

## **Abstract**

For the most part the 2003 Criminal Justice Act, which came into effect in England and Wales in April 2005, was accepted by the probation service with relatively little opposition. Given the enormity of its impact acquiescence to this degree of change ought to come as something of a surprise. The 2003 Act changed fundamentally the nature of community supervision, it brought to an end the traditional range of non-custodial penalties and replaced them with a single community order to which sentencers could add any of 12 possible requirements. This paper considers the impact of the 2003 legislation on one particular offender group – drug misusers. Drug misusing offenders have the potential to pose serious difficulties for probation officers; the habitual nature of drug addiction and a tendency toward an irregular lifestyle make drug misusers particularly susceptible to breach. Under the new legislation courts have significantly fewer options available to them when responding to incidents of offender non-compliance. This paper argues that many of the provisions of the 2003 Act together with developments elsewhere in the UK are likely to have impacted disproportionately on those groups whose lifestyles are chaotic and whose routines are incompatible with the terms and conditions of modern day probation practice. It concludes that greater flexibility towards non-compliance, supported by regular and consistent judicial review, would encourage improved rates of compliance and retention in treatment and improved outcomes for offenders,

## **Introduction**

So far as the probation service is concerned, the introduction of the 2003 Criminal Justice Act appears, generally speaking, to have been a relatively quiet and

trouble free affair (but see Marston (2010) and National Audit Office (2008) for a discussion of impact on workloads in particular). For anyone involved in the administration of criminal justice, and certainly for anyone who remembers the introduction of the 1991 CJA, this ought to come as a surprise given the enormity of its impact. Whilst there was at least a modicum of disquiet when the Criminal Justice and Court Services Act 2000 changed the titles of well-known sentences, the 2003 Act effectively brought an end to many of the traditions associated with community based sentencing. More specifically, and with respect to community penalties, the 2003 Act replaced the traditional range of individual community orders with one single order to which sentencers may attach any of 12 possible requirements.

There is much to say about the introduction of this Act and arguably even more to say about the scarcity of academic comment that has accompanied this transformation in probation practice (for exceptions see Von Hirsch and Roberts 2004, Player 2005, Fowles 2006). This article however, focuses on just one aspect of the 2003 legislation, namely the community supervision of drug misusing offenders. Drug misusers present the probation service with a number of challenges; conventional wisdom suggests that the inevitable escalation in the level of their criminality, combined with their propensity toward a chaotic lifestyle and an inclination toward relapse make them especially vulnerable to falling foul of the terms and conditions of supervision (Turnbull *et al.* 2000).

In previous incarnations criminal justice legislation has provided the courts with the opportunity to issue offenders in breach of a community order with a fine or take no action thus allowing the order to continue in its original form. In effect, courts had the option to respond to recalcitrant offenders in a measured and moderate way and this was particularly the case where offenders seized the opportunity to re-discover a commitment to their order in the period between

notification of breach and court action. The 2003 Act significantly curtails the courts' power in relation to breach action; courts must now either re-sentence or add additional requirements to an order. Although these provisions apply across the spectrum of offenders, this paper suggests that drug misusers, because of the precarious nature of recovery, are likely to be disproportionately affected by this particular aspect of the Act.

### **Drug misusers in the criminal justice system**

Whilst in reality the probation service has been working with drug users since at least the mid 1960s (see Dawtry 1968) it is only during the past few decades that this issue has attracted any significant degree of attention. It was the arrival of HIV during the 1980's, and more particularly its association with intravenous drug users, that pushed the issue of drug using offenders into prominence and ultimately created the impetus for a new model of practice. Driven by the fear that HIV had the potential to be transmitted to the general population, all agencies engaging with potentially 'risky' groups were strongly advised to implement a harm reduction strategy, and the probation service was certainly no exception (Advisory Council on the Misuse of Drugs 1982, 1988, 1991). The criminal justice system, along with other relevant agencies, was told, in no uncertain terms, that "...HIV is a greater threat to public and individual health than drug misuse. The first goal of work with drug misusers therefore must be to prevent them from acquiring or transmitting the virus." (ACMD 1988 p. 1)

Whilst a range of agencies, probation included, braced themselves for the rapid and unimpeded spread of HIV amongst their respective drug using clients, the success of the harm reduction model demonstrated its worth and most now agree that the approach effectively and significantly curtailed the spread of the disease

(Strang 2005; McDermott 2005). The success of harm minimisation, however, has been no guarantee of its continuance as the dominant mode of engagement with drug users. During the course of the last decade or so concern over the extent to which drug misuse drives criminality has seen coercive and punitive measures rise in their popularity (Duke 2006). Even if these have not replaced health concerns completely, there is now sufficient concern amongst academic and practice communities to suggest that harm reduction might have been relegated to a position of secondary importance (Buchanan and Young 2000, Seddon 2009) with the emphasis shifted from benefit for the individual to benefit for the community (Barton, 1999) and, consistent with the 'punitive turn' directed at offenders more generally (Pratt et al., 2005) in the context of the 'culture of control' associated with late modern penalty (Garland, 2001), greater priority accorded to compliance and enforcement (Hunt and Stevens 2004).

