Briefing

Delivering a Smarter Approach: Piloting problem-solving courts

Centre for Justice Innovation

Commitment in the white paper

Page 12 of 'A Smarter Approach to Sentencing' states:

"We will bring forward plans to **pilot problem-solving courts, which will incorporate a number of evidenced problem-solving components such as regular judicial monitoring and the use of graduated sanction and incentives**, for offenders with a high level of needs and often prolific offending behaviour. We intend to pilot these problem-solving court models in up to five courts."

Purpose of this paper

The White Paper sets out the Government's intention to pilot five problem-solving courts which will focus on three distinct areas: substance misuse; domestic abuse; and the specific, complex needs of vulnerable female offenders.[1] It highlights that previous attempts to pilot problem-solving courts in England and Wales have not fully embraced the evidence-based models developed internationally, most specifically regular judicial monitoring and the use of graduated sanction and incentives, for individuals who offend with a high level of needs and often prolific offending behaviour.

The Centre for Justice Innovation has a long and deep interest in the development of problem-solving in courts. We are the national provider of support to Family Drug and Alcohol Courts (FDACs), a family problem-solving court model,[2] and have been a prominent supporter of problem-solving in criminal courts across the United Kingdom in part due to our partnership with the Center for Court Innovation, the leading proponent of problem-solving courts in the USA.

We are very supportive of the White Paper's commitment to new pilots and, based on our experience and expertise in this area, we outline the key lessons that must guide the implementation of this reform— most importantly, to use this opportunity to embrace and build from existing innovation on the ground, to provide the pilots the best chance of success and sustainability.

Background

Problem-solving courts

Problem-solving courts are not one thing: they are a diverse family of court models, albeit with shared characteristics. They are used in adult criminal justice, youth justice and family justice settings. Their common familial features are that they (i) specialise in a specific set of issues or around a specific target group; (ii) integrate the court process with a multi-agency approach that rests on a collaborative intervention and supervision; (iii) use the court to hold individuals and agencies to account through judicial monitoring; (iv) endeavour to create a procedurally fair environment; (v) focus on improving outcomes.[3]

As the White Paper outlines, there is a broad and developed international evidence base on different types of problem-solving courts.[4] The strongest body of evidence is for adult criminal substance misuse treatment courts, which seek to reduce the substance misuse and re-offending of offenders with substance misuse needs who are facing custody.

Over the past ten years, there has been extensive work on why it is that different models of problem-solving courts work to reduce re-offending. The research suggests that the paramount factor that drives better outcomes is the relationship that builds between the judge and the offender developed through procedurally fair judicial monitoring[5]: offenders' perceptions of fair treatment are as important, if not more important, than both the decisions the court reaches and the treatment a problem-solving court can deliver. In turn, effective judicial monitoring rests on certainty and clear communication. These factors are more important than the severity of the sanctions which the court can bring to bear: there does not seem to be a link between more severe sanctions and improved effectiveness.[6]

A number of other jurisdictions, including Scotland, Northern Ireland, Australia, Canada, New Zealand and the USA, deploy problem-solving court models to promote rehabilitation and provide alternatives to custody. England and Wales is significantly behind other jurisdictions, including others within the UK, in using this type of approach.

Piloting problem-solving courts effectively

As the Ministry takes forward the five problem-solving court pilots, we strongly urge them to have regard to the evidence base, the existing effective practice already out there across the UK and to the need to provide the pilots with effective implementation support and a tailored evaluation strategy.

1. Pilot three distinct models of problem-solving court practice

The White Paper highlights that, in 2016, a problem-solving court working group, which was established by the then Lord Chancellor, Rt Hon Michael Gove MP, and the Lord Chief Justice, concluded that new problem-solving court pilots should be tested in England and Wales. The core components of these would include:

- regular reviews of progress, overseen throughout by a single judge;
- graduated sanctions and incentives;
- judicial power over breach decisions.

While these principles should be common to all the pilots, we strongly recommend that the Ministry of Justice embrace both the evidence and extant practice and separately pilot distinct approaches for the three target groups it identifies in the White Paper: (i) offenders with substance misuse needs facing custody; (ii) domestic violence perpetrators; and (iii) female offenders at risk of short prison sentences. All of these target groups merit their own specific approaches, each of which have their own distinct aims and will require a distinct approach.

Treatment courts as an alternative to custody

Over the last 15 years, a robust and extensive evidence base has developed which indicates that, when properly implemented, adult drug courts are effective at reducing reoffending and drug use. There have been several meta-analyses on the efficacy of adult drug courts in the United States. These meta-analyses demonstrate that drug courts consistently show better re-arrest or reoffending rates compared to randomized or matched comparison samples of drug offenders who were on other forms of probation or who had had their cases heard in traditional courts. These studies also show a marked decrease in drug use, as well as improvements in other outcomes, such as levels of alcohol misuse. We therefore suggest piloting a drug/

treatment court model at three Crown Courts. These should aim to draw people out of short to medium length custodial sentences (between 0-24 months' custody), by targeting repeat and prolific acquisitive offenders who have substance misuse issues and providing access to treatment and other services to improve their well-being.

