The criminal justice system in Scotland

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CHAPTER OUTLINE

Introduction

Though many non-Scots may not be aware of it, Scottish criminal justice is quite distinct from that of the rest of the UK; it is underpinned by its own legal framework, set of institutions, actors and processes and, some would say, set of values. Did you know, for example, that Scotland has just one police force, that young offenders in custody are separated from the adult prison population until the age of at least 21, that there are three possible verdicts that courts can reach in Scottish trials, that statutory community justice services are provided by fully qualified social workers, and that there is an ongoing political agenda aimed at reducing the prison population? This chapter discusses the defining aspects of Scottish criminal justice, beginning with its context and history and then providing an overview of the key areas of Scottish criminal justice and practice. This will be structured to mirror the chronological criminal justice process, from police, prosecution, court system, victims' services, community justice services, prison system, to the treatment of female and young offenders in the system.

History and context

The Union of Parliaments in 1707 united the previously independent Scotland with England and Wales to form Great Britain. However, from 1707 until devolution in 1997, Scotland continued to operate under its own system of laws and institutions, and all laws and policies relating to Scotland were made by a separate part of the British government based in Edinburgh. This autonomy allowed Scottish laws, institutions, and practices to develop along different trajectories to those of England and Wales in this time (McAra 2005; Morrison 2012; Mooney et al. 2014). Following the creation of the Scottish Parliament with devolution in 1997, the responsibility for Scottish criminal justice was handed to the Scottish Executive (renamed by the Scottish Nationalist Party (SNP) as the 'Scottish Government'). The first two terms of the Scottish Executive were comprised of coalition between Scottish Labour and the Scottish Liberal Democrats (1999–2008) and, since 2008, the SNP has formed the Scottish Government twice as a minority administration (meaning it relies on the cooperation of other parties in order to pass legislation) and once as a majority administration.

Since devolution, the Scottish Government has had control over all aspects of Scottish criminal justice with the exception of national security, terrorism, firearms, and drugs, which remain under the competency of the British government in Westminster. The onset of devolution precipitated a period of very significant reform of Scottish criminal justice, in domestic legislative activity and wider institutional reform (see Chalmers and Leverick 2013; McAra 2008; Morrison 2012; Mooney et al. 2014).

An examination of Scottish criminal justice reveals points of continuity and departure with traditions and practices in the rest of the UK and in recent years, this divergence appears to be extending (Garside and Ford 2015). Divergent practices in criminal justice can be attributed to a number of factors: firstly, the long tradition of Scottish autonomy based on its own legal system and institutions; secondly, the freedom provided in governance structures prior to devolution, which allowed for separate penal approaches to become embedded (McAra 2005; Morrison 2012; Mooney et al. 2014); thirdly, its own tradition and culture, which some claim is more welfarist in orientation (McAra 2005) and which is certainly so in aspiration and in the self-perception of those who work in and around the system (Mooney et al. 2014); finally, the growing divergent political sphere, which is allowing—and indeed promoting—a different sort of political conversation about crime and punishment (McNeill 2015) and beginning to have tangible outcomes for some parts of the justice system.

Policing

Policing in Scotland has long followed its own practices, structures, and governance arrangements; however, the recent seismic reforms of policing in both Scotland and England and Wales have increased and deepened divergent policing practices between the nations. This section will outline some of the key features of Scottish policing, emphasising in particular the areas of divergence with policing in the rest of Great Britain.

It is a truism to say that the work that police do on a day-to-day basis is broad and spans more than crime control alone, and this is reflected by the main stated mission of Police Scotland which is '*to improve the safety and well-being of persons, localities and communities in Scotland*' (Police Scotland 2017a). It may be easy to critique corporate 'mission statements' as not reflecting operational realities but this difference nonetheless reflects different aspirations for the service and is in contrast to the emphasis on crime control in England and Wales (Fyfe 2014). The Scottish approach orientates policing based on harm-reduction and well-being, although this plays out against the complex and competing demands of a service adjusting to new structures, political imperatives, and an

economic environment predicated on efficiencies, partnership working, and prevention.

Actors and structure

In common with policing in other jurisdictions, policing in Scotland is marked by a number of features. There are now more actors involved; although there is a diminished role for the private sector (certainly in comparison with the privatisation of some areas in England under the Common Platform Programme (CPP) reforms), the private security industry continues to play an important and dominant role in the commercial, sporting, and night-time economy contexts (Fyfe 2010). In Scotland, police pluralisation has occurred with the creation of 'community wardens' who are employed by local authorities and do not have any police powers but who do have a role in providing assurances and acting as a 'bridge' to other agencies (Brown 2013). Additional policing functions are provided by 'special constables', who are unpaid part-time volunteers (Police Scotland 2017b), and 'neighbourhood watch schemes'. Questions emerge, however, in relation to the equity of the pluralisation of policing and security—the provision of services in Scotland is often not correlated with the degree of need in particular areas (Fyfe 2010).

The creation of a single police force, Police Scotland, in 2013 represented a period of radical change to policing in Scotland and cemented divergence from practices in England and Wales. As policing in England and Wales becomes more devolved with greater opportunity for democratic involvement via the creation of Police and Crime Commissioners (PCCs), policing in Scotland has been centralised, the initial period of which was marked by central top-down control and the erosion of localised approaches (Fyfe 2016).

Prior to 2013, chief constables in the existing eight police forces were afforded a degree of autonomy to formulate strategic and operational objectives (Donnelly and Scott 2010). This was enabled by the local democratic decision involvement via the tripartite arrangement, which included a role for local government, but also the micro-level cultures of policing in that area and the preferences of that force's chief constable. The starkest examples of this were two different approaches to policing carried out by the two biggest police force areas: Strathclyde, covering the Glasgow region and beyond, and Lothian and Borders, which included Edinburgh. Strathclyde's approach was more crime-focused, enforcement-led, and driven by a strong performance measurement and management culture, in contrast to Lothian and Borders' focus, which was more on community well-being, partnership, and prevention (Hamilton-Smith et al. 2014). One indicator of these different approaches was the level of stop and search for 2010 in the two forces: 168 per 1,000 people in Strathclyde (the highest in the UK) compared with 40 per 1,000 people in Lothian and Borders (Murray 2014). It was therefore difficult to make claims about any 'one' Scottish approach to policing during that time.

In Scotland, the tension between approaches in policing characterised by prevention and partnership versus more centralised and exclusionary practices has ebbed and flowed over recent history (Fyfe 2010). Prior to devolution, more heavy-handed approaches to policing were seen in certain parts of Scotland, most notably in Strathclyde's adoption of a zero-tolerance approach to low-level crime and disorder in the mid-1990s, named 'Operation Spotlight', though this was notable for diverging from approaches followed in other parts of Scotland (Fyfe 2010). Following devolution, policing developed along both of these approaches: partnership and reassurance on the one hand (e.g. the creation of 1,000 new community police officers and a commitment to 'reassurance policing' in 2007), and on the other hand, the adoption of antisocial policing approaches in Scotland by the New Labour-led Scottish Executive, provided a means of introducing more draconian approaches in the vein of policing in England and Wales (Fyfe 2010). During the New Labour era in Scotland (1999–2008) and England and Wales (1997–2010), policing in Scotland therefore reflected the flows of influence in criminal justice policy between the two jurisdictions.