As concerns over the threat of HIV gradually subsided, the Government went to considerable lengths to publicise the link between illicit drug use and acquisitive criminality (HM Government 1995, 1998). The eventual consequence of this mounting concern was to bring about an alteration in the perceived purpose of treatment. Certainly as it applied to the criminal justice system, drug treatment was regarded as beneficial not just because it brought with it a range of individual and public health benefits, though these were not entirely dismissed, but because effective treatment could lead to abstinence from drugs and this in turn was expected to deliver a cessation (or at least significant reduction) in criminal activity (Buchanan and Young 2000; Harman and Paylor 2002; see also Carlin 2011 and Stevens 2011 for a contemporary discussion of the tension between public health and criminal justice goals in treatment). Finch and Ashton (2005) have suggested that nowhere was this emphasis on abstinence as the anticipated goal of treatment more evident than in the Drug Treatment and Testing Order (DTTO), though arguably the objective of the DTTO was less about promoting

abstinence per se than about severing the purported link between drug use and acquisitive crime. Introduced as part of the 1998 Crime and Disorder Act, this community-based order was expected "...to toughen up the probation response to drug abuse and require the offender to undergo treatment." (Bean 2002, p.74)

In essence the DTTO was based on the assumption "...that drug use is linked to crime, that coercive treatment enforced through the criminal justice system is at least as effective as non-coerced treatment and that there is good evidence from the UK that treatment does indeed reduce drug use" (Finch and Ashton 2005, p.189). While academics have sought to highlight the complex nature of the link between drugs and crime and the inconclusive evidence upon which relational claims are based (Stevens et al., 2005), findings from the National Treatment Outcome Research Study (NTORS) had demonstrated that appropriate treatment could not only reduce drug use, but where this happened criminal activity was also significantly curtailed (Gossop *et al.* 1998, Gossop *et al.* 2000; Polkinghorne *et al.* 2004). Subsequently, similar conclusions regarding the potential effectiveness of drug treatment have been reached by the Drug Outcome Research in Scotland (DORIS) study (McIntosh et al., 2007) and by other narrative (McSweeney et al., 2008) and meta-analytic (Lösel et al., 2011) reviews.

Given the frequent link between their offending and drug use, DTTOs were thought by policy makers to hold particular promise for female offenders, whom subsequent research has shown to have more entrenched levels of drug use and who might benefit from careful targeting of criminal justice interventions (Holloway and Bennett, 2007; UK Drug Policy Commission, 2008)<sup>i</sup>. However, as Barton (1999) has argued, the focus of the DTTO and that of drug policies more generally on high tariff, acquisitive crime meant that women, who were funding

their drug habits through prostitution and fraud were “becoming even more marginalised and forced onto waiting lists” (p.475).

As an idea, the DTTO had much to commend it: intellectually it came from ‘good stock’ and politically it appeared to offer an antidote to the probation service’s traditional association with social work values (see Sparrow *et al.* 2002). Initial evaluations of DTTOs however, gave every indication that there was a considerable gulf between policy intention and practice reality. The original pilot schemes in Croydon, Liverpool and Gloucestershire showed significant variations in the standard of supervision offered and all three probation areas struggled to form workable partnerships between themselves and the all-important drug service providers, with DTTO provision influenced to a significant extent by local treatment availability and complex commissioning arrangements within probation areas to ensure the availability of adequate treatment options. Despite the existence, and in some cases the persistence, of these issues, the DTTO did nonetheless demonstrate its capacity to bring about a reduction in the drug use of its participants (See Turnbull *et al.* 2000) and associated reductions in recidivism (Hough *et al.* 2003). Similar conclusions were reached from the evaluation of the DTTO pilots in Scotland (Eley *et al.* 2002, McIvor 2004) where, interestingly, implementation difficulties appeared less pronounced and outcomes consequently improved (Ashton 2003).

Notwithstanding the early onset of some very serious implementation problems, in October 2000, and in advance of the results from the evaluation studies, the Government chose to roll out the DTTO programme nationally. As Bean (2002 p. 79) has quite rightly pointed out, this suggests “...that a political decision had been reached rather than a criminological one.” Whilst there was no national evaluation of the DTTO (either in England and Wales or in Scotland where the decision to proceed to national roll-out also predated the completion of an

evaluation of the pilot schemes), the indications are that Services around the country continued to experience, to greater or lesser degrees, the same problems that were identified in the original evaluation studies (Turner 2004, Faulk 2004). Despite the persistence of these difficulties, however, most would agree that the probation service went to considerable lengths to make the DTTO a workable and constructive community sentence (Hales 2002, HM Inspectorate of Probation 2003).

