Drug offender diversion: a review of some of the issues

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Abstract

This paper reviews the development of the concept of diverting offenders from the criminal justice system to treatment programs, with particular reference to the establishment of formal diversion schemes for drug-dependent offenders. The author acknowledges there may be advantages for those diverted to treatment, such as minimisation of the stigma and ostracism associated with conviction. The paper canvasses a number of reservations about many of the schemes, including they may be experimental in nature, that they may have been setup for non-therapeutic purposes or to access Commonwealth funded health services. The author contends there is an inherent conflict between the social control approach of the criminal justice system and therapeutic framework within which the health system operates. Given the judicial foundation to diversionary schemes, it is argued that it will be very likely the goals and purposes of treatment programs will be determined by the criminal justice system as what is described as a 'marriage of convenience'.

Introduction

There are good reasons to divert some categories of offenders into rehabilitation and treatment programs. This rationale especially applies to those whose offending involves repetitive and additive behaviours, as such individuals as conceptualised as having underlying medical or psychological problems. The diversion of drug-dependent persons who are charged with criminal offences has attracted a strong measure of professional and community support in the current context of deep community concern about drug use. The purpose of this paper is to review the implications of the adoption of diversionary schemes for this particular group of offenders.

Formal and informal diversion

One of the earliest diversion schemes was the Vera Institute of Justice's Manhattan Court Employment Project established in 1968. It is difficult to establish the precise meaning of the term 'diversion' because of various formal and informal diversionary practices may occur at different stages of the criminal justice process: (a) by the police (ie no arrest occurs), (b) pre-trial orders (eg as part of bail conditions), (c) by prosecutorial pre-trial discretion, and (d) post-conviction. These practices can be described as consisting of both informal and formal approaches.

The informal diversion of offenders has had a long history, whereas formal diversionary practices have had a more recent origin, originally used in the juvenile justice system (Dunford 1977). A common feature of both formal and informal diversion is the loss of liberty of the individual. There is a tendency to favour flexible formal diversion schemes, that depend heavily on judicial discretion, so that arrangements can be tailored to suit each offender's perceived treatment needs, either before or after conviction. *"A system of diversion before trial in our criminal procedure requires that in some way there be an authority with sufficient power to make decisions before cases come to court at all."* (O'Connor 1986). The establishment of the office of an independent prosecutor may be able to exercise this power, as it involves weighing the interests of the community while at the same time paying regard to persons who commit offences. However, it is much more difficult to regulate the informal diversion that occurs by police at the arrest stage.

In the case of individuals dependent on illicit drugs, there is a reluctance by police to divert prior to arrest, compared to the common practice of removing persons grossly affected by alcohol in public places to sobering-up shelters in lieu of prosecution. This practice has been formalised by legislation in a number of the Australian states, such as the Intoxicated Persons Act 1979 in New South Wales, since April 1990 in Western Australia (WA), with the proclamation of the *Acts Amendment (Detention of Drunken Persons) Act 1989*. Similar schemes have operated in other jurisdictions for some years (Giffen 1975; Vorenberg & Vorenberg 1973).

The concept of diversion

In a number of American jurisdictions pre-trial diversionary schemes have been established and are routinely used to force attendance of drug dependent persons at treatment facilities. This method of treatment has been aptly described as *"coerced voluntarism"* (Peyrot 1985). These formal diversionary arrangements usually involve the suspension or non-determination of criminal charges in exchange for the individual's agreed participation in some formal treatment program.

This approach to diversion has been defined as *"the disposition of a criminal complaint without a conviction, the non-criminal disposition being conditioned on either the performance of specified obligations by the defendant or his participation in obligations... or his participation in counselling or treatment"* (Nimmer cited in Tomasic 1977, 124-125). Another definition describes diversion programs as *"formalised programs designed systematically to identify and refer drug offenders into community-based treatment resources"* (Weissman 1979, 5). This narrower definition accommodates another form of diversion, dependent on the inherent discretion of judges and magistrates, diverting by attaching conditions for release on bail of individuals charged with an offence that may or may not be drug-related.[1]

Diversion of drug-dependent persons in the US

A range of diversionary schemes have been developed, specifically concerned with drug dependent persons. Probably the most common approach in the American context has been the Treatment Alternatives to Street Crime (TASC), which has a community benefit goal, a crime reduction goal, and an individual benefit goal through the treatment of heroin dependent individuals.

While many schemes are difficult to evaluate, the consensus is that there is little optimism for achieving significant changes in offending rates of drug dependent offenders through diversion into treatment programs.