In the climate of public sector austerity since 2008, the Scottish Government claimed the fragmentation of policing over the relatively small area of Scotland was wasteful and inefficient, with the Cabinet Secretary at the time stating 'we cannot afford to do things eight times over' (MacAskill, quoted in Fyfe 2014: 498). However, it is also true that these reforms took place in the context of increasing central control over policing, which has been ongoing since the creation of the devolved Parliament in 1999—it is seen, for example, in the creation of the Scottish Policing Board in 2009, created in order to create national strategic priorities (Fyfe 2014). Whether the creation of Police Scotland was motivated by a concern over efficacies in a climate of austerity or whether this reform can be seen in the light of increasing central control is a moot point and the reforms can certainly be seen to fulfil both these objectives (Fyfe 2014).

The creation of Police Scotland has solidified and strengthened central control of policing in Scotland and raised important questions in relation to police accountability, not least given that the new governance body, the Scottish Police Authority, is comprised of members appointed by Scottish ministers, rather than elected by the public or by local government (see Henry et al. 2016). Of particular concern to many is the potential loss of local accountability in the new structures, especially given that local government no longer has the ability to influence policing via the previous tripartite arrangement and funding decisions; their role is now restricted to 'scrutiny

and engagement' (HMICS 2013), the practice of which varies across Scotland (Fyfe 2016). With such variation in Scottish social geographies, not least in relation to its many rural and more remote areas, local accountability becomes increasingly important (Wooff 2015).

This erosion of local accountability has coincided with a loss of local flexibility in policing approaches and styles, certainly under the reign of Police Scotland's first chief constable, Sir Steven House. The emergence of a single style of policing across Scotland, dubbed 'Strathclydification', represented the roll-out of a policing approach followed in Steven House's former force, Strathclyde, rather than an approach which represented a merger of the previous eight forces (Fyfe 2016). Some notable examples of a new national approach, perceived by many to be more heavy-handed, include high-profile raids in 2013 in Edinburgh on premises which had effectively operated as licensed brothels under a tacit agreement with Lothian and Borders Police Force; the very significant rise in the use of 'stop and search' across all regions of Scotland, especially on young people (Murray 2014; O'Neill and Aston 2016); and the routine arming of firearms officers rather than allowing them only to carry firearms in cases where there was a specific firearms threat (Yarwood and Wooff 2016), a decision which has since been overturned.

If an evaluation of the early period of Police Scotland suggests increased central control and more interventionist policing styles, it is also true that centralising the service has resulted in financial savings, the stated objective of the reforms; indeed, these equated to £72 million in the first year (Yarwood and Wooff 2016). Crucially, until an announcement made in February 2017, cuts had not been achieved through a reduction in the number of police officers, which was 17,256 in December 2016 due to a high-profile commitment by the SNP government to maintain these figures, despite calls that the number of police should be made for operational rather than political reasons (Thomson et al. 2015). Along with the savings achieved in Scotland by centralising and sharing services, there has been a significant reduction in the number of civilian policing roles in this time, which has had a sizeable bearing on policing practices, with some critics claiming that this has resulted in operational officers filling back-office roles. In 2015, two people died following a car crash which was reported to the police but then not further investigated for three days. This was later attributed in part to staff shortages at a police call-handling centre (HMICS 2015) and could be seen as a consequence of these cuts.

A current projected budget shortfall of £21 million has prompted Police Scotland to announce it will reduce police numbers by 400 over ten years. Part of this will also involve the relocation of civilian staff and specialist services to roles currently undertaken by police officers (Police Scotland 2017a).

Concerns over the initial years of Police Scotland, represented in the 'Strathclydification' of policing and more heavy-handed interventionist policing styles, culminated in the resignation of Steven House in 2015. The next chief constable, Philip Gormley, represents the potential for a new era in policing in Scotland. It is too early to evaluate the extent to which this potential is being realised, but signs suggest a desire to readdress some of the concerns raised by the early years of centralisation and it is perhaps not a surprise that the new Strategic Priorities for Police Scotland places 'localism' as its first theme (Police Scotland 2017a).

Prosecution, courts, and sentencing

The Scottish system of prosecution, courts, and sentencing has also seen significant reforms following devolution, though perhaps these have been of a less high-profile and populist nature than reforms to many other parts of the criminal justice system described in this chapter. This section outlines the key features of this part of the system, including recent reforms.

Prosecution in Scotland: The Crown Office and Procurator Fiscal Service (COPFS)

Once the police have decided whether or not there is sufficient evidence to charge a suspect, they have several options: use their discretion and take no further action; impose a direct measure ('on the spot' fine); or they can pass the case on for prosecution. In Scotland, the prosecution of crime is carried out by the Crown Office and Procurator Fiscal Service (COPFS), which reviews the evidence and decides whether to proceed. Other relevant agencies, such as HM Revenue and Customs, can also submit reports to COPFS for consideration along with the police.

The decision on whether or not to prosecute a case and if so, where it should be processed, is taken by Procurator Fiscals (PFs), who are specially trained qualified solicitors. In order to deal with the complexities of cases now being presented to them, they have a number of specialist units which respond to issues such as health and safety, sexual crime, wildlife and environmental crime, international cooperation, and criminal allegations against the police (Dyer 2013).

PFs make their decisions based primarily on the public interest and the strength of the evidence. Public interest considerations include issues such as the seriousness of the offence, the length of time since the offence took place, the interests of the victims and witnesses, and the age and previous convictions of the accused (COPFS 2001).

If the PFs decide to prosecute, they can either offer an alternative to prosecution (i.e. a warning letter or a fiscal fine) or they can decide to prosecute in one of the courts, which will have a bearing on possible sentence lengths if the suspect is found guilty. Statistics show that out of 225,537 criminal cases considered in 2016, 97,241 (43 per cent) were issued with a non-court disposal, 31,454 (14 per cent) were sent to the Justice of the Peace court, 58,186 (25 per cent) were sent to the sheriff court, and 517 (0.2 per cent) were sent to the High Court (COPFS, no date). This is a change from recent years, in which there were a greater number of cases dealt with by the High Court and sheriff courts.

Court system and judgments

As indicated above, Scotland operates a 'three-tier' criminal court system, which can process cases referred to them by COPFS. These are Justice of the Peace (JP) courts, which are adjudicated on by a lay panel, sheriff courts, in which cases are heard by a sheriff, and the High Court, in which cases are heard by a judge. JP courts hear less serious cases, such as being drunk and disorderly or some traffic offences. Sheriff courts are the busiest courts and they deal with cases including assault, theft, and some drugs-related offences. The High Court is reserved for the most serious offences and hears all rape and murder cases and also all appeal cases.

There are two types of procedures which can take place in these courts. First, 'summary procedure' cases, which are cases heard without a jury and which occur in the sheriff or JP courts. Secondly, 'solemn procedure' is used for the most serious cases. These involve a jury and may take place in either the sheriff courts or the High Court. In Scotland, there are 15 members of a jury and a decision requires a majority verdict of eight or more (i.e. a simple majority). Government legislation aimed at increasing the proportion of jurors required for a guilty verdict to two-thirds was withdrawn in 2013, but this may be an issue to which legislators return in the future (SPICea, 2016).

