

CODIFYING THE CRIMINAL LAW: MODERN INITIATIVES

Plenary 9

**DRUGS AND THE CRIMINAL LAW – ALTERNATIVE
APPROACHES AND RESPONSES**

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INTRODUCTION

Lawmakers have been dancing around the problem of illicit drugs for as long as there has been a problem. There are many reasons for this, not the least in recent decades being the influence of our great and powerful leader of the western world, the United States of America and of official policies it has adopted and encouraged others to adopt.

Even there (admittedly in a different context) a former President, Lyndon Johnson, once said: *“You do not examine legislation in the light of the benefits it will convey if properly administered, but in the light of the wrongs it would do and the harms it would cause if improperly administered”*. That is wise counsel for lawmakers – it is a pity that it is not always heeded. Certainly in the field of the criminalisation of drug possession and use the administration of the law in most places has in fact increased the harm already being done and burdened the community greatly.

Having created crimes, however, the law generally has a role also in crime prevention.

In relation to drugs as in other areas the focus should be on:

- reducing the supply of motivated offenders; and
- making crime harder to commit.

In the drug law context those approaches are translated to four groups of offenders:

- those whose crimes are directly associated with drugs principally as users (possessing, using and dealing);
- those whose crimes are entrepreneurial (manufacturing, trafficking and dealing);
- those who commit property offences to gain the means to obtain drugs; and
- those who commit crimes while under the influence of drugs (usually crimes of violence).

There may be overlaps between the categories.

The strategies employed to reduce the number of offenders in each category and to make the offences in each category harder to commit are various and with varying outcomes. Law enforcement addresses:

- deterrence (both individual and general);
- supply-side drug market disruption;
- demand-side drug market disruption; and
- coerced treatment (in various modalities, including diversionary schemes).

A bigger question is not so much how any law might be administered in these areas and with what effect, but whether the criminal law should have anything to do with seeking to regulate illicit drugs and to punish those who contravene those regulations. In my view the criminal law should intervene fully in the second category of offenders above, only tangentially in the third and fourth but not at all in the first. If different approaches are adopted to the first category, based on treating the possession and use (and some dealing) of drugs as a health and social problem and not primarily a criminal law problem, then there will be gains in minimising the harms to be addressed in dealing with the third and fourth and probably a reduction in the second category itself.

The most dangerous and most costly drugs in developed western countries are tobacco and alcohol. They are legally available (subject to restrictions) and heavily taxed. There are strong arguments for making illicit drugs such as cannabis, at least, available on the same basis. Heroin could also be made available, with the additional requirement of a medical prescription. Amphetamines may be in a different category but even there it may be possible to develop an overall approach that would be more beneficial than outright prohibition.

Speculation of that kind is all well and good – but what is the criminal law doing now and how can it be improved? Whatever the future might hold, we need to be getting the best bang for our law enforcement buck from the programs we can presently devise in the legal framework within which we must operate.

In many jurisdictions there are diversionary programs of various kinds, taking people away from the strict application of criminal prosecution processes with a view to minimising the harms already begun by drug use and involvement in that culture. Treatment programs of various kinds have been bolted on before or after plea or sentence and pragmatic cautioning schemes have been instituted in some cases. Medically supervised injecting premises for injectable drugs have undoubtedly saved lives and diverted users into treatment and support programs. There is a wealth of research, surveys and literature about such approaches worldwide and a review would be a major study on its own.

I intend to provide only a postcard from New South Wales – specifically of aspects of the Drug Court operating in western Sydney – with a short diversion to Queensland.

NSW DRUG COURT

Drug courts are a comparatively recent development in the treatment of these issues. They have been in existence now for some years in many jurisdictions and for the most part they seem to have demonstrated some success (in terms of reducing

criminal re-offending, treating and improving the condition of addicts and doing so in cost-effective and enduring ways).

In recent times in NSW the Drug Court, created 9 ½ years ago (and operating in a limited geographical area in western Sydney and still officially as a trial program), has been comprehensively evaluated. Last year it had added to its range of programs a compulsory treatment program that is still being trialled.

NSW EVALUATION

For the first three years of its operation the NSW Drug Court was evaluated by the Bureau of Crime Statistics and Research, part of the Attorney General's Department of NSW, and the Centre for Health Economics Research and Evaluation at the University of Technology Sydney. Just over 300 participants were compared with almost 200 offenders deemed eligible for the program who were unable to obtain a place in it.

