

CRIMINAL JUSTICE UNDER THE
COALITION

A tale of two Eras

Crispin Blunt MP

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Edited by Craig Cox

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THE JUSTICE SECRETARIES

It is difficult to think of a greater contrast between two consecutive Justice Secretaries than Ken Clarke and Chris Grayling. Their personalities, their professional background and their approach to politics contrast almost as much as the policy prescription and leadership they have brought to the role. I am lucky enough to know them both well.

Chris is my Parliamentary neighbour and close contemporary, having been elected within 4 years of each other. As a Cambridge educated, former BBC trainee TV producer turned management consultant, Chris seems the definitive modern serious politician. Whilst initially attracted to the SDP, ideas are clearly very important to him. His management of Liam Fox's campaign for the leadership in 2005, coupled with his energetic development of the 'Work Programme' under Iain Duncan-Smith mark him out as a sober minded instinctive social conservative. His rapid rise in Opposition owed much to his preparedness to embrace the "attack dog" role when discomfiting stories for the Labour front bench would appear. His calm, cool and, occasionally, taciturn public demeanour suited this role as Tory-inquisitor-in-chief. He has brought these attributes to the role of Justice Secretary - in a marked contrast to his predecessor - to emphasise a renewed robustness in policy towards criminals.

Ken Clarke is three decades our senior in Parliament, if only two in life. However, the fully rounded and well lived life is the stuff of legend. Before becoming his junior minister in 2010, I had spent half of the previous decade as his whip. This was hardly onerous as Ken was not exactly managed on a short lead; indeed, any kind of leash would have been wholly self-defeating. I hope I played a small but constructive part in getting him inside the Cameroon tent, particularly to help give authority to George Osborne's economic message.

THE 2110-12 MINISTERIAL TEAM

His appointment to Justice in 2010 was a surprise, as was my appointment as his Minister for Prisons, Probation and Youth Justice. The other minister with responsibility for part of the criminal justice portfolio was Nick Herbert who, whilst mainly a Home Office minister as Minister for the Police, also had a role at Justice to help deliver the criminal justice system reforms. This was wholly appropriate because, as Shadow Justice Secretary prior to the election of 2010, Nick was the principle author of our manifesto policies, offering a revolution in rehabilitation with radical policy ideas to incentivise improving outcomes for offenders. He would spend Tuesdays at the MoJ, and it was cheerfully clear from his demeanour which department provided a happier working environment. The truth is you are one lucky junior minister if you serve under a departmental head as experienced as Ken. He brought a delightful insouciance to the inevitable excitements around Justice in the press and gave strength to his officials to produce a coherent departmental programme despite pressure from outside. When officials would report that an official from No 10 was desiring

a change in direction, he would wish to know who precisely. Ken made it repeatedly clear that if the Prime Minister wanted change he was always available for a bilateral, but it was at that level that departmental policy would be set.

Ken Clarke and I had never discussed criminal justice until I found myself as one of his junior ministers. To his relief, and that of the Permanent Secretary, Sir Suma Chakrabarti, he found that I arrived firmly of the view that the number of prisoners in the UK was a shocking mark of policy failure and a national embarrassment. It at least meant we were all in the same place practically and philosophically. The department was faced with the challenge of austerity in an unprotected department and locking people up is expensive.

The full time Justice Ministers under Ken were Jonathan Djanogly, Lord Tom McNally and I. Tom McNally was our Liberal Democrat minister and a delight to work alongside. Originally one of Jim Callaghan's special advisors in No 10 in the 1970s, he had subsequently been an MP both for the Labour Party and the SDP. He was leader of the coalition in the House of Lords which took up much of his time and so he directly managed the lighter element of the justice portfolio such as International Relations.