### **Drug misusers and the 2003 Criminal Justice Act**

Legislative change is now a common and established feature of the criminal justice system (Fowles 2006). To such ends, the probation service's spirited attempts to make a success out of an order whose legacy owed at least as much to political posturing as it did to strategic foresight was never likely to guarantee protection from future policy upheaval. As Services around the country continued with their attempts to resolve the complexities associated with partnerships between health and criminal justice agencies (see Rungay 2000) the Government announced its routine 'shake-up' in the probation service and with it the demise of the DTTO.

The antecedent history of the 2003 Criminal Justice Act is to be found in both the Auld and Halliday reports (Home Office 2001), and then subsequently in the Government's White Paper 'Justice for All' (Home Office 2002). The scope of the 2003 legislation was so wide as to make detailed consideration of its impact beyond the scope of this particular paper. For our purposes however, the most crucial point to make about this legislation is that it effectively ended community supervision as most of us knew it. The traditional probation order and community service order (community rehabilitation and community punishment orders) were

replaced by a single generic community sentence to which sentencers could attach one or more of 12 possible requirements. These included, 'supervision' - akin to the old probation order - 'unpaid work' - what we used to know as community service - requirements to attend 'accredited programmes' and, of most relevance to this discussion, a 'drug rehabilitation requirement' (DRR).

There are noticeable similarities between the old DTTO and the DRR which replaced it. DRRs can last for between 6 and 36 months and they are designed for offenders who are dependent on, or who have a propensity to misuse, drugs and where it is judged that their drug misuse is susceptible to treatment. Above all the DRR contains the two defining characteristics of its predecessor, namely the right to test for the presence of drugs and the right for courts to review the progress of the offender. Beyond these similarities however, there are a number of potentially important differences. Firstly, it was not at all clear what level of supervision would be expected within the new DRR. Advice to Services suggested that at low levels of seriousness the DRR alone should be sufficient to tackle an offender's difficulties. For more serious offenders, however, the suggestion was that the DRR should be combined with an additional supervision requirement to aid rehabilitation. Secondly, the old DTTO was, broadly speaking, reserved for class A drug users at immediate risk of a custodial sentence; by contrast the newly devised DRR was deemed to be appropriate for a wider range of drug users<sup>ii</sup>, potentially resulting in increased access to court-ordered treatment for persistent, low level offenders (Hollingworth 2008) but with the clear potential to swell case loads, to net-widen and to bring low level users into contact with those at the heavier end of abuse. Finally, offenders who were in breach of their orders were no longer eligible for a financial penalty. The implications of increasing the punitive consequences of failure for this particular group of offenders is significant and it is to this issue that the remainder of the paper is devoted.



## **Enforcement and the consequences for drug misusing offenders**

The issue of enforcement has featured large in all recent criminal justice legislation and most would now agree that the general trend has been to move toward ever more stringent conditions of supervision (Hedderman and Hough 2004). Historically the probation service has always grappled with the problem of enforcement and despite claims of a professional antipathy toward the issue of breach, the truth is that probation officers have always been willing to return non-compliant offenders to court, albeit with varying degrees of reluctance (Sparrow and Webb 2004). What characterises more recent legislation, however, is the Home Office's unrelenting assault on the autonomy of probation officers and, perhaps more crucially, their attempts to constrain the powers of the court. In essence this has meant that probation officers have less opportunity not to breach and the courts have significantly curtailed options in terms of their response to non-compliance.

Most recent histories of the probation service now identify the 1991 Criminal Justice Act as the formal divide between 'old' and 'new' style probation practice, with probation thereafter being recast as 'punishment in the community' and the introduction of National Standards in 1992 marking the beginning of a new relationship between the Home Office and the probation service (Raynor and Vanstone 2007, Sparrow *et al.* 2002). Subsequent revisions of National Standards (Home Office 1995, 2000, 2005; Ministry of Justice 2007) and repeated attempts to 'firm up' the probation service through legislative action have resulted in a gradual erosion of practitioner autonomy and a noticeable rise in the importance of enforcement (Mair and Canton 2007). The 2003 Criminal Justice Act signified the clearest message yet that failure on the part of offenders to comply with the

terms and conditions of their order will be met with a speedy and punitive response.

