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Criminal justice responses to drug related crime in Scotland

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Abstract

This article examines contemporary developments in criminal justice responses to drug related crime. Drawing on evaluations of initiatives which have been introduced in Scotland along with published statistical data, it considers the expansion of drug treatment through the criminal justice system and the implications this has for increasing access to services. Importantly, it considers the potential consequences of implementing 'treatment' requirements, underpinned by potential sanctions for non-compliance, at different stages of the criminal justice process. It is argued that the introduction of interventions at different points in the criminal justice process may have increased access to treatment services, though the extent of engagement with services is called into question, especially where treatment is voluntary or less obviously 'coerced'. Moreover, there is evidence that extending treatment through the criminal justice system may have had the effect of drawing some individuals further into the criminal justice process than would previously have been the case, despite limited evidence of the effectiveness of many such interventions on drug use, associated offending and wider aspects of individuals' lives.

Keywords

Criminal justice; coerced treatment; drug policy

Introduction

Drug-related crime is an important policy issue for politicians, policy-makers and practitioners in the UK and internationally and over the years there have been significant innovative developments in the provision of services for individuals identified as problem drug-users whose law-breaking is considered to be related directly to their drug use. These services, located within the criminal justice system, have the primary intention of linking individuals into treatment services in the community. Evidence highlighting the benefits of intervening to address problematic illicit drug use (e.g. Gossop, 2004) has resulted in investment in treatment interventions as a way of addressing drug-related crime, a feature that has become embedded in successive drug policies in Scotland and the UK more broadly. Although the relationship between substance misuse and offending is complex, the development of criminal justice responses to drug-related offending gained impetus following emerging evidence that legally-coerced drug treatment need not be less effective than treatment that is ostensibly voluntary (Hough, 1996).

Policies in Scotland have been broadly in line with UK policy developments. Reports by the Scottish Affairs Committee (1994) and the Ministerial Drugs Task Force (1994) outlined the challenges that increasing drug use presented for Scottish communities and, among a range of responses, highlighted the need to examine provisions within the criminal justice system, in both prisons and the community. *Tackling Drugs Together* (Home Office, 1995: 1) set out a new UK-wide strategy: “*To take effective action by vigorous law enforcement, accessible treatment and a new emphasis on education and prevention to increase the safety of communities from drug-related crime; reduce the acceptability and availability of drugs to young people; reduce the health risks and other damage related to drug misuse*”. These

policies were continued in *Tackling Drugs to Build a Better Britain* (Home Office, 1998) which reiterated the need for treatment for those with drug problems, law enforcement measures for the processors, distributors and sellers of drugs, and also emphasised the need to prevent the increasing problem of drug-related deaths.

Tackling Drugs in Scotland: Action in Partnership (Scottish Office, 1999) set out Scotland's drug strategy in relation to the UK, building on the report of the Ministerial Drugs Task Force (1994). The Scottish Office (1999: 12) identified key concerns surrounding: "...the involvement of children and young people, the recent rise in the availability and misuse of heroin, the spread of hepatitis C, the untimely death of people using drugs and the associations with crime" as being of particular concern in Scotland. Additional funds were made available for new initiatives including Drug Treatment and Testing Orders (DTTOs) and to support existing Diversion from Prosecution, intensive drug related input to community based supervision, bail and supported accommodation services. As elsewhere in the UK, there was an aspiration that provisions within the criminal justice system could provide an opportunity to bring drug users who may not have had any previous contact with services into treatment. This approach underpinned the development of treatment in both prisons and the community and focused upon attempts to "protect our communities from drug related anti-social and criminal behaviour" (Scottish Office, 1999: 16). Successive policies (e.g. Drugs Action Plan for Scotland (Scottish Executive, 2000); Updated UK Drugs Strategy (Home Office, 2002)) continued this approach, expanding provisions through the criminal justice system at the point of arrest, court and sentence with wider testing, improved referrals and new and extended community sentences. New aftercare and through-care services were also intended to improve community access to treatment for those leaving prison. Access to treatment and support services at all stages of the criminal justice system has continued to be a key component in

the Scottish Government's attempt to reduce drug-related crime and re-offending, highlighted by the most recent drugs strategy *The Road to Recovery* (Scottish Government, 2008a).

Criminal justice interventions for problem drug users represent an attempt to link the divergent interventions of 'treatment' and 'punishment', providing a community-based disposal for high tariff (and, increasingly, low-tariff) drug-dependent 'offenders'. Treatment through the criminal justice system (as an alternative to more intrinsically punitive sanctions such as imprisonment) presents an opportunity to provide drug users and drug dependent individuals with assistance where there is an element of choice. The development of specific interventions which directly target problem drug users in the criminal justice system has added to the range of non-custodial alternatives, many of which have traditionally been reluctant to deal with drug users (Pearson, 1992). They require the consent (and subsequent engagement) of the individual drug user who must acknowledge that they have a drug 'problem' and be willing to access available help to address this (see also Moore, 2011).

While the interventions discussed in this paper indicate a shift in emphasis towards treatment and rehabilitation (as opposed to punishment), underpinned by the allocation of significant resources, there are a number of interesting dichotomies which this paper sets out to examine. The paper will not challenge the efficacy of 'coerced treatment': a broad range of research, from both the criminal justice and addiction studies fields, has illustrated that this is an important way of bringing people who may not otherwise access treatment into services (McSweeney, Turnbull & Hough, 2008; Stevens, 2010). Once that contact has been made, individual motivation to end or reduce substance use may be developed. Instead, this paper considers the underlying basis for these developments in Scotland,

taking into account that policies and operational practices are imbued with distinct priorities and objectives which reflect values and meaning throughout their implementation.

