

# A strategic approach to the Criminal Justice Act

## *Drug services have the power to influence court decisions and sentencing policy*

"A COMMUNITY IS infinitely more brutalised by the habitual employment of punishment than it is by the occasional occurrence of crime." Oscar Wilde's condemnation of prisons leads us to how drug services can prepare for implementation of a law intended to cut the use of prison, the Criminal Justice Act. How do you engage with a system that can be rigid and insensitive without becoming part of it? Can you reduce the harmful effects of the criminal justice system on drug users?

There are no simple answers, but it is worth thinking through the important issues, and anticipating some of the challenges, rather than merely reacting to events.

The demands on services posed by the Criminal Justice Act will depend largely on the approach of sentencers. Will the act produce a major reorientation in court disposals of drug users, requiring frame-breaking adjustments in drug service provision? Or will minor changes in disposals require simple, low-level responses in a few services? Previous attempts to reduce use of custody have failed. The signs are that the Home Office is anticipating a *rise* in the prison population. There's an atmosphere of great uncertainty.

One very important issue needs addressing at the start – the distinction between voluntary drug service use and service use as a condition of treatment attached to a probation order. Treatment as a court requirement is ultimately backed by the sanction of state detention. Voluntary attendance is – voluntary.

It has been argued that people who use services voluntarily experience pressures that bring them to drug services, equivalent to those exerted by the threat of imprisonment. This may be so in some instances – but not all. Voluntary attenders can control timing. They have the option to try a service out, give up, try another. They are not subject to an enforceable contract, and they are not under constant scrutiny. Ultimately, threat of a formal sanction like imprisonment is always present in treatment under

order. It is not something to be entered into lightly by service providers or users.

Whatever the eventual outcome, drugs work under the act will lead to new partnerships with a range of agencies operating within and outside the current drug service area of reference. Where more than one drug service exists, alliances with other service providers (even past competitors)

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**Drug services have an important responsibility to see that the act benefits drug users**

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may be the key to providing an appropriate range of services for drug users. A degree of compromise, cooperation and differentiation of service provision may be needed to make these partnerships work.

There may be difficulties. Drug service culture doesn't necessarily lend itself well to working with staff from more structured

statutory services. After all the recent joint training, consultation and work placements, there is still a potential for misunderstanding. Important and pioneering work has been done by the Inner London Probation Service (and others) on identifying drug users within the criminal justice system, but at local probation service level this work is not always understood or even known.

Drug services collectively could probably set basic guidelines for care in criminal justice work, which might provide a source of authority – and head off difficulties and misunderstandings – in their dealings with the criminal justice system.

Individual services will find it difficult to take on an effective and proactive role in partnership with key local contacts and service purchasers if they don't know what their service (and others) want to see coming from the act. What new services could be offered? Which services are out of the question? What about funding? Services may find it useful to work out which client groups might in principle be taken on or refused, and the consequent problems, solutions and development work.

In essence, I'm suggesting that services think strategically about the challenges that may lie ahead. The boxed checklist poses some of the key questions services need to ask, raising issues explored in more depth in the following paragraphs.

Factors that may influence the decision in principle whether or not to accept criminal justice referrals include available funding, implications for existing client programmes, and capacity to extend services to meet new demands. The service's experience in working with the criminal justice system and staff training implications need careful consideration. It's no good generating outside interest in a new specialist criminal justice service if you don't have the skills to deliver or to handle demands from non-drug professionals.

Before deciding, it may be worth thinking about possible stakeholders in your service – funders/purchasers, staff, users,

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Drug services are advised to develop a strategic approach to the implementation of the Criminal Justice Act. Basic guidelines would gain authority by being set collectively. Individual services will need to decide in principle whether to accept criminal justice referrals taking into account the impact on their existing client groups, funders, etc. Those which decide to accept referrals will need to develop criteria for accepting or rejecting individuals. A well-organised drug service lobby can influence court decisions and sentencing policy.

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professional groups, and the public. What are their interests? What would they like to see from your service? What do they think you are doing at the moment?

Even powerful stakeholders like funders can be influenced if they face well-founded and organised specialist advice on treatment issues from drug services working together as professionals. However, a successful strategy to deal with criminal justice demands will take funders' interests into account, building a coalition with other local and national drug service providers.

Hopes that new referrals will provide instant access to fee-generating court work – assessment, reports, court-directed treatment – are likely to be misplaced. Services shouldn't count on it – and certainly not as a means of cross-subsidising other service areas. The work may prove time-consuming, complex, and difficult to manage.

Positioning of the service may be an issue. Services such as needle exchange schemes designed to provide unconditional and easy access for clients could face difficulties unless they can convince clients that the service remains independent and confidential. Each service needs to make its own decisions, after realistic consideration and assessment of the issues involved.

It is also worth considering the types of case that might be most appropriate for formal drug service/criminal justice system cooperation. Telling people what you're prepared to do in advance could reduce disruption through inappropriate demands from the courts.