Breach of the community order is dealt with under section 8 of the 2003 Act. Under this section the Act is clear that breach action must be brought at the second instance of non-compliance; "...if the responsible officer is of the opinion that the offender has failed without reasonable excuse to comply with any of the requirements of a community order, the officer must give a *warning*...informing the offender that if within the next twelve months he again fails to comply with any requirement of the order, he will be brought back before the court" (Taylor *et al.* 2004, p 225). Whilst the number of absences is not out of kilter with recent thinking in the Home Office, it is the response to breach that represents such a noticeable increase in the punitive consequences of non-compliance. Where a breach is proven, the courts' powers are now restricted to three possible options: to revoke the order and re-sentence having regard to any progress made during the course of supervision; to impose a period of imprisonment on the offender, even where the original offence was not imprisonable; or to add additional requirements to the existing order, thus making the remaining period of supervision more onerous and increasingly burdensome. Under the terms and conditions of the Act, courts are no longer permitted, as they were with previous community based orders including DTTOs, to issue a fine and allow the order to continue.

Collectively all of these options pose serious problems. Clearly the first two bring with them either the distinct possibility or, alternatively, the absolute certainty of imprisonment. At first sight, therefore, the addition of extra requirements does at least appear to offer the promise of a measured approach to non-compliance. Assuming, however, that the original sentence was based on an assessment that considered both the seriousness of the offence, and also type and range of

offending, it will presumably reflect a delicate balance of deterrence and incapacitation on the one hand, and reform and rehabilitation on the other. Part of this process will inevitably have involved thinking about what offenders are capable of managing, and whilst not 'overloading' offenders might appear to hark back to the days when probation was indistinguishable from social work, this does not stop such an approach having considerable merit. The practice of adding further requirements to orders where offenders have already shown their reluctance, or perhaps their inability, to comply might, therefore, defy rational notions of good practice. However, in the absence of relevant published data it is impossible to ascertain the extent to which this is occurring or to identify the numbers of offenders who are imprisoned specifically for breaching a DRR (see Hansard, 2010).

Breach rates for DTTOs were typically high: for example Hough *et al.* (2003) found that 67 per cent of orders were revoked due to non-compliance or reconviction. Assessing the enforcement of DRRs specifically is problematic, since there are no published data on rates of breach or imprisonment following breach of the specific requirements of a community order or suspended sentence order. However, data provided in a written parliamentary answer by David Hanson (then Minister of State for Justice) on 9 March 2009 indicated that there had been an increase in the revocation rate for failure to comply with a DTTO/DRR (as a result of breaches of requirements or reconviction for a further offence) from 23% in 2005/6 to 29% in 2007/8. Whilst this may seem at odds with the reported increase in completion rates of DTTOs/DRRs from 28% in 2003 to 47% in 2008/9 in the same parliamentary answer, the latter may reflect a shift towards the use of shorter DRRs – which are less likely to be breached (Gyateng *et al.*, 2010) – with less entrenched drug users/offenders. Given evidence that community orders more generally are replacing other non-custodial options rather than sentences of

imprisonment, the net effect may be an overall increase in the numbers of offenders going to prison (Mair *et al.* 2007; Patel and Stanley 2008).

### **Promoting compliance**

Whilst the ultimate justification for, and defence of, the DTTO and DRR has been that coercion is effective (Hough 1996, McSweeney *et al.* 2007 but see Stevens, Berto *et al.* 2005), there is little evidence to suggest that meeting failure with an overtly punitive response is likely to re-engage the offender with the process of supervision (Ugwudike 2010). There is, however, evidence that achieving increased compliance with supervision and treatment can reap longer term benefits in terms of sustained reductions in drug use and recidivism, with those retained in treatment doing significantly better than those whose orders are revoked (Hough *et al.* 2003, McIvor 2004). Hearnden and Millie (2004) found that offenders on community based orders whose orders were breached and continued had lower reconviction rates than those whose orders were revoked, arguing that the most effective strategies for achieving increased compliance were likely to focus on rewarding progress rather than punishing non-compliance. As McSweeney *et al.* (2008. P. 48) observe, "in order to effect behavioural change, the research evidence appears to encourage a move away from punishment-oriented to incentive based approaches".

Robinson and McNeill (2008 p. 444) have argued that "...an inflexible response to formal non-compliance has the potential to jeopardise future substantive compliance..." by undermining legitimate authority, while Hucklesby (2009) has argued that compliance among offenders on electronically monitored curfew orders is influenced by experiences of procedural justice and legitimacy (Tyler, 1990). McIvor (2009, 2010a) has advanced similar arguments in relation to drug

court participants, suggesting that increased legitimacy in turn promotes normative as opposed to constraint-based or instrumental compliance (Bottoms, 2001). Given that Powell *et al.* (2007) found that being breached following a third missed appointment was perceived as overly harsh by offenders subject to DTTOs, one must wonder what impact current enforcement and breach practices must have upon offenders' perceptions of judicial legitimacy and procedural justice. Indeed, the need for flexibility of response by treatment providers to non-compliance has been further highlighted by Ashby *et al.* (2011) in relation to the Alcohol Treatment Requirement whereby, in the event of 'relapse', "encouragement rather than punishment is offered, enabling individuals to re-assess their situation" (p.55).