In policy terms a clear distinction is made in Scotland between 'criminals' (who happen to use drugs) and individuals whose law-breaking is directly related to their drug use or, to use Nurco's (1998) typology, 'primary offenders' and 'primary drug users'. Such typologies are less evident in other parts of the UK (Best, Day, Hodayoun, Lenton, Moverley & Openshaw, 2008). Assessments are intended to illustrate that the drug use of the latter group is directly related to offending behaviour, indeed that it can be interpreted/presented as the 'cause' of their offending. There is a clear requirement that an assessment of the individual will be able to rule out any suggestion that they are 'career-criminals' (see also Collison, 1993) especially given evidence that those who are 'primary offenders' tend to have poorer outcomes in response to criminal justice drug treatment (Best et al., 2008). The individual is required to continually prove this throughout the duration of any order that is imposed. This distinction illustrates the gulf between the 'career-criminal' and those individuals who, it is assumed, will stop offending once their drug use has been reduced or ended. However, the emphasis on fast-track access to treatment and support has the potential to draw some individuals into relatively high-tariff disposals which have significant implications for non-compliance and its consequences. While the majority of interventions discussed here are aimed at relatively persistent 'offenders' the issue of net-widening is a recurrent concern. Moreover, the extent to which mandatory power underpins interventions is linked to the point in the criminal justice process at which they are offered. Although interventions which are imposed as a court disposal arguably exert greatest control over the individual – indeed, non-compliance can itself constitute an additional offence – by considering existing

interventions on a continuum, the extension of control can be identified at various points in the criminal justice process. Through an examination of currently existing interventions in Scotland, this paper will consider the aims and objectives of recent community-based initiatives and examine the extent to which they support 'recovery' as opposed to the monitoring and surveillance of individuals; and in so doing reflect assumptions about the role of treatment and punishment in relation to those who are and who are not deemed capable of being 'reformed' (Malloch, 2007). Although various treatment and other services and interventions have been introduced within Scottish prisons, these are beyond the scope of the present paper which focuses on community-based initiatives and the issues that arise from them.

Pre-prosecution initiatives

Interventions for problem drug users are in place throughout the criminal justice system in Scotland from the point of initial police contact through to after-care on release from custody. First we consider initiatives that have been introduced to encourage accused persons to undergo assessment for drug problems and/or engage with treatment services prior to prosecution and a plea or finding of guilt. Given their non-convicted status, the emphasis has principally been upon the voluntary referral of accused persons to treatment services; however varying degrees of coercion and control are nonetheless apparent.

Arrest referral

Arrest referral is one of a number of initiatives that have been introduced in Scotland in recent years in an attempt to address substance misuse and associated criminal behaviour. Arrest referral schemes have been extensively piloted in the UK over the past two decades

(Sondhi & Huggins, 2005; Sondhi, O'Shea & Williams, 2001, 2002) providing evidence that with adequate funding and with measures in place to ensure independence and perceived confidentiality they can offer a valuable opportunity to effect early intervention with those who have failed to present to treatment up until that time (Mair, 2002; Townsley 2001; Turnbull & Webster, 1997). Previous UK research has cited high levels of service contact as a result of this type of intervention (Barker, 1992; Edmunds, May, Turnbull & Hough, 1998; Oerton, Hunter, Hickman, Morgan, Turnbull et al., 2003; Turnbull, Webster & Stillwell, 1996).

An arrest referral pilot was introduced - and funded - by the Scottish Executive in 2004. It involved the provision of basic harm reduction information, new referrals to agencies for individuals with no prior agency contact, or liaison with services that arrestees were already in contact with. Funding was provided to six schemes (in a mixture of court and police based locations) with an anticipated throughput in each of 100-900 cases a year. Arrest referral was a voluntary service that sat alongside arrest rather than serving to divert offenders from the criminal justice process: in other words, arrestees who agreed to the offer of arrest referral for drug or alcohol problems would still be charged, prosecuted and, if convicted, sentenced.

Evaluation of the arrest referral pilots suggested that they had been successful in reaching arrestees with substance misuse problems, with most of those who were assessed admitting to recent drug or alcohol use (that is, within the 24 hours prior to arrest). Arrestees were most typically male, white and under 30 years of age, unemployed and with previous convictions. Arrestees offered help in relation to alcohol were less likely than those offered

help in relation to illicit drug use to have previously been offered help or support (Birch et al., 2006).

Arrestees' appraisals of the service were generally positive, with 92% of respondents reporting that they found the service useful, 89% indicating that they would be willing to see an arrest referral worker again and 84% stating that they would recommend arrest referral to other people. There was some evidence of at least initial engagement with services among arrestees, with most of those referred to treatment services keeping at least one appointment though it was unclear whether this constituted more than an assessment. The extent of longer term retention in treatment and, as in England and Wales (Mair & Millings, 2010), any longer term impact on drug use and offending could not be gauged (Birch et al., 2006). Moreover, just over one half of arrestees clearly understood that arrest referral was unrelated to the prosecution and sentencing process, suggesting that others may have agreed to be referred in the mistaken belief that it would make a difference to whether or not they were prosecuted or to the sentence they would receive. In addition, a quarter of arrestees who were interviewed did not understand that participation in arrest referral was voluntary (Birch et al., 2006), indicating a degree of perceived coercion among a sizeable proportion of arrestees.

