their own targets.

Housing agencies have been involved in CJAs, but more in relation to operational commitments surrounding Multi Agency Public Protection Arrangements (MAPPA) and dangerous and violent offenders. Although discussions about MAPPA

and the housing of these offenders may be reflected in some of the CJA's meetings, this co-operation would undoubtedly be happening anyway because of the MAPPA policy agenda.

The involvement of the other statutory bodies on the CJA has been marked with less success. Although it should perhaps be easier for CJAs to engage with other criminal justice organisations, this has not proved to be the case, and while it has been easier to engage with health, literacy, employability services etc, it has been more difficult to persuade the police, the crown office and the court service to become involved. One Chief Officer reflected that this might be because the CJAs are seen as too "social work orientated", and the other organisations may see their role much more as processing offenders up until sentencing and having little concern with the management of offenders following conviction. They also have their own agency which fulfils their need for partnership working, Criminal Justice Boards, which comprise the Sheriff Principal, the area Procurator Fiscal, the Court Service and the local police representative. The National Strategy also required CJAs to build connections with Sheriffs in their areas. However, from the interviews I conducted, it appears as though they have not been involved in CJAs at all though one representative did sit as an observer on the NAB. Naturally, this is to do with their fiercely protected independence, and the CJAs have had enough difficulties in their day to day tasks without having to try and gain co-operation from another reluctant group as well.

### *Conclusion*

This section has shown the mixed fortunes of the different players involved in CJAs. It argued that, although resisted heavily at every turn, CJAs have resulted in increased co-operation and co-ordination between local authority CJSW. CJAs have also greatly improved the relationship between CJSW and the SPS, although the SPS have managed to 'keep their heads dry' and secure partnership working very much on their own terms. CJAs have provided mixed fortunes for the voluntary sector, providing some with new opportunities for participation, and for others it has escalated the drying up of their contracts. Finally, CJAs have not been terribly successful at engaging with wider partners: the co-operation with housing services is likely to have happened anyway, and health services sign up only if it suits them as

well. Overall, however, the most important agencies that CJAs were created to improve the integration of, were CJSW and the SPS, and as we can see, although it might be resisted in the case of CJSW, or somewhat partial as in the SPS, the CJAs have managed to improve the communication and co-operation between these two agencies.

#### **9.4 CJAs and the New Administration**

As we have seen, the CJAs were created under the Lib/ Lab coalition, they were driven forward very strongly by the Labour Justice Minister at the time, and implementation was given to a body which answered to the Minister not civil servants. Following the election in 2007, the Justice Department was able to disband the NST which removed a large support from the CJAs, and this period also coincided with a more general period of drift for the CJAs in the context of a civil service and a Minister who were unsure what to do with these agencies.

The new Justice Minister had a very clear political agenda for justice policies, but they involved high level outcomes rather than lower level organisational structures, and he was happy to leave this sort of operational detail to bureaucrats. Part of the SNP's agenda included a desire to improve the standards of community penalties in order to support a reduction in the prison population, but at the beginning of the SNP's tenure at least, there was not much certainty about how the CJAs would fit into this picture. There were also rumours that the new Government would have looked favourably on a single agency solution, although not in the 'correctional' vein mooted by the previous administration.

The CJAs felt this ambivalence towards them keenly, with several people in CJAs recounting a community justice conference where the Minister attended and failed to mention the CJAs in his speech. One year after the SNP came to power, the Scottish Prisons Commission's Report was published and was dismissive of the CJAs, mentioning them only in passing, and then only to say that it "remain concerned about the capacity of the CJAs to deliver on reducing reoffending, given their very limited powers and resources" (Scottish Prisons Commission 2008:43). There was more qualified support from the Government's review of community penalties, Fair, Fast and Flexible, which did at least mention CJAs more often, although there were some references to the ways in which CJAs 'should' be managing services (Scottish

Government 2008:20). However, it also stated in relation to ensuring local engagement, that “CoSLA and the Scottish Government are committed to continue support and development of CJAs in that important role” (ibid:24).

In short, there was a general view that there was ambivalence toward the CJAs from the new Scottish Government in its early days with one Chief Officer saying that the new administration just “sat back and watched”. They were seen as a product of the previous administration, and their difficult early days hardly proved to anyone that this new set of structures would deliver miraculous results. However, by the time that Fair, Fast and Flexible was published, eighteen months after the new administration took power, it had become clear that CJAs would not be scrapped.

There was neither political, nor administrative, mileage in scrapping CJAs at this stage. Politically, this was a minority administration, and they had their hands full with more pressing matters, and as the CJAs were not seen as a diabolical failure or expensive waste, rather as structures whose merit was uncertain, there was little political benefit in scrapping them. Administratively, there was also little incentive to scrap them. Firstly, they had been set up in statute, and therefore, dismantling them would be more difficult than just allowing them to slowly fade away, and secondly, if the CJAs were to be dismantled, it would be very resource intensive for the Justice Department to go back to administering funds to thirty-two separate authorities. The CJAs were therefore kept on, not because the new administration believed in them, but rather because there was no real incentive to get rid of them, they were still in their early days and so therefore still might prove themselves, and because they did provide some marginal benefit to the Justice Department.

This early period in the new administration’s tenure represented a period of drift for the CJAs, and was a particularly difficult time for the former Minister and her team who now had to sit back and watch their project, which had commanded so much time and energy, as it teetered along somewhat precariously. As she told me:

“One of the frustrations was that we were getting to the point where they needed to be continually driven, to make sure that something actually happened with it. Because if someone’s not driving it forward, things sort of drift a bit and I think that the timing was unfortunate... here is something that really could work. And it also has the potential for absolute disaster if it is not co-ordinated properly and driven properly.”

Parry (2008:117) argued that civil servants much preferred working under the SNP administration than the previous Executive; they carried out more consultation and preferred working with a party which did not have connections to another party in England and Wales. It may also be that they enjoyed working under the SNP more because they seemed to enjoy considerably more control following 2007. In the context of a Minister who was more concerned with high level strategic direction of policy rather than the lower-level detail of the delivery of community justice, the Justice Department took control of CJAs. After the NST was prevented from continuing, the civil service were further able to increase their control as the NAB was also disbanded. Now that both the NAB and the NST were gone, and the Minister also expressed little interest in CJAs, the Justice Department had free reign to decide how they should be used. The importance of who is in charge within the Justice Department to the shape and direction of policy, was felt keenly by the CJAs, and perhaps more so in the context of a Minister who gave the department a freer reign than his predecessor had. As the CJAs progressed, it was the civil servants in the Justice Department, and not the Minister or the Government, who decided the shape and direction of the CJAs. As one Chief Officer told me:

“What we can now say, is that it doesn’t actually make that much difference whoever is in charge. What makes the difference is the civil servants. The people running the criminal justice directorate, they are the people with the power.”

Apart from the fact that CJAs were difficult to get rid of given their statutory footing, there was another reason why they were not disbanded, and that is because they also performed a function to the new administration’s policy direction which was to improve community justice in order to reduce the prison population. However, as discussed in chapter eight, the new political climate meant that this would have to be done with the co-operation of agencies. In this context, the CJAs provided a perfect tool to the Justice Department to monitor the quality of CJSW services, and a useful meta-level structure which made the administration of funds to thirty-two local authorities easier. Thus, the Government could retain its position of ensuring national direction, whilst hoping the CJAs remained more focused on local delivery.

The previous overarching principle of ‘reducing reoffending’ has quietly fallen away under the new administration. Though they hope that if services work

well then this will be a natural outcome, there is no centrally set target of reducing reconvictions and CJAs' area plans are no longer orientated primarily around this goal.

As discussed in the previous chapter, the CJAs were set up to deliver the policy framework of the National Strategy, in which work would be orientated around three groups of outcomes for: offenders, community, and 'the system', all under the ultimate banner of 'reducing reoffending'. The 'outcomes' as listed in the National Strategy resulted in a very complex performance framework which was difficult for the CJAs to use, with one Chief Officer calling it "unmanageable and incoherent". The practical difficulties associated with using the National Strategy, or at least the performance indicators that were drawn up using the National Strategy, as a policy direction for the CJAs, was one of the reasons why, by the time I conducted my interviews, it had fallen out of favour with the CJAs and the Justice Department. However, the other, perhaps more important reason why the CJAs were not marching to the rhythm of the National Strategy drum anymore, was because it was a policy drawn up by the previous administration. In December 2008, the Scottish Government published "Protecting Scotland's Communities: Fair, Fast and Flexible Justice" (2009), which brought together the recommendations made by the McLeish Prisons Commission with the Government's own review of community penalties. By the time of interviewing at the end of 2009, Fair, Fast and Flexible had become the overarching policy umbrella that the CJAs must work towards and the National Strategy had fallen into the background. However, it was not a clear-cut case that the policies from the new administration were now relevant and the ones from the older administration were not, it was more a case of one set of policies 'moving to the front' and the other 'moving to the background', with some elements of the older documents continuing to be relevant and others not. At the time of interviewing, this situation had left the CJAs in a state of some confusion, although there was a hope that this would soon be resolved as a new framework of indicators was in the process of being drawn up. In light of this halfway-house situation, CJAs drew up their own outcomes to work towards, such as the successful completion of community orders, or percentage of prisoners from the area in the local prison. This enabled them to demonstrate success, or at least, activity, to their board and central government. These outcomes were drawn up in consultation between the Justice Department, CJAs, ADSW, CoSLA and the SPS. However, several CJA participants commented to me

that it was the department who dictated the direction, albeit without the use of diktat or coercion. As one liaison manager told me: “the CJAs? we’re just the mouthpieces of the government anyway” (‘government’ in this instance referring to the Justice Department, not ministers).

Because of the ring-fencing arrangements and the strong policy drive to increase the standards of community service, the Justice Department continue to dictate what the core-funding should be spent on, and they continue to set the national strategic direction for all of CJSW. This reflects the continuing strange position of CJSW between central and local government and the lack of trust that remains within central government over its operation. In the post-concordat climate, this position is even more remarkable, because local authorities otherwise have so much autonomy and all other ring-fencing has been removed. As an SPS liaison manager remarked to me:

“I think that the ring-fencing is interesting as well. Because the Government effectively control most of that and how it’s spent centrally. So much for Single Outcome Agreements and autonomy! ... Now, if the Government want to do DTTOs then that will happen even if they’re not very good. The CJA can’t decide that it’s not going to spend money on that... So, the Government still retains a lot of control.”