### **Judicial monitoring of progress**

Several commentators have suggested that court-based reviews of community orders generally and the review of drug treatment requirements more particularly could help to achieve improved retention (e.g. McSweeney *et al.* 2008, McIvor, 2009, 2010b). Certainly the antecedent history of court-based review can be found in the US drug courts (with, for example, Bean (2002) describing DTTOs as 'watered down' versions of drug courts). The US Drug Court movement established an operational procedure of judicial monitoring – rooted in a framework of therapeutic jurisprudence (Wexler and Winick 1992) – that would appear not to sit easily alongside the British tradition of adversarial justice. For drug courts – and, indeed, other types of 'problem-solving' courts that are now emerging in the UK (see McIvor 2010a, 2010b) – the focus is on achieving treatment outcomes and in delivering a very distinctive form of individualised justice, with the court reserving the right to both review and amend the treatment regime during the period of supervision. Whilst the right of the court to respond to the peculiarities of an individual case – through the use of

appropriately tailored sanctions and rewards that can penalise non-compliance and recognise progress in meaningful ways - has come to define problem-solving court process, recent legislation in England and Wales has meant that, in terms of responding to non-compliance and breach, judicial flexibility with drug users has become an even more remote possibility.

McIvor (2010b, pp. 222-3) has argued that "(a)dvocates for increased judicial involvement in offender management have pointed to its potential to provide 'better' justice by improving judicial decision-making, promoting procedural justice, enhancing compliance and achieving improved outcomes". Offenders appear generally to find court-based reviews motivating (Powell *et al.* 2007, Turnbull and Webster 2007, McIvor, 2009) and there is evidence from domestic violence courts that ongoing reviews reduce non-compliance and re-arrests (Burton 2006). In the USA, Senjo and Leip (2000) found that supportive comments offered by sentencers during review hearings had a significant effect on drug court programme completion and, consistent with Maruna and LeBel's (2003) assertion that strengths-based approaches are more effective than coerced obedience in engaging offenders and promoting intrinsic motivation to change, that offenders were particularly responsive to the use of positive reinforcement as opposed to the more traditional use of punishment.

There is emerging evidence from research into problem-solving courts that consistency or continuity of sentencers is linked to individual success. The process evaluation of the Dedicated Drug Courts in England found that continuity of sentencer across court appearances was associated with enhanced compliance with court hearings, lower levels of positive drug tests for heroin, an increased rate of completion and a reduced frequency of reconviction (Matrix Knowledge Group 2008)<sup>iii</sup>. In the North Liverpool Community Justice Centre offenders reacted positively to reviews and "increased engagement with the proceedings

and the continuity provided by the single judge model ... served to increase offenders' accountability to the court" (McKenna 2007, p. 32). Offenders who were subject to review requirements reported fewer issues in completing their sentence and there was some evidence that their completion rates were higher than those of comparison cases dealt with in another court (McKenna 2007).

There is little doubt that a court can exercise a powerful influence over an offender's commitment to treatment and there is certainly greater scope for courts to move away from their traditional adversarial model and make use instead of more constructive approaches that motivate offenders to participate in treatment and which offer positive reinforcement to support desired patterns of behaviour (McGuire 2003). Whilst research suggests that versions of the 'therapeutic' or 'problem-solving' court could be a realistic and effective prospect for drug users (McIvor 2010a) the extent to which the 2003 Act shifts the British approach to dealing with drug misusers in this direction is doubtful. Although the legislation allows for the periodic review of all orders with DRRs, such reviews are only required for DRRs over 12 months, even though offenders with shorter requirements are also likely to benefit from judicial monitoring (Powell *et al.* 2007, McSweeney *et al.* 2008), especially during the first few months of the order when the risk of non-compliance is particularly high (Eley *et al.* 2002). In its current incarnation then, the 2003 legislation significantly restricts the flexibility of the court to respond to instances of non-compliance and whilst these measures will impact on the whole range of offenders, it does seem likely that they will impact disproportionately on drug users where failure is often regarded as a regular feature on the road to recovery.

Whilst there is much evidence to suggest that ongoing review can be beneficial to drug using offenders, the 2003 Act also contains provision for the periodic judicial review of community orders (and suspended sentence orders) more generally.