Mandatory drug testing

Mandatory drug testing of arrestees (MDTA) was introduced in Scotland by the Police, Public Order and Criminal Justice (Scotland) Act 2006. The aim was to identify problem drug users and encourage them to engage with treatment services as a means of addressing their drug problem and associated offending. In both objectives and practices they shared

similarities to on-charge testing in England and Wales (Matrix Research and Consultancy and NACRO, 2004).

Three two-year pilot sites were introduced at police stations in Aberdeen, Edinburgh and Glasgow in June 2007. The sites were selected because they had a high throughput of arrestees and high levels of drug use. During the pilot it was anticipated that anyone arrested for a trigger offence (drug and theft offences) would be subjected to a mandatory drug test via oral fluid testing to detect the use of heroin or cocaine. If a positive test was obtained, the arrestee was required to undergo a drugs assessment to identify any dependency on drugs. Those deemed likely to benefit from treatment were then introduced to drug treatment providers. An important feature of mandatory drug testing was the element of coercion introduced through the existence of penalties for refusal to participate in testing or assessment: non-compliers could receive a fine of up to £2500 and/or a three month custodial sentence. While this raises serious questions about potential net-widening and sentence inflation among accused persons who have not yet been prosecuted and convicted of the offences with which they have been charged, in practice, as in England and Wales (Matrix Research and Consultancy and NACRO, 2004), very few arrestees refused to submit to tests, with 26 refusals recorded in Aberdeen, two in Edinburgh and none in Glasgow, in all likelihood reflecting the coercive power wielded by the availability of onerous sanctions.

A process evaluation of the pilot MDTA suggested that initial estimates of throughput (15,000 arrestees tested per year) were unrealistic and that relatively few arrestees who were not already in contact with services engaged with treatment as a consequence of the

MDTA scheme: around 42 out of 848 arrestees tested in Aberdeen and 68 out of 630 tested in Glasgow (comparable data were not available for Edinburgh where only 46 arrestees - out of 1830 tested and 471 positive tests - engaged with services overall) (Skellington-Orr, McCoard & McCartney, 2009). Moreover, a comparative analysis of the unit costs of MDTA and arrest referral based on the (low) numbers of arrestees attending assessments and entering treatment suggested that the latter was considerably more cost-effective (Skellington-Orr et al., 2009). On the basis of these findings, and before longer-term outcome data were available, the Scottish Government decided not to continue the MDTA scheme beyond the end of the pilot period, with the intention that resources freed up by discontinuation of the pilots would be "*reinvested in making community penalties more robust*" (Scottish Government, 2009, p.10) thereby introducing a greater level of control over offenders at a later point in the criminal justice process. This contrasts with the situation in England and Wales where mandatory on-charge drug testing continues despite limited evidence of its efficacy and cost-effectiveness.

Diversion from prosecution

In Scotland responsibility for criminal prosecution rests with the procurator fiscal who is provided, by the police, with reports on people who are alleged to have committed crimes. Procurators fiscal have wide discretionary powers and are not obliged to pursue prosecution of an accused if another course of action is deemed to be more appropriate. They have available an increasingly wide range of options - such as fiscal fines, warning letters and fixed penalties - as alternatives to prosecution. The first social work diversion scheme was introduced in Ayr in February 1982 through co-operation between the local procurator fiscal and the social work department and by 1986 a total of 12 schemes were operational mostly

under a model of waived prosecution in which the decision to divert was final and unconditional and the right to prosecute was waived at the point of referral. Between 1997 and 1999 the (then) Scottish Office made available central government funding for pilot diversion schemes, some of which focused specifically on accused who were identified as having drug and/or alcohol related problems. In their evaluation of the diversion pilots, Barry and McIvor (2000) found that 91 accused (out of a total of 514 diversion cases) were referred to substance misuse diversion programmes (treatment or education) during the pilot and the subsequent national roll-out of social work diversion included accused with drug and/or alcohol problems as one of four priority groups.

There has, however, been a marked reduction in the number of cases referred to drug education or treatment over time, from a high of around 211 cases in 2003/4 to around 60 in 2006/7 (Scottish Government, 2007, 2008b, 2010a). While this is consistent with a wider decrease in the use of social work diversion between 2005 and 2007, apparently unconnected to other policy developments (Bradford & MacQueen, 2011), the reduction in the number of cases diverted from prosecution to drug treatment or education has continued on a downward trend which started at the same time as the piloting of arrest referral schemes. It is therefore possible that prosecutors were less inclined to offer diversion to offenders with drug problems if they believed that they had already had an opportunity – via arrest referral – to access treatment for their drug problem. As a consequence, some accused individuals who may previously have been diverted from prosecution may have been denied that opportunity and prosecuted instead, though there are no available data to determine the extent to which this might be the case.

It is also worth observing that the national roll out of social work diversion schemes was associated with the increased use of deferred prosecution in which the decision to prosecute is informed by the compliance of the accused with the conditions associated with the decision to divert. The model of deferred prosecution introduces an explicit element of coercion and control because avoiding prosecution is dependent upon the progress that accused persons are perceived to have made in addressing the problems underlying their offending. Even in schemes that adopted a model of waived prosecution - in which there was no possibility of prosecution regardless of the degree of compliance by the accused - there was evidence of control being exercised through accused persons not always understanding the implications of the waiver and often being unclear about their legal status on completion of a diversion programme (Barry & McIvor, 2000).