However, although the government retains control over CJSW via the CJAs, this is a very different sort of control than that which the CJAs had when first constituted, it is less prescriptive and based more around partnership. Although as the above quote shows, the government does have ultimate control and will always have the final say, this occurs with more consultation and less coercion. As one convenor remarked to me: “they’re actually working with us as opposed to against us. There’s less protocol and more shared agenda”

The new relationships between central and local government has resulted in a situation in which there is a much more relaxed relationship between the CJAs and central government. This has an effect not only on the expectations that the Justice Department have of the CJAs, but it has also created an interesting knock-on effect on the way that the CJAs operate within themselves. The climate in which there were penalties for non-compliance and a strong emphasis on accountability, has given way to one in which there is a much stronger focus on working together than was intended in the original legislation. As a Chief Officer commented:

“I couldn’t now go to [the local] NHS trust and say ‘as a consequence of your three year failure to co-operate, I’m now going to report you to the Cabinet Secretary, who reserves the powers to remove some of your functions’, because that’s actually what the legislation says! That is not going to happen. There is fundamental requirement for us to use a different set of skills in order to achieve compliance, which is about partnership working, relationship building, consensus.”

Another Chief Officer commented that he much preferred working in this new climate, as it was easier to get co-operation if people did not feel so coerced. However, this new climate has also meant that the CJAs have become more emasculated, with few actual powers to compel. However, although they have less of a ‘tough edge’ than they had before (which was already significantly diluted due to the compromises during their creation), they nonetheless continue to form a useful administrative function to the Justice Department and they do improve the linkages between agencies and are able, albeit with some difficulties, to force local authorities to co-operate.

This section has shown how policy created in a politicised environment can falter when that environment changes. This occurred with the CJAs, which experienced a period of drift following the change of administration. However, the reason that they remained was because they do continue to form a valuable administrative function for the Justice Department who are able to retain central control whilst allowing CJAs to monitor local delivery, and in practice, the CJAs are answerable to the bureaucracy in the department, who set the direction. In the post-concordat climate, this degree of central control is even more remarkable, and is testament to the continuing concern within the government about the quality of offender management because of its perceived close knock-on effect to the prison population. Despite CJAs emerging from a heavily politicised New Labour agenda, they have gone to be shaped and controlled by the bureaucracy, who once again have managed to assert control over the organisation of offender management services.

## **9.5 Reflecting on CJAs**

At the time of interviewing, there was still significant variation between the different CJAs, and some argued that they were still in the process of proving



themselves. It would be impossible and unfair to give a definitive evaluation about the ‘success’ or efficacy of CJAs, although it is possible to give an overall view based on frequently occurring themes that emerged during my fieldwork. This is what the following section seeks to do.

### *9.5.a The Achievement of CJAs*

Whatever the weaknesses of CJAs, everyone I spoke to acknowledged that they have improved partnership working between agencies, they have formalised partnerships that existed previously in a more ad-hoc manner. As one Chief Officer said: “it’s added to, enhanced and supported, what was already starting to happen previously.” Another CJA partner described them as a “catalyst” which has brought together partners who would previously not have worked together so closely. The key relationship that the CJA has improved is between the SPS and CJSW, primarily through the creation of the liaison manager. Everyone I spoke to, including even CJSW, welcomed the creation of this post, saying it had improved communication and understanding, and more consistent working between the agencies. As one SPS liaison manager told me: “I mean, I’m not going native, but the CJAs enable all partners to come together to try and do stuff in a consistent type way. There are still a lot of barriers, but it’s much, much better than what it was.”

There may be questions about the extent to which CJAs can take credit for this improved partnership working. CJAs were created, and they are therefore the structure in which this partnership takes place, but working in partnership more was beginning to occur when CJAs were created anyway. An SPS board member reflected:

“Partnership working is the direction of travel that we are moving in anyway. If the CJAs weren’t there then we would probably still have a post like a liaison manager, although we might structure it slightly differently.”

Interestingly, I heard much the same argument from a CJSW manager who acknowledged that there was far greater partnership working, but that this would have occurred anyway with the increased investment in throughcare and improving relationships between the SPS and CJSW. This may very well be the case, but CJAs

were the structure which was created, and they have given shape to improved co-operation. In a sense, whether this would have happened or not is immaterial.

However, the hope from some within the Executive that the CJAs would be an equal control over both the SPS and CJSW has certainly not been realised. The SPS has managed to maintain its own autonomy, and it has managed to secure partnership working very much on its own terms, and there is still a degree of mistrust between the two agencies as regards their financial management, although the CJAs have undoubtedly improved the situation that which existed previously.

Many people acknowledged that the CJAs have provided a good planning and co-ordinating role on a local level, but the question about whether they had achieved any broader strategic impact was unanswered. However, many people also thought that the CJAs had grown in confidence and effectiveness after three and a half years, and had come a long way, not least given the hiatus that occurred following the change of administration. Furthermore, at the time of interviewing, the results of the spending reviews were beginning to come through which should give CJAs increased leverage in the future to move money from authority to authority. There is therefore a hope from the supporters of CJAs (primarily the Chief Officers and convenors), that they would continue to grow in effectiveness and confidence still further, as time progresses.

Nobody disagrees that CJAs are a wonderful thing in principle. They bring together different agencies with a common aim of reducing reoffending. They allow the delivery of a national strategy, whilst allowing for local autonomy, local delivery and local accountability. They are relatively inexpensive to operate, only really providing the structure and framework in which organisations come together. However, during interviews, many I spoke to who were involved in them (most people excluding Chief Officers and elected members) were disappointed with them and felt as though their good principles had not been translated into practice.

One of the reasons for this is due to their confused role as part planner, part monitor, part resource allocator. It is also because of the confused lines of accountability between services, elected councillors, the Chief Officer, and the Minister (or latterly, the Justice Department). Finally, it is also because of the problem of power and political self interest which the CJA structure has not been able to put to one side. Although the CJAs have managed to set themselves up as some sort of planning body which can create better partnership working, not least between CJSW

and the SPS, the biggest question for CJAs seems to be whether they are really adding any value to the delivery of offender management services. Even those who were enthusiastic about the CJAs seemed unsure of this. A councillor who was very passionate about CJAs, (although, because he was newly elected in 2007, he had not worked under any other system for administering CJSW resources), when pressed on the issue, became unsure whether they were actually required or not, saying:

“What the added value is? I’d be really keen to read your thesis! I’m sceptical to be honest ... So yeah, I’m not sure whether it’s superfluous or not. Honest answer.”

There have, however, been very significant variations between the different CJAs, which perhaps conveys the contingent nature of their success, namely that they are reliant on goodwill and relationships having relatively few powers themselves. The success or otherwise of CJAs is also very dependent on the personality of the Chief Officer, indeed, this was said by several to be *the* most important factor in how well a CJA worked. It is undoubtedly a frailty of the structure of CJAs that its success is dependant on the personality of the Chief Officer. The CJA’s weak structure relates to the fact that Chief Officers have very little power over agencies (with the exception of CJSW, but even this is not straightforward and resisted at every turn as we have seen). The Chief Officers are responsible for delivering a plan to ‘reduce reoffending’ but they have no financial control over many of the agencies who contribute to this. The resource that does flow through the CJA is Section 27 funding only, and decisions on this are taken by individuals who are asked to act impartially and potentially allocate money away from their own authority. Although the role of the councillor lends the CJA political legitimacy through local accountability, the involvement of elected members in CJAs also adds an unhelpful political dimension into offender management, as well as asking councillors to leave aside the allegiances to their council. In short, it was not a structure that was designed to facilitate any radical change because attempts to change anything were resisted at every turn and things had to proceed based on consensus. These weaknesses were evident from the outset. As someone involved in training and helping the CJAs in the early days told me:

“the principles I think are kind of there, but it just didn’t have the underpinning ... here you’ve got this concept of pooling resources, under one area plan, monitored and overseen by one Chief Officer, and reporting to a committee, ideally that is excellent, but they had no power over their budgets, they had no actual authority to actually structure anything ... they were based on good will, purely reliant on good will. Built in weaknesses.”

Given that even the staunchest CJA supporters also agreed that they had a very difficult job to do without many powers to do it, it does rather beg the question whether these problems were realised at their outset. The head of a voluntary sector organisation said that it there must have been “surprising naivety” within the Executive for CJAs to have been created with all these in-built flaws, describing them as “an express train crash”. Others commented that the legislation “had not been thought through particularly well”, or that the issues “were not thought properly through at the outset”, and that this legislation was “rushed through as ‘something’ because reoffending rates were posing such significant concern”.

The legislation was certainly passed incredibly quickly, the civil service were not used to producing legislation in such tight timescales and their preferences was for this Bill to be introduced one whole year after the Minister wanted. So where does the responsibility for creating such a muddled body lie? Although fault may lie with the parliament for not being able to ‘stand up’ to the Executive during the scrutiny of this legislation, or with the previous Minister who wanted these policies created over a very short time because of the political timetable, the primary reason that CJAs have been so compromised is because of the bargaining and negotiation which occurred between central and local government, and to a lesser extent, between the two coalition partners, during the whole of the process. The need to compromise, because of political institutional factors detailed in earlier chapters, meant that the final ‘product’ was a half-way house affair, whose powers were limited thus making its task much harder. However, this thesis argues that the CJAs, even in this context, continue to provide a useful function: although not always successfully, they have largely succeeded in forcing co-operation between local authorities and they have improved partnership working between the CJAs and the SPS, two of this policy’s key objectives. The fact that their ability to do either of these things is hampered does not detract from the fact they have continued to succeed in these tasks, improving the situation which existed previously.