Heralded by the Halliday Report (2001), Section 178 of the Act 2003 introduced the option for courts to review offenders' progress on community orders, though this power was only made available in the first instance to the first two community justice centres in North Liverpool and Salford before being extended to a second tranche of 11 community justice centres in 2007. The 2009 Green Paper 'Engaging Communities in Criminal Justice' subsequently contained proposals to roll out problem-solving principles to all Magistrates Courts in England and Wales and to encourage courts to make greater uses of the Section 178 powers to review community orders "in order to enable the judiciary to build relationships with offenders, acting as a source of encouragement, praise and reprimand as appropriate" (Criminal Justice System 2009, para 51, p. 32). However, achieving consistency and continuity across review hearings has presented practical difficulties in Magistrates Courts in England and Wales which operate with a rotating three-magistrate bench (Turnbull *et al.* 2000; Brown and Payne 2007, Matrix Knowledge Group 2008). The 2009 Green paper therefore proposed that continuity might be achieved by having at least one magistrate continuously involved throughout the case review process (Criminal Justice System 2009, para 47, p. 30).

It is also worth noting that recent legislative changes have occurred in Scotland through the implementation of the Criminal Justice and Licensing (Scotland) Act 2010, the key provisions of which came into effect in February 2011. The most significant changes include the replacement of most existing community disposals (though not, interestingly, the DTTO) with a single generic Community Payback Order to which a range of conditions may be attached. In an attempt to encourage the use of community based orders as an alternative to imprisonment, the 2010 Act also introduced a presumption against prison sentences of three months and less, requiring that if they do decide to impose sentences of this length sentencers must provide reasons as to why no other method of dealing



with the offender is appropriate. The Act further enables sentencers to undertake periodic reviews of community payback orders, taking the form of “informal discussions between the judge and the offender” (Scottish Government 2008, p. 14), with formal responses of the judiciary to the new arrangements being broadly positive ((Scottish Parliament 2009).

### **Managing failure: The plight of the drug user in contemporary criminal justice**

As greater emphasis is placed upon treatment enforced through the criminal justice system (albeit that criminal justice referrals still represent a minority of referrals to structured drug treatment services (Jones et al 2007; National Treatment Agency for Substance Misuse 2009)), an increasing number of drug addicted individuals are likely to become the subject of probation based supervision (Kothari *et al.* 2002). Where once the primary aim of intervention was to maintain contact and reduce harm (even within the probation service) there is now a clear expectation that successful intervention is that which leads to users becoming drug free (HM Government 2010; see also Stevens 2011). These days probation officers have little room for manoeuvre, and offenders have few opportunities to permit their deficiencies to surface. Thus, whilst the breach court has always been a precarious site for recalcitrant offenders, current legislation means that non-compliant offenders on community orders in England and Wales are now almost certain to receive a noticeable curtailment of their freedom.

For many drug users, failure is an expected part of recovery. Indeed, in McIntosh and McKeganey’s (2002) account of 70 recovering addicts, relapse emerges as a regular feature along the road to abstinence. “A common feature of the biography

of most drug addicts is that their careers are likely to be peppered with numerous attempts to escape from their addiction. Periods of abstinence can last from a few days to a few years but, by definition, the great majority of these end in failure.” (McIntosh and McKeganey 2002, p. 90). There can be little doubt that in the early stages of becoming drug free, addicts are particularly susceptible to relapse. The continued craving for drugs, often combined with a sense of loss at shifting away from a familiar lifestyle can leave the ex-user emotionally delicate and thus vulnerable to failure. Although the relapsing nature of dependency has been recognised at government level (see, for example, Hansard, 2010), failure to recognise relapse as a near certainty in the cycle of recovery, particularly within the context of a court enforced programme of assistance poses, potentially, a number of very serious problems.

For many probation clients, abiding by the terms and conditions of supervision can test the very limits of their organisational capabilities. For the drug dependant probationer however, this challenge might well defy the best efforts of both supervisee and supervisor. The ‘addict lifestyle’ can be a busy one, filled daily by the necessity to acquire drugs and, as a consequence, the need to raise funds (Burr 1987). The inevitable realignment of priorities with the gradual onset of dependency is a crucial factor in the supervisory relationship since, despite their best intentions, it is unrealistic to assume that appointments with a supervising officer will be amongst the probationer’s highest priorities. As Barton 2003, p. 107) observes:

“Once a person becomes locked into this cycle, their life begins to change. There is a growing preoccupation that intrudes into the person’s life, skewing their priorities towards, in our case, an illicit drug. With this compulsion come the routines which ensure a ready supply, consumption of the drug becomes less dependent on external

cues and the person becomes less and less concerned about the consequences of their actions.”