Post conviction disposals

At the point of disposal, a range of options are in place across Scotland providing different potential interventions to sentencers faced with an individual with drug-related problems and/or patterns of offending. This can include traditional disposals with drug treatment and other conditions attached or specialist disposals aimed directly at drug-related crime. In two locations in Scotland offenders with drug problems may also be referred to a specialist Drug Court.

Structured Deferred Sentence

Scottish courts have the option, instead of imposing a sentence immediately upon conviction, of deferring sentence for a period of time – typically 3, 6 or 12 months - during

which the offender is expected to be 'of good behaviour' and may be expected to engage, on a voluntary basis, with a range of treatments or interventions. The deferred sentence, which has its legislative basis in Section 202 of the Criminal Procedure (Scotland) Act 1995, is not a disposal per se and, following the period of deferral, a sentence will be imposed by the court that reflects not only the original circumstances of the offence but, in addition, the behaviour of the offender while sentence has been deferred.

In 2005 structured deferred sentence pilots were introduced by the government in three areas (Angus, Ayrshire and Highland) to tackle problems that might be addressed through social work intervention, including the misuse of alcohol and drugs, and subsequently extended, in 2008, to two other locations (Tayside and Glasgow). Structured deferred sentences are intended to allow for a relatively brief period of focused supervision – either three or six months - aimed at addressing 'criminogenic needs' and reducing the frequency or seriousness of offending. Importantly, they aim to avoid offenders being 'up-tariffed' to unnecessarily intensive and intrusive periods of supervision by offering those convicted the opportunity to seek treatment/support for problems related to their offending without the need for a statutory order which, if breached, could result in imprisonment. However, despite the presumed benefits of structured deferred sentences in diverting offenders from more punitive and restrictive disposals, the uncertainty associated with the final sentencing outcome ensures that deferred sentences continue to exert a degree of control.

Two of the pilot schemes (Highland and Angus) specifically identified offenders with substance misuse problems as a priority target group for a structured deferred sentenced while the third targeted 'low tariff' offenders with alcohol problems. The evaluation of the pilots found that, across the three schemes, between half and four-fifths of offenders were

reported in Supplementary Social Enquiry Reports (made available to the courts to inform sentencing decisions following the period of deferral) to have reduced their alcohol and/or drug use (McDavitt, 2008) though the types of interventions that had been provided during the period of deferment were not specified.

No further published data are available on the use of structure deferred sentences.

However, government statistics indicate that from a peak in 2005-6 the number of all deferred sentences imposed (and their use as a proportion of all court outcomes) has decreased steadily, with the decline being particularly marked among men (Scottish Executive, 2005; Scottish Government 2008b, 2010a) . The proportion of women among those given deferred sentences has increased steadily over the same period, possibly reflecting the targeting of structured deferred sentences on women. As Barry and Mclvor (2008) have argued, structured deferred sentences, with their focus on 'needs' rather than on 'deeds', seem particularly suited to women.

Probation/Community Payback Order

In Scotland, responsibility for the supervision of offenders subject to statutory court orders rests with local authority social work departments. Until 2011, the probation order was the principle disposal through which convicted offenders could be made subject to criminal justice social work supervision by the courts. Since February 2011, probation orders have been replaced by Community Payback Orders (introduced by the Criminal Justice and Licensing (Scotland) Act 2010). Community Payback Orders, like the probation orders they replaced, can involve supervision in the community for periods of between six and 36 months and a range of specific requirements – including drug or alcohol treatment requirements - can be attached.

A national study of probation in Scotland found that social workers generally referred clients to external organisations for help in relation to drug or alcohol problems rather than addressing these issues themselves (McIvor & Barry, 1998). Drug problems were more common among female probationers with this being reflected in the relative use of drug treatment requirements with men and women by the courts (McIvor & Barry, 1998). More recent statistics reveal a similar pattern, with 7.4% of probation orders given to women and 4.2% given to men in 2009/10 having an additional requirement relating to drug education or treatment (Scottish Government, 2010a), mirroring gender differences in the use of drug rehabilitation requirements in England and Wales (Mair, Cross & Taylor, 2007; Patel & Stanley, 2008).

The use of drug treatment requirements has, however, decreased over the last 10 years, from 631 requirements in 2002/3 to 506 in 2009/10 (Scottish Government, 2008b, 2010a). The decrease in the use of drug treatment requirements is likely to have occurred as a result of the introduction and subsequent national rollout of Drug Treatment and Testing Orders whose appeal would appear to lie, at least in part, in the capacity for sentencers to monitor (and control) drug-using offenders' behaviour much more closely than would have been possible with existing community sentences. This might explain why trends in the use of alcohol and drug conditions have been in opposite directions, with the use of alcohol requirements increasing steadily over the same period.

Drug Treatment and Testing Orders

Drug Treatment and Testing Orders (DTTOs) were introduced in Scotland (as in England and Wales) under the Crime and Disorder Act 1998 in two pilot sites (Glasgow and Fife) in 1999, aimed at offenders with an established pattern of drug-related crime who were at risk of

imprisonment. DTTOs can be imposed for a period of 6-36 months and combine access to drug treatment, regular drug testing, case management by the supervising social worker and regular judicial review of progress. DTTOs differ from probation in that they are not intended to address offenders' wider problems.

The evaluation of the Scottish pilots (Eley, Gallop, McIvor, Morgan & Yates, 2002) identified the typical DTTO participant as a male heroin drug user in their late twenties with an extensive criminal record and a long criminal history of property crime related to substance use, receiving their DTTOs for acquisitive property offences (such as shoplifting, theft from cars and housebreaking) and drug offences. This was similar to the characteristics of DTTO participants in England (Turnbull, McSweeney, Webster, Edmunds & Hough, 2000) though in Scotland orders were typically made as the sole sentencing disposal rather than running alongside a probation order as they often did in the English pilots (Turnbull et al., 2000).

