

The north and south divide

Kenny MacAskill explains the Scottish Government's distinctive approach to justice policy



Scotland had a separate legal system long before the restoration of the Scottish parliament or even the election of a Scottish National Party (SNP) administration. Scots Law, along with Church and education, were preserved by the *Act of Union 1707*, and were pillars that upheld a distinctive national identity throughout the 300 years. More profound if less passionate than separate sporting teams, these three pillars of civic society helped ensure that Scotland existed as a separate entity when many other peoples in Europe and elsewhere were simply assimilated.

Indeed many who voted 'No' to political independence in the referendum would not countenance any abandonment of autonomy in those fields. Trade-offs for a lack of political independence and their rights and privileges, they are guarded jealously by those both within and without them. Political independence may be debatable but a removal of those pillars is not. Hence, crossing the border both then and now, it is clear that Scotland is a separate country with a different jurisdiction.

The widening gap

Following the re-establishment in 1999 of the Scottish parliament, and the creation as a consequence of a Scottish Government, the gap with south of the border in criminal justice has deepened and widened in many ways. Has that been as a consequence of a nationalist administration seeking to drive a wedge between the jurisdictions? Not really. Recent distinctive changes

have been with broad cross-party support across the constitutional spectrum, such as lowering the drink drive limit and seeking to licence air weapons. Instead, a great deal of the growing divide has been as a result of the Labour Party, and especially the United Kingdom coalition government, seeking to enforce policy and even ideology contrary to the views of the experts and the practitioners. Police and Crime Commissioners and privatisation are just two examples. Both are highly visible in England and Wales, yet are overwhelmingly rejected in Scotland.

Since 2007, the SNP administration has sought, in the main, to base its policies on ideas from, and support within, both the criminal justice sector and wider society. The failure to take control of the then Scottish Executive when the parliament was restored in 1999, followed by a further and heavier defeat in 2003, was a salutary lesson for the party. The SNP realised that it was not enough to state what it was against but also it had to articulate what it stood for. Moreover, as Labour Party hegemony finally began to fracture in Scotland during the Blair years, an opportunity opened up to engage with and learn from civic Scotland that has always been social democratically inclined. That chance was taken by the SNP, which interacted with and formulated its policy platform on an agenda

outlined by academia, experts and the sector representatives.

As New Labour shifted to the right, the SNP sought and took the social democratic mantle. The Blair mantra of 'tough on crime, tough on the causes of crime' either ran out of steam or was shown to be hollow. Child anti-social behaviour orders and curfews for young people in

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small town Scotland were perhaps the nadir. New Labour ignored the advice of practitioners and paid the price in popularity with both them and the public. The change was

significant, both in the number of votes that switched allegiance, and substantial in terms of public endorsements that were given as a consequence for the SNP policy platform.

The SNP's priorities

There is an ongoing debate about the record of the United Kingdom coalition, and what the new government will do. That is a factor in Scotland, but given the separate jurisdiction and parliament it is necessary to go back beyond that for an accurate reprise north of the border. Moreover, it is necessary to bear in mind that in Scotland the constitution divides as much as the normal political spectrum. Where you stand on the issue of independence is as relevant as where you are positioned on the left-right split.

Without repeating the historical context, Scottish politics is defined not just by a change in the United Kingdom administration in 2010, but also by the Scottish election of 2007. That election saw a minority SNP administration take office. The changes were to be more than simply the nomenclature of a Scottish Executive being translated into a Scottish Government, important though that was symbolically. On a broader political front the commitment was for a referendum on independence. However, the actions of the administration were wider than that, seeking sustainable economic growth and pursuing a social democratic agenda. A public perception of competence and capability, as well as popular policies, saw it re-elected as a majority government in 2011. Ironically, the majority government was a feat thought impossible by the Westminster government, which devised the electoral system to thwart nationalist ambitions.

Justice portfolio

In the justice portfolio the directions were far from constitutional and much more parochial. The first clear directions given to officials were on a broad sweep but indicative of a direction of travel and based on that expert advice from within the sectors, academia and wider society. There were four specific areas relating to criminal justice in particular.

Firstly, a visible police presence in our communities to deter citizens who would break the law and reassure the law abiding majority. That was to be delivered by the recruitment of 1,000 additional police officers, with a requirement that those officers would be in the community; addressing not just crime itself but the fear of crime, which is far harder to both quantify and address. Secondly, a coherent penal policy to ensure that prison was for those required to be there,

either because they were a danger to society, or who had committed an offence for which no other sentence was appropriate. The McLeish Commission on prisons in 2008 was followed up by the Angiolini Commission on Women Offenders in

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2012. Thirdly, a recognition that crime is a business for some with both nefarious consequences and influence. Hence, tackling the scourge of serious and organised crime saw the establishment of a Serious Organised Crime Task Force and actions consequent to it, in particular proceeds of crime. Finally, taking action on alcohol abuse that fuelled so much offending in Scotland. Alcohol licensing was brought within the justice portfolio and action on price, promotion and sale followed.

