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Published version

ROBINSON, Anne (2014). Enforcement and compliance: critical practices for community rehabilitation companies and the new NPS? *Probation Journal*, 61 (3), 265-277.

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Enforcement and Compliance: Critical Practices for Community Rehabilitation Companies and the New NPS?

Introduction

From its inception, the probation service has been concerned with the compliance of probationers and has used its authority and powers to respond to non-compliance. However, for most of its history, enforcement, including letters and home visits after missed appointments, was geared towards encouraging engagement with the requirements of the court order (Vanstone, 2013). More recently, enforcement of orders has been seen as a good in itself and an indicator of quality and efficiency in the probation service's delivery of community sanctions (Loumansky et al, 2008). The evident limitations of this strategy – not least the inexorable rise in the prison population (Whitehead, 2010) - has produced 'a new theorising of compliance that suggests there is much more to achieving effectiveness in community penalties than forced or constrained compliance with penal 'products' ' (McCulloch, 2013: 45). This article explores the implications of these new understandings as the penal landscape is reshaped and further privatised. In a controversial – and to key critics, an ideologically driven move (see for example, Collett, 2013) – the probation role is being split between Community Rehabilitation Companies (CRCs) and a new version of the National Probation Service (NPS). Crucially, while supervision and intervention of lower risk offenders will transfer to the CRCs, the NPS will retain responsibility for enforcement (MoJ, 2013a; MoJ, 2013b). The quality of communications and practices around enforcement could thus be viewed as a bellwether, powerfully indicating the health and legitimacy of the in-coming system.

Brief thoughts on the history and development of enforcement in probation

Reviewing the history of criminal justice policies which give enforcement actions their shape and tone, Gwen Robinson (2013) helpfully identifies four eras in developments in England and Wales: the changes wrought by *Transforming Rehabilitation* will no doubt bring us into a further new and unfamiliar phase. Robinson's eras, in turn, were characterised by: *discretion* lasting from 1907 to 1989; *standardisation* during the 1990s, coinciding with the introduction of National Standards and managerial systems; *enforcement* from the late 1990s through to 2004; and, finally, *pragmatism* from 2004 onwards. She argues that the notion of compliance and what constitutes compliant behaviour has differed in each of these phases or eras, as reflected in its constructions in official statements and documents (2013). For example, before the Criminal Justice Act (CJA) 1991, the probation order was an alternative to a sentence and probationers were expected to 'be of good behaviour', co-operating with the aims and the spirit of supervision as well as its explicit requirements. Accordingly, in legal terms further offending was a breach of the contract of trust implicit in the order (Robinson, 2013). With the advent of National Standards, compliance became more directly related to attendance and behavioural compliance than inner beliefs and pro-social attitudes (notwithstanding the simultaneous increase in cognitive behavioural interventions). The expectations that practitioners would respond promptly and consistently to breaches was enhanced through successive sets of National Standards, circumscribing their practice and scope for discretionary decision-making (Mair and Canton, 2007).

The 'toughest' period of enforcement followed new versions of National Standards in 2000 and 2002, alongside a provision in the Criminal Justice and Court Services Act 2000 which created a legal presumption in favour of a custodial penalty as an outcome in breach proceedings (Robinson, A, 2011). However, threat-based approaches are problematic, assuming wrongly as they do that offenders' actions spring from calculation and rational decision-making (Robinson and McNeill, 2010). Bullish attitudes to enforcement are also self-defeating in that they tend to undermine rather than reinforce, the legitimacy of court orders and of the probation service who administers them (Robinson and Ugwidike, 2012), bringing many more offenders within the ambit of formal enforcement actions and so liable to be labelled as non-compliant, whether justified or not (Robinson, 2013). It seems that politicians and policy makers had simply failed to take sufficient account of the complexity and ambivalence associated with compliance (Canton and Eadie, 2005; Canton, 2011). When this reality did begin to dawn, one key response was to impose quantitative targets for completion of orders and post-custody licences. So, although the revised set of National Standards published in 2007 (MoJ, 2007) did allow more room for professional judgement, this occurred within the existing managerialist framework, evaluating the legitimacy (and thus credibility) of probation on the percentage of orders or requirements on orders completed without breach, instead of on the basis of strict enforcement (Robinson 2013). And as always, well-intentioned targets seemed to create perverse incentives, with managers reluctant to support decisions to recall or to return an offender to court, even where warranted. Robinson's (2013) small study conducted in 2008 found practitioners expressing concern about inconsistencies and the poor messages this might convey to offenders, and further reporting that their discretion was being 'stolen' by managers. This resonates with

my own communications with learners on the probation officer training programme about the organisation overruling their judgement about appropriate enforcement actions, and particularly concerns that their efforts to model pro-social behaviours and set clear behavioural expectations and boundaries are being undermined.