Evaluation of DTTOs in Scotland (Eley, Gallop et al., 2002; McIvor, 2004) found, as elsewhere in the UK (Hough, Clancy, McSweeney & Turnbull, 2003; Turnbull et al., 2000), that they were associated with reductions in drug use and drug-related offending, particularly among those who were successfully retained in treatment and completed their orders. For example, there was evidence of marked reductions in positive tests for opiates while mean weekly self-reported expenditure on drugs decreased from £490 immediately prior to being made subject to a DTTO to £57 after six months on an order (Eley, Gallop et al., 2002).

Following the successful piloting of DTTOs in Scotland, a national rollout of orders began in 2001/2. DTTOs are now available to the High Court and all Sheriff Courts, with a steady increase in the number of orders made nationally from 412 in 2003/4 (Scottish Executive, 2005) to 739 in 2009/10 (Scottish Government, 2010a). Although DTTOs no longer exist as a

distinct sentencing option in England and Wales (having been replaced by the Drug Rehabilitation Requirement of the Community Order and Suspended Sentence Order) they continue to be available in Scotland in addition to Community Payback Orders.

Scotland's national guidelines allowed for the discretion of the court in revoking orders and emphasised the importance of keeping the participant in treatment leading to much better completion rates than in other areas of the UK (e.g. Best, Ho Man, Rees, Witton & Strang, 2003). Although the majority of revocations of orders in which a further sentence is imposed result in imprisonment, only 29 per cent of breach applications in 2010-11 led to immediate imprisonment because courts often allowed orders to continue. Breach rates, while initially very high (40% of terminations in 2003/4) (Scottish Executive 2005) have gradually reduced over time (to 23% of terminations in 2009/10) (Scottish Government, 2010a). However, in each year since their introduction, breach rates have been higher among women than among men. While the reasons for this gender difference are unclear, they echo the difficulties experienced by women more generally in meeting the requirements of community sentences (Malloch & McIvor, 2011) – with DTTOs being particularly onerous in this regard - and the absence of specific treatment services for women may also have resulted in lower levels of retention on orders.

DTTO II

In 2008 the Scottish Government provided funding for the piloting of a 'low tariff' DTTO scheme – referred to as DTTO II - in the Lothian and Border Community Justice Authority area. They were intended to make DTTOs available to lower tariff offenders earlier in their criminal careers and could be imposed in the Sheriff Courts and Justice of the Peace Courts

(the latter dealing with the least serious offences and not having provision to impose 'ordinary' DTTOs). It was anticipated that DTTO II orders would be shorter in duration than DTTOs (and should not normally exceed 12 months) and that court-based reviews of offenders' progress should take place less frequently (every 6-8 weeks instead of monthly under a DTTO).

The initial evaluation of this initiative (McCoard, Skellington-Orr, Shirley & McCartney, 2010) examined data from 59 orders made between June 2008 and November 2009. Most Orders imposed were for the duration of 12 months and the average age of clients was 27.4 years. Early indications were that during participation in the DTTO II, drug consumption and re-offending rates reduced for individual participants, with relatively high completion rates despite low numbers. Those taking part in the scheme indicated they had experienced some positive changes in their health and living arrangements and had made moves towards improving their employment and/or education status. However given the characteristics of participants (low-tariff offenders) and the absence of comparison cases who did not receive any intervention it is not possible to conclusively attribute these outcomes to the DTTO II pilot.

The introduction of 'low tariff' DTTOs was intended, in part, to increase the number of women accessing services who would not have been eligible for a DTTO because of the less serious nature of their offences and orders appear to have been implemented on a proportionately high number of women (49% of those given orders). However, although described as a 'female friendly disposal' by McCoard et al (2010, p.8) there is no indication what alternative disposals were imposed upon individuals with similar characteristics nor what the consequences for breach and/or non-compliance with these orders might be. If

non-compliance is dealt with by custody or a direct alternative to custody, women (and men) could be placed at increased risk of imprisonment despite having committed relatively minor crimes (Player, 2005).

Drug courts

Following the apparent success of the DTTO pilots, and following an analysis of their use in other jurisdictions (Walker, 2001), pilot drug courts were established by the Scottish Executive in Glasgow (2001) and Fife (2002) Sheriff Courts. Like drug courts in other jurisdictions (Belenko, 1998; Gebelein, 2000; McIvor, 2010a; Nolan, 2001), they aimed to reduce crime by addressing drug use and drug-related offending by adults who had committed serious and/or frequent offences. The intention was that the effectiveness of existing sentences such as DTTOs would be improved by additional treatment resources and intensified and specialist judicial supervision which aimed to be 'therapeutic' rather than 'punitive' (McIvor, 2009). Analysis of the drug courts' operation over two years indicated that most drug court clients had an extensive history of previous convictions and custodial sentences (McIvor, Barnsdale, Malloch, Eley & Yates, 2006).