Jonathan Djanogly, my fellow Parliamentary Under-Secretary of State, took on oversight of the court system and legal aid. Ken had decided that criminal legal aid, having had its budget cut very recently by the previous government, was a well that had run dry for savings, so Jonathan was faced with a challenge of finding savings from rationalizing our estate of crown, county and magistrates courts and looking at reform of the civil legal aid system. His energetic attention to detail delivered significant rationalization in the court estate which of course always had a strong local lobby to defend each court building. His work was a significant success in delivering the austerity agenda in a sensible fashion.

On appointment I was delighted to find that I was responsible for prisons, probation and youth justice. It appeared to have been some time since policy had been held in one place under a justice chain of command that wanted to escape the tyranny of the tabloids and make policy on its criminal justice and economic merits. The Permanent Secretary had skilfully sorted out the responsibilities before we arrived.

The Institute of Government advises junior ministers to identify three specific policy priorities. The areas I wanted to champion personally were the implementation of payment by results around rehabilitation, a step change in the use of restorative justice and the creation of far more useful work and industry for serving prisoners.

A TWO YEAR TRUCE IN SENTENCING MACHISMO

Ken Clarke's arrival as Justice Secretary marked the end of a period of seventeen years of competition between the parties on who could out-tough who on sentencing offenders. The period had begun with Michael Howard as Home Secretary declaring to the 1993 Conservative Party Conference that 'prison works' and 'if you don't want to do the time,

don't do the crime'. He was marked by an aggressive new shadow Home Secretary in the form of Tony Blair, anxious to address Labour's perceived weakness on offender management. The prison population under Michael Howard rose from the 43,000 he had inherited in 1993 from Ken Clarke as Home Secretary to 66,000 by 1997. New Labour's sentencing reforms, particularly the 2003 Criminal Justice Act, which introduced the ill-starred indeterminate sentences for public protection (IPP) - essentially life sentences in disguise for selected short sentenced prisoners - meant that we inherited more than 85,000 people in prison in 2010. The last years of the Labour Government were marked by a constant prison population crisis which forced the automatic early release of offenders, the use of expensive police cells to manage the overflow and an expensive prison building programme.

Six weeks into office, Ken gave his first substantial policy speech. In it, he attacked the culture of ever longer sentences, indicated his opposition to IPPs and identified the failure of the criminal justice system to address the revolving door of short sentenced prisoners. He talked up the prospect of payment by results, but in private was cautious about the prospect of a 'rehabilitation revolution'. He had the scepticism of a seriously experienced minister who had seen endless good ideas come and go, and brought the attitude of a former Chancellor of the Exchequer to the need to find real savings as a priority over building castles in the air. However, he was convinced enough of the potential merits of payment by results to support a wide programme of pilots. These pilots had £100 million committed to them, but given the budget challenge the Permanent Secretary was having to assume future success from the pilots dropping demand on the Justice budget, but as accounting officer he took the risk on this globally new approach.

The speech itself had a remarkable effect. We had inherited a trend of an increasing prison population that would, our statisticians told us, be approximately 96,000 by 2015 if there was no change in sentencing policy. Sentencers, and the Parole Board, understood the message. They were now allowed a greater element of judgement and discretion over the use of custody as against probation oversight in the community. Unlike Dr John Reid, who as Home Secretary when the tabloids attacked shouted at "soft" sentencers and the Parole Board from his bully pulpit, the message from Ken was clear. We expect you to make sensible judgements, and the default position of justice ministers would be to support the conclusion of sentencers and the Parole Board. In the months that followed, the prison population stopped rising.

We then had to attend to the hard yards of making the savings through civil legal aid reform and sentencing reform in the form of legislation. The Legal Aid, Sentencing and Punishment of Offenders Bill took the first long session of Parliament ending in April 2012 to deliver. It radically reformed civil legal aid but on the criminal justice side the achievement I took most satisfaction in was the overdue abolition of IPPs.

