

Sentencing Review

Families and Friends for Drug Law Reform's response to the Issues Paper

Introduction

Families and Friends for Drug Law Reform is a community-based organisation concerned with illicit drug policies and their consequences for the community. Details about the organisation can be found on its website www.ffdlr.org.au.

Since the organisation is concerned with illicit drug issues, this paper responds in that context and concentrates on the issue of crimes and sentencing related to illicit drugs. Additionally it draws from Families and Friends for Drug Law Reform's submission into the *Inquiry Into Crime In The Community: Victims, Offenders, And Fear Of Crime* by the House Of Representatives Standing Committee on Legal And Constitutional Affairs and other material that has been published on its website. A copy of that submission can be found on the Families and Friends for Drug Law Reform website.

This paper also provides some background to the issue of drug related crime because consideration of the issues and what is effective sentencing cannot simplistically start at the tail end of this social issue --sentencing offenders.

Background

Law enforcement directed at interdicting supply

Traditionally, the underlying strategy of drug policy has been to deploy law enforcement to prevent supplies of illicit drugs reaching consumers. Even so it has long been recognised that elimination of supplies is impossible. Instead, law enforcement has focussed on disrupting the supply with a view to reducing the amount on the market.

In a study written 23 years ago of a United States academic commentator with experience in the Drug Enforcement Agency and other close links to government described the objective of law enforcement in the following terms:

“. . . the objective [of supply reduction effort] presented here acknowledges that despite our best efforts, drugs will reach illicit markets. Given an appropriate unyielding commitment to the maintenance of civil liberties, and competing claims for resources, the government is simply unable to mount a supply reduction effort that will keep all drugs from reaching illicit markets. The problem is cast in terms of minimizing the rate at which drugs move to illicit markets (and measuring this effect in terms of availability) rather than stopping all drugs. Clearly this is a more realistic objective than stopping all drugs.”¹

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1. Mark H. Moore, "Limiting supplies of drugs to illicit markets" in *Journal of Drug Issues*, vol. 9, no. 2, pp. 291-308 (Spring 1979) at pp. 293-94.

If successful, not only would there be less drugs on the retail black market but, so the theory goes, the price would rise beyond the reach of many consumers. Price and availability are thus key indicators of the success of supply side law enforcement. Another indicator is the purity of the drugs. If supply is plentiful purity is likely to be high; if scarce, low.

Judged by these indicators, over the years the trend has been for more drugs to be available on the Australian black market. This is clearly shown in data methodically collected since 1996 as part of the Illicit Drug Reporting System (IDRIS). The notable exception is the decline in availability of heroin during the heroin drought.

For its part the Federal Government continues to publicise large drug seizures as evidence of the effectiveness of its law enforcement policy. In fact such evidence is ambiguous. As the Australian Federal Police has acknowledged, increased seizures may in fact indicate greater availability of drugs: “While seizure rates do not necessarily correspond with production, they can be a good indicator of production trends.”²

Thus the addictiveness of drugs and the enormous profits of the industry make attempts to use punishment as a deterrent, problematic. On the one hand there is the case of the user/dealer – a person who is addicted and is selling drugs to pay for (or acquire) drugs to support his own habit. On the other hand the large profit to be gained from selling illicit drugs will guarantee that someone will always be tempted. Further, if the cost of the drug is driven up by interdiction then that increased cost represents an increased profit (in economic terms: to compensate for the added risk), again there will always be someone who is tempted.

Apprehension of users

Apprehension of drug dependent users involved in dealing or property crime to maintain their habit may well lead to a reduction in crime rates but this action is likely to have only a short-term effect. The large reduction in property offences in Canberra over the past year may well have been attributable to law enforcement effort as well as the heroin drought. A police operation focussed on property crime (Operation Anchorage) and, after that ceased, police continued to detain repeat offenders in which they were assisted by changes to bail legislation.

The long-term unsustainability of an approach that focuses on incarceration to reduce the crime rate is admirably expressed by Mr Don Weatherburn, director of the NSW Bureau of Crime Statistics and Research:

“You need to bear in mind that [targeting of repeat offenders is] not going to work forever, and it didn’t work forever in New South Wales. After about two years, the reduction in crime bottomed out, and then it slowly began to increase again. So you get some leverage from increasing the arrest rate if you target the right sorts of people, but it’s not a magic wand, and nor is imprisonment. . . .

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2. Sandy Gordon, “Technology impacts on drug production in Asia: The role of amphetamines in Asia’s growing drug problem” in *Platypus Magazine*, no. 72, pp. 17-22 (Sept. 2001) p. 18.