Like many other criminal justice systems, Scotland has attempted in recent years to reform the processing of cases in prosecution and the courts, to improve both the efficiency and the experience for those involved with them in order to deal with increasing caseloads and diminished public budgets from 2008 onwards. Devolution and renewed political attention on Scottish criminal justice undoubtedly helped facilitate these processes, however. There have therefore been several important reviews of the Scottish criminal courts over the past 15 years, aimed at helping them to work more efficiently—notably the McInnis reforms to summary justice (Summary Justice Review Committee 2004), the Bowan reforms of solemn sheriff cases (Bowan 2010), and the Bonomy reforms of the High Court (Bonomy 2002). In Scottish justice, as in other jurisdictions, the 'due process' model has been tempered by reforms aimed at increasing efficiencies in court processes (Tata 2010). Far-reaching reforms of the summary justice system sought to minimise the number of cases which reached trial and included an expansion of the range of direct measures available to police and prosecutors (see Richards et al. 2011 for an the evaluation of these measures). Despite these reforms, the system still struggles to cope with demand within constrained budgets and is facing the additional pressures of dealing with increasingly complex cases—for example, those relating to historical sexual offences and domestic abuse (Audit Scotland 2015).

There are three verdicts that can be found in Scottish courts for criminal cases: guilty; not guilty; and not proven. The latter verdict is unique to Scotland and has the same implications as a not guilty plea in that the accused is acquitted. The 'not proven' verdict has proved controversial, however, and there have been recent attempts to reform or abolish it on the basis that it causes confusion for the public and victims and it may stigmatise the acquitted because of the perception that they were guilty but there was insufficient evidence to convict (SPICe 2014). However, recent legislation which sought to abolish this verdict was not passed by the Scottish Parliament (see SPICe 2014 for an overview). Nonetheless, a review by the Scottish Government into jury decision making is currently underway again so the question of jury verdicts may be returned to in the near future (Mattheson 2016).

Other recent reforms in Scottish justice include the debates around the requirement for corroboration, which means there must be at least two sources of proof in order for a case to proceed. Therefore, for example, a case cannot proceed unless there is an additional piece of evidence alongside the testimony of the victim or a single witness. This is regarded as a fundamental safeguard against miscarriages of justice which may rely on a single witness. Corroboration is regarded by many in Scotland as one of the defining features of Scottish criminal law and one which contributes to its distinctiveness. The rest of Europe and the Commonwealth have no such rule. It was felt by the Scottish Government that removing this rule may contribute towards an increased rise in prosecution and guilty verdicts for sexual crimes; indeed,

rape and attempted rape have a 48 per cent acquittal rate, the highest rate for any crime in Scottish courts (Scottish Government 2017a).

The Carloway review suggested that the rule of corroboration may in fact contribute to miscarriages of justice, not prevent them, because single, persuasive testimonies were deemed inadmissible, arguing that it was 'quality' of evidence which should be important not 'quantity'. It recommended that the requirement for corroboration be abolished, calling it an 'an archaic rule that has no place in a modern legal system' (Carloway 2011). However, this proved controversial and legislation which would remove the requirement was dropped in 2015 to allow more time for consideration, the Cabinet Secretary for Justice stating that he wanted to build consensus on the subject before proceeding further (BBC News 2015).

Similarly to England and Wales a number of years earlier, Scotland reformed its laws around double jeopardy in 2011 (Double Jeopardy (Scotland) Act 2011), which now allows an individual to be tried for the same offence again following a not guilty or not proven verdict in an earlier trial, in cases including where the acquitted person has subsequently made a credible admission of guilt or when new evidence has emerged such that, were it presented in the original trial, a guilty verdict would have been highly likely.

Victims, witnesses, and restorative justice

The Scottish legal term for the 'victim' is the 'complainer', though the word 'victim' is used in common parlance. In Scotland, as elsewhere, there has been a growing awareness of the interests and rights of victims and witnesses in the criminal justice system over the past 30 years. Once again, the new legislative capacity created with devolution has escalated the policy attention given over to this important stakeholder in the justice system, and consecutive administrations in the Scottish Parliament have passed legislation or other reforms which seek to improve their experiences in the criminal justice system. Notable examples of this include the Vulnerable Witnesses Act 2004, which expanded the range of ways in which children and vulnerable adults can give evidence (e.g. via a video link or behind a shield). A further important example of the changing role and status of the victim in the court process has been the introduction of a national victim statement scheme in 2009, which allows victims in solemn cases (the most serious ones) to prepare a written statement which allows their voices and experiences to be aired after the accused has either pled guilty or a guilty charge has been reached by the jury (Chalmers et al. 2007; Munro 2016). Latter changes in the Victims and Witnesses (Scotland) Act 2014 include the introduction of a 'victims surcharge', so that offenders can contribute towards the costs of supporting victims, and it also included provisions to allow victims to make oral representations about the release of life-sentenced prisoners (see Scottish Government 2015a for an overview).

The place and role of victims in the criminal justice system has of course been framed in a new way with the growth of the restorative justice movement throughout the world. In Scotland, the introduction of restorative justice to criminal justice processes has been ad hoc and patchy. There have been some schemes, primarily for low-level and juvenile offenders, but these have either been short-lived or regionally limited, due in part to a lack of national political direction given to these practices (Munro 2016). This may be changing, however; the Scottish Restorative Justice Forum, founded in 2014, seeks to engage all stakeholders and promote this approach more broadly. However, time will tell to what extent this can be successful without firmer political commitment to support the agenda.

Sentencing options

As detailed earlier, the COPFS will decide which court should hear a trial depending on the nature of the case. This is important because each court has different tariffs it can impose if guilty verdicts are reached. Thus, JP courts may impose sentences of up to 60 days' imprisonment and fines of up to £2,500; sheriff court summary cases may impose sentences of up to 12 months' imprisonment, fines of up to £10,000, and all community-based sanctions; sheriff court solemn cases may impose fines of up to five years' imprisonment, unlimited fines, and all community sentences; and, finally, the High Court may impose unlimited periods of imprisonment, unlimited fines, and all community sentences. Sentencing guidelines which set out minimum and maximum sentences for some offences are produced by legislation passed by both the Scottish Parliament and the UK Parliament. For example, recent legislation aimed at addressing anti-offensive behaviour at football matches cannot receive a custodial sentence of more than five years, and an adult convicted in the High Court for a third drug trafficking offence must receive a sentence of seven years or more (see Scottish Sentencing Council, no date).

More general guidelines for sentences are available from 'guidelines judgments' (i.e. appealed sentences which provide guidance for future similar sentences) and from case law (i.e. sentences passed for similar cases) (see Scottish Sentencing Council, no date).

Sentencing patterns and trends

There has been a reduction in the number of convictions since the peak time of 2006–7, in line with both a reduction in crime in Scotland (see Scottish Government 2016a) and also a reduction in the number of cases being sent to courts for trial in line with the summary justice reforms mentioned earlier. Most recent figures show that 50 per cent of sentences passed in Scotland resulted in a fine and 14 per cent in a sentence of imprisonment (Scottish Government 2017b). Within this headline figure, a number of issues are worth highlighting. First, the average custodial sentence length for all crimes excluding life sentences was 9½ months in 2015–16, which is an increase from 7½ months ten years ago. However, custodial sentences of between three and six months are the most frequently used by courts, overtaking sentences of two months and under around 2010 (see Chart 8, 'Length of Custodial Sentences, 2005–06 to 2014–15', Scottish Government 2016b).