The function that CJAs serve to central government is probably the most important reason why the CJAs have lasted as long as they have. They are a meso level governance structure which allows central government to retain control without getting bogged down in operational minutia. They provide a means of distributing money to local authorities in a way that would be extremely resource intensive for the Justice Department, whilst still allowing a strong degree of control to be held by setting targets and monitoring performance. Ever since the CJSW budget was ring-fenced and central government therefore had a vested interest in the delivery of services, the correct balance between local autonomy and central control has been striven for. Local authorities could not be trusted to run services in a consistent or organised way, partly because they were replicated thirty-two times over the relatively small geographical area of Scotland, and partly because good business models had not been developed for this area of social work as they had for other local authority services, because of central government control. The CJAs therefore represent the last in a long line of ways of dealing with the ‘problem’ of the governance of this service, and it would be surprising if they were the last.

Whether they remain or not will depend most obviously on the efficacy of the CJAs themselves, and not in one or two different CJAs, but across the piece. And efficacy in this instance means making local authorities act more corporately and also involving a wider range of agencies in innovative and imaginative projects. A lot of this will depend on the willingness of CJSW to co-operate with CJAs, and in this respect, CJSW is torn in two directions. The spectre of the single agency still looms over the service. Many people suspect that the SNP would have favoured a single agency, indeed, the Prisons Commission was rumoured to be on the brink of such a recommendation. CJSW therefore know that they cannot be complacent with the CJAs as they were with the Tough Option groupings, because they may not be able to resist another attempt at structural reform. They have therefore been careful not to drag their heels too heavily with the CJAs: even though they dislike them, they remain better than a single agency.

### *Conclusion*

This section has argued that CJAs have greatly enhanced partnership working, particularly between the SPS and CJSW, and they provide an important function in

terms of co-ordination and financial management. They perform a valuable planning and co-ordinating role on a local level, but whether they are able to provide broader strategic impact is debateable. Although CJAs are wonderful in principle, in practice, many involved with them remain disappointed. This is primarily because of their confused lines of accountability, the fact their powers are hampered by the need to work consensually, and the fact they introduce a political element into offender management. Their weak structure means they rely heavily on pre-existing relationships between councils and primarily on the efficacy of the Chief Officer. The fact that CJAs operate ‘with one hand tied behind their back’, is primarily due to the necessary compromises which were made during the legislative process because Scottish Labour were in coalition and because of the need to keep local government on side. Although this has hampered CJA’s ability to effect real change, their existence is overall a benefit to the governance of offender management. Amidst continuing concern about the quality of community justice services in relation to managing the prison population, CJAs are the latest in a long line of developments of central government trying to manage a local government controlled service.

## **9.6 Implementation**

It is worth spending a moment to consider what the implementation literature discussed in chapter three, can add to the account given above. This chapter has taken elements from both the top-down and the bottom-up approaches to understanding policy implementation. It seeks to understand both why the way that the policy was implemented varied from the intentions of those who created it, but it also views the process from the ‘bottom-up’, i.e. by speaking to those who shape and mould the policy themselves.

Taking a top-down approach, we can say that the reason that ‘perfect implementation’ (Hogwood and Gunn 1984:206) was not achieved was primarily because there was a change of administration one year after the CJAs were up and running. As the previous Minister said, at the end of their first year, CJAs were getting to the stage where they had to be “continually driven”: because of their inherent weaknesses, discussed above, they needed a strong force behind them, spurring them on, keeping them accountable, and demanding answers, and this is what the previous Minister did during that formative year. Although there were very

clear 'rules' for implementation in place once the legislation was passed (Hill 2005:187), these fell away when there was a new Minister and a change in political climate following the election of the SNP. This marked the emergence of a new relationship between central and local government which meant that the ability to use coercion fell away. This also corroborates the literature which argues that the more 'links in the chain' there are between formulation and implementation, the more chance that policy will be implemented in a manner different from the policy makers' wishes (Pressman and Wildavsky 1973:147).

Looking at the process of implementation from a bottom-up perspective, we can say that the fact that one of the reasons there has been so much variation in the success of the eight CJAs is to do with the efficacy of the Chief Officer, and therefore, these 'street level bureaucrats' (Lipsky 1980:xii) have a significant affect on the success or not of this particular policy. However, the picture that emerged from interviews was one in which it was the bureaucracy who very much now dictated the rhythm of the CJA's drums: they set their targets and monitored their performance and there seemed little 'interpretation' of policy done by the CJAs in this context. Therefore, the extent to which policy continued to be formed by those 'on the ground', was mitigated in the context of strong central control from the Justice Department.

## **Conclusion**

This chapter had looked in detail at the implementation of the policy which the previous chapters have charted the journey of, with the belief that if one is to come to a full and true sense of a policy then one has to examine how it is implemented in practice (Jones and Newburn 2007a:23; Tonry 2007:12).

One of the most important messages to emerge from this chapter is how important the change of administration was to the development of this policy. However, although the new political climate has meant that CJAs are even more emasculated than they already were, it is nonetheless notable that they were kept on at all. This is solely because they also serve some administrative function to the bureaucracy, and they fit in with the new administration's policy direction of improving community justice in order to reduce the prison population. Of course, this was one of the motivations for the reforms in the first place, but the same policy

objective was tackled in a radically different way, thus also underlining the importance of political ideology in penal change.

So what does the story of the CJAs tell us about penal change? It tells us that the policies which will remain in place when there is a changed political climate are those which are less political and more 'administrative'. Although these policies undoubtedly sprang from a highly politicised agenda, because of the compromises needed due to working in coalition and keeping local government on side, they became less fiercely political and there more to serve an administrative function which most people could agree required addressing (even if they disagreed with the solution). Of course, politicised aspects of these reforms remained even after the compromises, including the target to reduce reoffending by 2% within two years, and the threats of central intervention should agencies be seen to be 'failing'. But on the whole, by the time the CJAs were drawn up during the Bill process, they had become a policy which was there to solve an organisational function, which most could see the need for. Crucially, the bureaucracy could see the need for them, and this is the real reason they continued. Other notable reforms of that era, the youth justice and the antisocial behaviour agenda, both fell away entirely following the change of administration (Morrison and Munro 2008:2, Morrison 2009:3-4). Therefore, the story of CJAs tells us that policies which are more heavily politicised are more likely to fall away in a new political climate than those which I argue serve more of an administrative function.

CJAs also tell us that, as argued throughout this chapter, although the various factors which modified these policies along the way, relating to Scotland's institutional architecture, may have created a policy which is not 'neat and tidy', this is still arguably better than an un-tempered, 'tidier' politicised agenda.

Finally, the example of CJAs shows, once again, the battles for power which reign over policy. Battles for control will almost certainly feature in any policy-making / implementing context, but I argue this is especially true of the Scottish post-devolution context. This is because devolution created a new power structure, displacing existing power structures, namely the bureaucracy and agencies, which had much freer rein over policy prior to devolution. Therefore, the years following devolution have seen a constant imposition, resistance and renegotiation of the boundaries of control between these and the new locus of power in central



government. The CJAs, along with the rest of the account of this policy, provide a means of viewing this.

This brings us to the conclusion of the ‘story’ of these reforms. The following chapter will attempt to draw together the strands from the previous chapters into a coherent argument about penal change.

## Chapter 10

### Conclusion

This thesis demonstrates that an analysis of policy processes provides a valuable way of understanding the factors which influence penal transformation: if we are to truly understand change then it is surely necessary to examine the means by which it occurs. Taking this approach has illuminated factors which would not otherwise have been visible by looking at either policy documents or policy outcomes alone. It sheds light on the role of agency as well as structure and highlights the messy and often serendipitous nature of penal policy (and therefore penal change). This level of analysis is often marginal in work about penal transformation, perhaps because it is regarded as too rooted in local specificities and therefore unable to ‘tell a bigger story’. However, while this approach cannot make any claims which are generalisable in any ‘scientific’ way, it does provide valuable insights into factors which affected change in Scotland which are also likely to have resonances beyond (whilst recognising that local specificities will always mediate outcomes). This type of research *can* contribute towards the construction of ‘grand theory’, via the ‘middle-range’ approach proposed by Merton (1968:68).

This thesis’s argument about penal change has been made throughout the previous chapters, but this final chapter will pull the key arguments together by way of conclusion. In so doing, it will address the four questions which framed this research:

- What were devolution’s effects on criminal justice?
- Why did devolution affect criminal justice in the ways that it did?
- What are the factors which resist and facilitate change?
- What can the process of penal change in Scotland tell us about penal change more generally?

This chapter begins by discussing devolution and Scottish criminal justice, addressing the first of the two research questions. It illustrates how devolution has put criminal justice policy-making into a volatile and politicised environment, where the administrative ‘buffers’ which once protected policy have been removed. It moved

from an incremental model of policy-making to one that is fast moving, chaotic and messy. However, following the change of administration in 2007, it seems as though policy-making slowed down once again (although we wait to see whether this will continue into the fourth post-devolution term now that the SNP Government command a large majority). Although part of the reason for this change in tempo was related to political institutional factors, it was also influenced by political choice, and this indicates how both structures and the decisions which are taken within them, are important. This section also illustrates how devolution created a new position of power, displacing the existing power structures which had hitherto controlled criminal justice in Scotland. However, this remains contested, and the ebb and flow of power between the new and the old interests continues.

The second section of this chapter discusses the factors which led to penal change in Scotland at this time, taking my case study as an example, which address the second and third research question, above. It shows how it was political institutional factors which shielded Scottish penalty from rapid change prior to devolution, and it was precisely a change in these factors which led to change following devolution. However, this does not assert an overly deterministic view of the power of institutions in penal change. Both structure and agency are important, and, drawing on Kingdon's three streams framework, it confirms how institutions only formed the parameter of future behaviour, political choice was also crucial. The different factors that made certain choices more favourable are then outlined.

The third section of this chapter illustrates the factors which hamper the rate and extent of penal change, again, placing the structure of political institutions at the centre of analysis. This part of the chapter proposes that the rate of change is likely to be tempered in jurisdictions where there are PR electoral arrangements and where there is decentralised political power. This section also suggests that in the context of a ruling majority, the Scottish Parliament is unlikely to act as a veto on executive power.

