

SENTENCED TO GET BETTER

Government proposals will force courts and drug agencies to work closer together. The opportunities are great, but so are the risks.

A recent green paper proposed treatment alternatives to custody for drug misusers. Drug agencies may be tempted to cooperate in the belief that they will help keep their clients out of prison, but experience shows this will not happen if courts impose rigid regimes. However, legal pressure can be used positively if client and counsellor are allowed by the courts to negotiate their own objectives and treatment methods.

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MOST PEOPLE in the business of helping drug users believe prison does not help their clients, and do their best to keep them out. In mid-1988 it appeared the Home Office was on their side when it published its green paper, *Punishment, Custody and the Community*.¹ Its aim was to encourage the further development of community sentencing disposals which could present courts with alternatives to immediate imprisonment, and it specifically included drug misusers in its proposals (see box opposite). At first glance this approach may seem commendable, but in fact the issue is more complex.

Sentencing policy concerns drug treatment agencies because a very large percentage of their caseloads have dealings with the criminal justice system, one reason why the second AIDS report from the Advisory Council on the Misuse of Drugs devoted a chapter to the issue² (see box).

The Advisory Council welcomed the green paper with open arms because they believed its proposals would help keep drug misusers out of prison, restricting one potential source of HIV infection in the prison population.

But one vital question has not been properly addressed. Can we assume that providing new alternatives to custody will actually achieve the aim of decreasing the prison population? Many, myself included, believe this assumption is false.

The Advisory Council's report came close to recognising this when it said: "Sentencers should be encouraged to make the most of existing non-custodial sentences for drug misusers. This will not come about automatically".

What they did not appreciate is that past legislation which increased the range and type of non-custodial sentences has largely been ineffective in reducing the prison population. Ironically, the reverse has happened: once a new alternative to custody is introduced, the prison population actually increases!

Such was the situation when suspended imprisonment and community service were

introduced. More recently, the 1984 Criminal Justice Act introduced tougher conditions into certain types of probation orders, the apparent consequence being that the prison population has continued to grow.

Even taking into account changes in the proportion of young men (most likely to offend and to be imprisoned) in society, the evidence is not encouraging.

'Alternatives' backfire

The most likely explanation for this apparent contradiction is that increasing the number of alternatives available to sentencers merely encourages more rapid movement of offenders up the sentence tariff. Offenders are sentenced to the new 'alternatives' which are perhaps tougher and more demanding than previously. More fail to meet these stricter requirements and, when they reoffend, the court has little option but to impose a sometimes lengthy period of custody.³

There is every reason to believe that the green paper — with its emphasis on *punishment* in the community — will continue this tradition. To 'sell' its proposals to conservative voters, to the general public, and,

The tougher sentencing alternatives become, the more offenders will fail

most importantly, to judges and magistrates, the Home Office had to convince them that the alternatives it was considering were not an easy option — that they were 'real' punishments. But the tougher the sentencing alternatives become, the more likely it is that offenders will fail and be sent to prison anyway.

It was exactly for this reason that the National Association of Probation Officers (NAPO) responded quickly to the green paper. The paper's excited discussion of 'punishment in the community' does not grasp the policy issue at the root of

unnecessary imprisonment: how can the inconsistent behaviour of sentencers (judges and magistrates) be controlled?

Statistics show that if you live in some parts of the country you are far more likely to be imprisoned than in others. For example, in 1983 NAPO reported that in Rotherham just over 6 per cent of those sentenced at magistrates courts received custody compared with nearly 30 per cent in Kingston upon Hull.⁴ More recent research by Professor Howard Parker of Manchester University suggests this unsatisfactory situation has not changed (see box on page 10). In any particular area, offenders from racial minorities are more likely to be sent to prison than the rest of the population.⁵ Unless these sentencing inconsistencies are addressed, creating new types of 'punishment in the community' will fail to reduce the prison population.

Since publication of *Punishment, Custody and the Community*, the Probation Service has been under pressure to 'toughen up' its supervision of offenders, exercising more control over those given non-custodial sentences.

NAPO is fiercely resisting these pressures, believing they are detrimental to the rehabilitation of most offenders. Many probation officers suspect the cry for 'tougher supervision' derives from political ideology and rhetoric rather than anything more positive. Why is there a need for more client control, and what evidence is there that it will achieve more successful rehabilitation?

Role of drug agencies

This debate is of great importance to drug agencies. We may well be entering a period when the compulsory treatment of misusers is widely advocated. It would be a mistake for agencies to agree to supervise such treatment purely in the, usually false, belief that the clients will be protected from prison. A client who fails a strict court-imposed programme is highly likely to be imprisoned as a sanction for failure, and drug misusers are not very good at sticking to structured programmes imposed on them.