To satisfy themselves that an offender is at risk of receiving an immediate prison sentence (the only cases that the act says should be considered for formal referral to drug treatment), drug service staff need to be aware of the local sentencing 'tariff', and the different factors considered in sentencing. Local probation officers will be able to advise. Remember that 'labelling' of defendants is not unknown in the courts. Known drug users may be inappropriately seen as having a drug 'problem' requiring a drug service solution. This brings us to professional assessment.

### **Assessing individuals**

Deciding in principle to accept criminal justice referrals leads on to the issue of which referrals to accept in practice. If drug services need to ration the number of criminal justice referrals, establishing priorities will be important. The courts must satisfy themselves that:

### **Strategic questions**

#### **An initial checklist of points for a strategy discussion might look as follows:**

- ? Do we have the resources (both money and time)?
- ? What needs will funders/service-purchasers identify? What is their approach likely to be?
- ? What needs do potential service users have?
- ? What (if there are any) are other local services doing?

#### **And some more practice-orientated questions:**

- ? What criteria should we use in deciding to accept or reject referrals?
- ? How can assessment take place against these criteria?

#### **Other important matters include:**

- ? Can drug services influence court decisions?
- ? Can drug services influence policy in general?
- ? How can services communicate their approach to other stakeholders – professionals, the courts, drug users?

- the offender is dependent on or has a propensity to misuse drugs;
- the dependence contributed to the offence; and
- is susceptible to treatment.

First, some cautionary notes. Remember that a small minority of defendants seek inappropriate help from drug services in the hope of avoiding prison. However much you disagree with sentencing policy, services should not take on problems that don't belong to them.

Prejudice is often part of the sentencing process. Offenders from ethnic minorities and women in difficult family circumstances sometimes receive harsh sentences. Drug services have not always attracted these groups, and are now keen to redress the balance. It might be tempting to accept these referrals simply because they are target client groups at risk of prison, but accepting an inappropriate referral could backfire – wrongly sentenced (low tariff) offenders could be at *greater* risk of prison if the treatment relationship doesn't work out. Advocating a non-discriminatory disposal lower down the tariff could be a more productive approach.

Under these circumstances, how can services use their resources most effectively? Services may need to distinguish between resourcing the court's assessment process, which could increase substantially

with pre-sentence reports, or instead offering treatment under order.

Even then, services under pressure may find it necessary to pick and choose between clients. Likelihood of an immediate prison sentence combined with a drug problem must be the key issues determining acceptance of assessment requests and formal court referrals. The diagram overleaf may help services decide whether and how much time to allocate to assessing an individual offender.

Services should ask themselves whether the offender's drug use relates directly to their offending behaviour, and whether they can offer anything relevant to the needs of the defendant or the court. Where the answers to both are yes, sentencers are going to be responsive. It's worth making an effort.

### **Exerting influence**

Waiting for the referrals to come may not be the best strategy. Proactively engaging the court might be more effective. In the past drug services have had some success in persuading sentencers to use non-custodial sentences. Staff have described how surprised they were at court – they were listened to carefully, and sentencers readily agreed to use non-custodial options in quite serious cases. This could change if drug service assessments become the norm through increasingly being incorporated into pre-sentence probation reports.

It is important that courts understand what drug services do, and why. Courts (and probation officers) may assume they can 'dump' offenders on drug services and demand rigorous supervision incompatible with drug service philosophy. Local drug services will need to 'sell' harm reduction to the courts and criminal justice officials. Since sentencers are sometimes reluctant to attend training events, it is likely that the courts will need to be educated – case by case.

Drug services need to ensure that they are not stereotyped as woolly liberal 'carers', but seen as professionals implementing policy imposed by government advisers. ACMD pronouncements on the need for a harm reduction approach can be cited as an 'authority'.

General drug treatment policy may need airing in court reports and assessments, but remember that drug users divulging a history of illicit drug use may (from a legal point of view) be seen to confess to countless past drug offences, and to criminally sustaining an economically unviable

lifestyle. Placing such information before the wrong person could have a prejudicial outcome on sentence. If in doubt, it is better to gloss over these issues and concentrate on the future, the treatment framework, and its relevance to the particular charge. It could be worth indicating that drugs are available in prison under relatively unsafe conditions – prison not being a harm reduction option.