The study made a number of findings, including the following.

- 1 Despite the high drop-out rate (about 40%), the program was more cost-effective in reducing the number of drug offences.
- 2 It was equally cost-effective in delaying general criminal re-offending.

The cost per day for someone on the program at that time (2002) averaged \$144 per day, compared with \$152 per day for the control group. The main contributors to the costs of the program were health care and court attendances; but sanctioning (as part of the coercive measures undertaken) was also a significant cost.

The report also made a number of recommendations such as: improving the ability of the program to identify in advance those who might benefit; terminating earlier those who are found to be unsuited to the program; improving the match between offenders and treatment regimes; and improving the level of coordination between agencies involved in the program. (That is, doing better ...!)

Other aspects of the study demonstrated that those who remained on the program showed clear and sustained improvement in their health and social functioning and were generally very satisfied with it.

Managers were also generally satisfied with the program; although they pointed to the need to clarify legal aspects of eligibility for the program (eg violent offenders are excluded) and the need for improved services for women, Aboriginal offenders and those with a current psychiatric problem.

QUEENSLAND EVALUATION

A study of recidivism by the first 100 participants in the Queensland Drug Court carried out by the Australian Institute of Criminology in 2006 after six years' operation of the court found that overall 70% of graduates committed a new offence while participating, while 92% of terminators re-offended while in the program. For

graduates there was an average 42% reduction in offending (72% in drug offending and 54% in property offending, for example).

After leaving the program (by graduation or termination) the findings were:

- 59% of graduates re-offended within 2 years;
- 77% of terminates re-offended within 2 years;
- graduates committed an average of 0.61 offences every 6 months after graduation, down by 80% compared with the 12 months before entry; and
- terminates committed an average of 1.38 offences every 6 months after graduation, down by 63% compared with the 12 months before entry.

That report concluded: “Overall, these recidivism findings confirm earlier drug court work that those who graduate from the program have significantly improved criminal justice outcomes when compared to those who terminate and/or those who were otherwise imprisoned”.

COMPULSORY DRUG TREATMENT, NSW

The compulsory treatment aspect of the program was introduced to the Drug Court Act 1998 in 2007. When a court sentences an offender to imprisonment it must consider whether the Drug Court might find that the person should be the subject of a compulsory drug treatment order and, if it does, it must refer the matter to that court. (There is no appeal from that decision.)

The Drug Court has power to direct that an eligible offender serve the sentence by way of compulsory drug treatment detention and a small facility has been constructed within the bounds of a prison in western Sydney at Parklea.

The Drug Court must first:

- refer the offender to the multi-disciplinary team (consisting of the Director of the Compulsory Drug Treatment Correctional Centre or his/her nominee, a Probation and Parole officer, a person appointed by the CEO of Justice Health and anyone else prescribed by regulation);
- consider the assessment report made by that team;
- be satisfied that the offender is of or above the age of 18 years;
- find that the offender is a suitable person for referral;
- find that it is appropriate in all the circumstances for that course to be taken;
- be satisfied that there is accommodation available or likely to become available in the next 14 days; and
- be satisfied that the offender’s participation in the program will not damage the program or other participants.

No appeal lies from the decision to make or not make an order.

When it makes its assessment the multi-disciplinary team must have regard to:

- the offender’s level of motivation and attitude to the compulsory drug treatment program;
- the offender’s drug treatment history;
- the risk of a domestic violence offence being committed during the 3rd stage (community custody); and

- the offender's history of committing offences involving violence.

Before making the order the Drug Court must also ensure that all reasonable steps are taken to explain to the offender his/her obligations under the order and the consequences that may follow if the offender fails to comply with those obligations.

These are still early days of the compulsory drug treatment scheme, but it will be evaluated as it proceeds.

CONCLUSION

This session of the conference is considering alternative approaches and responses; that is (as I see it), alternatives to the strict application of the law that underpins the prohibition approach to drugs and the punishment of all those who transgress. Drug courts directly address the additional harms suffered by drug users. At least in Australia their experience has been positive. It remains to be seen if compulsory treatment adds to the gains already made.