*[T]argeting repeat offenders won't drive your crime rate down forever, and you're going to need some longer-term strategies as well."*³

Some causes of drug related crimes

Teenage years for most is a time of experimentation. Experimentation with drugs, as witnessed by school surveys reporting the large numbers of young people who have tried the illicit drug cannabis, is not unusual.

Fortunately only a small proportion become problematic users. However of that small number some may engage in crime because of the role that illicit drug use has played in their background. The excellent Commonwealth publication, *Pathways to prevention: developmental and early intervention approaches to crime in Australia* (National Crime Prevention, Attorney-General's Department, Canberra, 1999), describes the risk factors associated with criminal behaviour and the big opportunity that exists to prevent crime by carefully targeted cost effective programmes that address those risk factors. That publication recognises, on the basis of widespread research, that substance abuse is a potent risk factor for crime. It mentions substance abuse on at least 25 of its 201 pages. The publication makes the point that whether a risk factor leads to crime is likely to depend on an accumulation of risk factors throughout the life of a person rather than the existence of one risk factor in isolation.

Many of the other potent risk factors for crime are themselves closely associated with substance abuse behaviours of carers. Family violence and disharmony, long term parental unemployment, abuse and neglect of children, low birth weight and school failure are among the risk factors that are often associated with parents whose life is out of control because of their illicit drug use. In other words, use of illegal drugs has a big indirect as well as a big direct influence on criminal behaviour. Thus, much of the crime today can be said to be the harvest of a crop sown thirteen or more years ago by substance abuse.

Substance abuse is closely linked to the crisis in child protection in New South Wales and elsewhere. The competence of parents is often disabled by their dependency on illicit drugs even though they still love their children. Governments are unable to provide the resources required to meet the problem and in any case it is clear that removing children from their parents, even where there is illicit drug dependency, more than likely does immeasurable harm to the children. The dilemma thus posed is extreme.

Causes of problematic drug use is a complex issue and for a variety of reasons drug use can strike any family, which does not necessarily point to failures on the part of parents. The 2001 National Drug Strategy Household Survey detected "no clear trend for illicit drug use and socioeconomic disadvantage. Persons who are in the middle category of socioeconomic status . . . are more likely to have used an illicit drug in the past 12

3. ABC Radio National, Background briefing, 14 July 2002 at <http://www.abc.net.au/rn/talks/bbing/index/bbchronoidx.htm>.

months.”⁴ The very availability of drugs thus serves to recruit children from all social backgrounds to use drugs and crime. Their availability also drives the intergenerational perpetuation of many social problems.

Illicit drug use or the lifestyle associated with it can precipitate or aggravate mental illness which is closely linked to crime. The Federal Government recognises that substance use disorders are mental disorders. (See Commonwealth Department of Health and Aged Care, *Promotion, prevention and early intervention for mental health-a monograph* (Mental Health and Special Programs Branch, Commonwealth Department of Health and Aged Care, Canberra, 2000) p. 3). A high proportion of people with a substance use disorder suffer other mental disorders such as depression, bipolar disorder or schizophrenia.

In evidence on 19 August 2002 to the House of Representatives Standing Committee on Family and Community Affairs Dr Richard Matthews, Chief Executive office of the Corrections Health Service of New South Wales, revealed that according to a national mental health index 78.2% of male prisoners and 90.1% of female prisoners suffered a mental disorder on reception.

A recent report on the relationship between mental disorders and offending behaviours prepared for the Criminology Research Council states:

“The report has already repeatedly highlighted the frequency with which the coexistence of substance abuse with a mental disorder increases the level of the association with offending behaviour. In those with mental disorders increased rates of substance misuse (including alcohol, cannabis, sedatives, stimulants and opiates) have been reported from around the world, including Australia. The evidence is mounting that the frequency with which those with mental disorder are resorting to the abuse of drugs and alcohol is increasing. In one of our own studies the rate of recorded problems with substance abuse among first admissions increased from 10% in 1975 to 35% in 1995. [One authority] concluded his review by noting ‘there is substantial evidence for substance misuse being a major risk factor for violence and aggression in patients with mental disorders particularly schizophrenia’.”⁵

The report goes on to warn that it should not be assumed that “substance abuse causes offending behaviours in the mentally disordered because “to a greater or lesser extent substance abuse may reflect, rather than cause, such factors as anomie, impulsivity and fecklessness which contribute to offending.” Whatever the causation, it is highly likely that substance abuse and the pressures of the associated lifestyle will aggravate offending

