From England

FROM CONSENT TO COMPLIANCE

by Malcolm Lacey

As we celebrate the centenary of the Probation Service, it is worth a moment's reflection on the central concept of the Probation of Offenders' Act 1907. It is not the famous injunction to probation officers to "advise, assist and befriend" the offender, important though that has been in guiding, and often inspiring, probation officers in their work. It is, rather, the opportunity given to the defendant to enter into a recognizance with the court to be of good behaviour. A recognizance is a bond or obligation of record entered into before a court of record or a magistrate, binding a person to do a particular act.

> *Where any person has been convicted on indictment of any offence punishable with imprisonment, and the court is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.*[1]

The Act is quite specific that the order is *"in lieu of imposing a sentence of imprisonment"* or, as it is often expressed *'instead of punishment'*. This is emphasised in the wording *"the court may, without proceeding to conviction"* make an order.

It is also quite clear that such an order can be made only if the defendant *enters into a recognizance* which was usually interpreted as the defendant giving *his or her consent*. Recognizance is stronger than consent, which can be seen as a fairly passive acknowledgement of the conditions the court was laying down. Recognizance entails an active decision to become party to a contract that the word "entering" implies.

It is also clear that recognizance is the primary element in the probation order:

> *A recognizance ordered to be entered into under this Act shall, if the court so order, contain a condition that the offender be under the supervision of such person as may be named in the order during the period specified in the order and such other for securing such supervision as may be specified in the order, and an order requiring the insertion of such conditions as aforesaid in the recognizance is in this Act referred to as a probation order*.[2]

It is from this that the duty to advise, assist and befriend originates. It is the offender who is in control of the rehabilitation that is the joint aim of both court and the offender. This makes it a little easier to understand why probation officers began to use the word *client* - the offender could turn to the probation officer for help in achieving his other aim of maintaining good behaviour but the probation officer could never be in charge of that process (Gregory, 2006). It is analogous to anyone going to a solicitor or an architect; the client knows what he or she expects to achieve; the professional has the knowledge and technical know-how on how that aim may be carried through. As Jessie Taft (1962) expressed it, *"my knowledge and skill avail nothing, unless they are accepted and used by the other"(*p.159) [3]

The probation officer had a complementary role in relation to the court - to whom he (it was always he in those early days) was directly and personally responsible. He reported to the court any breaches of the order and made recommendations about releasing the offender from the order if it was felt that there had been substantial and genuine progress.

It may be that, in a wish to help offenders and, sometimes, to protect them from the consequences of their own actions, that this hard edge was neglected and they were allowed to escape the demands of the order - demands which they had entered into agreements to keep. Probation officers should never forget that their role is to represent the court, acting as its agent in bringing home the expectations of society. This challenge, even confrontation, is the most valuable thing that they have to offer because it allows offenders to work out, in a relatively safe relationship, the clash of values that landed them in trouble; the offender wants *"someone who will permit him ultimately to find himself....without interference or domination; someone who will not be fooled, someone strong enough not to retaliate"* (Taft, ibid. p. 165).

Probation officers who were confident in maintaining their role could also exercise a degree of discretion, something the Courts recognised as necessary if the helping process was to be successful.

The issue of consent was a very live one around the time of the Act. There was, for example, a lively debate around National Insurance - was it right to make contributions compulsory or should it be a voluntary scheme? Some eight years after the Act, the War Cabinet was beset by a major disagreement over the issue of conscription; the same issue of compulsion versus consent and one which, in the end, enabled Lloyd George, who was in favour of conscription, to oust Asquith from the premiership.

There is a remarkable memorandum written in 1915 by an unknown civil servant in the cabinet office, given as footnote in a political history of Britain. It sets out the conditions for mobilising consent. In brief, *'it is impossible to secure the performance of any new duty by the individual member of the population unless the particular act of fulfilment is closely linked up with the personal self-interest of the individual'*. More emphatically, *'The most radical fallacy ……is the assumption that the individual …… can be brought to perform even the simplest operation by being subjected to a legal obligation to do so'*. And finally '*No system of legal obligation and penalties, even if the individual were aware of them, will induce or compel the general population to take steps which from their point of view are difficult and complicated, and the point and importance of which they cannot realise. This is not due to any lack of patriotism or of respect for law, but has its cause deep down in the genius of the nation, the freedom of its private life from bureaucratic incursions, its unfamiliarity with and distaste for formalities of procedure and "red tape"'*. Such a system could only be successful when enforced, as in Germany, by a rigorous and ubiquitous police system upon a nation accustomed to being regulated in all the minor matters of life.[4]

While National Insurance and conscription may seem to be worlds away from the establishment of the Probation Service, the fact that the same underlying issues were being discussed at the same time, and in such widely varying contexts, explains why the Probation of Offenders Act is so clear and principled a piece of legislation.

The memorandum expresses a number of insights which, despite the different context of dealing with people who had offended, are worth highlighting.