Looking at practice

What the above suggests is that the turn to compliance in policy terms was equally 'myopic' and no more informed by an understanding of the psychologies motivating compliance than the drive for enforcement (Robinson and McNeill, 2008). And it does raise questions, as the centrally directed bureaucracy around practice has further relaxed under the Coalition government, about how this has affected the way that practitioners now define and 'do' compliance (Ugwidike and Raynor, 2013). The subject of compliance has featured little in empirical research, and what does exist, points to complexity and contradiction. Clearly this is an area begging for further investigation. On the one hand, Ugwidike's (2010) research in one probation area in Wales found that probation officers go a long way to try to address practical problems and to build relationships with offenders, resisting a deterrence-based view of enforcement and deviating from the perceived rigidity of the National Standards then in force. Nevertheless, in that study, the officers' concepts of compliance were still closely allied to attendance, and they clearly emphasised work to remove obstacles to compliance, social and personal (Ugwidike, 2013). However, while flexibility and responsiveness are desirable (and arguably necessary), where the priority becomes getting an offender through to the end of the order, rather than his or her progress and learning whilst under supervision, efforts may be rather misplaced. Of course, as Canton (2011: 123) observes, '[p]robation has a duty to

give effect to the orders of the court and can achieve none of its purposes without the offender's attendance and participation'. Yet there are dangers in offering too much flexibility and, effectively, taking responsibility from the offender. Phillips (2011) adds insightfully to Anthony Bottoms' (2001) well known model which describes compliance as variously based on instrumental concerns, constraint, habit or routine, or the adoption of normative values and beliefs. His research with offender managers suggested that their exercise of discretion often happens behind closed doors with little input from the offender; while this may produce short-term gains in terms of motivation, it may be less helpful in promoting the type of normative compliance that signifies desistance. Thus, through what he calls 'offender manager-constructed compliance', there may be evidence of formal compliance with the requirements of probation, but not necessarily the substantive compliance which denotes more active engagement and co-operation from the offender (Robinson and McNeill, 2008). Moreover, it may render the offender's non-compliance meaningless, nullifying the underlying expression of, for example, resistance, indifference or incomprehension.

Considering compliance

Interestingly, and related to the above discussion, McCulloch (2012) contends that both the enforcement and compliance orientations seen in recent policy, have constructed offenders as the objects of intervention. Drawing on Nils Christie's (1977) seminal article, *Conflicts as property*, she argues for a reframing of the enforcement/compliance debate so that professionals take a step back, recognising that 'the action and pursuit of compliance (and non-compliance) is *owned* by the offender/desistor actor' (2012: 29). This would turn practice on its head and change

the role of criminal justice agencies so that it is 'much less about how to manage or produce compliance (though there will be a place for the former) and much more about how to create the environments, relationships and resources known to motivate and *support* offenders to take responsibility for, and progress their own compliance journeys' (McCulloch, 2013: 59). The similarity with discourses around desistance is striking and, indeed, as Canton (2011: 126) remarks,

The compliance that probation seeks ultimately *is* desistance.....probation strives to bring it about that people refrain from offending because they come to see it as wrong and to have no place in their self-identity.

Moving towards normative compliance requires offenders to think and act differently, and this has moral dimensions and associated questions of legitimacy for the practitioners and the agencies around them (McCulloch, 2013). The way that criminal justice agencies – and practitioners within them - act and interact can be pivotal in providing role models and demonstrating intellectual and moral virtues that offenders might seek to emulate. These contrast with the much narrower instrumental attempts to remoralise and responsabilise offenders evident through much of the New Labour era. Research (for example, McIvor's (1992) and McCulloch's (2010) studies in community service in Scotland) suggest that positive features of practice encourage both short and long-term compliance behaviour, such features including relationships with supervisors, pro-social modelling and help with personal and social problems. Other features, in contrast, impede compliance and, in the context of community service, these included lack of clear objectives and purpose, tasks that were not seen as relevant and offender conceptions of the work as primarily punitive (McCulloch, 2010). These points seem to apply across the

range of probation supervision and activities, giving pause for thought about the complex and dynamic nature of compliance and engagement. Community penalties, by definition, require offenders to give up their time and to participate in activities or work that they would not otherwise choose to do (Canton, 2011), so motivation is critical. Robinson and McNeill (2008; 2010) draw upon socio-legal research on tax payers to outline a model of motivational postures, characterised by defiance (resistance, disengagement or game-playing) or deference (commitment or capitulation). Typically, over time, offenders may adopt different postures, maybe due to factors outside of their supervision, but crucially in response to their experiences of probation as well. So they may move in a positive direction, given encouraging environments and relationships, from simply following the rules to a more substantive form of compliance (and ultimately to long-term legal compliance or desistance). Conversely, practices which are inconsistent or authoritarian, for example, may cause potentially co-operative offenders to become resistant or manipulative, and even to question the legitimacy of their court orders.