The fourth and final section draws further conclusions about penal change from looking at my case study, exploring the inherently political nature of penal change (both in terms of the structure of political institutions and the political choices exercised within them), how more 'personalised' systems are more vulnerable to rapid penal change, and how penal policies are vulnerable to being used in political capacity-building exercises. It concludes by maintaining that strong democratic

involvement is preferable to ruling by an unelected elite, even though it is arguably a more risky enterprise.

## **10.1 Devolution and Criminal Justice Policy**

This section of the chapter discusses the first two research questions, namely, devolution's effects on criminal justice in Scotland and some of the reasons for these changes. The story here is one of a rapid increase in political involvement and shifting and disputed contours of power.

### *10.1.a From Incremental and Stable to Messy and Chaotic Policy-making*

I have illustrated how penal policy changed with devolution from a model that closely mirrors the incremental model of policy-making, to one that was volatile and changeable. Prior to devolution, policy was made in partnership between agencies and civil servants with relatively little political interference. Although nominally making policy under the control of the Secretary of State for Scotland, in practice, the Secretary of State operated a relatively 'hands off' approach, partly because justice was just one of the policy areas he was responsible for, and partly because much of his time was spent in London, and during this time policy was negotiated between groups of Scottish policy elites comprising of the bureaucracy and heads of agencies (McAra 2005:293, 2007:293, 2008:493; Keating 2010:19,27,28). Policy-making in this period is similar to the 'incremental' model of policy formation described in chapter three in that it was made without a central co-ordinator, the rate of change was slow, and decisions were made based on negotiation and compromise. Following devolution, the environment changed to one in which political interference was heightened and the policy environment became unstable and changeable, often appearing chaotic and messy to observers (see also Croall 2005:177; McAra 2007:108,110, 2008:494).

Devolution catapulted the somewhat sleepy and cosy world of Scottish criminal justice into a more volatile, fast-moving and exposed environment. It introduced new means of achieving change and new motivations for doing so. It created a new locus of power (the Executive) with a new set of veto points, and it displaced existing power structures which had hitherto 'run the show' including the

bureaucracy, local government and agency representatives (McAra 2007:116, 2008:494; McGarvey 2009:126-127; Keating 2010:117). Policy-making in this context also became profoundly more political than it was before (Megaughin and Jeffery 2009:13) and this affects the motivations behind policy creation, the shape it takes, and the new and hastier way in which it is created.

Devolution has had both positive and negative impacts on Scottish criminal justice, and the view from those I interviewed was that there was a need to take the rough with the smooth. There is certainly much more opportunity for engagement and possibility to influence, and legislation is now made specifically *for* Scotland. On the other hand, policy is now increasingly politicised, leaving it open to volatile changes and populist ideas. However, the nature of the political involvement depends very much on the administration at the time. In each of the three terms of the Parliament so far there has been a Justice Minister from a different party in post, and each has taken a very different approach to justice policies. Justice as a policy area will always be one of the areas in which political action will seem attractive to some parties, because of its potential populist appeal, because of its scope for managerial reorganisation and because it is a 'bread and butter issue'. However, the short history of the Scottish Parliament thus far has shown that whether this occurs is as much a matter of political choice as a consequence of devolution. Therefore, while devolution certainly makes policy-making much more vulnerable to the negative aspects of political interference as I argue below, the more problematic periods of recent criminal justice policy-making in Scotland have arisen because of the particular administration in power at the time, rather than with devolution *per se*.

The period of most concern since devolution (if 'concern' is measured by rapid changes and populist policies) was under New Labour's tenancy of the justice portfolio during the second parliamentary term, between 2003 and 2007. It was New Labour's brand of justice policies which were the 'problem' (inasmuch as volatile changes in policy are regarded as a problem), rather than the creation of the Parliament (although of course the creation of the Parliament has opened the door to more immediate and potentially damaging political involvement). Criminal justice policy-making during this time bore many of the hall marks of New Labour reforms: the love of targets, managerial reform, control of evidence and expert voices, more populist policies orientated towards the 'everyday' public, both in terms of policy content and also in the manner in which policy was made (see for example: Ryan

1999:14; McLaughlin et al. 2001:306; Newman 2001:50-51; Newburn 2003:258; Tonry 2003:1-2,20; Downes and Morgan 2007:214-215). As discussed in chapter eight, a target of 2% was set in Scotland to reduce reoffending within two years, similar to targets being set in England and Wales at the same time (Solomon et al. 2007:41). Apart from the small matter of measuring 'reconvictions' rather than 'reoffending', these targets were also considered wildly unachievable by most of the criminal justice experts and professionals who advised the Minister at the time. Although these targets were dropped following the change of administration, the levels of reconvictions remain intractable and seemingly impervious to different government strategies since (Scottish Government 2011:1), which highlights the marginal effect that the organisational structure of the criminal justice system has on levels of reoffending. (McNeill (2006:49-52)suggests that it is the relationship with, and support from the probation officer which is important in this regard.)Although the reducing reoffending reforms were motivated by managerial reform rather than populism, the antisocial behaviour agendas and youth justice agendas of the same time certainly were certainly motivated much more by populism (Croall 2006:599; McAra 2007:111). Reforms of this time also put an emphasis on making justice more accessible and understandable to the public. Although the Management of Offenders Act is not emblematic of a desire for greater community engagement and was said by many to be one of the least populist pieces of legislation passed at this time, there were elements in it which were influenced by this agenda. For example, a large part of the National Strategy was devoted to 'communities' and ensuring that they have confidence in offender management issues (Scottish Executive 2006:24-25), which has resulted in the CJAs spending time on community engagement and communication. Furthermore, the *way* in which the policy was made was also emblematic of the desire for public engagement, also mirroring Ryan's observations about New Labour in Westminster, as discussed in chapter two (1999, 2003). Examples of this are the Executive's decision to hold a very full consultation which included seeking the public's views on offender management and the way in which many of the stakeholder events throughout the Bill process were open to the public. Therefore, reforms around this time represent New Labour's desire to 'bring justice back to the people', both in substance and in process. The New Labour agenda round this time highlights an inherent tension within criminal justice about who 'owns'

policy, the public's role in it, and the problem of securing democratic accountability without resorting to populism.

This thesis has also discussed the problematic relationship between policy, evidence and expert knowledge during this time. In this context, there was pressure on the Scottish Executive researchers to 'find' evidence that a single agency would reduce reoffending; the advice given by the ministerially created sentencing commission in relation to the sentencing of sex offenders was ignored; and expert views and evidence were curtailed in the NAB.

In this new politicised climate, policy is dictated by the four-year political cycle and the knowledge that any attempted reforms must be cleared and imbedded before the next election. As I was told by one of the previous Minister's team: "there's no point being a one-term president". Four years is just not regarded as enough time to create and implement policy, but the fixed term of the Scottish Parliament very much dictates the speed and rhythm of policy creation and implementation. This places artificial constraints on policy-making: in my case study the pressure on time meant that the CJAs were drawn up and implemented sooner than the civil servants were comfortable with (though ministers would claim that the pace at which civil servants work is too slow). Civil servants anticipated that the Management of Offenders etc. (Scotland) Act 2005 would be introduced one whole year later than the Minister wanted which perhaps partly accounted for the rather imperfect CJA structure that emerged from the process. The extremely tight turnaround time was also one of the reasons why implementation was taken out of the hands of the civil service (because their approach to everything was considered 'glacial' in comparison with the speedy tempo demanded by the new politicised environment).

A further hallmark of this messy new environment was that it fell back on quick fixes. One of the key aims of the reforms was to reduce the prison population, although this was cloaked in the language of 'making the system more efficient'. The white paper offered several solutions to this problem (Scottish Executive 2004c:47-51). Primarily there was reforming CJSW with an aim not only of making it have more of a rehabilitative impact but of also making it more attractive to sentencers. The white paper also promised to create (yet) more community penalties, to build more prisons, to create a sentencing commission, and to introduce HDC. Building prisons would take a number of years, and creating a judicially led sentencing council was a way of kicking sentencing reform into the long grass. Creating more

community sentences may work, but they had already tried this in the past and it had not, so hopes were not high. Therefore, faced with a pressing problem of overcrowding, policy makers reached for a quick fix which was the introduction of HDC, although the Executive always maintained in public that this was introduced in order to 'aid prisoner reintegration' (Jamieson 2005a, 2005c). The Government used every tool available to them to reduce the prison population (operating within the parameters of what they regarded as politically feasible), but most of them would take a considerable time to come into effect. The realities of policy-making are that the objectives may take time to achieve and quick fixes are therefore sought.

One final observation about the 'chaotic' and 'messy' nature of policy-making at this time, relates to way in which policies are now vulnerable to changing political climates. Some policies are more political than others; some are created and implemented within an ideological context following a fierce political battle while others quietly play out following decisions that are more administrative in nature. The reducing reoffending reforms of the Lib/ Lab Executive were fiercely contested and political in their initial stages, but then went on to become a rather administrative policy once the CJA compromise had been reached. They were therefore partly political and partly useful from an administrative point of view. Politically inspired policies are more likely to fall by the wayside following a change of administration. Thus ASBOs were allowed to 'wither on the vine' by the SNP administration (Morrison and Munro 2008:2). Conversely, policies that carry some definite administrative function are more likely to continue. The reason that the CJAs have continued is primarily because they serve an administrative function to the Justice Department.

This section has illustrated some of the features of the new policy environment post-devolution. It has moved from one in which change was slow and policy was made in partnership, to one which was rapidly moving and arguably 'messier'. However, this significantly depends on the party in charge of justice at the time. My research focused on a piece of legislation in the period between 2003 and 2007 when there was a Scottish Labour Minister in post, which saw the most rapid changes. Policy shared many of the same features of the New Labour government in Westminster in relation to setting targets, managerial reform, a problematic relationship between evidence, expert voices and policy, and populist policies which sought to reconnect with voters, both in terms of the policy content and its process. In



this new climate, policy is dictated by the four-year political cycle, it falls back on ‘quick fixes’, and it is vulnerable to falling away following a change of administration.

A further feature of devolution’s effect on Scottish criminal justice is that it created a new power structure which sidelined the existing interests who had made policy up until this point. This will be discussed next.