Although sentence lengths are increasing overall, it is the frequent use of these short sentences that contributes most significantly to the prison population rate and it is therefore short prison sentences which have become the focus for the Scottish Government, intent on reducing Scotland's rate of imprisonment.

An increase in the number of short sentences of imprisonment and the overall increase in average length of sentence passed have together resulted in a rise in the rate of Scotland's prison population, although since 2012 this has been showing signs of reducing (World Prison Brief, no date).

Sentencing reform—presumption against short sentences, tagging

Scottish levels of imprisonment have risen consistently since the end of the Second World War, in line with many other Western jurisdictions (Scottish Centre for Crime and Justice Research 2015). The rates of imprisonment in Scotland (i.e. prison population in relation to the overall national population) have remained consistently similar to, or just below, those of England and Wales. The current prison population rate in Scotland is 141 per 100,000 and in England and Wales it is currently 149 per 100,000, although for a period in 2012 the Scottish rate exceeded that of England and Wales. This is notably higher than rates of imprisonment in the rest of Western Europe, which vary from the Scandinavian countries (53, 57, 74) to the Mediterranean countries (135, 134, 92) (World Prison Brief, no date).

The extent to which the prison population can be 'controlled' by policy makers is interesting. The Scottish experience in this regard highlights the difficulties inherent in the endeavour, as well as telling a very interesting story about Scottish criminal justice and the Scottish 'penal temperament'.

Those working in and around the Scottish criminal justice system see themselves as in some way more 'liberal' and 'moderate' than the rest of the UK (Mooney et al. 2015; see also McAra 2005 for an analysis), but as detailed earlier, this has not yet been reflected in one of the key barometers of penal national identity: the prison population. The early years of devolution were marked by penal policies and political rhetoric which was emblematic of the New Labour 'law and order' agenda in England and Wales during the time (McAra 2008; Morrison 2012; Mooney et al. 2014). This was reflected in a growth in both the prison population and also those undertaking community sentences. Since coming into power in 2008, the SNP have attempted to create a different tone in relation to criminal justice, with the Cabinet Secretary for Justice stating his government's desire to have 'the most progressive justice system in Europe' (Mattheson 2015a). This would be marked, in particular, by a reduction in the use of imprisonment, achieved primarily by focusing on reducing the use of short-term prison sentences (Mattheson 2015b).

The commitment of the SNP government to this agenda has been expressed in a number of policy developments. Most notably, the Scottish Prison Commission (SPC) was established by the first Cabinet Secretary for Justice, Kenny MacAskill, after he came into office in 2007. He stated: 'I do not believe that there is something about the Scottish psyche which intrinsically means that Scots are more liable to commit crime. The conclusion must be that it is something to do with prevailing attitudes and the operation of the justice system' (McAskill 2008). The Commission spent nine months gathering evidence and made a number of recommendations in order to reduce the prison population, stating that the Scottish Government should pursue an overall prison population target of 5,000, which could be achieved through a range of measures including greater public dialogue and engagement about the use of imprisonment; that imprisonment should be reserved for people whose offences are so serious that no other form of punishment will do and for those who pose a threat of serious harm to the public; and that paying back in the community should become the default position in dealing with less serious offenders (Scottish Prisons Commission 2008).

Reforms emerging from this review focused on both community justice and broader sentencing policy. The Reducing Reoffending Programme (RRP) (see Scottish

Government 2016c) sought to bolster the efficacy and legitimacy of the community justice system and, more controversially, legislation was introduced to the Scottish Parliament which sought to reduce the numbers of short prison sentences which were recognised as doing little to support offenders' desistance from crime. The legislation, passed in 2010 (Criminal Justice and Licensing (Scotland) Act 2010), introduced a presumption against the use of sentences of imprisonment of three months or less, unless it is considered that there is no other appropriate method of dealing with the offender. Importantly, this does not constitute a *ban* on sentences of three months or less; a sentencer may still impose a short sentence if they believe there is no other appropriate sentence available, but if they do so they must state in court the reason for their opinion.

The number of sentences of three months or less has decreased significantly since 2011, although this trend began just before the presumption against short sentences legislation was introduced. Nonetheless, sentences of three months or less still comprise 30 per cent of all sentences passed (Scottish Government 2016b). Evaluation of this legislation showed that sheriffs did not feel as though it contributed significantly to their decision making because sentences of three months or less were used relatively rarely; they continue to consider custody as a 'last resort' and they would continue to use imprisonment if they felt there were no other alternatives (Anderson et al. 2015).

This has resulted in the Scottish Government once again seeking to address the use of short-term sentences through legislation, with Scotland's rate of imprisonment referred to as 'totally unacceptable' by the Cabinet Secretary for Justice in the context of historic low crime rates (Scottish Government 2015b). Thus a new consultation was published in 2015 seeking to extend the presumption against sentences shorter than six, nine, or 12 months. Consultation responses published in March 2016 indicated an 85 per cent agreement with proposals to extend the presumption. Of these, 84 per cent favoured a presumption against sentences of 12 months or less (Scottish Government 2016d). We await to see what emerges from these proposals. It is certainly true that, in order to be effective, there will need to be goodwill and cooperation from the judiciary and increased support for community justice services to cope with the increased workload resulting from any extension to the presumption.

Currently, the Scottish Government is focusing on other ways of tilting the penal axis away from imprisonment. These relate to a range of initiatives under the Scottish Government's 'Reducing Reoffending Programmes (I and II)' (Scottish Government 2016e) and involve a range of measures aimed at improving and extending community justice services in Scotland.

Community justice and other non-custodial sentences

The use of community sanctions in recent Scottish history tells an interesting story of penal adaptation. Responding to the broader forces of penal change and continuing Scottish traditions, community sanctions have been continually framed and remoulded in the shadow of the prison population and ongoing attempts to become established as a default sanction in place of imprisonment.

Context, history, and governance

'Community justice' is a broad term which refers in general to the range of criminal sanctions which are carried out 'in the community'. Community sanctions refer to all penalties which in some way restrict the liberty of offenders as a stand-alone sentence or as a set of conditions following a period in custody (Munro and McNeill 2010).

Community justice services are delivered by statutory and non-statutory agencies in Scotland and the number of agencies involved has been increasing over time, though private sector providers in Scotland play a lesser role than in England and Wales. The key agency in community justice in Scotland is the Criminal Justice Social Work service (CJSW), which is comprised of fully trained social workers employed by local authority social work departments. CJSW is the Scottish equivalent of 'probation services' found in other jurisdictions. CJSW has a statutory duty to:

- supervise offenders aged 16 and over who have been made subject to a social work order (this is usually a Community Payback Order (CPO), discussed in the next section);
- provide 'criminal justice social work reports' to the courts to assist with sentencing. These provide contextual information about the offender to the courts so they may take this into consideration when sentencing and to the parole board to inform decisions about release from prison (see McNeill et al. 2009; Anderson et al. 2015: ch. 2);

- provide prison-based social work services during custodial sentences and statutory supervision and support (called 'throughcare') for offenders released from prison.