SENTENCING

IPPs had proven both unjust and administrative disaster. There were cases of people sentenced to as little as 28 days in prison with an IPP, who were subsequently still in prison years later. On the trends we inherited, there would have been 25,000 of these people in prison, beyond their punishment tariff. To be released by the Parole Board they had to demonstrate they were safe to be released into the community, a test that was almost impossible for an offender in custody to pass, particularly if they had not completed various offender behaviour programmes. When we came into office, just 1 in 20 of the applications from prisoners who had served the punishment part of their sentences, succeeded in convincing the parole board they were safe to be released. This was both cruel and unreasonable to the individuals, and an administrative disaster inside the prison system. The capacity of the system to place offenders on offending behaviour programmes was swamped by the number of IPPs and life sentenced prisoners who needed to have undergone these programmes before the parole board would contemplate release on license. The result was an unjust administrative own goal, as we paid to keep people in prison that we had failed to prepare for release and who had served the punishment part of their sentence.

The attitude of the tabloids to these reforms was predictable and unremittingly hostile. Three months into office, I made my first major policy speech to mark the hundredth anniversary of a great penal reform speech given by Winston Churchill as Home Secretary. In his speech, which was remarkably sympathetic to the plight of prisoners, he concluded by saying

“A calm and dispassionate recognition of the rights of the accused against the state, and even of convicted criminal against the state, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, *and an unfaltering faith that there is a treasure, if only you can find it, in the heart of every man* these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.”

In it, he praised the role of music in aiding prisoner rehabilitation. I used the opportunity to authorise a new prison service instruction on the use of the performing arts in prison which, whilst it made a microscopic change to its predecessor, sent a message that such activities were to be encouraged by governors.

RELATIONSHIP WITH DOWNING STREET

The reaction of the Daily Mail was immediate and splashed my speech as “it’s parties for prisoners and you’re paying”. Ken had previously used the cheerful description of his predecessor Jack Straw of making policy with a cheque book in one hand and the Daily Mail in the other. Downing Street, in dealing with this matter, preferred to imply that we had had our wings clipped, and the out of order junior minister was a ministerial “walking corpse”. Not entirely helpful 3 months in, but by then it was not the first time I found myself left out on a limb by the leadership. The Coalition’s programme for government contained a commitment to anonymity until charge for rape defendants. Appearing in policy papers for both parties it had been waved through in the coalition negotiations and became an immediate target for Labour. There’s a perfect good case to be made for it and I had to make it. Make it I did, first in a bad tempered Adjournment debate only to find the policy subsequently disowned. The exercise was repeated a year later when I found myself making the case for increased sentence discounts for early cooperation of offenders with police and prosecution. I used the rather obvious example of rape victims being spared the ordeal of testimony if rapists had a decent incentive to spare them the agony of trial. This led to a synthetic row about being soft on rapists, which Ken inadvertently blew up by discussing a distinction between date rape and violent stranger rape on Radio 5. Ed Miliband tried to exploit this at PMQs, and the PM made a particularly good fist of defending it, however the increased discounts were abandoned. The regret is that some of the best policy is driven when a good old fashioned cash crisis forces original thinking and Justice was ripe for it, but despite this it still had to pass the tabloid test.

Despite the nervous oversight of Number 10, we did get on with serious system reform which Ken believed it to be the biggest concerted programme of change he had overseen in any department. We set up a new company, 131 Solutions, to put work in prisons onto some form of commercial footing. In the absence of money the only way to increase the scope of prisoner employment was to make it economic, as the existing make work schemes were largely a cost centre. Enabling education in prisons to be specifically linked to the training needs of potential work providers in prisons was wrung out of BIS who held the budget for this service. My ministerial colleague on these reforms was much more interested in performing in front of his officials at my expense than serious minded reform. However, once he was promised the opportunity to announce the changes, he proved less of an obstacle. As an object lesson in ministerial vanity, it took some beating.

Restorative justice was getting a boost from ministerial advocacy and an increase in resources - raised from offenders - to train people in delivering it. I saw this as going hand in hand with sentencing changes designed to increasingly hold offenders accountable to their victim, and making clear that serious compensation awards should be the first option open to sentencers.