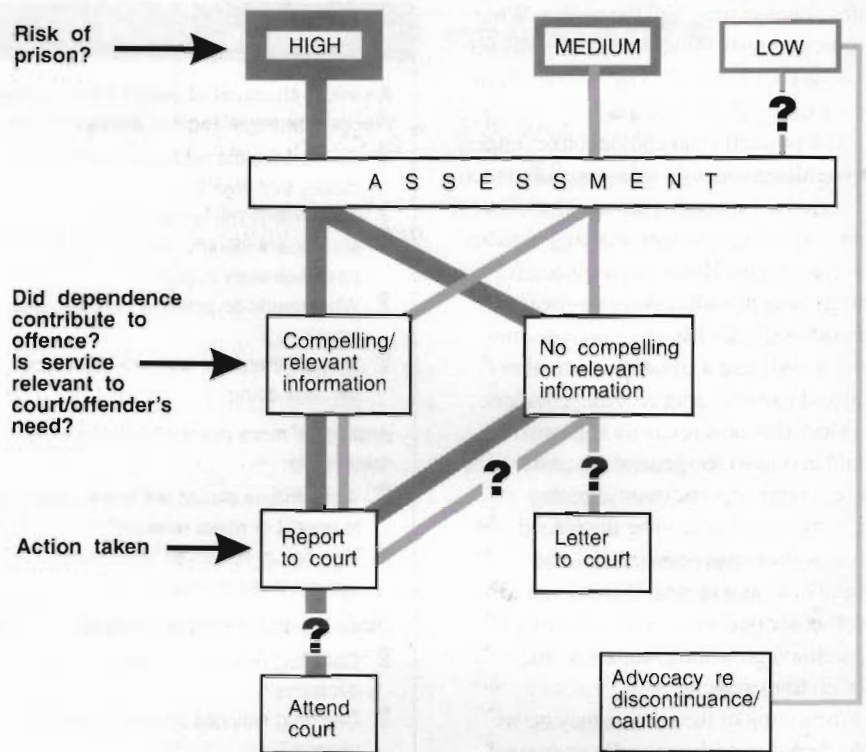
Drug services could not just influence individual court decisions but also how the Criminal Justice Act is implemented. It is essential to try to influence decisions about drug users arrested for minor offences, with a view to avoiding some clients having to appear in court at all. This will have a ripple effect further up the sentencing scale. Services could remind the police and prosecuting authorities that many offenders (including those charged with non-drug offences) could be diverted from court through the use of police cautions, saving public money. The Crown Prosecution Service (CPS) can consider remitting minor cases to the police for cautions, and sometimes drops cases altogether, known as 'discontinuance'.

Grounds can be compassionate, such as HIV-related illness. There is also a public interest aspect – this is normally seen as saving money. Release observes that discontinuance often occurs to save embarrassment, such as when there is insufficient evidence or the offence is merely technical. Drug services could point up a new 'public interest' to be taken into consideration – harm reduction in sentencing.

Unfortunately, discontinuance does not appear to occur without prompting – written representations are important. Since legal aid is increasingly unavailable except in serious cases, some agency needs to take this work on. Probation services are often not involved with defendants until very late in court proceedings. While anxious to raise awareness among its staff about discontinuance, the CPS seems reliant on traditional contacts – defence lawyers and probation staff – to raise the issue.

There must be a role for drug services here, lobbying and corresponding at an early stage on behalf of clients, setting out arguments about the public interest, about compelling client circumstances, and about harm reduction responsibilities. Gaining a reputation for practical advocacy, delivering real results, getting criminal cases 'discontinued', could help drug services motivate new voluntary users to make contact. Getting cases 'discontinued' could be a new

### Allocating time to criminal justice referrals



focus for drug services, saving money, improving effectiveness, and extending harm reduction to the prosecution of cases.

### The strategic agenda

Some of the most powerful players in the criminal justice process (sentencers) have a poor record in attending training and taking up networking opportunities, even when pressed to do so.

Training others in harm reduction and its application to sentencing will be important – educating people about what to expect from drug services, but also how they can work with the approach themselves. New groups – prosecutors, police, sentencers – need co-opting into harm reduction, exercising social responsibility and cooperating with agencies. Inevitably, the criminal justice system will seek out systems that seem culturally familiar, preferring highly structured drug services. It will also seek out services that respond to the criminal justice timescale – three-week remands for reports, and then an expectation of a packaged sentencing proposal.

It's up to drug services to work together to shape services to meet all appropriate demands. In the event of the act leading to a large influx of new clients, services should also play a major role in setting standards. Organising discussion of strategic issues among local drug services, the probation service, and other service purchasers may provide some help in establishing who does what, gaps in services, and needs, as well as

facilitating communication. Developing a local strategy may give all the professionals involved a sense of appropriate professional behaviour and expectations, as well as addressing issues of standards and quality, with reference to ACMD recommendations.

Finally, of course, services need to communicate very effectively both with existing client groups and with new referrals, establishing clear ground rules for treatment. It is crucial that services have sufficient freedom to maintain the confidence of clients, and to operate a comprehensible confidentiality policy.

If the legislation has its intended effect, there could be huge benefits as users are diverted from custodial sentences. Low-level offenders may be motivated to seek help from drug services on the basis of their advocacy work. But drug services also need to be aware of previous legislative failure to cut the numbers imprisoned. In the most polite and diplomatic way, they must ensure they only accept drug users with a formal condition of treatment as a last resort before imprisonment, while taking on a more active role in diverting minor offenders from the courts altogether.

IN BEING ABLE to accept or refuse inappropriate referrals, drug services are gatekeepers and have an important responsibility to see that the act brings real benefits to drug users. It is a difficult balancing act, and it will take some time to settle all the issues involved. ■