### *10.1.b Devolution and the Renegotiation of Power*

This section explains how devolution created a new position of power, displacing the existing power structures which had hitherto controlled criminal justice in Scotland. However, this remains contested, and the ebb and flow of power between the new and the old interests continues. Although there are no doubt others, two of the key areas in which this has played out have been highlighted in this research, and that is the renegotiation of power between ministers and the bureaucracy, and between central and local government.

There was, first, a power battle within the Executive. Prior to devolution, the power to determine the shape of policy lay in the hands of civil servant and agencies who made policy together in partnership (McAra 2005:293, 2007:293, 2008:493; Keating 2010:19,27,28). During interviews this clearly emerged as the civil servants’ preferred mode of policy-making: they are aware of the need to maintain good relationships for implementation and they also believe that better policy is made in this way. Civil servants also work at a very different tempo from ministers; they were unaccustomed to pushing through legislation at the speed at which their new political masters wanted them to. Civil servants were accused by those working with the new politicians of being “steeped in their old way of thinking”, and therefore unable to drive through change. They were a vested interest but without being aware that they were one. As Keating also noted: “politicians continue to complain ... that the civil service will always find reasons why change cannot occur” (2010:118).

Devolution created a new body with the power to determine the direction of policy, thus displacing the existing structures. This was particularly uncomfortable for civil servants who, although nominally answerable to their political masters, will always also have their own ideas how best to make and implement policy (James 1997:20). As Parry observed ‘[devolution resulted] in a sense of disorientation as the

anchors of civil service norms are loosened' (2001: 55). However, although devolution resulted in much increased control over civil servants, my findings showed how at times throughout the reducing reoffending reforms the Justice Department succeeded in regaining the upper hand over the control of policy, often using hidden or subtle methods rather than more direct ones. This research offered a number of opportunities to view these changing contours of control. The bureaucracy's non co-operation with the National Support Team (NST), and their ability to, as the expert advisor put it, "strangle it at birth" and eventually kill it off is one example. Secondly in the National Advisory Board (NAB), the civil service was able to control the agenda (following the change of administration), restrict the conversation, and ultimately let it wither away. The latter instance especially demonstrates an exercise of the 'second face of power' (Bachrach and Baratz 1962:948). Both the NAB and the NST had been established by the previous administration and were not answerable to the bureaucracy, and in the context of a new Minister with less tendency to micro manage, civil servants were able to disband the old bodies and establish similar ones which they found more responsive. They are perhaps especially able to do this in a period following a change of administration when a new government are finding their feet, or in the context of a Minister who takes more of a hands-off approach. As we have seen, the change in administration in 2007 provided them with both. Working under the new Minister the Justice Department was once again able to take control of CJAs and offender management policy. They, not ministers, set the direction and dictate targets, leading one Chief Officer to state that the CJAs are "just the mouthpiece of the government anyway" ('government' in this instance meaning the Justice Department).

The power of the bureaucracy should not be underestimated. Although their power was significantly displaced following devolution, civil servants have on several occasions succeeded in reclaiming the reins of policy delivery from ministers. Civil servants have their own agenda and ideas about policy and they will attempt to be able to shape practice. This illustrates how the creation of a new power structure has resulted in an ebb and flow of control over the direction and nature of penal policy within the executive.

This thesis has also highlighted a similar battle between central and local government. Local government is particularly interesting, because it is a democratically elected layer of government which retains a degree of autonomy and

right to delivery policy according to their local circumstances whilst at the same time acting almost like an arm of central government because it delivers many statutory public services. It would therefore not be surprising if tension arose in this climate and this indeed turned out to be the case.

It has been argued that central government have much less ability to intervene in local government in Scotland than in England and Wales (Keating 2010:207), and that the Scottish approach to policy-making between central and local government is marked by a feeling of shared ownership (McGarvey 2009:129). My findings suggest that, in the area of criminal justice during the second parliamentary term there were nonetheless very significant attempts by central government to retain greater control over local government's operations. The creation of the new Parliament displaced local government's power by creating a closer body who were more interested in 'local' affairs and desired closer control over them (see also McAteer and Bennett 2005; McGarvey 2009:126). This resulted in a long-running contest in which central government has sought to coerce local government and local government has resisted. As one MSP told me "the perennial debate with local government is to tell them they *should* do something, or whether to *compel* them do something". The extent to which central government seek to micromanage local government varies, and during the second term there was a high degree of mistrust between central and local government. Whilst McAteer and Bennett (2005:298-299) claim this mistrust was found mostly strongly amongst the civil service rather than politicians, my findings suggest that mistrust between local and the political arm of central government was equally, if not more, prevalent within criminal justice at this time. Nonetheless, devolution certainly resulted in much increased central control over local government's operations (ibid:300-301; McGarvey 2009:129).

Part of the reason for the Executive's desire at this time to gain further control over CJSW was partly because of their general tendency to control from the centre, but also because they felt as though local authorities had already been given the benefit of the doubt and a chance to change their ways, and they had failed to do so. During the Tough Options Review, local authorities staved off the first attempts at centralisation by promising they could change their working practices by increasing co-operation, sharing resources and organising themselves into groupings so there was one point of contact. However, the groupings were too informal, there were no penalties for non co-operation, and in practice CJSW carried on much as before. This

failure to self-regulate was seized on by the Executive and later used to justify the need for the single agency, and local authorities subsequently realised that they had been too complacent in their approach to the groupings. After having looked the prospect of a single agency in the eye, they promised that they were now in a position where they could deliver what the Executive wanted them to. By the time central and local government decided to settle on the CJA model, there was a feeling within the Executive (both the civil servants and the Minister), that it was now up to local authorities to prove their word. As I was told by a civil servant at the time, “they said they could deliver, now it was up to them to show us they could.”

This process has been contested however, as illustrated throughout this research. Even when central government were able to impose change, local government were able to retaliate by suppressing the salary of the chief officer, and following the creation of the SNP Government, local government has managed to reclaim back some of the power they once had (see also McGarvey 2009:129-130). Furthermore, as we have seen, one of the factors which have most impeded the CJAs has been the somewhat obstinate attitude of CJSW. They were seen as the agency more than any other which stands in the way of CJAs making anything of themselves (although it should be noted that some of the councillors also thought that CJSW had to ‘mature’ and accept the CJAs, the problem thus seems to lie more with CJSW than local government). Local authorities tread a difficult line here: they don’t want to be coerced and have their power taken away from them; however, they know that if they don’t comply with central government’s demands then the threat of a single agency is never far away. Although it is likely that as long as the concordat remains in place, the flavour of existing relationship between central and local government is likely to remain, it will be interesting to see whether, following their landslide victory in 2011, the SNP administration will remain so docile about challenging local government. They are already pressing ahead with their plans to form a single police force in Scotland, much against local authorities’ wishes (Herald Newspaper 12.8.2011) although whether this is indicative of a new approach, it is too soon to tell.

### *Conclusion*

This section has illustrated how devolution fundamentally changed the nature of criminal justice policy in Scotland. It moved from a relatively stable incremental

model of policy formation to one which was politicised, chaotic and messy. However, the nature of this depends very heavily on the administration at the time, and I have suggested that the most problematic period of Scotland's criminal justice policies since devolution has been under Scottish Labour's tenure, in large part because this drew heavily on the New Labour criminal justice agenda from Westminster. Devolution has also created an interesting reconfiguration of control between the old and the new power structures. This research has highlighted the ebb and flow of power between ministers and the bureaucracy and between central and local government. Although the political branch of the executive remains nominally in charge, and during the second term retained strong central control, the bureaucracy and local government have both been able to retaliate on several occasions, using both overt and subtler means consistent with both the first and the second 'faces of power'.

The next section of this chapter will draw on my case study and look more specifically at the question of penal change and the factors which lead to it, addressing my third research question: what are the factors which resist and facilitate change?

## **10.2 Factors Which Lead to Penal Change**

I argue that the reason for the slow rate of change prior to devolution was the absence of national political structures making policy for Scotland, and therefore that the primary reason for rapid penal change following devolution was because of the addition of new political infrastructure. However, this is not to paint an image of institutional determinism. Rather, institutions formed the parameters in which choices were made. The first part of this section examines the argument that it was changes to the political institutional structure which led to change, and the second section examines some of the factors which led to certain choices being made in this context.

### ***10.2.a Institutionalism and Penal Change.***

This research borrows from the institutional theoretical framework to propose that the structure of Scotland's political institutions is the primary influence upon Scotland's criminal justice policies both prior to and following devolution. Part of the reason for the slower pace prior to devolution was simply because the means of

creating radical changes in policy were much more difficult. Prior to devolution civil servants were able to make policy in partnership with agencies and during this time the bureaucracy in the Scottish Office displayed a preference for organising the delivery of services rather than making new policy (Keating 2010:117). The pre-devolution constitutional arrangements also meant that there was relatively little political interference in policy-making (ibid: 28). As I was told by a senior member of local government at the time,

“[the Secretary for State for Scotland and his staff] arrived in a fleet of vehicles ... they attended for 10/ 15 minutes, and then they left, and the whole entourage left as well. They were very distant, it was a very different style.”

The Secretary of State’s absence meant that much control over policy-making was handed over to officials in the Scottish Office. As I was told by a senior civil servant working in the Scottish Office at the time “Scotland just governed itself essentially”. To use Savelsberg’s distinction, this was emblematic of a ‘bureaucratised’ system (1999:53), in that there was an administrative ‘buffer’ between policy and public opinion. As I have stated above, civil servants have a different style of policy-making to politicians: they provide consistency, whereas ministers are concerned with making noticeable changes within the four year political cycle. As someone who worked closely with Scottish justice ministers and with civil servants put it:

“Government policy announcements are like fireworks – they go off and make a beautiful sight and a big bang and then they disappear. And [civil servants] would describe themselves as people with guns who have to point the guns at the target and make sure that the bullet hits the target. And that’s the distinction they make ... They fire the guns and the politicians make the fireworks. They provide consistency.”

As described above, another facet of the way in which civil servants prefer to make policy is to do so in partnership with agencies, to, as one of them put it to me “take [agencies] along with you”. They believed this made better policy and would also aid implementation. Therefore, the primary reason for the nature and rate of change within criminal justice in Scotland prior to devolution was because of the institutional arrangements which gave control to civil servants, not politicians, and the

means of creating more rapid changes were more difficult because Westminster was far away (Himsworth 2009:57).