In the light of the interconnectedness of social issues relating to criminal behaviour and recognising the expertise which can lie in smaller organisations, there are many partners and agencies involved in the delivery of community justice. In Scotland, there is an especially strong role for the third sector, an example of which are the partnerships created as a result of the Reducing Reoffending Change Fund (Mulholland et al. 2016). The remit of community justice services extends beyond that of 'crime control' and supervision. The Scottish Government now refers to community justice as:

> The collection of individuals, agencies and services that work together to support, manage and supervise people who have committed offences . . . to prevent and reduce further offending and the harm that it causes, to promote desistance, social inclusion, and citizenship. (Scottish Government 2016f)

We will return to the themes of 'desistance, social inclusion, and citizenship' briefly at the end of this section.

It is worth emphasising the fact that community sanctions are administered by fully qualified social workers in Scotland. This is in marked contrast to the probation services in England and Wales which, similarly to the police, have latterly been opened up to fragmentation and market forces under the 'payment by results' philosophy. The location of community justice services within social work is a legacy from the Kilbrandon report of 1964, which recognised that offending behaviour was symptomatic of broader social needs and injustices (McNeil 2005). However, it has not been immune to the political pressures for reform which have had such an impact on probation work in England and Wales. The Scottish service has also endured a number of attempts to remove it from its operational and ideological location within social work over the past 20 years or so, most notably in 2003–4, when the New Labour-led Scottish Executive attempted unsuccessfully to create a 'single correctional agency', similar to NOMS mooted in England and Wales a little while later. The reason it failed at this time was to do with the fact that the Scottish Executive was a coalition and the Scottish Liberal Democrats, the coalition partners of Scottish (New) Labour, were able to veto the proposal. In addition to this, the service was under the auspices of Scottish local government, whose support was required by central government at that time (see Morrison 2014; Mooney et al. 2014). The service thus continues to be run by fully qualified social workers with a specialism in criminal justice.

As with policing in Scotland, the governance of community justice in Scotland has evolved in response to central/local dynamics and control. Attempts to centralise the service and merge it with the prison service, outlined earlier, were resisted and it continued to be operated by local authorities, albeit grouped together in eight national Community Justice Authorities (CJAs) to ensure greater consistency across all 32 local authority areas (Morrison 2014; Buchan 2016). Amidst ongoing concern about consistency, governance, and the 'status' of community justice in Scotland, CJAs have now been disbanded and governance will now involve the 32 'Community Planning Partnerships' which coordinate a range of public services within each local authority. This maintains the strong role for local government in the delivery of community justice and is supposed to ensure a holistic response to offending behaviour predicated on partnership working. Critics may note that returning to the fragmentation of the service over 32 areas will do little to promote efficiencies and consistency (Buchan 2016). In order to temper this development, a new national body, Community Justice Scotland, has also been created although its remit at this point in time remains focused on providing leadership, promoting innovation, learning, and development, and on 'championing' community justice, improving its status so that it may gain 'parity' with the custodial sector (Scottish Government 2016f). The creation of Community Justice Scotland is an interesting development which provides much potential to enhance the status of community justice services. We wait to see the effect it has on, and in, the penal landscape.

The framing of community justice as an 'alternative to custody' has a long tradition in Scotland as elsewhere, although this not been articulated as 'punishment in the community' to the extent that has occurred in England and Wales (McNeil and Robinson 2004), notwithstanding recent 'moments' in recent history which sought to remove the service from within social work (Croall 2006; Morrison 2014). However, developments in community justice in Scotland must nonetheless be seen in the shadow of the prison population, with reforms given emphasis by attempts to reduce imprisonment for financial reasons (as in the era of Malcolm Rifkind in the late 1980s) and ideological reasons (as in the recommendations of the Prisons Commission in 2008, outlined earlier). Recent and current reforms of the system are framed around 'reducing reoffending' and have involved a range of measures.

Community justice sanctions—Community Payback Order

Most notably, recent reforms in community justice include the introduction in 2011 of a single community sanction, the Community Payback Order (CPO), which replaced

three pre-existing community sanctions. CPOs can currently be issued by courts alongside Drug Treatment and Testing Orders (DTTOs) and the Restriction of Liberty Order (RLOs) (see the following section).

CPOs comprise around 95 per cent of all social worker orders issued by the courts in 2015–16 (Scottish Government 2017c). CPOs were created in order to be flexible and tailored to the offender, the crime they committed, and their needs, to support their desistance from crime. The sentencer can select from nine 'requirements' which will dictate the nature of the activities to be undertaken, together with an appropriate length measured in the number of hours. The requirements are:

- alcohol treatment requirement;
- compensation requirement;
- conduct requirement (in which the offender is required to refrain from certain activities);
- drug treatment requirement;
- mental health requirement;
- programme requirement (i.e. attending a course or other series of activities: for example, programmes aimed at addressing violent or sexual abuse behaviours);
- residence requirement (in which the offender is required to stay at a particular location);
- supervision requirement—the offender is required to attend meetings with social workers (all of the above orders will be imposed alongside a supervision requirement);
- unpaid work and other activity. This is the only requirement which can be imposed without a supervision requirement (although for 16- and 17-year-olds, this must also include a supervision requirement).

See Scottish Government (2011) for more information on these.

Recent figures show that the most common requirement in CPOs issued is 'unpaid work or other activity' (78 per cent) and offender supervision was included in 51 per cent of orders (Scottish Government 2017c).

The domination of the requirement to carry out unpaid work as part of the CPOs reflects the broader aspirations outlined in the Scottish Prisons Commission report around the importance of 'payback' in robust community sanctions (2008), drawing on theory and evidence which emphasises the importance of 'generativity' in desistance from crime (McNeill and Maruna 2007). The payback element of CPOs illustrates the different (and competing) aims of community sanctions, namely: punishment; rehabilitation; and community reparation. Payback in CPOs should be carried out swiftly (guidelines aim for commencement within seven days of the sentence being passed), be completed, and be tailored towards the needs of both the community and the offender (Anderson et al. 2015).

Early evaluations and recent figures of the unpaid work element of CPOs confirm that there was indeed a variety of work undertaken, though at times it was difficult for social workers to secure placements, not least given the pressures of commencing within seven days, often competing for placements with other voluntary work schemes, and the difficulties of placing sex offenders (Anderson et al. 2015).

Recent official figures show that 68 per cent of orders resulted in completion and discharge in 2015–16. If orders are 'breached' (i.e. the offender fails to meet the requirements), the offender will either be sent to custody or issued with a review or another order.

Other community sanctions—DTTOs, RLOs, and electronic monitoring

Drug Testing and Treatment Orders (DTTOs) are available in Scotland as they are in England and Wales, though they are issued far less frequently than CPOs. DTTOs provide a higher tariff disposal for people with substance-use problems who might otherwise receive a custodial sentence. They require regular drug testing throughout the order and regular meetings between the offender and the sentencer to check on progress. DTTO IIs have also been piloted in Scotland and aim to provide the same support and requirements for those convicted of lower level offences (see Malloch 2011).