The evidence base, as highlighted by the 2016 working group report, is strongest around this cohort. Research shows that the biggest gains can be made by targeting higher risk / more prolific offenders, and where the problem-solving route is an alternative to significant custodial sentences. Entry into the pilot should be only on a guilty plea, and guided by a commonly agreed set of eligibility criteria.

These courts should embrace the full spectrum of new powers (see below) and integrate them with high quality substance misuse services in areas with well-developed police/probation joint working arrangements. It will be especially important to create a clear set of graduated incentives and sanctions that the judge can deploy to motivate compliance within their judicial monitoring. The court would regularly review the probationer's progress. The review would deploy consistent judicial monitoring, with the same judge reviewing progress on a regular basis, to hold probationers to account. The multi-agency supervision team, possibly based on existing Integrated Offender Management (IOM) approaches,[7] would use these reviews to report on progress at the review hearings and adjustments could be made more flexibly, either to reward progress or to provide additional restrictions. The reviews would be used as a way of clearly communicating, and deploying, a set of graduated sanctions and incentives, including the ability to 'step up' and 'step down' the frequency of reviews or drug tests, as well as incentives like verbal or written praise, vouchers, certificates and 'graduation' ceremonies on successful completion.

The domestic abuse court pilot

It is important to recognise that, unlike many other problem-solving courts, the focus of domestic abuse problem-solving courts is primarily on victim safety, and not just on offender rehabilitation. The evidence base on domestic abuse courts strongly suggests that domestic abuse courts are complex interventions, often with multiple and overlapping aims, including: (i) faster listing of domestic abuse cases; (ii) improving victim satisfaction with the court process; (iii) improving victim safety; (iv) improving victim well-being; (v) increasing the meaningful resolution of cases (which may include dropping charges if reasonable alternative resolutions have been found); and (vi) reducing re-offending.[8] While there is promising evidence that problem-solving domestic abuse courts can result in significantly less repeat violence by the offender than comparison victims (using multiple measures of re-victimisation),[9] there is also evidence that they significantly increase the likelihood and severity of penalties for noncompliance with sentencing conditions. [10]

Based on this, we suggest that a domestic abuse pilot should have a triple set of aims of a better court process for victims, improved victim safety and holding perpetrators to account. It will not seek to reduce the use of custody. The domestic abuse court could operate at magistrates' court level, building on a functioning Specialist Domestic Violence Court (SDVC), as endorsed in the 2016 working group report. This will mean retaining two existing features of SDVCs: (i) fast-tracking DA cases into specialist hearings and (ii) providing victims with specialist support and advocacy. Crucially, the pilot should add to the SDVC model by incorporating post-sentence judicial monitoring, holding offenders accountable and swiftly responding to non-compliance and/or increased risks to the victim. We assume entry into the judicial monitoring part of the pilot will NOT be based only a guilty plea, as we would want to hold accountable perpetrators who were found guilty after trial.

This court could embrace the new breach powers, graduated sanctions and incentives and integrate those with strong links with victim services and other DA-focused services. As it is at a magistrate court level, the pilot should either be presided over by small bench of specially-trained magistrates with intensified sitting patterns, or a district judge.

Female offender court

Women are a small minority of offenders, accounting for 15% of the probation caseload and 5% of the prison population.[11] However, their needs profile differs from that of male offenders in a number of ways. They are more likely to have experienced trauma: 53% of women in prison report having experienced emotional, physical, or sexual abuse as a child, compared to 27% of men and a similar proportion report having been victims of domestic violence.[12] They are more likely to be primary carers of children: a 2013 study found that six in ten women in prison had dependent children and one-fifth were lone parents before imprisonment.[13] Their offending is more likely to be driven by their relationships: the same study found that nearly half of women prisoners (48%) reported having committed offences to support someone else's drug use, compared to 22% of male prisoners.

Based on the evidence of women's distinctive needs, and the impact of gender-specific approaches, we have long held that a problem-solving court approach for female offenders who have complex needs or are at risk of custody has the potential to reduce reoffending and address criminogenic needs. We see a strong theory of change for a specialised approach informed by evidence-led trauma-informed and gender-responsive practice which responds to the distinctive needs of women offenders. We therefore suggest that a female offender court at magistrate court level should seek to divert vulnerable women away from short custodial sentences and into gender-based and other specialist services. It should be targeted at women with complex needs and multiple previous convictions, who are at risk of short custodial sentences.

This court should incorporate the lessons from Aberdeen and Manchester women's problem-solving approaches and could consider, for example, the use of deferred sentencing as an alternative disposal (another commitment in the White Paper). We assume entry into the pilot will be only on a guilty plea, based on an agreed set of eligibility criteria (most likely based on Manchester's work in this area). The pilot would seek to address the complex needs of vulnerable women in the criminal justice system, including their experience of abuse and trauma, by bringing together statutory and third sector agencies to provide joined-up, holistic support.