But what evidence is there that the compulsory treatment of drug dependency does not work? Why am I being so pessimistic in assuming that many will fail, return to court and ultimately end up in prison?

Statistical evidence is hard to come by, but, like many probation officers, I can speak from experience. Imagine, for example, that an opiate dependent offender is given probation on the condition that they take a reducing prescription of methadone for two months. A further condition stipulates that the offender give weekly urine samples and that if any test positive for illicit, unprescribed drugs, then the client will be returned to court — a legal impossi-

bility at present.

I looked back at my own caseload of clients under the supervision of the probation service and taking methadone. Over the last two years I found that over half would have been guilty of this hypothetical violation. But in reality just half of these potential violators have been in prison since their prescription started and the other half are making slow but significant progress in the community. For these people the rigid, court-imposed definition of 'failure' would have been inappropriate and counterproductive.

We already have a type of compulsory treatment in this country. Significant numbers of offenders are placed on probation with a legal 'condition of residence' that they reside at a named therapeutic community (like Alpha or Phoenix). If they

abscond in the first few months of treatment, they will be rearrested and resented. The use of a condition of bail residence, where leaving the rehab would breach bail conditions, would amount to a similar treatment model.

My experience of such compulsion is that it works well for a minority — but on many occasions clients entering rehabs subject to a condition of residence have soon absconded and ended up in custody.

Research is desperately needed: a study, say, to compare the length of stay at rehabs of those on conditions of residence with those not. US literature sometimes makes positive claims about compulsory treatment. Experience there is that legal referral to residential rehabilitation can cut dropout rates, particularly in the initial stages of treatment.⁶ Since retention in treatment is

Home Office proposes treatment instead of prison

After discussing such alternatives to custody as curfews, day centres and electronic tagging, the Home Office's green paper *Punishment, Custody and the Community* had this to say about drug and alcohol abusers.

"The programme for the offender could also include regular attendance at work, education or training and treatment for misuse of alcohol or drugs ... although more coordinated and intensified effort is being put into the care of drug misusers who go to prison, the chances of dealing effectively with a drug problem are much greater if the offender can remain in the community

and undertakes to cooperate in a sensibly planned programme to help him or her come off drugs.

"Such a programme would aim, in the first instance, to secure a transition from illegal consumption to a medically supervised regime designed to reduce the harm caused to the individual by drugtaking and would be based on a realistic plan for tackling the addiction in the context of his or her other problems. Monitoring by urine tests by the agency providing the treatment could be part of the regime."
— Home Office, 1988

See reference 1 for source

Advisory Council welcomes custody alternatives

"We ... greatly welcome the proposals for non-custodial disposals for drug misusing offenders, combined with a variety of treatment programmes, which are made in... *Punishment, Custody and the Community*.

"Such schemes would have particular value for drug misusers with HIV disease in terms of both preventing the spread of HIV infection within prisons, and enabling such individuals to receive the medical and other care they require. We therefore recommend that in encouraging the greater use of existing non-custodial options, and in the development of any new options, it should be recognised that there is a particular value in such disposals for drug misusing offenders.

"... However, even before any legislative changes are made, sentencers should be encouraged to make the most of existing non-custodial sentences for

drug misusers. This will not come about automatically — the involvement and advice of the Lord Chief Justice, the Judicial Studies Board, the Home Office, and the Magistrates Association will be needed.

"... many drug agencies have been reluctant in the past to accept clients under court orders. A change in attitude is needed so that services are willing to adopt an alternative-to-custody role. This will apply not only to rehabilitation services, as in the past, but increasingly to community-based services too... The time-consuming nature of this work should not be underestimated; neither should the difficulty of combining any perceived 'punishment' role with a treatment and rehabilitation role."

— Advisory Council on the Misuse of Drugs, 1989

See reference 2 for source

strongly associated with long-term success, the presumption is that legal referral increases success rates.

However, this is not the case: "Most TC [therapeutic community] follow-up studies report either small or no differences in post-treatment improvement by legal referral."⁷

Moreover, the American approach to institutional treatment is very different from our own. In particular, young people in the USA are more likely to have experienced imprisonment, and it is among juvenile offenders that the improvement in retention is most clearly seen. Older legal referrals if anything stay in treatment less time than their voluntary counterparts.

In this country the juvenile justice system has concluded that it is best to keep young offenders (presumably including drug misusers) out of institutions as much as possible if reconviction rates are to be minimised.⁸ Under 17-year-olds here are unlikely to face long prison sentences under harsh regimes, compared to which a year or more in a therapeutic community may seem an attractive alternative.

There are also broad philosophical doubts over whether compulsory treatment is likely to succeed. The psychologist, William Miller, has done much to widen our understanding of motivation and the role of the drug counsellor in increasing a client's willingness to change.⁹

But his model is a flexible one which depends on client choice and the agency's ability to be responsive to the client's state of mind. He states that people are nearly always "thinking about changing their misuse" and can be helped along this route via counselling and gradual negotiation of treatment. Conversely, he suggests trying to compel someone to take a particular path is more likely to polarise worker and client than to produce a successful outcome.