A current development in community justice, which is intrinsically bound up with the Scottish Government's ongoing attempts at reducing the use of prison (particularly short sentences), lies in proposals to revisit the ways in which electronic monitoring (EM) is used in the community. Currently EM is used in a range of sentences in Scotland, including:

- as part of a Restriction of Liberty Order (RLO)—which restricts individuals to a specified place for up to 12 hours per day and/or from a specified place for up to 24 hours. Offenders subject to a RLO will wear an electronic monitoring device or 'tag';
- as part of a Home Detention Curfew (HDC)—in which offenders (usually those serving short sentences) can be released up to 25 per cent of their sentence early, on licenced condition in the community;
- as a licence condition following early release from prison;
- as a Movement Restriction Condition (MRC) for young people imposed by a Children's Hearing.

(See Scottish Government 2017d.)

All EM orders in Scotland require the consent of the offender before they are issued, and the householder's consent to the installing of the technology which monitors the radio frequency, if the offender is not the householder (McIvor and Graham 2016). It has long been argued that there is an opportunity to use EM much more creatively in Scotland than it has been used to date, not least in the current context where there seems to be a greater appetite for reform underpinned by penal moderation (Nellis 2016a, 2016b; McIvor and Graham 2016). Currently in Scotland, EM uses radio frequency technology alone (which simply requires an individual to remain in a specific place, usually the home, for periods of time each day). Recent evaluations argued that it was frequently not used alongside other measures of support: its use was to restrict movement and the restriction of liberty alone formed the punishment (McIvor and Graham 2016). However, with ongoing developments in technology (i.e. GPS and alcohol monitoring), together with evidence of how EM is used in more creative ways in the rest of Europe (McIvor and Graham 2016), the Scottish Government are currently consulting on ways in which EM might be used alongside other ways of supporting offenders, as part of moves to increase the use of non-custodial penalties in Scotland (Scottish Government 2017d).

One final noteworthy development in the Scottish community justice landscape involves ongoing discussions about the possibility of changing the law around disclosure of prior criminal convictions in the light of evidence that meaningful employment is a key feature of supporting desistance from crime. Although a discussion paper in 2013 and a further consultation in 2015 received general support for reforming this legislation, the Scottish Government have now said they will consider these reforms in greater detail and move forward once 'suitable policy solutions' are found (Scottish Government 2016g).

Imprisonment

The Scottish Prison Service (SPS) has been shaped by forces which have affected imprisonment throughout the rest of the Western world over recent decades, including ever increasing populations, overcrowding, public sector austerity, and managerialism to name but a few; however, it is nonetheless claimed that it has unique characteristics and has been marked by more progressive practices at points in its history. Furthermore, current developments have the potential to set it apart from Anglo-American penal tradition and make its policies and practices more aligned with those found in some parts of continental Europe and Scandinavia.

Operating ethos and policy changes

Claims of Scottish 'distinctiveness' in criminal justice tend to focus predominantly on community justice services and the fact that they are delivered within a 'social work' framework, and juvenile justice, with the emphasis on 'needs not deeds' and the Whole Systems Approach (McAra 2008). In questions relating to Scottish 'distinctiveness' in Scottish criminal justice, arguably less attention has been given to the SPS, though the literature does highlight two periods in the history of Scottish imprisonment which could support such a claim. First, the work of William Brebner, the governor of the Glasgow Bridewell ('house of corrections') between 1808 and 1845, who pioneered what we can now regard as early vision of 'throughcare' and purposeful activity, in which prisoners were encouraged to maintain contact with their families and engage in education and training to facilitate their reintegration upon release (Coyle 1991). Secondly, and more famously, the celebrated 'Barlinnie special unit', which was a 'prison within a prison', operating in Scotland's largest prison between 1973 and 1996, provided a means of allowing the most violent and disruptive prisoners to have access to a range of therapeutic and artistic outlets in a context in which they were empowered to have far greater control over their regime (Tombs and Piacentini 2010). Although much celebrated, due in large part to the high-profile 'success' and rehabilitation of one of its inmates, Jimmy Boyle, the special unit was small, accepting no more than ten prisoners at a time, and it was not replicated elsewhere within the estate or after it closed (McManus 1999). The extent to which the special unit can really be emblematic of a more 'progressive' prisons policy in Scotland can therefore be queried (see also Munro et al. 2010).

Latterly, however, there have been developments within the SPS which attempt to set a direction underpinned by desistance and 'citizen recovery'. Although organisational change is notoriously difficult to modify (Chan 1996), the potential for this new era to have far-reaching effects on SPS practices should not be underestimated.

Scottish prisons also experienced riots and turbulence during the 1980s, although to a far lesser degree than those in England and Wales around the same time. However, the Scottish response to these disturbances and their revised operating agenda came from *within* the system, from

a group of progressive senior governors and the board (Coyle 1991), rather than the externally-imposed Woolf Report in England and Wales (Young 1997). The response to these disturbances culminated in the publication of a number of documents. This promoted a new operating rationale for the SPS which introduced the concept of the 'responsible prisoner' as well as emphasising the importance of justice, fairness, and proportionality within prisons (SPS 1990).

With the appointment of a new chief executive in 2012, a new era began for the SPS. The changing direction was enshrined in the *Organisational Review: Unlocking Potential, Transforming Lives*, published in 2013 (SPS 2013a). This document is significant for a number of reasons.

First, it stated that the previous focus on Custody, Order, Care, Opportunity (in order of importance) should be rebalanced so that each of the priorities and tasks was valued equally within the SPS (2013b: 46).

Secondly, it set out a Vision and Mission which should guide the operation of the Service. This is to:

> View ourselves as part of the 'whole system';
>
> Develop a person-centred, asset-based approach;
>
> Promote individual agency and self-efficacy to realise potential;
>
> Strengthen links into communities and support throughcare; and
>
> Professionalise and invest in SPS staff as effective change agents.
>
> (SPS website, no date)

Thirdly, it adopts the vocabulary and principles of desistance theory into the strategic direction (see McNeill 2016; Morrison and Sparks 2016). This is now expressed in the 'theory of change', which is person-centred and focuses on individuals' strengths and assets (SPS 2016).

Fourthly, it places staff, their values, and their development at the centre of the changes and lays the foundation for the professionalisation of prison staff, so that they are enabled to 'unlock the potential' of those in their care.

It is too early for a full appraisal of the aspirations contained in the Organisational Review, though a number of tangible outcomes are worthy of consideration. Space precludes a discussion of them all, so two will be mentioned. Firstly, a number of policies will support prison officers to become 'justice professionals' by increasing the status of, and skillset within, the profession. This includes a greater emphasis on continuous professional development for all staff, the development of a Higher Education Diploma for prison officers due to launch in 2018, and the ongoing training for staff into 'desistance theory and practice' (SPS 2016). Secondly, the throughcare agenda includes ever closer cooperation with community agencies and the creation of SPS 'Throughcare Support Officers', whose role is to provide the all-important 'bridge' between custody and the community in that most vulnerable time for those released from custody (SPS 2016).

History, governance, and organisation

Prisons in Scotland have been under the control of central government since 1927 (following devolution this is now the Scottish Government) and the SPS has been an Executive Agency since 1993, meaning it controls its own budget and management, though it is ultimately accountable to the government. This perhaps affords it more insulation from government control than other parts of the justice system, although if there are high-profile events (e.g. escapes or riots) or other issues of concern within the prison service, ministers will demand that action be taken. The SPS is responsible for the 13 public and two private prisons in Scotland, and all prisoners throughout the estate are covered by the Prison Rules (the legal framework which establishes the management of prisons and life within prisons).