THE CURRENT ERA

The reshuffle in September 2012 was welcomed by the tabloids. Chris Grayling quickly established the confidence of this lobby and has continued to do throughout his time in office. Delivery of probation reform and significant savings from the prison budget has ensured he has remained high in the esteem of No 10 and the Treasury respectively. His reputation with the professionals who work in the criminal justice world is rather different however.

He returned to the Criminal legal aid budget to seek savings. Clumsily delivered and ineptly resisted by the Criminal Bar at first, it remains to be seen whether the alienation of this part of the profession will have been worth it. However, cutting the cloth of apparent fat cat lawyers is always a popular target with the tabloids. More severe conditions for prisoners were proposed with a review of the incentives and privileges scheme and the robust message was reinforced by a system wide ban on books being sent to prisoners. The rhetoric around offender management became particularly robust following a couple of high profile absconds from open prisons, questioning the decision of the Parole Board that had put long sentenced serious offenders in open conditions. They and sentencers got the message. It should hardly have been a surprise that prisoner numbers started to rise. A new prison places crisis began to seem a possibility. A system already creaking under cuts to keep it in the public sector came under more pressure.

The private sector justice companies provided another popular target. G4S and Serco were the providers of the existing offender tagging contracts, as well as being the biggest custody providers. Early in his time it was drawn to Chris's attention that they had played faster and looser with the original tagging contract than was reasonable. He rapidly went public with this, doing a billion pounds worth of damage to Serco's share price in the process. However, it was well received in the press and reinforced his tough, uncompromising and austere image. G4S were already on their corporate PR knees after the fiasco of their involvement with London 2012 and were disinclined to fight. Both companies were taken out of any future bidding process for MoJ work. As they were the market leaders, this will have had its own unseen impact on the cost of future MoJ contracts. The rapid resort to public chastisement was expensive all round. A quiet discussion about appropriate compensation would have yielded more for the MoJ and protected the substantial British interest in the global success of these firms.

The contrast between Chris and Ken is remarkable. Chris Grayling has managed to outdo Michael Gove in the alienation of the professionals in his sector. Judges, lawyers, the Court service, Probation, prison officers and the major private sector providers seem to have a uniform private view of the Justice Secretary and it is far from complementary. Fortunately they have no media echo outside the liberal broadsheets and are not as well organised as the teachers. His calm media manner and robust messaging has so far carried the day publicly I do, however, fear for his place in history. Ken by contrast was popular and respected in

the department and by practitioners. However the editorials of the tabloids were consistently foaming against him.

PRISONS

Estate management was at the heart of Prison reforms. New prisons were coming online: Isis, Thameside and the biggest of all, HMP Oakwood in Staffordshire. The private sector inevitably won the contracts to man the new prisons as they could do it so much more efficiently than the public sector. The difficult truth for the public sector was that the private sector prisons were more innovative, generally (but not universally) better run and certainly cheaper than their public sector equivalents. We inherited from Labour the first competition of a public sector prison for its continuing management. Labour ministers had held this process over the public sector as a threat. I saw it as an excellent opportunity. Birmingham Prison was won by G4S despite the public sector running a very energetic bid to win the contract. G4S's bid was not only significantly cheaper than the public sector bid, but it also won on quality where it proposed a higher staff to prisoner ratio than the paired down public sector bid which saw staffing reduced to an absolute minimum in order to try and win the competition. Ten more prisons were then put up for competition under Ken Clarke. My vision was to have a mixed economy in the delivery of custodial services, with a public sector training estate into which the private sector would buy in order to deliver the common values required across a humane and decent prison system. I would also have wanted the Prison's Service College at Newbold Revel to become an academic authority on all aspects of criminology and for it also to be the place to which the probation service would look for its continuation training thus helping the professional development of the two key professions in criminal justice. The next round of public sector prisons were successfully placed into the market, with encouraging interest from major international private sector custody providers, as well as the UK's own market leaders. The programme was overtaken by the September 2012 reshuffle.