Making the order has to appeal to the person under supervision in a positive way, beyond simply avoiding imprisonment. "*No system of legal obligation*

and penalties, even if the individual were aware of them, will induce or compel (him or her) to take steps which from their point of view are difficult and complicated, and the point and importance of which they cannot realise." How much more is this likely to be true of people who have offended who, in the main, are more impulsive, less able or willing to plan ahead, less likely to abandon present pleasure for future reward. And this is true even if well over half of the present prison population would like to give up criminal behaviour on release if they could see their way to achieving it.

Probation officers would often argue that the consent that defendants give is so constrained - it is just a way of escaping imprisonment - that it is unreal to assume that this agreement [of the offender] is other than superficial and expedient. While there is some truth in this, it does not preclude, however, a genuine negotiation with the offender about how he or she might be helped through discussion or learning social skills or being supported through programmes of formal education or training. If the offender accepts none of these - and it need only be a minimal agreement to engage - then there is no basis for making the order.

In sum, the operation of the recognizance as used in the Act is an acknowledgement of the psychological truth that individuals have to be committed to and engaged in any process of personal change. It cannot be imposed by any external force, however powerful. It also signals a philosophical position of great importance: while the state has the power and the authority to punish, its ability to get people to change is limited. Those states that act on the assumption that people must be made to conform become increasingly dictatorial and intrusive. We may not have the confidence, nor the priggishness, to express it as forcefully as the anonymous civil servant - who did and in doing so put a finger on the alternative to consent and its consequences - a pervasive and expanding system of regulation - or, as probation officers experience it, the measurement of their effectiveness through adherence to disciplinary procedures rather than changes in behaviour.

Times are now very different. When the Act was passed, well over two thirds of individuals appearing before the courts were sent to prison and the establishment of the Probation Service was part of the movement to develop a more effective and humane penal policy. Now, those proportions have more or less reversed (though the recent rise in the prison population may cast doubts on how long that will be the case). It is also true that the Act came into being when the level of recorded crime in society was relatively

low and was not the subject of continuous media and political attention, except perhaps in the case of murders and the controversy over the death penalty. And this remained the case with its successors up to the Criminal Justice Act 1948, which enshrined Probation values until the alterations in the 1991 Criminal Justice Act.

Since the end of the 1950s, British society has experienced a continuing rise in the levels of crime.[5] Consequently, the thrust of criminal justice legislation was to devise new ways of dealing with offenders that did not entail going to prison - a genuine belief that rehabilitation in the community was more likely to reform offenders and, happily, it was cheaper. This continued right through to the 1991 Criminal Justice Act which was quite explicit in making the presumption that offenders would be punished in the community unless the offence was "so serious" that only prison would do.

The 1991 Act was, for the most part, welcomed by the Probation Service because it seemed to be a fulfilment of its own belief that rehabilitation in the community was the most sensible and effective way of reducing criminal behaviour. The price, and it was a heavy one, was that the offender no longer had to give his or her consent to the order. Thus, the probation order became the punishment. It is difficult to see how it could have been otherwise if it were to be presumed that a community order would be the punishment for the crime unless it were so serious that a custodial sentence was inevitable. In this new framework, it would have been unrealistic - improper even - to suppose that courts would have to obtain the consent of the offender in order to punish him.

In the consultations and arguments that were carried on in the preparation of the 1991 Act (which in themselves were a good model of negotiating consent) the Probation Service focussed on the difficulty of combining punishment with the traditional practice of advising, assisting and befriending. There were vociferous protests at the thought of being "in the punishment business". The Minister of State at the time, John Patten, responded by ridiculing probation officers for not accepting, as everyone else did, that the probation order was in itself a punishment and to stop deceiving themselves. Looking back, this focus on punishment by both sides in the argument was a lost opportunity. Both had forgotten that the traditional probation order had at its heart, a recognizance by the offender that was *instead of a punishment* and that he or she could be punished for going back on the deal.

It seems, however, as though everyone assumed that probation orders would go on much as before rather than thinking through a new and very different philosophy which would demand major changes in practice. To begin with, there is a shift from the designation "*client*" to... to what? It seems that "supervisee" is too awkward so that all organisations fall back on to "offender" - which has the curious effect of confirming an individual's offender status when the whole objective of the order is to help him or her to cast it off. Within this context, it is no longer strange or illiberal to consider uniforms for offenders carrying out unpaid work. Whereas once convict garb with its distinctive arrows was dispensed with because it demeaned people; now the chair of the Commons Home Affairs Committee, John Denham, speaks of bringing something like it back with an air of its being so obvious why would anyone object? (It is worth noting here that the American chain gangs working in orange overalls, on which this proposal is based, are not undergoing a community sentence but a prison sentence).

Another effect of the new order is that it has to become, first and foremost, a disciplinary measure. The probation officer has to ensure that the terms of the order, contained in national standards, are complied with. Compliance is a long way from consent and the word itself has an undertone of misrepresentation, an outward show belying an actual lack of acceptance. That in itself does not matter if the aim is simply to ensure that the offender "does his time". Nevertheless, it raises further matters.

The first is that the orders are still generally spoken of as rehabilitative. Rehabilitation implies consent, and, an 'in' word of the moment, *'choice'*, a *"buying into"* a process of change. An informal recognizance seems to have crept in through the back door! What are the practical implications of this for practice likely to be? And how does the probation officer set out for the offender the non-negotiable elements of the order alongside what is, in effect, a voluntary contract.