The two private prisons in Scotland were opened in 1999 and 2008 and are operated by Serco and Sodexo, both under a 25-year contract. These contracts are managed by the SPS, and the service employs staff in both prisons to monitor compliance with contractual obligations. However, these prisons have the autonomy to diverge from the fully controlled and operated SPS prisons in some important ways—for example, in staff–prisoner ratios and in the training and learning of officers working there.

The ratio of officers to prisoners varies across the estate, depending on security risks and other operational considerations (i.e. the internal architecture within prisons). However, the average ratio of prisoners to custody staff within the SPS at the current time shows a lower ratio than most other West European countries: in Scotland this is 2.4 and the European average is 3.5. In England and Wales it is 3.9 (SPACE 2017).

The majority of Scottish prisons lie in and around the 'central belt'. Whilst this reflects the population of Scotland, some have also argued that the geography of the penal estate means that it will be more difficult for prisoners from more remote areas to maintain links with families and communities (Tombs and Piacentini 2010). Nonetheless, over recent years there have been ongoing attempts to make prisons within Scotland more 'locally facing', meaning prisoners are held closer to their communities with the hope that it is easier for them to maintain and repair relationships. The wish to keep prisoners close to their communities will inevitably run counter to

the operational and budgetary pressure for the potential economies of scale in keeping offenders together who are convicted of similar offences who have specialist needs or regime requirements, i.e. the young, female, sex offender, those preparing for release, and (increasingly) older populations.

The tension between locally facing prisons (which are arguably better for the prisoner) and larger establishments (which are more cost effective) came into sharp focus with the announcement in 2012 by the then Secretary for Justice to build a new prison for female prisoners which could house up to 350 individuals. This was widely criticised, not least because it directly contradicted recommendations just made by a government-appointed expert group into female prisoners whose report had just called for the use of local prisons for this population (Commission on Women Offenders 2012). In 2015, the new Cabinet Secretary for Justice changed this decision and plans are now in place to build a new small national prison with 80 places, alongside five smaller community-based custodial units, each accommodating up to 20 women across the country (SPICe 2017).

While the decision has been taken to try to keep female prisoners closer to their communities wherever possible, the operational decision to keep other populations in single establishments which can provide services and regimes for their specific needs is still in place for young people in custody, increasingly for those convicted of a sexual offence and those preparing for release in the open estate (low security prisons).

The cost per prisoner place in the SPS is £34,399 (SPICe 2017), a considerable amount, not least in the context of the number of prisoners within the estate serving very short sentences for non-violent or non-sexual crimes (Scottish Government 2016b).

Prison population trends

As discussed in the earlier section on sentencing reform, there have been ongoing attempts to reduce the costs (financial and social) of imprisonment over the previous two to three decades by successive governments, both pre- and post-devolution. This has taken different hues in different eras. The first two Scottish administrations (1999–2008) 'talked up' the penal temperature with a range of New Labour-inspired justice policies (Croall 2006; Mooney et al. 2014; Morrison 2012; McAra 2008), whilst simultaneously introducing Home Detention Curfew as a 'back door' way of releasing offenders early in order to mitigate the swelling population (Morrison 2012; Tata et al. 2012). As discussed, the SNP government have largely adopted a different approach and attempted to change 'front door' sentencing policy (the 'presumption against short sentences' agenda discussed earlier), and have engaged in a qualitatively different political conversation about crime and punishment (McNeill 2011). Although rates of imprisonment continued to rise for the first four years of the SNP administration, they have latterly shown signs of reducing (SPICe 2017).

The figures underlying this statement are also interesting and there are a number of factors worth emphasising. First, there have been very significant reductions in the number of young people in custody (aged 16–21) and women in custody, in the latter case particularly those on remand (SPICe 2017). This is due to the Whole Systems Approach for young people (discussed below) and greater diversion policies for female offenders. The reduction in these populations in custody can only be a positive thing and must be celebrated, but it also means that the nature of the remaining population of young people and women in custody is different now that the less serious offenders are diverted away from custody; for example, the remaining populations are likely to have more complex needs.

Secondly, the prison population in Scotland is becoming older and there is an ever growing proportion of them who have been convicted of a sex offence; indeed, there has been a 40 per cent increase in this number since 2012 (SPS 2017). The ageing population means the SPS must accommodate more social care services, which poses considerable challenges for the estate. One of Scotland's prisons now even employs a full-time palliative care nurse to support the needs of prisoners nearing the end of their lives.

The history of the SPS therefore reveals adaptations to global pressures and continuing local traditions. The current time is important for the Service as it embeds the vision outlined in the *Organisational Review* and there is greater potential for it to be regarded as part of the justice system which is celebrated for bold and progressive work, as other parts of the justice system have also been in the past.

Juvenile justice

Juvenile justice in Scotland is one of the areas which most embodies claims of 'distinctiveness' in Scottish criminal justice and which in some ways has been the most sensitive to the changing political environments of recent decades. The competing aims of punishment, public protection, care, and support for change, which are present in

most criminal punishments, are orientated most strongly towards the rehabilitative elements in juvenile justice. Some argue that this is especially the case in Scottish juvenile justice (i.e. Centre for Youth, Crime and Justice 2016; McAra and McVie 2010). The key elements of the system will be outlined.

Changing political climates: From Anti-Social Behaviour to the Whole Systems Approach

The juvenile justice system in Scotland was subject to a range of reforms during the first two terms of the Scottish Parliament when a number of New Labour-inspired policies were introduced, most notably the Anti-Social Behaviour agenda. McAra (2004) noted a shift in the underlying ethos of the service towards one of public protection and a shift away from a focus on the 'needs' of the young people towards their 'deeds'. The Justice Minister at the time reaffirmed this shift by stating that 'punishment was now a key part of the youth justice process' (cited in McAra 2004: 34). There was also a rise in contradictory messages, with the introduction of measures aimed 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. Nonetheless, it has been argued that despite this 'moment' in juvenile justice policy in Scotland, it has avoided the more punitive developments and practices of other jurisdictions (Centre for Youth, Crime and Justice 2016).

This has come into sharp focus in latter years with the adoption of the Whole Systems Approach (WSA) in Scotland, which has had a significant effect on the experiences of, and outcomes for, young people in, or at risk of becoming involved in, the criminal justice system.