Chris Grayling was presented with a united front by NOMS and the Unions, the Prison Governors and the Prison Officers Associations, fused in their ideological desire to protect the public sector. They offered Chris an immediate prize if he abandoned the competition programme: the savings asked for by the Chancellor of the Exchequer. He accepted the deal leaving the front end of prisons in the hands of the POA and its officers in return for more 'contractorisation' of some of the support services. Anyone familiar with the Probation facilities management arrangements would have been deeply wary of this particular split of responsibilities. However, the most egregious consequence of this reform was to immediately begin to strip the manning of all public sector prisons down to the level of the Birmingham public sector bid, which was significantly below the long term staffing levels the private sector could offer. Public sector prisons were already undergoing one round of efficiency reorganisation in their establishments through "Fair and Sustainable" and this one was followed in short order by a dramatic and unwelcome addition to already hard pressed establishments in the form of "New Ways of Working" following a further benchmarking exercise. As a consequence, 2013 was, in the words of the Independent Monitoring Board, a

“dreadful” year for the High Down prison in my constituency, as it was across the Service. Reports are still making clear that prisons have not yet settled down to make the new manning arrangements work and there are real difficulties now in managing prisoners’ access to constructive activity. The priority around work in prisons has all but disappeared.

PROBATION

My title as minister included being minister for probation. I was proud to be the ministerial figurehead for a profession that was by any standard performing well. This was marked by the award of the British Quality Foundation’s Gold Medal for Excellence to the profession in 2011 by HRH The Princess Royal. The shape of the Probation reforms now being implemented were being cooked up from 2011 by the National Offender Management Service at the behest of No10 (the probation review Ken had conceded as a price for the abolition of IPPs). The legislation had largely been put in place in 2007, but the more I learnt the more these reforms looked as though they would be a profound missed opportunity to widen the scope of payment by results around rehabilitation to the whole social sector.

PAYMENT BY RESULTS

By the time I left office we had in train 24 different pilots around payment by results around rehabilitation. We were trying to learn both how to manage these schemes, how to write the contracts and whether there was an optimal part of the criminal justice system to incentivise. All of this was globally new and a very exciting development of the idea first presented in a manifesto programme in Nick Herbert’s Prison Reform Trusts. One, in Peterborough Prison, had been in development before May 2010 and was launched in September that year. The full programme envisaged another private sector prison based scheme in Serco’s Doncaster prison and two public sector prison pilot schemes at High Down and Leeds. Eight drug treatment related pilots were being led by the Department of Health in different parts of the country. Six local authority or police area based schemes were set up with Greater Manchester police and five London boroughs. The Youth Justice Board set up four small pilot PBR schemes of their own. However, the most significant I hoped were going to be the two pilots run around probation in the two trial areas of Wales and Staffordshire.

To do this a whole raft of difficult issues had to be resolved. Could you even have a public sector pilot? Could success and failure be rewarded or penalised in the public sector? On rehabilitation of offenders, did you reward providers for a fall in the number of anticipated offences carried out by an individual or group of offenders? Should you demand no reconvictions of an individual to score, or simply a measured drop in offences? Should you allow the contracts to enable providers to concentrate resources on those whose behaviour was likely to improve through programmes, or should programmes apply to all in their charge? How do you measure a group’s performance and how do you avoid providers gaming the system to get the most reward with no effective improvement?

Overhanging all this was the issue of savings. If this was to drive savings, how did you avoid the police simply filling up the new capacity in the Justice system, with the spare places at court and in prison given up by the now non-reoffending offenders, by finding other people slightly lower down the criminal food chain to arrest instead?

I became convinced that it was the whole criminal and social justice system itself that needed to be incentivised. If the police and local authorities could not be part of dropping demand on the front end of the system, we would be left with the most difficult work to fix the broken people coming out of the Justice system.