On a broader front, a support for the public and third sector was matched by an opposition to privatisation. That was immediate in delivery, if not without its difficulties in practice. Had the plans by the previous Labour/Liberal Executive to proceed with HMP Low Moss gone ahead, almost 40 per cent of Scottish prison capacity would have been

private, and it is likely a tipping point would have been reached. Revenue costs would have been such that future builds would have required private finance rather than through ever constrained capital expenditure. So the SNP government overturned these plans, initially in the face of dogged opposition from some senior Scottish Prison Service staff and Justice Department officials. Subsequently, they came around and became strong defenders once again of the public sector. Administrations come and go but policy at official level takes time to catch up with a new regime! The decision was also

supported by the sector including the Prison Officers Association (POA) and the Prison Governors Association.

Challenging privatisation

Unfortunately, it was impossible to cancel the contract for HMP Addiewell, which opened in 2008 – another private prison – without unaffordable legal damages. Regrettably, a prison that could have been built for £140 million will end up costing £940 million; another of the private finance ventures of New Labour that put the actions of many an inmate in context if not to shame. But those actions showed willing and brought forth both respect and support. Indeed prison numbers rose alarmingly in the early part of the SNP administration. It was only as a result of staff being prepared to work on in conditions they need not have accepted, that the government did not fall in a prison numbers crisis. The support for the public sector was repaid by those who worked in it and it extended well beyond the prison service, even if that were the most visible manifestation of it.

The SNP's engagement with and respect for sectorial interests in

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opposition was maintained in government. On becoming Justice Secretary, I was surprised to find that stakeholders engaged with regularly in opposition were not on the regular

meeting list for government. Chief Constables fell into that category, as did many others, including staff and stakeholder organisations. Likewise, taking questions at conferences and events and going out on the road to meet and engage was not the norm. It was astonishing to be the first Justice Secretary at the Scottish Police Federation (SPF) annual conference to take questions. Looking back it would seem that the first Labour/Liberal administration in 1999 allowed themselves to be steered by officials happy to keep them closeted and restricted in access when they gained office. The

SNP, having had the luxury of opposition, was already open and networking and it was officials who required changing. That spirit of openness and a willingness to engage was pursued and paid dividends. Ironically, being a minority administration perhaps helped. With limited support in parliament, backing from without was ever more vital. Positive engagement with the sector brought positive publicity for the government as well as support and backing.

Attempts were initially made to try and build a broad social democratic consensus on justice policy. After all, other than the Tories, all parties in the Scottish parliament at that time were centre or left of centre in policy. The ability of other small or similar jurisdictions to make significant social progress was viewed with envy. The Scandinavian countries have always been the template for many in the broader nationalist movement. Whether Sweden or Finland, there was always a broad political consensus on many justice issues: policy disputes related to grand affairs of state, such as membership of the Euro or NATO; attitudes towards Russia or the extent of the welfare state. Consensus was the norm and in the main prevailed on tackling social issues, such as prison numbers or alcohol abuse. Overtures were made to opposition parties to see if that could be achieved across the North Sea.

Sadly, Labour's reaction to an electoral defeat in Scotland, albeit a seismic one, saw them pursue a policy of oppositionism that even seemed to turn their own values on their head. Their position on justice in particular, but also much wider, was to criticise and attack whatever the SNP government proposed. There was little if any willingness to cooperate on social issues of concern. On alcohol abuse they shamefully refused to support minimum unit pricing. On knife

crime they pursued a public campaign for mandatory six month sentences that flew in the face of advice from police, youth workers and criminologists. The SNP government resisted calls for mandatory sentencing, with crucial support from senior police officers, from the outstanding Violence Reduction Unit and countless others.

The results have been staggering: a 67 per cent drop in crimes of handling an offensive weapon in Glasgow alone is testimony to the success of the policy. This was allied, of course, with other aspects, such as tough sentences for many who did

offend and the significant use of stop and search. Labour's position of opposition for opposition's sake continued into and beyond 2011, which partly explains their even deeper defeat at that election.

Deals, though, could and were struck. The Tories were eager to ally themselves with the police numbers pledge and the Liberal Democrats were willing to support a presumption against the use of short sentences, though sadly only to three months not six. Come 2011 and the historic victory of an SNP majority administration meant that additional parliamentary support was no longer required. However, a direction had been set which was viewed favourably by stakeholders and practitioners, in the main; even though negativity, if anything, became more strident from the opposition.