Enforcing compliance under *Transforming Rehabilitation*: looking ahead

So far, so good. But what does all this mean in the context of *Transforming Rehabilitation*? In terms of structural arrangements, the *Target Operating Model: Rehabilitation Programme* (MoJ, 2013b: 10) states that the new arrangements 'will give CRCs the combination of 'grip' or control over offenders and flexibility to deliver appropriate rehabilitation services' Centrally prescribed National Standards and contract requirements will be minimal, in the expectation that this will allow room for innovation, but there will be audit and quality assurance mechanisms around the termination of orders and licences 'on completion or other occurrence' (2013: 10).

Effectively, these will guide enforcement practices and have potential to spawn a range of local policies and procedures, agreed with the public sector NPS and representing the 'grip', such as it is, referred to by the MoJ. The diversity and responsiveness to local need, however, may well be compromised both by the nature of the market model involving large nationally agreed contracts for CRCs (Senior, 2013), and by the centralised structure for the NPS which may in a different way create challenges for the localism agenda.

Transforming Rehabilitation: A strategy for Reform (MoJ, 2013a: 23) sets out the government's intentions:

The current legislative framework combines both delivery and enforcement of a community order or suspended sentence order in one role, the Responsible Officer (RO). Under the current framework, the RO is usually a Probation Trust, as a provider of probation services but for certain types of order it is a provider of electronic monitoring or the person in charge of an attendance centre. We intend to introduce technical legislative changes so that

- Delivery of an order can be the responsibility of either the public sector probation service or a contracted provider, depending on who is responsible for managing the offender;
- Issuing a warning can be the responsibility of either the probation service or contracted provider; but
- Laying information before the court to enforce the breach (and the decision in these cases on whether the breach was reasonable) would be reserved to the public sector probation service.

This means that the process is shared, with the CRC administering initial warnings, alerting the NPS of a further failure to comply and supplying evidence to support breach proceedings. The NPS in turn will conduct the prosecution in court and prepare written and oral advice to assist in the determination and disposal. Whereas these respective responsibilities seem quite clear, the area in the middle – where the NPS reviews the case brought by the CRC and makes a judgement about whether to return the order to court – may be more contentious.

In addition to community orders, CRCs will assume responsibility for supervision of post-custody licences, following risk assessment and allocation by the NPS. This will include new arrangements for the supervision of prisoners released from a sentence of less than 12 months. Again, the enforcement role falls to the NPS, who will review cases and deal with recalls or, where considered appropriate, issue warnings or apply for variations of licence conditions. These are potentially sophisticated decisions on breach action or recall where the NPS should rightly be able to draw on its knowledge and expertise, but the division of roles establishes an inherent power differential between the two agencies which may be an enduring source of discomfort and irritation.

Transforming Rehabilitation also stipulates that CRCs must refer cases to the NPS where there is an escalation of risk level such that the offender is considered at high risk of serious harm. Although the NPS will have authority to identify trigger points or risk indicators at the point of allocation to the CRC that would require the case to be referred back (MoJ, 2013b), this again will be an area of judgement and therefore potential inter-agency conflict. Such conflict may be heightened in the face of

commercial considerations for CRCs and the pressures inherent in Payment by Results, destabilising existing risk management processes. As Guilfoyle (2013: 39) notes '[p]lacing so much reliance on commercial contracts seems a very high risk strategy when dealing with many of society's most difficult, damaged and dangerous individual's.' In this context, there may be strong incentives for CRCs to under-report instances of both escalating risk and non-compliance, practices which would surely pose a significant threat to the new arrangements

There are concerns also from the perspective of offenders, as having two separate agencies dealing with their infractions could be deeply unsatisfactory or even downright discriminatory (although in theory each could act as a check and balance on the practice of the other). If the two operate in tandem, working in ways that are respectful and mutually reinforcing, this should support the primary supervisory relationship and model the sorts of collaborative and problem-solving approaches conducive to desistance (see, for example, Rex, 1999 and McNeill and Weaver, 2010). But this is being hopeful. In reality, it is not too difficult to envisage situations that allow offenders (or their defence counsel) to make mischief where they see evident disagreements or inconsistencies between CRCs and the NPS. It is also possible that the CRCs and the NPS could find themselves cast as 'good cop/ bad cop' undermining attempts to provide a unified and coherent response to the offender and his or her capacity or willingness to engage. Perceived injustices or inflexibility at the interface of a CRC and the NPS could amplify resistance or undermine the motivation of a co-operative and receptive individual. If this were to extend across a significant proportion of the population under CRC supervision, it

could provoke a crisis of legitimacy from which it would be extremely difficult to recover.

