Ten years of sentencing reform

Nicola Padfield argues that the sentencing reforms of the last ten years have resulted in greater fragmentation and more confusion.

The first and most obvious point about sentencing reform is that there has been far, far too much of it in the last ten years. First, there were the fundamental changes to the law on sentencing young offenders, in statutes in 1998 and 1999 (the introduction of the odd Detention and Training Order which can only be given in fixed 'bite size' chunks, as well the more notorious ASBO, the added bureaucracy of the Referral Order and so on). But little has been done to 'decriminalise' young offenders or to reduce the number of children in custody. A government tough on crime, but not so tough on the causes of crime?

A second landmark was the 'code' of sentencing law in the *Powers of the Criminal Courts (Sentencing) Act 2000* with its 168 sections and 12 appendices, which in the Stationery Office bound version runs to 231 pages. A mere glance at this reveals what a complex business sentencing had already become. But it was a matter of weeks only before this 'code' was amended by the *Criminal Justice and Court Services Act 2000* (out went Probation Orders, and in came Community Rehabilitation Orders, for example).

A third milestone was the *Proceeds of Crime Act 2002*, a brave attempt to strengthen the powers of the state to 'recover' the profits and proceeds of criminality. Fines, confiscation and reparation as alternatives to incarceration must be the right way forward. But the Assets Recovery Agency, which the *Proceeds of Crime Act* created, has not been considered a success and is now being abolished, to be swallowed up inside the latest creation, the Serious Organised Crime Agency. The main criticism of the ARA was that it cost a huge amount of money and raised much less than expected. (But whoever said that effective law enforcement comes cheap? And why have Money Payment Supervision Orders never been as popular with sentencers or governments as one might have hoped?) All this before the fourth landmark, the notorious *Criminal Justice Act 2003*, with its fundamental shake-up of sentencing law. This has already been followed by numerous changes to sentencing law (particularly in relation to minimum and maximum sentences) in a host of other statutes.

What is the legacy of the *Criminal Justice Act 2003*? A rising prison population, of course. And high levels of confusion. Life sentences have proliferated. The provisions on sentencing the 'dangerous' include a presumption of dangerousness which is widely acknowledged to be unduly wide. The Court of Appeal has interpreted the provisions imaginatively to help sentencers avoid life/indeterminate sentences being imposed on too broad a group of offenders. But the numbers speak for themselves: in December 2006, there were 8,396 people in prison in England and Wales serving indeterminate sentences, an astonishing increase of 31% (up from 6,431) in just one year (see NOMS, *Population in Custody, Monthly Tables*, December 2006). The long-term impact of this is going to be huge: lifers are unlikely to be released on tariff, not only because the Parole Board is significantly under-resourced, but also because much greater priority has to be given to providing better (more joined-up, less fragmented) supervision in the community. At the other end of the 'seriousness' perspective, confusion and complexity have been acerbated because some of the more interesting provisions of the *Criminal Justice Act 2003* have still not been introduced: 'Custody Plus' and the Community Order for 16 and 17 year olds.

Perhaps the most disappointing legacy of the *Criminal Justice Act 2003* is its failure to achieve any sense of 'joined-up' sentencing. 'Front door' sentencing, what judges or magistrates decide when sentencing, is just the beginning of the story. It is not obvious that the enforcement/implementation of those sentences has been improved in the last ten years. We need better sentence planning (and therefore routine, full pre-sentence reports), and less fragmentation of services. If the National Offender Management Service had simply taken over responsibility from the National Probation Directorate for managing offenders' sentences in the community, and from the Prison Service for those in custody, all well and good (though I would have called it something rather different!). But what we have is the privatization of prisons and probation, and the fragmentation of services. Sentencing should not be looked at in isolation.

I would suggest that few of these 'reforms' have improved the sentencing system, and even fewer have contributed to the reduction of crime in society.

The *Halliday Report* recommended review courts (see Halliday, 2001), and Drug Training and Testing Orders (introduced in 1998, but now replaced by the generic Community Order, which may include a drug rehabilitation requirement) usefully involved the courts in the management of the offender. Surely a parole board or sentence review judge (like the *'juge d'application des peines'* in France) should provide independent oversight of the implementation of sentences (see Padfield, 2007)? Many prisoners are being recalled to prison by their supervising officers, but the courts have only a small role in overseeing this back door (or revolving door) into prison (see Padfield and Maruna, 2006).

Rather than exploring the legacy of the *Criminal Justice Act 2003*, perhaps it is more interesting to question why all this change was considered necessary. I would suggest that few

of these 'reforms' have improved the sentencing system, and even fewer have contributed to the reduction of crime in society. The government's most recent consultation on *Making Sentencing Clearer* (December 2006) asks alarmingly basic questions such as "What more could be done to promote the use of community sentences instead of short periods of custody for lower level offenders?" Is it not obvious that sentencers will not believe that community penalties are 'robust' unless the requirements on offer are challenging and significant? Yet probation priorities (and resources) are being diverted towards the management of the 'dangerous'. 'Offender managers' (what was wrong with calling them probation officers?) need much closer relationships with those they supervise, and smaller case loads. There is also of course the problem of the 'custody threshold': the legislation (and the Sentencing Guidelines Council) still forces sentencers to assume that custodial sentences are more serious, and higher up the ladder of penalties, than a community order. Yet all sentencers know that a sentence of nine months' imprisonment probably means in reality only three months inside (and a life much disrupted during that time), thanks to Home Detention Curfews, another legacy of the *Crime and Disorder Act 1998*. A community sentence with teeth, imposed with challenging demands over perhaps two years, may be much more 'punitive' and much more useful in encouraging an offender to lead a 'good and useful life'. So we need imprisonment for the seriously dangerous, and tougher and more effective community penalties for less serious offenders: we knew that ten years ago.

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Nicola Padfield *is a Senior Lecturer, Faculty of Law, Fitzwilliam College, University of Cambridge.*

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(Dorling, 2004). Crime reduction through better physical security, desirable in itself, paradoxically feeds a sense of insecurity as its paraphernalia and routines act as constant signs of threat (Zedner, 2003). These are major factors in the 'reassurance gap', the failure of public opinion to recognise the declining overall levels of crime. In short, New Labour has largely delivered on its pledge to be tough on crime overall, but it needs to get tough on the economic and social causes of crime, especially more serious crimes, if it is to achieve security and a public sense of security.

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Robert Reiner *is Professor of Criminology, Mannheim Centre for the Study of Criminology and Criminal Justice, London School of Economics.*

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