Governments though have not only to win support but keep it. Trust, as they say, takes a long time to win but can be very quickly lost. This can occasionally be difficult in power as pressures mount especially from the media. It is at times like those that some political courage needs to be shown. The SNP government came under concerted attack not simply on knife crime, though this was perhaps where criticism was most strident. On other issues – whether open prisons, home leave or youth justice

– the attacks from much of the press were relentless. A great deal of work went into getting the message across through other more balanced and modern media and ensuring visible support for the policies. Again, stakeholder support was critical. A politician may not be trusted, nor even sometimes sadly an academic or social worker; but police and prison governors are, and others who looked and talked the part spoke out. They were critical in steering the government ship through stormy seas.

Received wisdom, or perhaps more accurately press prejudice, that justice policy could neither be liberal nor tough on alcohol was shown to be wrong. Both those policies proved to be popular and electorally sellable as public attitudes changed or as policies were properly explained. Public support for action on alcohol abuse and the electoral damage sustained by Labour in particular in opposing minimum unit pricing testify to the former. The acceptance of community-based sentencing and the presumption against sentences of less than three months was indicative of the latter.

Of course, it wasn't always plain sailing and there were occasions when the administration ran into opposition from stakeholders. Legal aid lawyers were outraged at cuts and the imposition of contributions for criminal legal aid. However, savings there had to be as austerity post the 2008 crash kicked in. Valiant efforts were made by the Scottish Legal Aid Board to preserve the integrity of a system geared for all, especially the most vulnerable, not just those facing a criminal charge. References to the far worse situation south of the border were fine for political debate but not for those who felt themselves the victims of injustice. However, the interests of the legal profession were not seen sympathetically by the public, and the policy prevailed.

More recently, the proposal to abolish the historic routine requirement for corroboration saw outrage amongst similar vested interests in the former judiciary and current defence lawyers. That story has not yet concluded as the

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legislation is delayed but pending. But again, the angst of those with a vested interest in its retention was offset by support from and working with those who had suffered because of it. Rape Crisis Scotland and Scottish Women's Aid, Victim Support Scotland and individuals of great courage, prepared to forego their anonymity, stepped forward to speak out. It is a difficult issue for government as it is emotive and there are fears for civil liberties. Much of corroboration is a myth and most is complex, making it difficult to explain. But history will no doubt record its passing from Scotland and the end of it being the only jurisdiction in the western world still requiring it.

Cheers and jeers

Of course incidents did arise that highlighted the differences between the two jurisdictions. A very early precursor of the new world that had arisen post the SNP victory in 2011, was the refusal of the Home Secretary to honour the police pay arbitration award. To the consternation of officials at the time, used to administrations supine to or part of the Westminster machine, the Scottish Government refused to follow suit. Governments which agree to arbitration should be bound by them, especially when dealing with a service that cannot strike; but it would be fair to say it was also the start of a relationship between police officers and the government in Scotland that has got significantly warmer, in contrast to the deep freeze that has occurred down south.

The contrast between the jurisdictions was stark. Scottish Ministers, routinely applauded at SPF conferences whilst UK ministers were jeered at Police Federation of England and Wales conferences; the POA Scotland accommodating to the Scottish Government whilst the POA UK confrontational; the Fire Brigades Union (FBU) Scotland at the pumps when the FBU UK was out on strike; and social workers and practitioners in justice supportive of the direction

of travel in Scotland, whilst south of the border there was anger and despair.

Consensus vs confrontation

Whilst Scotland had discussion and an element of consensus, in England and Wales it appeared to be dictated and direct confrontation. Best policy in the former was matched by party ideology in the latter. The clearest examples were the privatisation in probation services and prisons, done against the wishes of staff and specialists; the appointment of Tom Winsor as Chief Inspector of Constabulary in October 2012, and the denigration if not outright attack on the police service; and a continuation of New Labour's perception of youth as a threat rather than a small minority being the issue.

There was also a significant difference in the willingness to confront the vested interests, whether of big business or other influential lobbies; the alcohol industry being an obvious example. North of the border, the Scotch Whisky Association and the supermarkets railed against many policies, whether minimum unit price or licensing law changes. However, both were persevered with by the Scottish Government and garnered both sector and public support. That has since been followed by the lowering of the drink drive limit; again finding public support in the face of some vested business interests. South of the border, the Prime Minister seemed to initially genuflect towards action, whether on minimum unit price or licensing changes. But since then there has been an abandonment of them with rhetoric on alcohol abuse sufficing rather than action on price and supply; matched by a failure to implement the North review, in 2010, on drink and drug driving, and

lowering the drink drive limit. Similar contrasts were shown on firearms.

Change has been slow and limited south of the border, whether on the cost or availability of licences. North of the border air weapons, now a devolved matter, are being licensed and there is a continued push for further action and increased charges on the issues that remain reserved to Westminster.