The WSA is underpinned by a growing body of evidence which highlights the adverse consequences of system involvement for children and young people. This means that, all things being equal, if a child or young person comes into contact with the system (i.e. is subject to formal criminal justice processes), they are more likely to continue or escalate their criminal behaviour than if they were dealt with by other means (i.e. diverted away from the justice system). This evidence emerged from the important Edinburgh Study of Youth Transitions and Crime (McAra and McVie 2010), which tracked 4,300 children's pathways in and out of offending as they grew up. The key findings from this suggested that, in light of the fact that children and young people who offend are amongst the most vulnerable and disadvantaged section of society and that the effect of justice system contact seems to be negative, effort should be put into diverting people away from the justice system and providing them with a range of diversionary strategies which will facilitate the desistance process (McAra and McVie 2010). The WSA is therefore centred around the following three policies:

1. Early and Effective Intervention (EEI), which aims to reduce referrals to the Children's Reporter [see later in the chapter];
2. Diversion from Prosecution which aims to keep young people away from the criminal justice process, and;
3. Reintegration and Transition supporting young people in secure care and custody and planning for their reintegration into the community

(Murray et al. 2015)

Early evaluations of the WSA have been positive, citing reduced numbers of young people coming into the system and concurrent decreases in offending behaviours of young people. Although it is not at this stage possible to definitively say that the WSA is *responsible* for the falling level of crime committed by children and young people, it has occurred at the same time and is perceived very positively by those who work in the system. It will be important that the ethos and approach of this approach is sufficiently embedded in Scottish practice and professional cultures that it would remain in place if the external political context were to change (Murray et al. 2015).

Age of criminal responsibility

The legal framework which sets out the age by which children and young people will be subjected to juvenile or adult justice processes in Scotland has been criticised over recent years and is now in the process of change. Currently, the age of criminal responsibility in Scotland is eight, which has long attracted criticism, including from the UN Committee on the Rights of the Child (CRC) (Scottish Government 2016g) and by those highlighting this as an example that proves Scottish claims of 'progressive' penal policy are misguided (Munro et al. 2010). In 2010, the Scottish Government amended legislation with the result that it is now not possible to *prosecute* a child under the age of 12, although they remain technically still criminally responsible and they can continue to be referred to the Children's Reporter (see the following section) on offence grounds between the ages of eight and 12, and can have judgments included in their criminal record. In 2016, the Scottish Government consulted on plans to increase the age of criminal responsibility to 12,

which would bring it in line with the 'absolute minimum' provided by the European CRC (Scottish Government 2016h). In December 2016, the Scottish Government announced plans to bring forward legislation to increase the age to 12 (BBC News 2016).

All children under the age of 16 who are suspected of committing an offence will be referred to the Children's Hearings System (CHS) (see the following section), which will decide on the most appropriate action. Legally, 16- and 17-year-olds can be tried in adult courts, although they if they are subject to a Compulsory Supervision Order (see the following section), it is likely they will continue to be dealt with by the CHS.

The Crown reserves the right to prosecute children (above the age of 12) in adult courts for the most serious crimes such as rape, serious assault, or homicide, though actual figures are very low and have been falling consistently since a peak in 2008 (SPICe 2016b).

Children's Hearings System

Central to the juvenile justice system in Scotland is the Children's Hearings System (CHS), which is much celebrated for embodying a 'welfarist' approach to juvenile justice; indeed, it has been referred to as the 'jewel in the crown' of the criminal justice system by Scottish politicians (see e.g. BBC News 2009).

The CHS was established following the recommendation of the Kilbrandon Committee in 1964 and remains largely intact to this day, though there have been some moderations over recent years to incorporate changes relating to human rights and governance. The hearings were created on the twin assumptions that, first, there was no essential difference between children who commit offences and children in need of care and protection, and secondly, that a court-based system of justice is inappropriate for children (Asquith and Docherty 1999).

The hearings are administrative tribunals, not courts of law, and they operate with the best interests of the child at the centre of proceeding; they are not supposed to differentiate between children referred on offending grounds and those on care and protection grounds because offending behaviour is regarded as symptomatic of wider social problems. They are intended to be non-stigmatising for the young person in trouble, and they often advocate early intervention. Children can be referred to the hearings by anyone or any agency, such as social work or education departments; however, most are made by the police (71 per cent) (Children's Hearings Scotland 2017a). The panels are comprised of three lay panel members who are specially trained volunteers and are chaired by a Reporter, who adjudicates. The panel will consider all available information from relevant parties (including the child) and has the ability to impose a Compulsory Supervision Order (CSO). This may have measures attached to it such as where the child or young person should live and who they can see and when. CSOs are also able to recommend that the child or young person be held in a secure placement if they are deemed to be at risk of running away from home and being in danger of hurting themselves or someone else (Children's Hearings Scotland 2017b).

Conclusion

Criminal justice in Scotland features institutions, processes, actors, and trends which will be recognisable to those familiar with criminal justice in the UK, as well as some which are noticeably different. The introduction to this chapter outlined some of the reasons underpinning the Scottish approach, highlighting historical, political, and cultural factors. It is worth making some other comments about Scottish criminal justice by way of conclusion.

Firstly, we can see the competing tensions between local and central governance and approaches, most notably with respect to the creation of Police Scotland and the continued location of CJSW within local authorities, notwithstanding the important creation of the new national body, Community Justice Scotland. Secondly, we can also see different eras in the political response to crime and justice over the past 30 years, with periods of populism, particularly in the second term of the Scottish Parliament when Scottish (New) Labour held the Justice Portfolio. We are currently in an interesting time in which there are attempts to reverse some of these trends and promote a more moderate approach in (nearly all) areas of criminal justice. To what extent this is contingent on the prevailing political climate, or reflects something deeper which could remain in place were the political context to change, remains to be seen. Thirdly, Scottish criminal justice remains marked by the ongoing attempts to 'do more' in an environment of austerity. This prompts developments which seek to promote efficiencies (one of the key stated drivers behind the creation of Police Scotland, for example) and partnership working. Finally, it is worth reflecting on the importance of multi-level governance structures and the ongoing debate about Scotland's place in the UK. Reforms and practices in Scottish criminal justice have been shaped very significantly by devolution, initially (and paradoxically) in a period of convergence with England and Wales and now, increasingly, the space created by a nationalist political agenda. To what extent this continues to play out in ongoing renegotiation of constitutional questions remains to be seen.

FURTHER READING

Croall, H., Mooney, M., and Munro, M. (eds) (2010) *Criminal Justice in Scotland.* Cullompton: Willan.

Croall, H., Mooney, M., and Munro, M. (eds) (2016) *Crime, Justice and Society in Scotland.* Abingdon: Routledge.

These are two recent edited books which outline some key features of Scottish criminal justice, providing overviews in a single edition.

McAra, L. (2005) 'Modelling Penal Transformation' *Punishment and Society* 7(3): 277–302.

Whilst not at an introductory level, this article provides an interesting discussion about the reasons which may underpin the Scottish approach to criminal justice.

McAra, L. (2008) 'Crime, Criminology and Criminal Justice in Scotland' *European Journal of Criminology* 5(4): 481–504.

This article provides a more accessible overview of both crime and justice in Scotland.

Centre for Youth and Criminal Justice (2016) *A Guide to Youth Justice in Scotland: policy, practice and legislation.* Available at http://www.cycj.org.uk/wp-content/uploads/2016/06/A-guide-to-Youth-Justice-in-Scotland.pdf.

This provides an indispensable overview for those interested in youth justice.

http://www.parliament.scot/parliamentarybusiness/31137.aspx.

Though descriptive, the Scottish Parliament Information Centre (SPICe) briefings on criminal justice provide an overview of some of the key features of the system.

http://www.gov.scot/Topics/Justice.

The Scottish Government Justice website provides the key policy documents and statistics.

http://scottishjusticematters.com/.

Scottish Justice Matters provides an excellent, and accessible, overview of developments and issues in Scottish criminal justice since 2013. Their back catalogue can be accessed on the website.

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