All is not lost if services resist the temptation to enter into new forms of compulsory treatment. Sentences are already in place which should be better researched and developed. Not enough has been made of existing probation facilities. For instance, being 'sentenced to counselling' allows the criminal justice system to



Fiercely independent, sometimes eccentric, the decisions of the judiciary will determine whether treatment takes over from prison.

encourage client change in the right direction, without overdetermining exactly what that change must be and how it could be brought about — issues best worked out between counsellor and client.

The strength of such non-specific requirements is that the counsellor can negotiate the way forward with the client as circumstances progress, there being a minimal definition of failure. The court is not concerned with specifics but rather — an overview.

For example, with a short deferred sentence a client could be recommended to attend a treatment agency and mandated to return to court again in (say) three months' time to explain how they have progressed. Another example is the traditional probation order, where the court stipulates that the client must see the officer frequently and give an up-to-date record of their address, but all other specific issues, such as treatment regimes, are negotiable between the officer and the client. Often the treatment is delegated to a local community drug team.

Conflicting agendas

Such strategies can be very usefully engineered to build on the client's reevaluation of the pros and cons of drug use, often stimulated by an appearance in court. Drug treatment services should view deferred sentences, and adjournments prior to court hearings, in a creative way. The client will be increasingly reviewing their life, and thinking about changing it, while awaiting attendance for sentence.

The recent trend towards placing probation liaison staff with community drug teams is a simple but significant strategy. It has the potential to increase positive client outcomes, as the criminal justice system becomes more aware of the difficult realities of drug treatment, and as treatment agencies increase their understanding of how the criminal justice system affects their clients and their drug misusing behaviour.

The danger with compulsory, closely specified treatment is that the goals are too clearly defined (without the client's involvement) with sanctions for 'failure' immediately imposed by the criminal court rather than used as a platform to a more successful attempt. Increasing the 'legal stakes' in this way could, on the basis of recent history, help further stock our prisons with drug users. More research is needed before resources are ploughed into such a doubtful strategy.

Drug agencies also need to be aware of the risk of conflicting agendas and of giving conflicting messages. These proposals come at a time when services need to be more 'user-friendly' to attract more clients. Can they be both user-friendly and administer compulsory treatment? Could the same community drug team monitor compulsory methadone detoxification followed by the opiate neutraliser naltrexone, and at the same time advise on the safe use of injecting equipment and where to obtain syringes? ■

The judicial idiosyncracies that could sabotage treatment alternatives plan

Professor Howard Parker, of Manchester University social work department, was given access to four busy magistrates courts, including the opportunity to witness sentencing decisions.

He said: "The magistracy is vast and remarkably secretive. They tend to be drawn from the same, middle-class strata of society, and their behaviour is, at times, quite eccentric.

"They are strongly inclined to engage in moral analysis of those before them and take strong views about the reports given to them. They claim they can tell who is genuinely remorseful, who will be back, and make other

moral judgments that are very different from what the law is asking them to do.

"They also take great pride in their own insularity, not knowing what is happening elsewhere in the country or even what their colleagues do in a neighbouring court."

The consequence for probation staff supposed to be helping benches arrive at their sentence was a perplexing degree of unpredictability. In only a little over half of cases were the writers of background social inquiry reports able to second-guess the magistrates.

—David Utting, *Sunday Correspondent*, 24 September 1989

1. Home Office. *Punishment, Custody and the Community*. HMSO, 1988.

2. Advisory Council on the Misuse of Drugs. *AIDS and drug misuse. Part 2*. HMSO, 1989.

3. Hawkins K. "Alternatives to imprisonment." In: McConville S. ed. *Essays in the changing state of penal policy*. Routledge and Kegan Paul, 1975.

4. Fletcher H. "Inconsistencies in sentencing." *National Association of Probation Officers Bulletin*: March 1986, no. 252.

5. National Association for the Care and Resettlement of Offenders. *Some facts and findings about black people in the criminal justice system*. June 1988.

6. Pompei K.F. et al. "Retention of court-referred adolescents and young adults in the therapeutic community." *American Journal of Drug and Alcohol Abuse*: 1987, 13(3), p.309-325.

7. De Leon G. "Legal pressure in therapeutic communities." In: Leukefeld D.S.W. et al. eds. *Compulsory treatment of drug abuse: research and clinical practice*. US NIDA, 1988, p.160-177.

8. Rutherford A. *Growing out of crime*. Penguin, 1987.

9. Miller W.R. "Motivational interviewing with problem drinkers." *Behavioural Psychotherapy*: 1983, 2, p.147-182.