4. Australian Institute of Health and Welfare, *Australia's health 2002* (Canberra, AIHW, 2002) p. 151.

5. Paul E Mullen, *Mental health and criminal justice: a review of the relationship between mental disorders and offending behaviours and on the management of mentally abnormal offenders in the health and criminal justice services* (2001) pp. 16-17 at <http://www.aic.gov.au/crc/reports/mullen.pdf> visited 3/08/02. References included in the source text have been omitted from the quotation.

behaviours of the mentally ill. Moreover, the Commonwealth monograph on *Promotion, prevention and early intervention for mental health* identifies virtually the same risk factors for mental illness as the *Pathways to prevention* report does for crime. Directly or indirectly abuse of illicit substances and mental disorders have a close association with each other and together they are potent influences that lead to crime.

From this discussion on the role that illicit drug use commonly plays in the upbringing of those engaged in crime and mental health, it is evident that any “Tough on Drugs Policy” or “Tough on Drug User Policy” is inconsistent with policies of early intervention to address risk factors of social problems including crime. These inconsistencies are explained in more detail in a submission dated 9 August 2002 of Families and Friends for Drug Law Reform to the House of Representatives Standing Committee on Family and Community Affairs.

Strategies focusing on treatment and psycho-social support of users

A highly regarded study on the control of cocaine undertaken by the Drug Policy Research Center of RAND in California strikingly points out the large cost-benefit of treatment over various forms of law enforcement. The benefit was measured in terms of reduction in the number of users, the quantity of the drug consumed and the societal costs of crime and lost productivity that arise from use of the drug. The study estimated that “the costs of crime and lost productivity are reduced by \$7.46 for every dollar spent on treatment.” Described in other terms, domestic law enforcement, the most efficient form of law enforcement, “costs 4 times as much as treatment for a given amount of user reduction, 7 times as much for consumption reduction, and 15 times as much for societal cost reduction.”⁶

Given that addiction is a chronic relapsing condition, it is to be expected that many users will leave treatment early or relapse before they achieve long term abstinence. To the objection that for this reason treatments tend to be ineffective the study has an interesting response:

“ . . . this report concludes that treatment of heavy users is more cost-effective than supply-control programs. One might wonder how this squares with the (dubious) conventional wisdom that, with treatment, ‘nothing works.’ There are two explanations. First, evaluations of treatment typically measure the proportion of people who no longer use drugs at some point after completing treatment; they tend to underappreciate the benefits of keeping people off drugs while they are in treatment -roughly one-fifth of the consumption reduction generated by treatment accrues during treatment. Second, about three-fifths of the users who start treatment stay in their program less than three months. Because such incomplete treatments do not substantially reduce consumption, they make treatment look

6. C. Peter Rydell and Susan S. Everingham, *Controlling cocaine: supply versus demand programs prepared for the Office of National Drug Control Policy, United States Army* (RAND, Drug Policy Research Center, Santa Monica, 1994) pp. xv-xvi.

weak by traditional criteria. However, they do not cost much, so they do not dilute the cost effectiveness of completed treatments.”⁷

Governments are implicitly recognising the inadequacy of law enforcement processes to handle people with an addiction. Dedicated drug courts or other courts that have developed special procedures have been established in most if not all states and territories. This includes schemes to divert addicted offenders to treatment. The Commonwealth has encouraged States to put in place police diversion schemes. Several jurisdictions (including the ACT and South Australia) have expiation systems to deal with minor cannabis offences. Western Australia is likely to introduce such a system shortly. Treatments such as methadone have been introduced into a number of prisons.

Families and Friends for Drug Law Reform welcomes all such initiatives but regrets that more resources are not directed to treatment needs to prevent users getting entangled in the law in the first place. Far more value for money would be obtained by such a step than is obtained by providing Rolls Royce treatment for a small number of offender-users under drug court or diversion programs.

The recognised need for law enforcement processes to be adapted as much as they are to deal with people dependent on illicit drugs shows the inappropriateness of law enforcement in the first place. The medical and psychological issues surrounding addiction are essentially the same whatever the substance a person is addicted to. It matters not whether it is a legal or illegal drug. The role of the criminal law directed at users was to prevent them using certain substances. It fails to achieve that and indeed encourages uptake and use by making drugs more available. It certainly should have no role in the treatment of people who have become addicted to the very substances that law was intended to protect them from.