Offenders sentenced in the drug courts were made subject to DTTOs or probation orders (or a combination of both in the case of those convicted of multiple offences) and were required to submit to urinalysis and regular (at least monthly) review by the presiding Sheriffs. The drug court teams comprised dedicated criminal justice staff (including Sheriff Clerks, court officers and, in Glasgow, a Procurator Fiscal and Co-ordinator) and a Supervision and Treatment Team that provided assessment, supervision, treatment, testing and court reports. Despite some initial tensions arising from different philosophical underpinnings, multi professional teamwork was effective at the individual level (Eley,

Malloch, Mclvor, Yates & Brown, 2002; Malloch, Eley, Mclvor, Beaton & Yates, 2003; Mclvor et al., 2006). The problem-solving dialogue between Sheriffs and offenders and continuity of sentencers over successive reviews were considered to be a significant element in motivating individuals and sustaining compliance (Mclvor, 2009) as they have been shown to be in other jurisdictions in the UK (Kerr, Tompkins, Tomaszewski, Dickens, Grimshaw et al., 2011; Matrix Knowledge Group, 2008) and beyond (Fischer & Geiger, 2011; Gottfredson, Kearley, Najaka & Rocha, 2007; Marlow, Festinger, Dugosh & Lee, 2005; Marlowe, Festinger & Lee, 2004) and pre-court reviews were seen as crucial in establishing and monitoring achievable goals for clients (see also Moore, 2011).

Professionals and clients were optimistic that the drug courts were effective in reducing drug use and involvement in drug-related crime. Many clients also indicated that drug court orders had brought about other improvements in their lives (e.g. health) and in both courts there was a steady decrease in the proportions of clients testing positive for opiates and benzodiazepines over the course of an order (Mclvor et al, 2006).

Forty-seven per cent of clients in Glasgow and 30% of those in Fife had completed their orders during the first two years (Mclvor et al., 2006). Two year reconviction rates among those sentenced in the drug courts in the first year of their operation were similar to those found during the first year of operation of DTTOs, with clients who completed their orders being less likely to be reconvicted. Overall, 50% of participants remained conviction-free after one year and 29% were free of further convictions after two years (Mclvor et al., 2006). Although in absolute terms this may not appear to be a high success rate, it needs to be considered in the context of the extensive criminal histories of drug court participants. Indeed, an important feature of the Scottish Drug Courts has been their emphasis on 'high

risk' offenders in comparison to similar courts in other jurisdictions, particularly the USA, which often address less serious offending or operate at earlier points in the criminal justice process (Huddleston, Marlowe & Casebolt, 2008).

A subsequent review of the Glasgow and Fife Drug Courts by the Scottish Government (2010b) indicated that, two-year reconviction rates (at 82%) were similar to those among offenders given DTTOs in other courts, though this comparison was hampered by relatively small drug court samples (McIvor, 2010b). The review identified considerable support for drug courts among professional staff and stakeholders, who generally acknowledged the challenging nature of addressing drug-related crime and the entrenched difficulties facing many serious and/or persistent offenders with drug problems. The in-depth assessment, intensive treatment by a specialist multi-disciplinary team, continuity of supervision by the sentencing judge and improved efficiency in fast-tracking outstanding offences, warrants and complaints were viewed by professionals as particular strengths (Scottish Government, 2010b).

Post-release initiatives

Although this article has concentrated on initiatives that have been introduced to divert offenders and link them into treatment and support services at different stages of the criminal justice process, it is also important to recognise the importance of throughcare in providing community-based support for offenders *after* they have served a custodial sentence. Throughcare has been defined as “the provision of a range of social work and associated services to prisoners and their families from the point of sentence or remand, during the period of imprisonment and following release into the community” (Scottish Executive, 2002, p.1). It has been identified as critical in maximising the effectiveness of

prison-based interventions (Fox et al, 2005; Home Office, 2005) and ensuring that released prisoners with drug problems are linked into appropriate services on release (Burrows, Clarke, Davison, Tarling & Webb, 2001; Martin and Player, 2000), having been described as 'absolutely vital' (Ramsay, 2003: viii) to the success of drug treatment in prison; after-care following release has been shown to be as important as providing interventions during custody (Ramsay, Bullock & Niven, 2005).

The introduction of interventions that have aimed to identify and address the needs of prisoners in custody and on release has, however, met with numerous challenges in Scotland as elsewhere (Paylor, Hucklesby & Wilson, 2010). These include levels of take-up, co-ordination of services in light of fragmentation of provision and ongoing engagement in the community. In order for strategies to be effective, they need to extend across prison and community provision to ensure fluidity of access on entry and release from prison.

Transitional care

The introduction of the Scottish Prison Service Transitional Care Initiative highlights the challenges of linking released prisoners to community services (MacRae, McIvor, Malloch, Barry & Yates, 2006). In Scotland, only prisoners serving sentences of four years or more are eligible for post-release support on a statutory basis. Prisoners serving shorter sentences can access support from local authority social work services on a voluntary basis during the 12 month period following release though, in practice, few prisoners avail themselves of this service. Transitional Care was a national initiative introduced in 2001 under contract to the Scottish Prison Service to provide post-release support to short-term prisoners with identified substance misuse problems. It targeted problem drug users who were not already subject to mandatory post-release supervision with the aim of linking them into community

services. Prisoners were assessed within prisons and linked to sub-contracted staff based in the community who they were expected to meet with up to three times over a 12 week period post-release to identify and address any support needs they may have. However, just over 28% of those assessed as suitable attended a post-release appointment: unless staff were proactive in reaching clients they tended not to take up the offer of transitional care.