Smooth administrative arrangements are important in order to ensure that any system of enforcement operates effectively and in a just and fair manner. Here the division of roles may be particularly unhelpful and may act to the detriment of offenders by causing delays and confusion. Protocols and procedures will no doubt be introduced in order to pre-empt lengthy reviews and time taken up resolving disputes or different interpretations of facts or offender motivations. And herein lies one of the central paradoxes inherent in *Transforming Rehabilitation*: structural changes made with the intention of reducing bureaucracy, creating innovation and increasing practitioner discretion may have exactly the opposite effect. The difficulties in trying to explain practitioner judgement and the latitude given to an offender across agency boundaries, in essence, may result in CRCs resorting to a form of rule-based enforcement (albeit rules devised locally rather than by central government). Conversely, practitioners in the NPS, who could be expected to have more nuanced understandings of motivations and behaviours, may nevertheless be wary of disagreeing with the CRCs because of the repercussions this might have for on-going inter-agency relationships. It can be anticipated, therefore, that what we will see in practice is a construction of compliance that plays to the lowest common denominator, and is once again based around attendance and other indicators that can be quantified and evidenced. This would be deeply regrettable in the light of the new insights and awareness of the psychological and social dimensions of compliance discussed earlier in this article.

Towards positive practices

That is not to say that all is doom and gloom. CRCs will deal with a large volume of offenders with diverse characteristics and needs, and may form a complex mosaic of provision. Certainly, the MoJ aspiration is for the Voluntary, Community and Social enterprise sector to join with prime contractors as 'supply chain partners', although doing so may present challenges and risks for small organisations (Marples, 2013). Nevertheless, it may reasonably be expected that CRCs will offer specialist provision for women, drug using offenders and individuals experiencing mental ill-health, and in some areas projects or team working with specific minority ethnic groups, homeless offenders or young adults, for example. Specialised teams may develop close relationships with the NPS in their local areas, and especially so where the NPS is able to dedicate individual officers to work consistently with these teams or projects, building joint understandings and good practices.

The challenge, however, will be to develop systems and practice consistently across the two agencies, not just in small pockets. With this in mind, CRCs and the NPS could benefit from investment in joint training events and workshops for practitioners and managers. Secondments of probation officers from the NPS to work in CRCs may also be fruitful. The immediate pay-offs, though, will be highly contingent on where secondees are placed and the authority they are able to exercise in order to guide and influence practice, and also on the degree of openness and receptiveness to their advice and interventions that they encounter. It is not possible to anticipate in any great detail the atmosphere and culture of CRCs in their early lives, but there could well be defensiveness and resistance amongst practitioners directed there from the current Probation Trusts where they were previously empowered to make

their own judgements about enforcement actions. Curtailing the autonomy of CRC practitioners is not likely to be a popular move and could easily result in a backlash against NPS practitioners. First line and middle managers may also be sensitive about the limits on their decision-making powers, particularly in the face of organisational demands to produce high levels of orders and licences completed without breach.

Considering more ambitious visions for the CRC/NPS interface, lessons might be learnt from the compliance panels held by the Probation and Aftercare Service in Jersey in the British Channel Islands. Raynor (2013) describes the essential building blocks as being: guidelines allowing the reasonable use of discretion; a high level of agreement between practitioners and managers about the right way to treat people; and use of 'compliance meetings', typically involving the offender, practitioner and manager to review cases before formal breach action. Raynor's research suggests that this provides a constructive deliberative forum and allows the offender to participate more freely than in a formal court setting, so encouraging the co-production (McCulloch, 2013) of future compliance. The system is characterised by a high degree of endorsement from senior managers, so enforcement practice and discretion in decision-making are openly and transparently discussed, unlike the research from the mainland which suggests that, in many instances, practitioners have been creative and have even resorted to subverting official guidelines in the interests of fairness and responsiveness (Ugwidike, 2010; Phillips, 2011).