For the drug dependant probationer, then, breach, like arrest, might well be an occupational hazard, accepted by both officer and offender as a matter of routine during the difficult and unpredictable road to recovery. Under the terms and conditions of the 2003 legislation, however, the consequences of breach are now set to become increasingly significant, with a term of imprisonment becoming a much more distinct possibility, even if a custodial sentence would not have been warranted for the original offence<sup>iv</sup>. In restricting the powers of the court, the only alternative to custody now available is the imposition of additional requirements - perhaps a group-work condition or a number of hours of unpaid work. For such an approach to have the desired impact, an offender needs to not only comprehend the implications of the so-called 'last chance', but also be capable of mustering the organisational skills to meet these additional requirements. Within probation caseloads, however, there remain a significant minority of offenders whose lifestyles constantly defy their best efforts to honour their commitments and it is these offenders who are likely to be disproportionately affected by this legislation. This suggests the need for improved assessment and targeting of DRRs upon those who are both willing and able to comply and decreased tolerance of non-compliance as a means of ensuring that treatment places are allocated to those who are ready to engage with them. However this may also result in an *overly* cautious approach in which many drug-using offenders who might benefit from it are denied access to 'coerced' treatment. Such an outcome is, arguably, all the more likely in the context of recent moves towards outcome based commissioning of criminal justice services and payment by results.

## Conclusion

Despite the move toward a more punitive response to non-compliance there remains, even now, little evidence to suggest that tougher enforcement leads to either greater compliance or a lower reconviction rate (Hedderman and Hough 2004). Despite this fact, the approach contained in the 2003 Act remains rooted in the now long-standing presumption that offender compliance is most effectively achieved through an increase in deterrence. As Von Hirsch *et al.* (1999, p. 6) have pointed out, however, an increase in penalties may not necessarily produce the desired effect if the target audience "...do not fear the increased penalties, or fear them but have overriding interests (e.g. financial ones) or inclinations (e.g. a drug addiction) favouring offending." Certainly in terms of drug dependency, therefore, the compulsive character of addiction has the clear potential to override the deterrent intentions of the 2003 legislation.

Within a climate dominated by the idea of effectiveness, there appears to have been remarkably little thought given to the issue of enforcement. According to Ellis (2000, p6), "...current thinking on enforcement runs counter to what works principles in two key areas: It lacks clear theoretical underpinning and evidence that it is effective [and it has]...an over-reliance on tough sounding rhetoric which undermines the development of a more effective approach to ensuring compliance..." There is little in the 2003 legislation to suggest that the current approach to compliance or enforcement is any different: although there is an expectation that breach will only occur in the face of wilful or persistent failure to comply (Hansard, 2010), this absence of published data make it impossible to determine whether or not this is happening on practice. In fact, and based on the foregoing analysis, it is tempting to conclude that the point of non-compliance has now become the principal opportunity for the criminal justice system to showcase its punitive credentials. Whilst such a strategy might make sense for a

succession of Governments that have been keen to persuade sentencers that the restrictions of imprisonment can be replicated in the community, the extent to which some probation officers have been persuaded by the idea that breach has the capacity to re-establish and even improve the supervisory relationship has not gone un-noticed (Drakeford 1993). As a number of authors have noted, however, this rehabilitative view of breach is often difficult to defend in the face of the significant penalties and the subsequent hardships placed on offenders (Drakeford 1993, Ellis 2000, Sparrow and Webb 2004) even if the lack of routine monitoring renders these hardships difficult to qualify.

If the therapeutic credentials of breach have always been difficult to defend, then within the context of the current legislation any such assertion seems even less convincing. Drug users, like other groups of offenders living insecure and chaotic lives, require careful handling. Their commitment to the probation service is often precarious at best and there is now good evidence to show that in the absence of what they perceive to be useful and beneficial assistance, their attachment to supervision can be easily and sometimes permanently damaged (Farrall 2002). In general terms, offenders have long histories of non-compliance and not just with the probation service. Indeed, as Hedderman and Hough (2004, p.163) have observed, "...it seems especially optimistic that probation officers will succeed in securing compliance where all others have failed." Assuming the accuracy of this view, the prospect of a more punitive response to breach ought to give serious cause for concern.