These actions and events also need to be seen against the backdrop of attitudinal and cultural change in Scotland. Devolution initially disappointed; understandable and not atypical elsewhere in the world in other similar changes. Reality could never meet expectations, especially pent up ones after 300 years, and restricted powers left limited room for manoeuvre. However, as the parliament in Holyrood bedded down, and the spotlight was more on Edinburgh than Westminster, attitudes began to change. Distinct policies pursued by the Labour/Liberal administration on free personal care for the elderly and bringing the smoking ban in earlier than down south were popular and helped grow confidence in the institution and the country. Ironically for Labour and Liberals, that was no doubt part of the reason for the success of the SNP in 2007 and 2011 as a people, growing in confidence, sought to pursue their own policy direction.

There was also a growing recognition of other differences between the two jurisdictions, such

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as the different demography and geography with consequent implications for the delivery of services. England is a land with numerous metropolitan areas, each larger in population

than Scotland as an entity. Not just Greater London, but Greater Manchester, the West Midlands and so on. Scotland, by contrast, has several large cities but none larger than 500,000 in population. It has many more small towns and rural

and remote areas than in the south. Accordingly, the way in which services are configured and delivered in urban England could not be replicated in small town or rural Scotland. So, it was not just from a social democratic perspective that Scots looked to Scandinavia and elsewhere for options and solutions.

However, the differences in policy direction have accelerated since 2010. In England and Wales, the administration has followed an Anglo-American ideological model with contempt for public service and a desire for free market delivery. In Scotland, it has been a more north European political agenda of support for state, the third sector and a belief in the need for and benefit of regulation.

It is for each jurisdiction to decide its own policy direction, but Scotland has a good story to tell. Police numbers at record levels with recorded crime at a 40 year low. Significant drops in crimes of violence and the use of weapons. Prison numbers flat lining though sadly not reducing. Young offenders down and at numbers not seen for over a decade, with the whole system approach paying dividends. Reoffending down with support given for mentoring and other necessary support through the third sector and public agencies. Alcohol consumption declining, though from a very high base level; but signs of progress all the same. Court reform and rationalisation of the court estate done to ensure quicker and more effective justice within a tightening budget.

All that done, and a reasonably harmonious relationship maintained between government and agencies, notwithstanding the austerity inflicted post 2008. Rather than proceed with privatisation or redundancies the Scottish government sought to engage. A

social contract of no compulsory redundancies in return for pay restraint was agreed. Money aplenty there was not, but realism was shown by the sector and an

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acceptance that changing work and operations were needed, and collaboration and amalgamation required. The Police Service of Scotland is the single biggest

example thereof, but much back office sharing and realignment has taken place across the justice front. Similar consolidation will take place in years to come in community justice, as Community Justice Authorities, are replaced with delivery remaining local, but direction and policy going national. That contrasts with the position in England and Wales.

Looking ahead

So where now for justice in Scotland? The financial challenges will remain, irrespective of the outcome of the United Kingdom election. However, the repositioning means that it will be easier, though not easy to face them. Financial pressures will test the relationship and harmony between government and sector. As prices rise and pay remains relatively static, clamour for action will increase and tensions grow not just with the administration but between agencies and organisations. However, a sense of realism will remain and, in any event, a simple glance south of the border will show the alternative is worse.

The political battlefield in Scotland will remain on the constitution. Independence may be off the agenda, for a while, but the issue is more devolution versus home rule. The referendum battle may have

been won by the No campaign, but the peace is being won by the Yes parties. SNP and Green membership has surged, with the former now being the third largest party in the United Kingdom. Following the United Kingdom General Election, the Tories in Scotland are a marginal force. Perhaps in recognition of that significant shift in membership and support to SNP, Labour is seeking to reclaim its social democratic credentials. That offers an historic opportunity in Scotland to create that consensus that has been shown to work elsewhere, particularly in Scandinavia. A broader consensus on justice policy in Scotland can be formed between the SNP and Labour as the two big beasts, with support from the Greens and Liberal Democrats; leaving only the right rump in the Tories outside. Then the policy thinking of the criminal justice sector can be implemented whilst the parties continue to debate the constitution and other grand affairs of state. It will not be easy with the financial backdrop nor with the Anglo-American agenda still spouted in the media and south of the border, but it can be done.

As Scotland continues its political journey, distinct from the rest of the United Kingdom, justice policy too

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will develop in distinctive ways. The likelihood is that the two jurisdictions will continue to go in different directions. This divergence will

be fuelled as much by the actions of the United Kingdom Government as the Scottish Government. The separate pillars that endured an incorporating union for 300 years in 1707 will survive a referendum defeat in 2014; but provide the base for a continued distinctive society and justice policy. ■

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