Drug and alcohol problems, and housing were most often identified among those attending appointments. However, seven months after release, those who had received transitional care were no less likely to have unresolved needs than those who had not and there were no differences in relation to health, substance use, injecting behaviour, housing, employability or involvement in crime. The system of three appointments was viewed by workers as insufficient to address complex needs and ensure that ex-prisoners were effectively linked into services and although ex-prisoners were broadly positive about transitional care, some complained that expectations of services were raised and not fulfilled (MacRae et al., 2006; see also Harman & Paylor in respect of the CARAT initiative in England and Wales). The Transitional Care initiative highlighted how levels of take-up of service are particularly low in the absence of coercion and, perhaps more importantly, how the effectiveness of such initiatives is dependent upon the availability of provision that can be accessed by released prisoners.

Throughcare Addiction Service

The Throughcare Addiction Service (TAS) was introduced in 2005 to replace Transitional Care as part of a wider voluntary throughcare strategy developed by the government to address the throughcare needs of priority groups of prisoners, including those with drug problems. Delivered by criminal justice social work services, TAS aims to provide a continuity

of care for those leaving custody after serving sentences of more than 31 days to achieve a transition from interventions for drug problems received in prison to post-release interventions in the community, though the minimum sentence length does not apply to women and young (under 21 years of age) offenders who are deemed a priority for TAS. Prior to release, a Community Integration Plan (CIP) is developed, in consultation with the prisoner, which establishes how any addictions-related work undertaken in prison will be taken forward in the community. TAS works with the prisoner in the six weeks prior to release (where the focus is on development of the CIP and motivational work) and six weeks after release (where the emphasis is on linking prisoners into appropriate community services).

The TAS service has not yet been evaluated but information is collected on aggregate (number of individual cases and number of individuals who received a service) and annual returns (providing specific information on those individuals in receipt of a TAS service). In 2006/7 (the first complete year during which it was in operation) 1,509 individuals received TAS (Scottish Government, 2007), though by 2009/10 this had decreased to 1,414 (Scottish Government, 2010a). A government review of TAS indicated that only 41% of prisoners offered a TAS service kept their initial appointment on release (though this was an improvement on transitional care) and only 15% of prisoners attended all six appointments offered (Scottish Government, 2008c). Importantly, it is unclear how effectively those who *did* keep appointments actually engaged with services on release.

Conclusions

As the preceding discussion indicates, Initiatives have been developed in Scotland at different stages of the criminal justice process to encourage offenders with substance misuse problems to seek treatment and support. The criminal justice system has evolved as a gateway to drug treatment, reflecting stated government policy commitment to simultaneously promote recovery while reducing drug-related crime (Scottish Government, 2008a).

There have, consequently, been an increasing number of referrals to treatment through the criminal justice system and some evidence that those who complete an order or intervention demonstrate reductions in drug use and associated offending. Despite initial tensions arising from underlying philosophical positions (justice and health), experience in Scotland – especially through DTTOs and Drug courts - has shown that effective multi-professional teamwork can be achieved. There is evidence from studies of these initiatives that the greatest reductions in drug use and drug-related offending occur during treatment for those clients who engage with the intervention, and evidence from other UK and international research that referrals to treatment through the criminal justice system and ‘voluntary’ referrals may be equally effective (Hough, 1996; McSweeney, Stevens & Hunt, 2006; Schaub, Stevens, Berto, Hunt, Kerschl et al., 2009). However, there is currently insufficient evidence to measure the effectiveness of diversion from prosecution, arrest referral, prison throughcare and low tariff DTTOs (DTTO II). While engagement with treatment, and readiness to engage with treatment, tends to be the precursor of success, there is also limited (and mixed) evidence as to what constitutes the most effective interventions for specific groups (Malloch, 2011).

Addressing the needs of problem drug users involved in drug related crime in the *community* rather than in *prison* has a number of advantages, including access to a wider range of more effective services, and avoiding the negative impact of imprisonment. Community interventions are more likely to result in lower rates of reoffending and offer better value for money. For example, evidence from the DORIS study in Scotland (2001-2004) indicated that while drug treatment (in general) was beneficial in the short term at least, clients of community drug agencies experienced greater improvements than the clients of prison-based services. Community drug agency clients experienced a broader range of support than clients of prison-based services and viewed the service they had received more positively (McKeganey, Bllor, McIntosh & Neale, 2008; Neale and Saville, 2004). Evidence from the Drug Treatment Outcomes Research Study (DTORS) in England and Wales also indicates that the cost benefit outcomes of treatment interventions are significant (Donmall, Jones, Davies & Barnard, 2009). Given the estimated rate of offending for many dependent users, criminal justice interventions in Scotland may cover their costs in terms of immediate savings to the criminal justice system, however problems of measuring the costs and assessing the outcomes limit conclusions that can be drawn regarding their cost-effectiveness or value for money (Malloch, 2011).

The availability of drug interventions in the Scottish criminal justice system does, moreover, raise a number of concerns. For example, there are wide variations in the scale and scope of interventions and treatment services across the country. While some initiatives (such as DTTOs) are now available on a national scale, the availability of others (such as diversion) is highly variable at the local level with arrest referral, drug courts and DTTOII available only in a limited number of geographical locations. The lack of uniformity of provision raises

important questions about equity and access to justice (see also Mair & Millings, 2010 more specifically in relation to arrest referral and drug testing).

A further concern relates to the 'net-widening' potential of initiatives that are introduced at various points in the criminal justice process. There was obvious scope for this to occur through the (now discontinued) use of mandatory drug testing, where accused persons were at risk of being fined or imprisoned if they failed to co-operate. It is also possible that the introduction of arrest referral resulted in fewer accused persons being diverted from prosecution and sentenced in the courts instead, while the potential for net-widening clearly exists with the DTTO II: the relatively high proportion of women who receive this sentencing option raises the possibility that 'up-tariffing' of women in particular may have occurred.