As this thesis has demonstrated, this all changed with devolution, and I suggest that the primary reason for this is because it created a new, closer, political structure which had the means and motivation for creating change. Devolution created a new Justice Department within the executive, which was headed up by a Justice Minister, who had a fleet of advisors and other personnel working for them. Previously, Scottish justice matters would have occupied a small proportion of the Secretary of State's time and energy; now there was a whole cabinet position and expanded government department dedicated solely to this task. The Parliament also provided another forum for activity and debate which had not existed previously. Justice issues featured regularly in debates and questions in the chamber, and there was also a Justice Committee (increased to two Justice Committees in the second term), which was dedicated solely to discussing matters of Scottish criminal justice and law. The newly expanded capacity for closer and more immediate governance of criminal justice, in and of itself, created opportunity and motivation for change. It moved the system away from one that was 'bureaucratized' to one that was 'personalised' (Savelsberg 1999): the institutional arrangements had now removed the buffer between policy and public opinion.

Therefore, I claim that *one* of the reasons for the more sudden changes in policy following devolution was simply because of the creation of new political structures and easier access to policy instruments that allowed for more dramatic changes (i.e. primary legislation) combined with the political will to use them. This analysis shares some of that taken by Munro et al., in that it suggests that the key reasons for the tenor of criminal justice policy both prior to and following devolution was to do with the type of policy instruments available at each point in time (2010:296). However, as I illustrate below, political choice was as important in this context as well.

### *10.2.b Political Choice and Penal Change*

Although this research places institutions at the centre of analysis, it is important not to paint an overly deterministic picture of their explanatory potential: both structure and agency are important in penal change (Simon 2008:251). Drawing

on Kingdon's multiple streams framework I have shown how institutions formed the parameters in which political choice was made. Kingdon's framework explains how rapid changes occur when problems, policies and politics converge and a policy window is opened (1995). Given that the labelling of 'problems' is heavily dependant on the political circumstances at the time, not to mention the fact that problems of one sort or another are always likely to exist in criminal justice, as are policies to fix them, the key variable here is the 'political' stream of the trichotomy. The political stream detailed in chapter five, showed that it was not only the availability of new means of change afforded by devolution which was crucial, but it was also a perceived need to build political legitimacy for this new institution, combined with the availability of a 'ready-made' political approach to law and order from Westminster, which created the all important changes in the political 'stream'.

The perceived need to build political legitimacy sprang from a particular range of circumstances towards the end of the first term which led to a feeling within Labour figures in the Executive that there was a need to bolster support for the new Parliament amidst a feeling that public support for devolution was waning. Indeed, the Parliament was subject to a barrage of negative press around this time (Hassan 2002:11; McCrone 2009:93; McNair 2009:121-122; Keating 2010:106). The new First Minister and his team's approach to creating this political support was to produce large amounts of legislation which would connect with voters. This would provide ministers and the Parliament with activity; it would prove to the public that they were doing something, that they were needed, and that devolution had been worthwhile. Scotland had, after all, been managing to 'run itself' prior to devolution without major difficulties, so the existence of the Parliament had to be seen to be necessary and beneficial. The content of these policies also sought to re-engage with a disenfranchised public: the fact that so many people were focused on justice issues was related to the need to create policies which had a 'bread and butter', 'everyman' appeal. This echoes literature about penal change in response to a crisis of legitimacy (Garland 2001; Pratt 2007; Simon 2007), and was clearly a case of using criminal justice policies in order to build political legitimacy in the post-devolution context, as McAra has also argued (2007, 2008).

The political capacity-building exercise was combined with a further factor which heavily influenced the 'flavour' of many of the policies emerging at this time, and that was the close connections between the Scottish and the UK Labour party (see



also Keating and Cairney 2009:38-39; Keating 2010:42) and the availability to politicians in Scotland of an approach to crime and punishment from England and Wales. This corroborates arguments from both McAra (2007:108) and Croall (2006:592) who also noted the influence of New Labour policies within justice at this time.

Some of the key Labour politicians of the Scottish Executive of the first two terms had come from Westminster and had been involved in the creation of the New Labour project there (McLean 2004:153-154), including two of the First Ministers and, crucially for this case study, their political advisor. They continued to retain these close links, attending national party conferences to discuss a range of policy issues. The adoption of a particularly New Labour brand of justice policies in the second term in Scotland was therefore not an imposition due to multilevel governance structures. Rather it was readily adopted in Scotland because it suited Scottish Labour's agenda as well (Keating 2010:165). However, in the Scottish case this related to a desire to reconnect with voters rather than to outflank their opponents on the right as was also a driver for developments in England and Wales (Downes and Morgan 2007). Although the specifics of the single agency announcement detailed in this thesis were not taken from Westminster or Lord Carter's future proposals for NOMS, this policy nonetheless shared many traits which were similar to the UK New Labour agenda in relation to institutional restructuring, increased central control and 'end to end reform' (Newman 2001:50-58; McLaughlin et al. 2001:307). Other policies around this time, notably the youth justice and the antisocial behaviour agendas, certainly were taken, in a more literal sense, from Westminster. Therefore, the perceived need to build political legitimacy for a fledgling institution, combined with a ready made political approach to law and order which suited their agenda as well, created the circumstances in which political choice was exercised in the parameters of the opportunities presented by new institutional structures, outlined above.

## *Conclusion*

This section has demonstrated that the primary reason for penal change following devolution was the creation of new political institutional structures, which introduced new means and incentives for creating change. However, these changes

only provided the parameters in which choice was made, and I have suggested that the decision to generate change is more likely when governments seek to use crime control to bolster public support in response to a perceived lack of legitimacy, and furthermore, that close political and philosophical links with another jurisdiction is also likely to lead to the adoption of similar policies in the domestic setting.

These factors outline the different factors which led to change in my case study, which I suggest have resonance for penal change more generally, which are discussed in the final part of this chapter. The following section of this chapter details the different factors which impeded penal change in my case study.

### **10.3 Factors Which Resist Penal Change**

The previous section placed institutional structure at the centre of analysis of what caused penal change (though arguing that they form the parameters in which choice is then exercised). The following section illustrates that institutions also had a critical role in determining penal transformation by the extent to which they can temper the degree of change. There are three relevant factors here: the PR electoral system, decentralised political power, and the Parliament's ability to act as a veto point.

#### ***10.3.a Constitution of the Scottish Parliament***

The constitution of the Scottish Parliament with its adoption of the 'additional member system' (a version of PR), means that the Scottish Executive will most likely either be composed of a coalition or a minority administration (recent events notwithstanding) (Steel 2009:18; Keating 2010:32). This means that the whims of one particular party are likely to be tempered by the inevitable compromise and bargaining that occur within coalition or minority, and there will be a need to incorporate wider interests (Lacey 2008:66-65; Himsworth 2009:58, 59). This is *the* key reason why the single correctional agency did not occur in Scotland, Labour simply could not secure the votes. Although many critics of the Executive's justice policies around this time may have decried their punitive and populist tones, they may seek comfort in the fact that they would have been far worse had it not been comprised of a coalition (see also Keating 2010:73-74,111,225). The Scottish Liberal

Democrats sought concessions from their coalition partners on the antisocial behaviour legislation (Sunday Herald Newspaper 12.4.2004), and on DNA retention meaning that the approach adopted in Scotland was later praised by the European Court of Human Rights while the New Labour led English approach was ruled illegal (BBC news 11.11.2009). The Scottish Liberal Democrats also prevented their coalition partners from pursuing a full 'Sarah's Law' which would disclose the whereabouts of sex offenders to communities. If Scottish Labour had not had to compromise with the Liberal Democrats, it is far more likely they would have progressed with their manifesto promise to 'publish a white paper within weeks of the election and consult generally in order to put [the single agency] into place', which was the speed at which the NOMS proposals unfolded south of the border (Nellis and Goodman 2009:210; Burke and Collett 2010:236). Therefore, although the creation of the Parliament has unleashed politics onto Scottish criminal justice, the constitution of the Scottish Parliament means that it is likely to be more moderate than the agenda in Westminster, inasmuch as one party will usually have to offer concessions to others. This clearly supports the arguments of Lacey (2008:62-76) and Tonry (2007:21) about the importance of the structure of political institutions, and in particular, their voting arrangements, in penal change.

Lacey has argued that a punitive law and order agenda is most likely when the two main parties both adopt law and order policies and an 'arms race' ensues (2008:76), and she suggests that this is most likely to be the feature of countries operating a first past the post electoral system. Apart from the fact that there is a PR electoral system in Scotland, there is another more important reason for believing that an arms race is unlikely to occur here. During the short history of the Scottish Parliament thus far, it is Labour and the Conservatives who have adopted more punitive policies. However, Labour has never been in direct competition with the Scottish Conservatives who are more of a fringe party, and their political brand is still too toxic in Scotland for a winning party to enter into coalition with them in order to form a ruling majority. The main opposition to Labour comes from the SNP who have moderate penal policies, and the remaining parties (Liberal Democrats and a small number of Greens) also have broadly inclusive justice policies. The composition of parties thus places Scottish politics on a relatively left leaning axis (Keating, 2010:50). The multiparty system combined with the relative left leaning ideological

composition of the Scottish Parliament has thus far prevented an ‘arms race’ scenario from developing, and it is likely to continue to do so into the future.

Therefore, the constitution of the Scottish Parliament means that the whims of a ruling party are likely to be tempered by the need to compromise, either because they are in coalition, or because they form a minority administration (Himsworth 2009:58-59). This can also mean, of course, that more moderate penal policies are also diluted, and this was certainly the case in the third parliamentary term when the SNP had to offer sizeable concessions to opposition parties in order to get their legislation passed (Morrison 2010:1-6). However, as Lacey (2008:65-66) and Tonry (2007:21) have claimed, PR tends to moderate more punitive policies, not the other way around, and this was certainly the case in my case study and in the second term.

There was one other crucial veto point on the Executive’s desires however, and that is discussed next.