Users of illicit drugs who commit property and other offences should, of course, continue to be dealt with by the criminal law but given the nature of drug addiction, treatment combined with reparation may be a better sentencing option. Nevertheless their treatment within the criminal justice system for an addiction should be just as independent of correctional and other processes as is the treatment of any other medical condition that they may have.

It is obvious that the more effective a treatment is in retaining a user the greater the margin of benefit of that intervention over the criminal justice system. It is thus of the greatest importance that methadone and other pharmacotherapy maintenance programs are retained and expanded. (Methadone maintenance is referred to as the gold standard of treatment.) It is not a valid objection that some users on methadone maintenance relapse or continue using some illicit drugs. They use much less illicit drugs than they would have and thus are less involved in other crimes.

7. *Ibid.*, pp. xvii-xix.

Discussion and conclusions

The stated reasons for imposing sentences are one or more of the following:

- To punish
- To deter offender and others
- To rehabilitate
- To reinforce community standards
- To protect the community

It is clear from the foregoing discussion that the criminal justice system has limited effectiveness in respect of all the stated reasons, with the exception of the aim of rehabilitation. There may well be some small effects, largely on an individual basis, but on the broad scale past practices of law enforcement have not reduced supply nor drug use and their associated crimes.

This is not to say that certain options should be removed – because a degree of coercion may be necessary from time to time to encourage an offender to treatment – but the limited effectiveness of such options needs to be recognised. It is also clear that custodial sentences for drug addiction and mental illness is inappropriate. And it is clear too that the long term consequences on families and children of sentencing options must also be taken into account.

For simple drug use offences, for all illicit drugs, an expiation system should be applied. A case for this is argued on the basis of the waste of the courts' time on such cases and on the basis that the intervention of the criminal justice system does a great deal more harm to the individual than is warranted⁸. One would expect that with such a system as with the present SCON system, police use their discretion and only apply a SCON when there is some level of nuisance being caused by the drug use. Police, as it should be, do not actively search out drug users for simply using drugs.

The most effective options for crimes associated with problematic drug use are likely to be those that relate to rehabilitation. These include treatment, counseling, diversion schemes and the like.

The following views are related to the requests for opinion sought by the issues paper:

Non-custodial sentencing

Non custodial sentences and creative options in this category are always to be preferred to custodial sentences for drug related crimes.

Conferencing

Conferencing for drug related offences may assist but while the person retains the craving for the drug, the success rate is likely to be low.

⁸ Department of Community Services and Health, The social impacts of the cannabis expiation notice scheme in South Australia - Summary Report, Monograph 34.

Reparation orders

Families and Friends for Drug Law Reform supports the use of this option.

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Families and Friends for Drug Law Reform sees little value in Victim Impact Statements for drug related crimes such as illicit drug use or theft and burglary even though it may provide some comfort to the victim. Such statements are likely to be from persons who have no insight to, nor understanding of addiction. They are thus unlikely to assist the court process.

Access to services

Whatever the outcome of the court sentencing process, whether that be a jail sentence, diversion or home detention etc, the person being sentenced should have access to services and treatments to the same extent as a person not being sentenced. That is if the person is being sentenced to a jail term and is addicted to, say heroin, then they should have access to methadone treatment, counseling services, NA services and so forth. Similarly those with mental illnesses should have access to appropriate services.

Young offenders

The principle to be adopted here is that provision of treatment, counseling or other services at the earliest possible time is likely to be more successful than delaying the process or jailing without appropriate treatment.

An ACT Jail

Families and Friends for Drug Law Reform's view on an ACT jail is that it would be a costly exercise which would on the one hand increase the number of offenders incarcerated and on the other hand would enable more ready access for family and friends. The latter would also enable the Territory government to operate rehabilitation and other programs within the prison that are not currently available to prisoners sent to NSW.

In the former case an ACT jail would be built with an excess number of beds over that which is currently required and there would be pressure for economic reasons to have those beds occupied. It would also remove the incentive for magistrates to search for alternative sentencing options. Thus it is clear that an ACT jail will affect the use of non-custodial sentencing adversely.

Furthermore the extra cost of building and running a jail would divert funds from early intervention approaches discussed earlier.

On balance Families and Friends for Drug Law Reform prefers that there be no ACT jail, but that as wide a range of alternate sentencing options be available to magistrates and that magistrates be fully cognisant of those options. In addition the relevant departmental authorities need to work with the NSW prison authorities to provide an adequate range of treatment and counseling options for those ACT offenders addicted to drugs.