While men are the predominant recipients of drug interventions in Scotland, providing appropriate and effective services for women remains a challenge. The 218 centre in Glasgow aims to provide women at risk of custody, mostly with drug and/or alcohol problems, with residential and non-residential services and support, including referral to other relevant services (Loucks, Malloch, McIvor & Gelsthorpe, 2006; Malloch, McIvor & Loucks, 2008). While the 218 Centre represents a good example of a gender responsive service offering a holistic approach to women's needs, there is an absence of other similar provision, with women elsewhere in Scotland, having to access resources that are ostensibly 'gender-neutral' or have been developed principally to address the treatment and service needs of men.

The availability of support and aftercare is crucial in reducing risk of relapse and, indeed, overdose on release from prison, but managing the transition between prison and the

community remains a significant challenge. The majority of prisoners are released after serving short sentences (or periods of custodial remand) and are not subject to statutory aftercare. While initial data from the Throughcare Addiction Service suggests that it may be more successful than previous initiatives in encouraging prisoners with drug problems to take up an offer of support on release, it is likely that most do not engage with the service in prison or on release and the nature and effectiveness of any such engagement remains unknown. TAS, moreover, is mostly aimed, for practical reasons, at prisoners serving sentences of at least 31 days so that those serving very short sentences or custodial remands are ineligible for support.

One of the important principles underpinning 'coerced' treatment is the attempt to enable drug-dependent individuals to desist from offending behaviour and to reduce or end their use of illicit drugs. The evidence available to date suggests that these objectives are plausible – and, in the case of DTTOs and drug courts, achievable in many cases - although they also raise some thorny issues relating to the potential redirection of resources from voluntary, community based services thereby reducing the potential for preventive strategies at an earlier stage. While it is appropriate to focus on individual behaviour in the context of 'coerced' treatment, it is often impossible to alter the restrictions placed on the individual by institutional bureaucracy, lack of adequate resources, or broader social and political determinants.

In the UK, and most notably in Scotland, there has been an increasing acknowledgement of the importance of 'recovery' in policy debate and development (UK Drug Policy Commission, 2008a; Yates and Malloch, 2010). Recovery has taken a central role in the latest Scottish Drug Strategy which recognises that drug addiction/dependence can be a long-term and

complex condition and that it is probably impossible to isolate the impact of specific interventions from the broader social, political and economic context of the individuals' circumstances (Scottish Government, 2008a). In this regard, Scotland has resisted the outcomes focussed commissioning of services that characterise developments such as payment by results and social impact bonds in England and Wales that reflect assumptions that the impact of services and interventions – including upon recidivism - can be documented in a relatively straightforward way (Fox & Albertson, 2011). Recovery cannot be assessed by traditional measures of effectiveness but requires a broader examination of pathways into recovery (e.g. Best et al, 2010; Yates & Malloch, 2010) and a wider examination of current policies and systems (for example, investing in communities may provide better outcomes than individualised policies of crime prevention). This area is, however, fraught with difficulty. As Lloyd and McKeganey (2010) note, there are very real problems of estimating the scale and nature of problem drug use and its long term impact on individuals, families and communities.

The evidence base for interventions in Scotland (Malloch, 2011), as elsewhere (UK Drug Policy Commission, 2008b) is relatively weak with much of the existing evaluations undertaken as process rather than outcome studies and carried out at the implementation stages of initiatives. More robust evidence is required from longer-term evaluations which focus on reoffending rates, but also on a wider range of interventions aimed at promoting reintegration and sustaining recovery (such as housing, education, employment) and the integration of these services. A 'holistic' approach to both service provision and evaluation is required that recognises the structural issues (such as housing, family relationships, legal

issues, unemployment etc.) that are a feature of the lives of individual drug users who come into contact with the criminal justice system (Best et al, 2010).

This paper has been organised in such a way as to illustrate the initiatives that have been developed at progressive points in the criminal justice system. Whilst this may give the impression of a coherent and planned approach, in practice the development of interventions to address drug-related crime has been more fragmented. The initial emphasis on high tariff, repeat offenders at risk of imprisonment has extended to encompass a wider range of less serious offenders for whom services are provided at different points in the criminal justice process as a means of disrupting the relationship between drug use and (mainly acquisitive) crime. While this can be welcomed as an attempt to avoid drawing offenders into unnecessarily intrusive (and costly) interventions and the associated consequences of non-compliance, it can also be argued that these developments represent a further widening and deepening of the net of social control through the availability of options which, even if ostensibly 'voluntary', can be characterised by varying degrees of coercion whether by accident or by design. Of particular concern is the lack of available data on the outcomes of interventions in terms of their capacity both to impact positively upon drug-use and associated offending and to draw offenders further into the criminal justice process than would previously have occurred. In this regard the potential benefits and consequences of purportedly benevolent interventions in the Scottish criminal justice system demand greater scrutiny than has been evident to date.

The developments in Scotland that we have discussed arose from concerns about the impact of drug use on communities and more specifically (g. Scottish Affairs Committee, 1994) in relation to the impact of drug-related deaths and transmission of HIV and other

diseases. This meant that the emphasis was, perhaps, more on treatment and support through the justice system than on 'punishment in the community'. However, as this paper highlights, the subsequent emphasis given to the ongoing expansion of provisions through the criminal justice system has been to extend the reach of more punitive responses despite the limited evidence for the efficacy of such an approach.

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