



A Contribution Position Paper from OFAP's International Observatory for Family Concern
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Making the punishment fit the crime options for tackling less serious drug and drug-related offending

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Introduction

The United Nations Office on Drugs and Crime (UNODC) has reported that the data it has gathered for its most recent United Nations Survey of Crime Trends and Operations of Criminal Justice Systems covering the year 2010 indicate that the only crimes showing an upward trend were drug related. It has also reported that up to 50% of the prison population are drug misusers. In young offenders 95% have a mental illness with 80% experiencing co-morbidity, that is, mental illness and a substance abuse problem. In addition to this population of offenders, a significant number of those on pre-trial detention are substance misusers. Overall, the cost of imprisonment and the high levels of recidivism place a significant burden on public expenditure and on community safety.

At the same time, unlike many other areas of criminal and offending behaviour, there is powerful evidence that targeted interventions aimed at preventing progression to regular and dependent drug misuse and at providing treatment and recovery services to offenders with drug problems, can significantly reduce offending. Such interventions are also beneficial in reducing the morbidity and mortality associated with drug misuse.

The criminal justice system is often the first point of contact drug misusers have with any service which may be concerned about their drug use. It is an opportunity for effective interventions which could have an impact both on the individual and on the wider community with benefit to all stakeholders. This Position Paper is intended to provide information on the requirements of international law, as expressed through the international drug control conventions and their official commentaries, to examine the possible options available to divert drug misusing offenders from the criminal justice system or provide alternatives to custodial sentencing and to propose other measures which can support long term recovery of offenders and reduce the likelihood of re-offending. It will also present a number of examples, largely drawn from developed countries, which appear to have had positive results both in terms of drug misuse, offending and recovery.

International Obligations

Countries have, through ratifying and acceding to the international drug control conventions of the United Nations, agreed “to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs” and to take such legislative and administrative measures as may be



necessary to give effect to and carry out the provisions of the Convention within their own territories.

There are three drug control conventions: the Single Convention on Narcotic Drugs 1961 as amended by the 1972 Protocol; the Convention on Psychotropic Substances 1971, and; the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. Each Convention has a different focus and some different provisions but share a broadly similar approach to the requirements for regulating and controlling the production, use and distribution of substances under international control. It has mistakenly been said that the Conventions require a prohibition on narcotic and psychotropic substances. In fact, all the Conventions recognise that the medical use narcotic and psychotropic substances “continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure their availability”. They therefore offer a variable regulatory framework intended to ensure availability for medical and scientific purposes while using the criminal law to tackle illicit production, distribution and supply. The UN Commentaries for each of the Conventions were produced to assist countries interpret the Conventions and design their own national laws to meet their international obligations. There is no dispute that all three Conventions require states to treat illicit production, distribution and possession of controlled drugs as a criminal offence. However, they also make a distinction between what are considered serious crimes requiring more severe penalties and lesser offences where prosecution, conviction and or punishment might be replaced by alternative measures. The 1988 Convention went further in that it provided for alternatives to be available to all drug law offenders as well as to drug users. The distinction it made was that treatment, education, aftercare, rehabilitation or social reintegration could be made available to drug offenders in unlawful possession of drugs as an alternative to or in addition to prosecution, conviction and treatment. For all other drug offenders, these measures were in addition to prosecution, conviction and punishment.

It is clear, therefore, that under the international drug control conventions countries have the duty to use the criminal law as one element to control the production, supply and possession of drugs. They are not, however, required to prosecute, convict or punish drug users, except in serious offences, and in all cases they may offer treatment, education, aftercare, rehabilitation and social reintegration as part or the whole of their response to an individual drug user breaking the law. It is for countries to decide how to implement the provisions of the Conventions “subject to their constitutional principles and the basic concepts of their legal system”.

As well as the obligations established under the drug control conventions, countries are guided by other UN conventions and by Political Declarations and resolutions adopted by the UN General Assembly, the Economic and Social Council and the Commission on Narcotic Drugs.