Following proposals in the *Breaking the Cycle* White Paper (MoJ, 2010), compliance panels have been piloted in the youth justice system (www.justice.gov.uk) which

may give indications of the opportunities and challenges that might be involved in introducing this on a much larger scale. Of course, both the Jersey Probation and After Care Service and the youth justice system on the mainland are more attuned to social and welfare needs than the present probation service, and so culturally these practices are more consistent with their overall approaches. Indeed, Youth Offender Panels dealing with referral orders, if they work as intended, already provide a forum for discussion and problem solving (Crawford and Newburn, 2003), so establishing this practice more widely is likely to be less of a stretch than it would be for probation. Notwithstanding the additional concerns that arise when small scale practices which have received heavy investment become routinised, panels in some shape or form that bring CRCs and NPS together with offenders, certainly bear more than passing consideration. While it is true that they could be run in a tokenistic way, used thoughtfully, they could provide scope for meaningful communication about the purposes of community sanctions and exploration of motivation and compliance in individual cases.

Developing practices such as compliance panels or review meetings would be in the gift of the NPS and CRCs. In the medium term, other parts of the criminal justice system may also develop practices and structures helpful to the enforcement/compliance debate. In particular, drugs courts and other problem-solving courts may provide arenas for discussing compliance, engagement and progress, through use of review mechanisms as well as breach proceedings. Essentially, drug courts are a different way of delivering justice, with a closer integration of criminal justice and treatment goals, and attention to process rather than formal court procedures (McIvor, 2009). Already well established in the US, they have been piloted in the UK

in the sheriff courts in Glasgow and Fife, and more recently in both Leeds and West London. Within the US model, the effect is to create a stronger alliance between the courts and treatment providers, and to largely strip out the mediating and monitoring function of probation (Bean, 2008). The UK model still retains an important role for probation or criminal justice social workers, yet seeks to forge a more direct link between the judge or sheriff and the offender and to foster a greater degree of informed interest. Studies in Scotland found that participants were positive about their experiences and found sheriffs knowledgeable and sensitive to the issues that they face (McIvor, 2009). Drugs courts are associated with reduced recidivism (McIvor, 2010), but their benefits are much wider than that:

The exchanges that take place between sentencers and offenders can be a critical element in encouraging compliance both during an order and in the longer term. Elements of procedural justice were clearly manifested in the Scottish drugs courts and this, according to Tyler (1990), is likely to confer greater legitimacy to sentencers and to increase the responsiveness of participants to exhortations that they should change

(McIvor, 2009: 47)

This model is interesting in that it takes the central role in producing compliance – with both the letter and the spirit of the court order – from the probation service and hands it squarely back to the offender. This suggests that probation – or in our new scenario, the NPS and CRCs – would still play a significant, but supporting part. Clearly this is helpful in terms of encouraging offenders to take ownership and responsibility for change (McCulloch, 2010). ‘Therapeutic jurisprudence’ of this kind could also neatly sidestep tensions between the NPS and CRCs, as both would contribute but neither would control the process.

Concluding thoughts

This brings us nicely back to thinking about compliance in the context of justice, meaning wider social justice *and* the justice system. If the probation service is, as McNeill (2011) argues, a justice agency, this creates a particular onus on all parties involved in *Transforming Rehabilitation* to ensure that justice, legitimacy and fairness are central concerns in the changes ahead. Failure to do so and a return to inflexible enforcement practices would be deeply regrettable, acting to further marginalize and exclude the already marginalized and excluded. In the best of all worlds, developing knowledge and understanding about compliance - whether short-term or long term, superficial or substantive - would inform the new arrangements and inter-agency relationships. But the reality is that we live in a messy world; moreover, a world where justice has been increasingly treated as a commodity, not a matter of principle, and impacted by a series of market-based reforms (Bowen and Donaghue, 2013)..

Transforming Rehabilitation and the contracting out of services are being pushed through at considerable pace which does not inspire confidence in positive outcomes (Senior, 2013). This article has exposed more potential problems than solutions, but perhaps we should not take an entirely dystopian view. The interface between the NPS and CRCs may prove to be more jagged-edged than smooth, but if the will is there, some helpful and creative practices will emerge. We should perhaps maintain some little hope that experiments and innovations do not disappear into the divide between the two, and that there is a critical mass of probation-minded individuals prepared to keep working constructively with, and for, individuals on either side. The

alternative scenario is deeply disturbing and will impact severely on the viability and credibility of the new NPS and CRCs. That in itself may be sufficient to motivate practitioners and managers to strive to make the new system 'work' and to mitigate the problems inherent in the new structures and inter-agency relationships

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