> *"(N)either incarceration nor compulsory community supervision are highly effective... despite good intentions, generous expenditures, and attempts at innovative programming, it is not evident that treatment in criminal justice facilities brings marked improvement in performance."* (Petersen 1974, p. 161-2).

A difficulty with evaluating diversion schemes is they may have been set up for conflicting reasons, such as, to relieve overcrowding of jails, to reduce congested courts lists, and assuage judicial doubts about the culpability of addicts who commit offences (Lidz & Walker 1977; Weissman 1977). In relation to drug dependent persons there has been a growing support to set up schemes as a means to force such individuals into abstinence focussed programs. Coerced treatment has often been seen as answer to increasing rates of crime and drug use, by a public disillusioned with liberal reforms in the sixties and seventies, for instance, involving prison reforms and the decriminalisation of some offences. Such a shift in public attitudes in response to apparently widespread heroin use and rising crime rates amongst young adults has been described as a process of correctional revisionism, involving a fundamental shift from criminological positivism to classical utilitarianism (Gould 1974; Weissman 1977).

Diversion of drug-dependent persons in Australia

The American experiences with diversion has inspired enthusiasm in Australia for similar treatment-oriented diversion schemes. The increased emphasis on treatment of drug dependent persons is

[1] In WA prior to the introduction of the Court Diversion Service in 1988, in a number of courts people charged with offences for which the magistrate believed rug use was an element, were only granted bail on condition they 'agree' to attend a residential drug treatment program, with lenient sentencing contingent on compliance with the bail condition when they returned to court for trial and sentencing.

coupled with the Federal government's involvement since April 1985 in large scale funding of drug abuse prevention and treatment since, through the National Campaign Against Drug Abuse (NCADA). The impetus to develop mechanisms to formally divert by judicial process to effect 'treatment' of apparently recalcitrant drug dependent offenders has been justified on two major grounds:

> *"To minimise the stigmatisation of offenders who if they had been judicially dealt with would have finished up as labelled deviants and further ostracised from society (Polk 1986), and drug use itself may have been the cause of the criminal act, in which case humane and effective treatment would be more appropriate than punishment."* (Rinella 1979).

The expansion of diversion schemes will have a major impact on health and welfare agencies that assist people with drug-related problems who also are involved with the criminal justice system. There is a likelihood that treatment outcomes will be largely determined by a magistrate or judge, thereby cutting across the rights for privacy and the notion of responsibility by the individual predicated on the notion of a freely entered into therapeutic relationship between client and health worker.

This attempted 'marriage of convenience' of these two different systems of practice and philosophy can be more accurately described as a collision. On the one hand the health system is traditionally concerned with the individual's well-being, whilst the courts, through their associated agencies the police, probation and parole services and the prison system, are in the first instance concerned with social control and the protection of the community.

Rationales for diversion

Proponents of diversion argue that it is necessary to temper the rigours of the criminal law, in the belief a drug dependent person is 'sick', whose dependence is akin to a disease, over which he/she has little or no control. This proposition means that drug dependent offenders are often characterised as *"suffering from some sort of mental, emotional, or physical distress and ... in need of treatment."* (Rinella 1979, p. 358), thereby justifying 'treatment', as such an individual is *"unable to protect himself (sic) from the consequences of his (sic) own actions."* (Petersen 1974).

The mystification and popular images that surrounds drug dependence have also been a factor for the emphasis to divert drug offenders. *"Like the clinic, court personnel learned about drugs from the addicts. Using the tried and tested excuse-making techniques described by Matza, the addicts tended to describe their drug use to the law enforcement personnel in terms of uncontrollable needs."* (Lidz & Walker 1977).

Support for the concept of diversion is also drawn from a rehabilitative ideal constituted by different groups with common interests, in the nature of an alliance between the behavioural and medical sciences optimistic about the potential for human development, and those groups concerned to eliminate the punitiveness of the criminal justice system (Giffen 1975).

Criticisms of diversion

Critics of diversion have argued that entry into treatment by diversion does not constitute voluntary admission, at best it is a form of coerced voluntarism, resulting in a large measure of control and discretion being given to therapeutic agents. Where diversion occurs prior to trial, as is common in the United States, there is no judicial determination of guilt of the offender nor consideration of the community's need for protection, offenders may undergo much greater deprivations of liberty than would have occurred if convicted.

In contrast to the usual therapeutic situation where control over the process is bilateral, *"(i)nvoluntary treatment gives control to treatment agents who can unilaterally require certain enforceable actions of clients, ultimately by the threat or use of coercion."* (Peyrot 1985). The same commentator points out unsatisfactory practices have developed in some treatment agencies because of the need of these

agencies for fee-paying clients for their survival. The plethora of agencies may also encourage client 'shopping around' to obtain a cooperative agency agreeable to achievement of minimum standards of compliance with a treatment order.