The 20th UN General Assembly Special Session adopted a Political Declaration in which it recognized that demand reduction was an indispensable pillar in the global approach to countering the world drug problem. It also welcomed the Guiding Principles on Drug Demand Reduction, which were subsequently adopted by the General Assembly. The Guiding Principles specifically call upon countries to promote reintegration of drug using offenders through the use of alternatives, to make provision for treatment and rehabilitation



available within the criminal justice system and to develop close cooperation between criminal justice, health and social systems. The High Level Segment of the 52nd session of the Commission on Narcotic Drugs adopted a Political Declaration and Plan of Action which specifically addresses “Drug Use and Dependence Care in the Criminal Justice System” It notes that there are limited alternatives available and treatment services within the system are frequently inadequate and proposes a number of actions which countries should take to address this situation. A number of resolutions adopted by the Commission on Narcotic Drugs have also called for improved provision of prevention, treatment and rehabilitation services, and be implication, improvements in the provision of these services to drug using offenders.

The 55th session of the Commission, held in March 2012, adopted resolution 55/12 specifically addressing the issue of drug using offenders. This resolution refers to the provisions in the Conventions, recalls the Political Declarations and Plans of Action referred to above and also refers to more general declarations and resolutions on the use of alternatives to prosecution, conviction and punishment adopted by the UN Congress on Crime Prevention and Criminal Justice and the Commission on Crime

Prevention and Criminal Justice.

Within the general caveats of the restrictions imposed by constitutional and legal frameworks the resolution encourages countries to adopt “the full implementation of drug dependence treatment and care options for offenders, in particular, when appropriate, providing treatment as an alternative to incarceration”. It also encourages countries which have implemented effectively such measures to provide technical assistance to other countries, the development of better coordination and cooperation between criminal justice, social and health care systems and the inclusion of alternative approaches to prosecution and imprisonment for drug-using offenders in their national drug control strategies. Finally, the resolution requests UNODC to provide a report on implementation of the resolution to the 56th session of the Commission.

Finally, the Commission, and through it the UN General Assembly, together with the World Health Organisation, UNAIDS, the Human Rights Council and the Office of the UN High Commissioner for Human Rights, amongst others, have declared that drug misuse is primarily a health issue which should be dealt with in the context of individual and public health. To this end, the criminal law and the use of imprisonment for offences committed by drug misusers should be limited to the maximum extent possible. This is not to remove responsibility from a person for the offence they have committed, nor is it to suggest different approaches to the punishment of drug misusers compared to the punishment of other offenders convicted for the same offence. Rather, it is to suggest that the opportunity provided by contact with the criminal justice system should be used to the fullest extent possible to direct the misuser into education, treatment and recovery services. The drug misusing offender may be convicted through the normal judicial process. It is the disposal following conviction which may vary.

From this general review of international law, as stated in the drug control conventions, and the interpretation of this law as provided in the commentaries, Political



Declarations and Plans of Action and resolutions adopted by consensus internationally, it is clear that there is strong encouragement to use alternative measures and to provide education, treatment and recovery services within the criminal justice system. A number of countries have now adopted measures and systems and others are in the process of doing so. There is the opportunity for many more countries to review their own arrangements to see how they might engage criminal justice, social and health care systems working together to reduce drug misuse and reduce crime.