The second is the question of sanctions. It is clear that a court punishment cannot be flouted and that the exercise of discretion must be limited. This seems to have led to a high proportion of people under supervision ending up in prison for an offence which in the first place did not seem to merit imprisonment. It is significant that there is now a government proposal to enable probation officers to impose a sanction without going back to court. Discretion also seems to be creeping in at that back door.

The third is that the offender is no longer in charge of the process in the way that was conceptually clear under the old arrangements. Now, a probation officer has to enforce compliance, whether or not that fits in with the rhythm of rehabilitation.

And, the most significant shift of all is that the Probation Service's primary task is the protection of the public. It has an enforcing rather than a mediating role. This becomes even clearer with the increase in the number of prisoners released on the basis that they will be closely supervised. As a recent Panorama programme has shown, some practice does not meet public expectations of what "close supervision" means. If we go back to the 1907 Act, it speaks of *"trivial offences"*, *"extenuating circumstances"* and *"nominal punishment"*. It clearly did not expect that probation officers would be supervising dangerous and "prolific" offenders. Over the years, skills and confidence grew, so that more and more serious offenders were being supervised and "high risk" procedures were developed. But that kind of supervision was, as it were, grafted onto the traditional model of office and home visits with, sometimes, residence in a hostel. One has to ask whether the kind of supervision that is now required has really been re--thought *de novo*? For example, it really cannot be adequate for people who have committed predatory sex offences to be able to roam freely, having only to sign in at set times. Nor can it be right that the main burden of contact should rest with hostel staff who have not had a professional training. Recently, there have been a number of high profile cases causing justifiable public concern about people released on parole who have then committed further murders. Barnardo's has just published a report on an experiment in which sex offenders were both monitored by tagging and by the use of lie detectors, which seems to have led them to be less evasive because they know there is a greater likelihood of being found out. The aim is to increase public protection but, perhaps, used imaginatively, it could be the start of an engagement leading to taking some personal responsibility for their own behaviour, rather than trying to subvert the process. We seem to be witnessing, in a fragmented way, the beginnings of a proper debate about practice in the light of the new demands being placed on the Probation Service; in turn, this raises questions about what can properly be expected of supervision.

The aim of professional training is to develop the critical judgement (not competences, however useful they are) that needs to be at the centre of a Probation Officer's practice. Such judgement is displayed in two key

characteristics: the assessment of what is going on in a given case and what can be done about it and a stance of readiness for action which will incorporate both empathetic understanding and sceptical - non-trusting - scrutiny. To encourage a person to change, the probation officer has to make a genuine attempt to enter into and understand the world of the person under supervision and, contemporaneously, subject them to an alert and sceptical scrutiny. It is the task of the senior management - which should be its professional leadership of the Probation Service - to manage the tension between that empathy (and the ever present danger of 'capture' and of minimising or ignoring signs of danger) and that non-trusting scrutiny.

The role of the probation officer can be seen more clearly in relation to post-prison supervision. If there is to be a "seamless" connection between what offenders experience in prison and under supervision, then the only person who can manage this is the probation officer. At the moment, the lead responsibility seems to be lodged with the prisons (Pryor, 2004). It is hard to imagine a more perverse arrangement, where the assessment is carried out by under-trained and often poorly motivated staff who have no responsibility for what happens on release. It seems perfectly obvious that the responsibility for ensuring a plan that extends from the prison into post-prison supervision should be lodged with the probation officer, who, through motivation and training, possesses the critical judgment and the "stance" to implement the programme. The prison should be *accountable to the probation officer*, formulating in conjunction with him or her the way in which the prisoner should be prepared for release. The probation officer will also be accountable for putting into operation the post-release plan. This implies, not simply the regionalisation of the prison estate but also the allocation of sufficient resources to enable probation officers to travel to see staff and prisoners during the sentence. The Home Office has never faced up to the financial and time implications of this.

How has Probation got into the position where some of the least experienced staff should so often find themselves responsible for some of the most dangerous people? It suggests that the mind set of the old consensual order persists into the new duties of public protection. One can only hope, therefore, that the centenary of the founding of the service may provide the spur to develop a new philosophy, centred on a proper understanding of dangerousness that can lead and guide practice for the new century.

NOTES

1 Probation of Offenders Act 1907 S. 1.

2 Ibid. S.2.

3 Jessie Taft; Virginia P Robinson (1962) Jessie Taft: Therapist and Social Work Educator - a professional biography (Philadelphia: University of Pennsylvania Press, 1962).

4 Middlemass, K. (1979) Politics in Industrial Society London, Andre Deutsch Footnote, p.84 Paperback Edition. 1980.

5 Recently there has been some levelling off and even decline in the incidence of the more serious crimes (Walker et al, 2006 inter alia). However, the general public distrusts these statistics. This is not surprising since horrible crimes, though rare, get extensive media coverage and in many neighbourhoods there are high levels of intimidatory behaviour.

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