The new posts of Police and Crime Commissioners, elected across police authority areas, should have been the answer. If the probation reforms could be linked to these mandated individuals - so they had an incentive both to drop demand on the system by promoting early social intervention - as well as incentivising improvements within the system in rehabilitating those already in trouble we could begin to knit together all the government's exciting reforms in this area. This would sweep up the work done by Iain Duncan-Smith and Graham Allen on early intervention, Louise Casey's troubled families' initiative, drive further the success of integrated offender management and the closer working of Probation and police around prolific offenders.

Had the 2010-12 ministerial team remained in place, I believe we would have insisted that Probation reform followed the pilots in Staffordshire and Wales and the contracts for what are the new community rehabilitation companies (CRCs) would have been led by Police and Crime Commissioners around police areas.

PROBATION POST-2012

Chris Grayling's appointment saw a determination to put in place the whole reform programme by 2015. Thus, the pilots were abandoned and NOMS's framework of 21 Community Rehabilitation Companies (CRCs) were driven forward. These were designed both for the convenience of the MoJ's procurement and contracting department and anxiety about media perceived risk around serious offenders than sensible policy. They represented an internal assessment about the size of business required to be placed in the market to attract large companies to underwrite the risk and the capacity of the department to contract. In any event, the ability of the department's own civil servants was overwhelmed by the scale and speed required to sort out some of the fundamental questions associated with PBR before any of the pilots had started reporting. The role of civil servants running the pilot programmes were in effect taken over by private consultants who acquired the responsibility for getting the programme into operation. The unnoticed tragedy of this is that the retained knowledge about PBR around rehabilitation being painstakingly built up inside the department was being lost. This learning around what was a globally new concept I thought was vital. Not retaining this knowledge and skill in this specialist and new policy area will hamper strategy development and implementation in future.

The abandonment of the pilots posed another serious risk to the whole concept of PBR. I was confident that the Wales and Staffordshire pilots would iron out the worst of the bugs and teach us how to do it well. It would also win the probation officers in those areas to the concept, returning them closer to the original purpose of probation being around the care and repair of damaged individuals, as well as sentence oversight. Whilst effective sentence oversight is necessary, the most creative part of the job is fixing people. PBR offers the opportunity to free Probation professionals to deliver this. However, now the profession is up in arms at what it sees as a bungled half privatisation, around incoherent geographic areas and is now thoroughly demoralised. It has belted the stuffing out of Probation as a profession. They now find themselves managing an artificial separation of serious and non-serious offenders and the categorisation of these has driven an unnecessary split in the profession between public and private sector. This categorisation owes less to good policy making than to managing the tabloids' view of risk from offenders. A whole bunch of unintended consequences has been built into this administrative farrago which could see either a defensive or aggressive management of risk owing to budget rather than priorities around public protection and rehabilitation.

CONCLUSION

The abrupt change in probation and prison reform owes much to the contrast in policy making by the two Justice Secretaries. Ken constantly emphasised he wanted grown up policy making, establishing that new programmes had a good chance of actually working before being implemented. Chris has the ideological confidence to press ahead on his watch. Experience brings patience and, in Ken's case, delightful wit and wisdom too. Ambition brings decisiveness, but a much shorter perspective. I fear that professionals in criminal justice will be picking up the pieces of the latter approach rather than enjoying the fruits of long term and sustainable reform.

It is Chris's policy that has carried the day. I view this as the triumph of effective media management over long term sound administration, but the background of the demands of an incredibly tough austerity programme in an unprotected department should always be factored in. It remains my belief that Ken Clarke's two years as Justice Secretary could have been a watershed had Chris decided to build on the programmes he inherited. He could have secured the rehabilitation revolution. Instead, those two years now seem like a brief interlude from unreflective harshness in the presentation of offender management and the consequent poisonous effect on policy making. However, I am proud to have been part of it, and will continue to support those who have the political courage to try and make a reality of the approach to criminal justice outlined so powerfully by Winston Churchill in 1910 and delivered by Ken Clarke in his terms as Home and Justice Secretary.