### *10.3.b The Power of Local Government*

The second crucial reason why the proposed single agency did not come about in Scotland, was because CJSW was operated and run by local government, which meant that any attempts to change the service became a political, as well as a criminal justice, issue. The reason why these reforms were resisted so heavily by CoSLA was because they were concerned about the loss of one of its services to central government: the proposals were viewed as creeping centralisation. CoSLA were joined by ADSW, the umbrella organisation for social work, in their opposition, though ADSW’s concerns naturally lay much more with the future and nature of the service than with political concerns about a central government takeover. However, ADSW’s opposition would not have mattered one iota to central government were it not for the fact they had been joined by CoSLA. Furthermore, it is possible that had local government’s opposition not been as vociferous as it was, then the Liberal Democrats could have been persuaded to support Labour’s plans (this was insisted by those working with the Labour party, while the Liberal Democrats told me this was not the case). In any case, local authority resistance certainly bolstered the political opposition within the coalition.

This affected not only the decision not to proceed with the single agency prior to the drawing up of the white paper, but also the manner in which the CJAs were

drawn up, which was very much in partnership with local authorities (albeit with a number of ‘red lines’ over which the Executive were unwilling to compromise). It should be noted that that it has been argued that the Scottish style of policy-making *is* a more consensual one (Keating 2010:120,203,208,257) - however, I suggest that the need to keep local government on side during this time is the primary reason for the inclusive basis upon which the government proceeded.

Local government opposition in and of itself would not be a problem to the Executive; after all, they do not require local government votes in order to pass laws in Parliament. However the central Scottish Labour party relied on the support of Labour councillor colleagues, and at this point during the second term, they were already ‘taking on’ local government on one other front. This relates to the Executive’s plans to introduce PR into local elections in 2007, which was a Liberal Democrat proposal, which would see the Labour stronghold over local government broken (McConnell 2006:81). It was regarded as simply untenable to take on local government over the single agency because Labour MSPs rely heavily on their local activists to campaign for them at election time. In this context it was viewed as politically unwise to have battles with them on two fronts at the same time. The ‘interconnectedness’ of different levels of government, and the reliance they have on each other, reflects the governance literature’s argument that the hierarchical model of governing is no longer tenable (Rhodes 1997:47).

It may be said with some justification that ‘the power of local government’ is a factor impeding penal change which is specific to my case study, rather than in relation to Scottish criminal justice policy generally. Were it not for the fact that CJSW was run and operated by local authorities, then my argument about the power of local government would be irrelevant. However, local authorities have more autonomy than local government in England and Wales (Keating, 2010:207), they play a strong role in the implementation of many Scottish public policies (Arnott and Ozga 2010:93), and certainly a number of key criminal justice ones. They have a stake in policing (via police authorities and joint police boards, although here they are one strand out of a tripartite governance arrangement), children’s hearings (by nominating area support teams and implementing hearing decisions), and community safety partnerships (who are responsible for dealing with antisocial behaviour). The example of antisocial behaviour illustrates the ability of local government to circumvent the Executive’s wishes. Although councils were not unanimously opposed

to the Executive's antisocial behaviour legislation (Scottish Parliament Communities Committee 2004), many of them were, and many of them chose simply not to implement them once they were on statute (Morrison and Munro 2008:2; Keating and Cairney 2009:39), prompting a frustrated Executive to put pressure on local authorities. ASBOs only began to be imposed following the introduction of ring-fenced funding which was to be used on these measures alone (BBC news 2.6.2005).

Where possible then, there is scope for local authorities to stand in the way of the Executive's demands, although this argument will have stronger implications for some areas of Scottish criminal justice than others; local government do not have a stake in prisons, prosecutions or courts and in the areas listed above their power may not be as strong as the case of CJSW. However, the ownership of any public service by local government makes it more protected from pressures of reform because local government will view attempts to take it over as a political attack. Furthermore, central government may be more reluctant to take on local government because of their continued need for their support to campaign at a local level. Although Tonry's analysis claims that whether power is centralised or not is not a 'determinant' of penal policy (2007:21), my analysis suggests that this may in fact have a powerful effect.

### *10.3.c The Parliament and Differing Abilities to Veto*

Most of the discussion about devolution so far has focused on the effects of the creation of the new power structure of the Scottish Executive. However, devolution also created another political structure with the power to both give policy democratic legitimacy and also to hold the executive to account, namely the Parliament. In theory, the Parliament is there to keep the governing administration 'in check'; it is another layer of accountability through which most policy has to pass (Himsworth 2009:58; Keating 2010:31). For this reason it is included for discussion in this section about factors which resist change. However, its inclusion here is also somewhat of a misnomer, because, as illustrated in previous chapters, in the context of an executive majority, it is very unlikely to form a meaningful veto point on executive power (see also McMillan 2009:66). It is a unicameral system, and the hope that committees would be able to perform the function that a second chamber does in other bicameral systems, has not been realised (Carman and Shephard 2009:25; Steel 2009:20). However, the Parliament *does* form an important added tier of scrutiny, which, even

in the context of an executive majority, will spot problems with the legislation and attempt to amend it accordingly (Keating 2010:136). The parliamentary process is also very useful to the civil servants who use it as a means of checking legislation: as one of them commented “it’s rarely right the first time round”.

Although an executive-dominated Parliament, and therefore subject committee, is extremely unlikely to vote against an executive piece of legislation at Stage 1 or 3, it is able to write fairly critical reports highlighting areas of potential problems, and table amendments. The committee report is especially important, and although it is selective about which areas of the report it will listen to, the administration is expected to take heed of most of the recommendations, or at least explain to parliament why they have chosen not to, and the amendments which the Executive *do* make in stages 2 and 3 tend not to alter the overall spirit of the Bill. Therefore, although in the context of an executive majority the Parliament offers a degree of scrutiny and allows civil servants and ministers to iron out possible problems, these changes are likely to be relatively technical and not change the overall spirit of the Bill (see also Cairney 2006:186).

This all changes under a minority administration however, when power swings back to the Parliament (Keating and Cairney 2009:41; Keating 2010:112). However, in this context, the Parliament is often sidelined because the government knows it can be voted down, therefore prompting complaints amongst the opposition that policy may be less good because it is not afforded the extra layer of scrutiny that the parliamentary process provides. Therefore, Parliament is used as a layer of scrutiny more frequently when ministers know they can be fairly assured of getting the legislation through *and* they have the legislative personality which wants to get lots through (although of course the two are often connected). When legislation is sought under a minority administration, the balance of power lies very much in the hands of the Parliament however, who are able to vote down or significantly modify legislation that is passed.

The Parliament serves two functions: firstly to hold ministers to account by scrutinising and amending any legislation it seeks to pass, and secondly, by giving legislation its democratic legitimacy through the act of voting on it by elected members. The fact that the Parliament (during the first two terms) was dominated by an executive majority meaning that the whips will ensure that their legislation is passed, means that it would be easy to claim that both of these functions are rendered

rather meaningless. However, although there is some merit to this argument, it does not capture the full role of the Parliament, as it does provide opportunities for fine-tuning legislation even under an executive majority. It also forms another function, which is to communicate the executive's activities to the public, thus putting policy-making into an open and democratic forum.

Therefore, although in the context of a ruling majority, the Parliament is unlikely to form any meaningful veto point on executive power, it nonetheless offers the opportunity to fine tune legislation and iron out problems, though not to make any radical changes. In the context of a minority administration, the Parliament regains power over the Executive, although as a consequence it is then sidelined whenever possible. The Parliament also performs the symbolic function of communicating to the public.

### *Conclusion*

This section has demonstrated that the factors which resisted the rate of penal change in my case study relate to the configuration of political structures in Scotland. Firstly, there was the constitution of the Scottish Parliament which operates a PR voting system. This means that the administration is likely to be comprised of a coalition or a minority, which entails a necessary degree of negotiation, compromise and incorporation of wider interests. Secondly, the decentralised nature of political power means that local government control CJSW (and I propose, also has a stake in a number of other key criminal justice agencies). This offers a degree of protection against centrally initiated attempts at reform. Thirdly, my research confirms that the Parliament does not offer any meaningful veto point in the context of a ruling majority, although it has useful 'fine-tuning' and important symbolic functions.

This chapter has so far discussed how penal change played out in relation to my particular case study, addressing numbers one, two and three of my research questions. However, the final research question sought to understand what the Scottish example can tell us about penal change more generally, and that is what the concluding section of this chapter seeks to do.



## 10.4 What Can Scotland's Experience Tell Us about Penal Change?

What, finally, can the example of recent penal change in Scotland tell us about penal change in general? It is possible, I suggest, to draw certain conclusions. Firstly, penal change seems to be inherently political. Though there may be 'macro level' social and cultural structural changes that underpin penal change, the way these forces play out in different jurisdictions is ultimately based on the 'meso level' political institutional arrangements and the 'micro level' motivations for using them. It may be justifiably said that this conclusion is shaped by the fact that this was the level of analysis that this thesis took. However, the fact that penal change occurred so rapidly and so specifically in Scotland over this period, when all that had changed were precisely these meso and micro level factors, supports my conclusion: the only thing that changed over the short decades before and after devolution *were* precisely the creation of new democratic structures which created the opportunities and incentives for different decisions to be taken.

The Scottish example confirms that the removal of a 'buffer' between policy-making and public opinion can lead to rapid penal change. It corroborates much of the penal change literature by agreeing that more 'personalised' systems (when decision makers are in the public eye and are reliant on public approval for the continuation of their role and there is therefore more incentives for more punitive policies in order to 'chase' the popular vote (Savelsberg 1999:53)) are indeed more likely to undergo periods of rapid penal change and be more vulnerable to populist and punitive policies.

However, as I have demonstrated, institutions, whilst crucial, only form the parameters in which choice is made. The Scottish example shows that there are certain factors which make choices leading to change more likely. Firstly, corroborating the arguments of Garland (2001a), Simon (2007) and Pratt (2007), it shows how governments do indeed use criminal justice policies as a political capacity-building exercise in order to reconnect with citizens and bolster their legitimacy. This research also illustrates that close political connections with other jurisdictions make the adoption of their policies more likely (though, as I have demonstrated, they are then very likely to be set on their divergent path due to different political structures and changing political climates).