An approach to breach which is singularly focussed on the number of absences and which dismisses all other potentially salient features of a case is unlikely to encourage compliance or be regarded as legitimate by offenders (Sparrow and Webb 2004). Whilst recent thinking around effective intervention has accepted that one size supervision is unlikely to meet the needs of all offenders,

enforcement remains strangely fixated with the idea of a one dimensional approach, despite Hedderman's (2003 p. 190) contention that "punishing non-compliance by substituting a custodial sentence should be reserved for those who have shown themselves to be unwilling to comply despite efforts made to assist and encourage them to do so". Based on the current assumption that the driver to effective intervention with offenders is a robust assessment of risk and need, then surely any response to non-compliance needs to be just as firmly rooted in these judgements. It is the assessment of risk and an appraisal of progress, therefore, rather than simply the calculation of absences, which might form the basis of a more flexible approach to enforcement with, logically, a more graduated range of penalties from which to respond (Sparrow and Webb 2004) and greater emphasis upon the use of rewards – such as phased reductions in the frequency of testing, appointments and reviews - to support and reinforce offenders' progress on their orders. As Canton (2008, p. 530) argues, "patience, attention, explanation and negotiation all conduce to compliance and their persuasive force is much more enduring than threat". This is particularly important given recent evidence that ongoing judicial review may be associated with *higher* levels of non-compliance with DRRs (Gayateng et al., 2010) or other forms of community supervision (Jolliffe and Farrington, 2009), possibly because the more intensive scrutiny and surveillance of offenders increases the likelihood of infractions being brought to light. Indeed, as Nolan (2001) has argued, problem solving court practices can be conceptualised as encapsulating a *new* form of rehabilitation in which private issues are exposed to judicial exploration and oversight and which makes possible the expansion of judicial authority, resulting in "the expansion of the state's supervision, monitoring and control over offenders' lives because they are being "rehabilitated"" (Burns and Peyrot, 2003, p. 434). This highlights the need for appropriate safeguards to ensure procedural fairness and renders arguments for increased tolerance and empathy with respect to the enforcement of orders all the more persuasive.

The degree to which the law and order agenda has displaced health concerns in the field of drug dependency might lead some to regard harm minimisation as an outdated mode of intervention. Such a view however is fatally flawed; in the face of a potential HIV epidemic harm minimisation provided nothing less than an inspirational opportunity for clinical practice and, it should be noted, one which yielded a significant degree of success. The Home Office is undoubtedly right in its assertion that drug users present a risk to the public and in the process of funding their habit they doubtless do significant social harm (Holloway and Bennett 2004, Holloway *et al.* 2004, Allen 2005). This truth does not take away from the fact that drug users, certainly at the heavy end of abuse, also experience significant personal harm (Mills 2004). Unfortunately the compulsive nature of drug dependency renders a simplistic deterrent based approach to recovery almost entirely useless. By its very nature the process of becoming drug free has an element of failure built into it and as a consequence more than the distinct likelihood of breach, especially where criminal justice agency expectations of abstinence conflict with drug agencies' tolerance of maintenance, giving out conflicting messages regarding what is required of offenders (National Treatment Agency for Substance Misuse, 2006; Department of Health (England) and the devolved administrations, 2007). Whilst there is little evidence to suggest that imprisoning drug users brings about long term recovery, there are reasons to believe that a therapeutically inclined court, empowered with sufficient flexibility to respond to changing circumstances of the drug user, can contribute to successful behavioural change (McIvor 2010b). It seems doubtful that to date the 2003 Criminal Justice Act has moved the British approach to the treatment of drug misusing offenders in this direction. In the curtailing of judicial discretion, in the restricting of reviews of DRRs to those given longer orders and in the failure of Section 178 powers of review to be extended beyond a handful of problem-solving courts, the 2003 Act limits the therapeutic possibilities of community

supervision. Indeed, in its current incarnation the legislation has the potential to propel drug users toward custody well before the full range of alternatives has been sufficiently explored.

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<sup>i</sup> In practice, however, there has been evidence of higher breach rates among women given DTTOs (see, for example, Scottish Government, 2010). The reasons for non-compliance are unclear but may include responsibilities for dependent children, the influence of drug-using partners and the absence of specific treatment and other appropriate services (Malloch and McIvor, 2011).

<sup>ii</sup> In a similar attempt to increase the range of offenders who could access court-mandated drug-treatment, a pilot scheme (referred to as DTTO II) was introduced in Scotland in 2008 aimed at lower tariff offenders. Evaluation of the pilot revealed that almost one half of those given orders were women (compared to fewer than one in five of those given 'standard' DTTOs) (McCoard et al., 2010).

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The levels of non-compliance and revocation of DTTO IIs have not yet been documented but given their higher levels of breach of 'standard' DTTOs the significant over-representation of women on DTTO IIs gives some cause for concern.

<sup>iii</sup> It should be noted that the dedicated drug court evaluation was not able to indicate what the outcomes were for offenders who were not subject to continuous review.

<sup>iii</sup> Although the government has indicated that imprisonment is intended to be imposed only in the event of wilful and persistent failure to comply (Hansard, 2010) the absence of published data on enforcement and compliance makes it impossible to ascertain the extent to which this is actually happening.

**Word count: 6919 excluding references**  
**9581 including references**