Proportionality and Differentiating the Target Populations

Broadly speaking, the purpose of the criminal law is to keep behaviour within acceptable boundaries and to sanction breaches of behaviour which are generally unacceptable. This is not a fixed process and laws have been adjusted over time to reflect changes in values. So, for instance, what is or is not a criminal offence has changed and the punishments appropriate to offences which remain on the statute book have changed. A number of principles have been developed which have sought to guide the legislative process and the implementation of enacted criminal law. A major principle has been that the punishment of an offence should be proportionate to the harm occasioned by the offence. The United Nations Office on Drugs and Crime (UNODC) has recently issued a Guidance Note "UNODC and the Promotion and Protection of Human Rights". In this document it argues that a number of practices are disproportionate and raise human rights concerns. These include the compulsory detention without consent in long term centres and the forced detoxification of drug misusers. These are not alternative measures within any meaning of the drug control conventions and entry into such centres is commonly neither subject to clear due process of law nor based on administrative provisions. Moreover, the treatment provided is rarely evidence based and in too many instances such centres are implicated in reports of neglect, maltreatment and even torture. The Guidance Note further states that the severity of penalties must not be disproportionate to the criminal offence.

Imprisonment should be used as a penalty of last resort and the choice between penalties should take into account likelihood of rehabilitation. With specific reference to drug prevention, treatment and care the Note has a number of key points relevant to drug misusing offenders:

- Responses to drug law offences must be proportionate. Serious offences, such as trafficking in illicit drugs must be dealt with more severely and extensively than offences such as possession of drugs for personal use. For offences involving the possession, purchase or cultivation of illicit drugs for personal use, community-based treatment, education, aftercare, rehabilitation and social integration represent a more effective and proportionate alternative to conviction and punishment, including detention
- Criminal law should not be an impediment to access to drug dependence treatment
- Drug-users when deprived of their liberty are particularly vulnerable and must receive appropriate medical care, including evidence-based drug dependence treatment
- Drug treatment should be voluntary and subject to prior full informed consent. Compulsory treatment may only be applied in exceptional situations of high risk for self or others, and for defined short periods that are no longer than strictly, clinically



necessary. Such treatment must be specified by law, follow transparent procedures and be subject to medical and judicial review

The approach articulated by the Guidance Note, and through Commission resolutions and reports from the Office of the UN High Commissioner for Human Rights clearly argue that compulsory detention without due process and compulsory detoxification are disproportionate responses and unacceptable. They also argue that any sanctions which are imposed should not be more harmful than the offence, for instance, that of unlawful possession for personal use should not merit a custodial sentence. Finally, proportionality of response requires that consideration be given to the likelihood of rehabilitation and avoidance of future offending. There is now very strong evidence for the effectiveness of a number of drug treatment interventions to achieve rehabilitation and a significant reduction in re-offending.

Proportionality also requires differentiation of the target populations when drug laws are applied. These may be considered in five main groups. Occasional / social and non-problematic drug users This group probably represents the largest group of drug law offenders, although they may not represent the largest group prosecuted. Certainly the evidence from studies in Europe and N. America suggest that the number of prosecutions for unlawful possession are a small proportion of the number reporting illicit drug use in the previous 12 months. Nevertheless, this population might be considered a prime target group for the use of alternatives to prosecution, conviction or punishment. The objectives for dealing with this population would be to avoid re-offending and to avoid generating additional harms for the individual and the community which might mitigate against successful achievement of the first objective. For instance, if a recorded conviction for a minor offence by a young person results in them losing the opportunity to enter further education or to take up / retain employment, this is a significant harm and it may have adverse consequences for future behaviour. A number of alternative options are available. These include cautions and warnings or fixed penalty fines, none of which are entered in a criminal record, arrest referrals where prosecution is deferred and may be abandoned, community sanctions and supervised release within the community. There is strong evidence that warnings and arrest referrals, using the model of brief alcohol interventions, can have a significant impact on drug use and offending behaviour for this group and that these are cost and socially effective responses.

Social / small scale producers and dealers

This population group consists primarily of illicit drug users producing or procuring drugs for their personal use and for a small circle of friends. They are not involved in drugs as a business but as part of their social activity. Often prosecution and punishment has not adequately distinguished between this level of activity and that of those involved in commercial activities where production and supply is their source of income. The objectives for this group would, therefore, be very similar to those for occasional / social users although the response options may incline more towards those with greater control such as arrest referral and supervised release.