Although institutional structure was a crucial variant in creating change, the structure of Scotland's post-devolution institutions has also somewhat paradoxically helped to mitigate the pace and rate of change. I have demonstrated that the existence of PR electoral arrangements does indeed dilute penal policy, which helps to slow the rate of change, although it is important to note that this can also result in the tempering of more moderate policies as well. Although Tonry maintains that there is mixed evidence for the decentralisation of political power's effect on penal moderation (2007:21), this research provides one example of why this is not the case, and suggests that this example would have bearing for other areas of policy too. And finally, I have suggested that in unicameral systems where the parliamentary composition reflects the size of the governing majority, there is less likelihood of parliament standing in the way of penal change.

There is one final comment to make about the place of democratic processes in the policy-making process, which this thesis calls attention to. And that is to highlight the inherent difficulties of securing democratic legitimacy without using crime and punishment for political expediency. Although Tonry may disagree (2007:31-33), democratic accountability in policy should be welcomed, whilst still recognising that it is a riskier endeavour than having policy made by unaccountable hidden elites. While political involvement in crime and punishment can lead to rapid changes and a ratcheting up of penal policy for political self-promotion, as we saw under the first two parliamentary terms, the third term illustrated that this need not always be so. The SNP have shown how it is possible to attempt to change the terms of the penal debate, to try and educate the population in order to have a different type of conversation about crime and punishment, which shows that although the political process can be problematic, it need not always be so.

Perhaps I may be permitted to end on a note of speculation that is prompted by this research but which also points beyond it to the necessity of future work. The political process can be deeply problematic in respect of crime and justice issues. Yet this is not a good enough reason for seeking to turn away from politics. Accountable debate is a better and more legitimate way to make policy. Just because democracy can be messy, does not mean it should not be attempted. Democratic policy-making does not mean that public opinion must be blindly followed; it can also mean that public opinion can be informed and enhanced by greater exposure to argument and information. No doubt this is a riskier enterprise than not involving the public at all.

Yet it is surely better than making policy in the closed and private world of no democratic involvement.

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# Annex 1

## Breakdown of interviewees by professional role

### Government (central and local) and Parliament

#### MSPs

- Ex-justice minister
- Opposition MSPs x 2

#### Ministerial advisors

- Expert advisor
- Special advisor
- Leader of the National Support Team

#### Local government

- CoSLA spokesperson x 2 (one now retired)

#### Civil servants

- Senior civil servant in the community justice division (now retired)
- Civil servant currently in the community justice division
- Civil servant in analytical services (no longer in post)
- Civil servant working with the CJAs

#### Other

- Justice Committee Clerk

### Criminal justice practitioners

#### CJAs

- Chief officer x 3
- CJA convenor (also member of CoSLA)
- CJA board member (also member of CoSLA)

#### SPS

- Senior SPS board member x 2 (one of which was a NAB member)
- SPS Liaison manager x 2

#### CJSW

- CJSW manager x 5 (2 of which were members of the NAB, and 2 of which are now retired, 3 of which were also heavily involved with CoSLA)

#### POLICE

- ACPOS spokesperson
- Police federation spokesperson

### VOLUNTARY SECTOR

- Agency Chief Executive x 3 (2 of which were members of the NAB)

### OTHER

- Parole Board member
- Academic and member of NAB x 2

## **Annex 2**

### **Sample Access Letter**

Please note – this is skeleton access letter which was then adapted for individual respondents if and when necessary.

Dear ....

My name is Katrina Morrison and I am writing a PhD on criminal justice policy at the University of Edinburgh. The focus of my research is on the effects of devolution on policy, and how policies adapt in changing political environments. The case study for my research is Management of Offenders etc. (Scotland) Act 2005. I am tracing this legislation from initial consultation through its Parliamentary processes, looking at how it was implemented and how the Community Justice Authorities are presently operating.

I understand you played an important role in the formulation of this policy, and I would therefore be eager to talk to you about this. I would be interested to hear your perspective on these events and your thoughts on Scottish criminal justice policy during this time.

All the participants in my research are offered anonymity, which means they will not be named and I will do everything reasonable to make sure they are not personally identifiable when the research is written up. Interviews should take around 45 minutes and can take place at a time and location of your convenience.

I attach a summary of my research for more information.

I look forward to hearing from you.

Best wishes

Katrina Morrison

## **Annex 3**

### **Draft Interview Schedules: General and Specific**

The first part of this annex is a general outline of topics to be covered in interviews, which was then tailored for individual respondents. The second part of the annex is an example of a more fleshed out interview schedule; this one was for the ex-Justice Minister.

#### **General topics to be covered in interviews:**

- Introductions / confidentiality etc.
- Mini biography of respondent

#### *Chronology of Management of Offenders policy*

- Single agency idea – genesis / opinion of / policy transfer?
- Consultation – involvement in / opinion of
- Opinions of Parliamentary process / playing coalition / justice committee
- Opinions of / involvement in the National Strategy / the Criminal Justice Plan / National Advisory Board / National Support Team

#### *Historical*

- Relationship between central and local government
- History of CJSW reforms
- Changing relationship between Ministers and civil servants

#### *Involvement in CJAs*

- Outline involvement
- Opinion of CJAs / chief officers / councillors
- Opinions of interagency working
- CJAs in new political climates

#### *General*

- Experience / opinion of policy making pre devolution
- Opinions of changes with devolution
- Opinions of political aspect of policy
- Opinions of CJ policy under first two terms
- Opinions of changes with SNP

#### **Specific interview schedule – ex-Justice Minister**

- You were made Justice Minister following the 2003 election, prior to which you were the Minister for Education and Young People. Was the justice portfolio a brief you particularly wanted? Why do you think you were given this brief?
- What is the process of familiarising yourself with a brief like ‘justice’ when it falls into your lap? How much of this involves civil servants and how much comes from the party? Did you have meetings with your Labour colleagues in London?

- The post of Justice Minister had previously been held by the LD Jim Wallace. Following the 2003 election, this was made into a Labour position. Do you know why this is? Why did the Executive decide it wanted to have a Labour person in the justice portfolio? Who makes these decisions?

### The reducing reoffending agenda and the single agency idea

- Whose idea was it to make ‘reoffending’ one of the key issues for the Executive in the second term? Why was this issue chosen?
- If there was a Labour Minister in the Justice portfolio - to what extent was there dialogue with the Liberal Democrats about the sorts of policy that were coming out of the Justice department?
- The single agency idea had already been floated when you came to office, and then you had the task of taking it forward. Why did you think this idea had been suggested? Where do you think it came from? And what did you think about the idea?
- What would you say to those who point out that the single agency idea was remarkably similar to that of NOMS which had recently been created in England and Wales (people might also point out that the ASB agenda had also travelled up from south of the border)
  - I’m just wondering about the process whereby the Scottish Executive ends up promoting an idea which is remarkably similar to that in England and Wales? Did civil servants borrow it from England and Wales? Was it promoted to you as a good idea?
- Was there much dialogue between civil servants in the Justice Departments in Edinburgh and London? Do you know if there were meetings?
  - Was there any dialogue between Ministers in the Executive and the British Government?
- How do the policy ideas get chosen? In this instance there is the headline ‘reducing reoffending’ idea – this becomes something which suddenly needs to be addressed. Amongst this is the idea that agencies are disorganised and that in itself is contributing to the idea, and one solution to this is the single agency idea.
  - Are these your ideas? Are they civil servants ideas? Are they drawn up in consultation between you both? Who do you need to consult with before they become a firm policy commitment?
  - Do you need to take it to either your party or to your coalition partners?
- Where you involved in drawing up the consultation? How were the topics synthesised into the five ‘themes’ that required addressing?

### Playing coalition

- Your coalition partners the LDs made their opposition to the single agency idea apparent when the consultation began. Did you have discussions with them about this? Were there any attempts to get them onside?
- Did the Liberal Democrats opposition to the single agency idea ever make you think that the single agency plans were not feasible politically?
- When the CJA idea emerged from the consultation (as it became apparent the single agency idea was not feasible), did you have discussions with the LDs to make sure that they would come behind the idea?
- To what extent did you liaise with the LD team to check each other's stances on issues before making them official party lines?

### White paper, the Bill, and CJAs

- Whose idea was it to include the 'extra' sections in the Plan – i.e. the parts that weren't being taken forward in the Bill
- Who's idea were the CJAs? And to what extent were they the product of local authority opposition?
- Why was the position of the Chief Officer so important?
- Why was this model of agency chosen? (i.e. one that was primarily about making local authorities accountable, and not involving other agencies to the same extent? )
- Where did the provisions for HDC and the monitoring of dangerous and violent sex offenders come from? And why were the provisions on sex offenders included against the advice of the Sentencing Advisory Committee
- How much Ministerial involvement is there in the process of drawing up the Bill? How much 'political' involvement is there, and how much is left to civil servants?
- When the Bill is written, does this need to be cleared by the Labour and LD parties? And does it need to be cleared with the Labour party in Westminster?

### The Parliamentary process

- What is your opinion about the respective roles of Parliamentary debates, and the Committee process? Do they both add something valuable to the process?
- Did you write all of your speeches for debates?
- Given that all the MSPs seem to vote along party lines anyway, what actual purpose do the debates in Parliament serve?
- To what extent did it matter that there was a Conservative chair on the Justice Committee?
- Do you view the two tasks of 'performing' in the political arena, and knowing the policy brief inside out as two separate things, which require different sets of skills?

- Which parts of the Bill were you particularly proud of when the Bill was passed, and which do you think could have been stronger?
- Do you think that this Bill would achieve the objectives it sought to achieve? I.e. to make offender management better organised and work more efficiently?

### The National Strategy

- Were you involved in drawing up the National Strategy?
- What was your experience of the National Advisory Board and did you think it would achieve what you hoped?
- What was your experience of dealing with local authorities and the other partners?
- What sort of progress had been made with the National Strategy when the 2007 elections occurred? Was momentum sustained after the election?
- How much have you kept abreast with developments in justice since then?
  - If yes, what do you think about the SNP's new direction with regard to justice? What do you think about their proposals to reduce the use of short term custody? What do you think the strongest parts are? Which are the weakest parts?