Another criticism of diversion, encapsulated by the term *"net-widening and mesh-thinning effects"* (Cohen 1979), is that it increases social control through a proliferation of agencies and programs. The result is a blurring of the boundaries between the courts and agencies not concerned with social control, and an increased dispersal and penetration of social control. *"(M)any of these multi-purpose centres are directed not just at convicted offenders, but are preventive, diagnostic or screening enterprises aimed at potential, pre-delinquents, or high-risk populations."* (Cohen 1979, 346).

Also, individuals may be more severely punished if they are deemed to have failed an opportunity for rehabilitation offered to them by diversion, than if they had been dealt with solely on the basis of their original offence (Rinella 1979). One commentator has expressed concern that the whole criminal justice system may be threatened by large scale diversion because the courts will become burdened with *"a clientele of hardened, recalcitrant, difficult offenders who seem unlikely to make it in the community."* (Carter 1972).

In the Australian federal-state financial context we need to ask whether the transfer of a large number of people from the criminal justice system to health system may enable the States to siphon off Commonwealth resources? In a study of a diversion program in Sydney the researchers observed that *"the intention of justice personnel in the present study was to 'hand-over' the target individuals concerned to health workers thus transferring at least a partial responsibility for the problem from one institutionalised system to another."* (Williams, Bush & Reilly 1983, 347).

Is diversion a marriage of convenience?

Considerable difficulties have been found in the movement of drug offenders by diversion into treatment programs conducted by health workers. Treatment systems are principally concerned with assisting the individual achieving maximal functioning, and the confidential nature of the therapeutic relationship precludes the disclosure of information to third parties, whereas the criminal justice system has as its primary objective the protection of society. We could view this as a bad marriage of convenience, in that *"what should be separate will be merged with the criminal justice system making decisions which are basically clinical and treatment programs making decisions traditionally reserved for the judiciary."* (Smith cited in Aprill, Flanzer & Parker 1980, p. 194).

There have been some innovative approaches to making these marriages of convenience work better. One such example is the Milwaukee Model, also known as the linkage model, where there is a clear separation of social control and therapeutic roles, vested in different individuals. The social control role within the treatment program is reserved for a parole officer placed within the clinical setting, whilst treatment agents retain a separate responsibility as agent of the client (in Aprill, Flanzer & Parker 1980).

In Sydney there have been a number of 'trial marriages' to setup formal diversionary schemes for drug offenders. The first, the Sydney Drug Diversion Program (DDP), which ran from 1977 to 1979, was considered a failure (Bester 1981; Williams & Bush 1982). A variety of issues contributed to the DDP's failure, probably the major one being polarised expectations of the participants. *"Magistrates stressed it was intended to 'cure and rehabilitate' while drug counsellors opted for the more modest ideal of 'to improve the health and social functioning'."* (Williams 1982, p. 215).

The second diversionary program, the Drug and Alcohol Court Assessment Program (DACAP), which is a pre-sentence model, is based on the linkage model and has been regarded as an effective service to the court system. The courts have retained under this system the power to select and divert offenders to the DACAP. They have tended to favour selection of unemployed individuals lacking in social supports and often possessing a substantial criminal record, adopting as well a protective attitude

towards females and a more punitive stance with male offenders (Schlosser 1984). Another diversion scheme, based in the Sydney suburb of Manly, which used a variety of networks of agencies, may be applicable in other Australian cities and regional areas with smaller populations, where it is necessary to rely on a matrix of treatment agencies and non-specialised community-based programs (Bush 1986).

In both South Australia, which operates the Drug Aid and Assessment Panel (DAAP) and in WA which operates the Court Diversion Service (CDS), diversion occurs at the pre-trial stage. In Victoria diversion occurs at the post-sentence stage, and unlike the other jurisdictions, operates within a legislative framework.[2]

Conclusion

In summary it is suggested we should be cautious about diversion schemes because they must be regarded as experimental and therefore difficult to evaluate. There are also serious reservations about the way many schemes operate. Firstly, they may extend substantial social control over large numbers of people with concomitant loss of liberty and privacy. Secondly, they will support the expansion of treatment services that hold abstinence as the preferred outcome and marginalise other forms of treatment, such as methadone treatment programs, which support harm minimisation through long-term prescription of medication. Thirdly, the acceptance of diversion legitimises the system of controls that criminalises drug use, perpetuating the underlying problem that those who want to use drugs must commit offences in order to pursue that objective.

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