This court could embrace the power to use the new breach powers (but not the other powers) and integrate that with strong links with local women's centres and other gender-based services. As it is at a magistrate court level, the pilot will need to learn from the evidence in Manchester about ensuring there is magistrate bench continuity in review hearings or should be presided over by a district judge.

2. Provide the pilots with the right powers— and use them in line with the evidence base

As the White Paper makes clear, some of the components of evidence based problem-solving court models, especially substance misuse courts, require new powers to be introduced by primary legislation. These include enabling judges to initiate breach decisions at review hearings instead of this being solely the responsibility of the Probation Service, and the expansion of drug testing beyond Drug Rehabilitation Requirements (DRRs), to incorporate offenders who may not be dependent or reach the threshold for a DRR, but whose drug misuse drives their offending behaviour.

Another power the Ministry proposes to give the pilots is the ability of courts to make use of an immediate short custodial stay as a sanction for non-compliance, after which the sentence would continue in the community. Some additional context here is essential: substance misuse problem-solving courts succeed in part because of the clear incentive and sanction regimes

they build around community supervision and judicial monitoring. However, substance misuse court experts in North America, including representatives from the Toronto drug court and drug courts in New York State, strongly suggest that best practice is increasingly emphasising the power of incentives and an increasing emphasis on non-custodial sanctions, and avoiding the use of custody where possible, as it undermines desistance and dislocates important rehabilitative services.

We think it is worth underlining the animating factors that have been shown to drive better outcomes in substance misuse courts: "drug courts that prevent higher numbers of criminal acts per month had high leverage (*e.g., nature and severity of sentence if failing drug court*), medium predictability of sanctions, client populations that enter at the same time point in the criminal justice process— either all pre-plea or all post-plea, and medium or high scores on positive judicial attributes (respectful, fair, attentive, enthusiastic, consistent/predictable, caring, and knowledgeable.)"[14] Research does not show a link between the severity of sanctions and the effectiveness of drug courts[15].

We therefore strongly recommend that the new powers are only fully extended to the three substance misuse Crown Court pilots and that the use of custody as a sanction is used very sparingly and only as part of a much wider set of incentives and sanctions with these pilots.

3. Build from existing practice on the ground

It is clearly important that at a national level, the Ministry must agree the high-level descriptions of the three models, with the judiciary, Her Majesty's Courts and Tribunals Service (HMCTS) and the National Probation Service (NPS). Yet, it is our view that those descriptions need to avoid over-specifying the model to allow the sites which are piloting the approaches the flexibility to develop more detailed operational models when they are selected. This would follow the pattern of our work on FDAC, where there is a common set of FDAC standards that every area delivers to, including a clear set of court processes, but that the exact supervision, interventions and delivery models are locally tailored.

The Ministry's approach to implementation should recognise the fact that there is a wealth of innovation out in the field. As the White Paper itself recognises, there has been "locally driven criminal problem-solving models producing positive results. For example, Greater Manchester, which runs a problem-solving court approach for women, has a lower annual average reoffending rate for female offenders compared to similar urban areas, and England and Wales overall (15% compared to 23% for the April 2017 to March 2018 cohort)."[16] We are aware of a range of other similar approaches across England and Wales, as well as related innovations and effective practice, on which the pilots can build. Moreover, the Ministry itself is supporting the piloting of a range of related developments, such as pre-sentence reports and Community Sentence Treatment Requirements.

We therefore recommend a mapping exercise at national level to determine where there are already relevant test bed areas where the pilots may find the most fertile soil to grow in, including judicial input to highlight certain courts or areas under strain. This should be twinned with a wide ranging call for expressions of interest, driven through local criminal justice boards (where they still operate) or other similar mechanisms. This process, which worked well in the latest roll out of FDACs, would (i) uncover things central government does not know, giving a much more colourful explanation of specific dynamics that are going on in local areas; (ii) identify the key individuals in each locality that will make it work; (iii) tease out where there is local buy in, the key to future sustainability.

4. Invest in implementation

Problem-solving courts pilot sites will face a range of challenges with which they will benefit from outside expertise: (i) understanding the evidence base; (ii) assessing local needs and assets; (iii) generating stakeholder buy-in; (iv) developing an operating model; and (v) learning from existing good practice and the experience of each other. We recommend a relatively long set-up phase as we have found that significant time is required to for areas to identify the changes they need to make to existing processes, to recruit new staff and to train staff and judges.

All the pilots will need to devote resources to a project coordinator, as recommended in the 2016 working group report, and we would suggest putting NPS in charge of co-ordinating and resourcing that position, rather than HMCTS, as the focus on outcomes lends itself more to professionals with experience of offender behaviour. That said, we also recognise the need, as part of the overall project team, for HMCTS to have a clear role in coordinating the court processes needed to deliver effective pilots, especially consistent judicial monitoring.

We also recommend that sites establish local steering groups with representatives of NPS, courts, judiciary, CPS, police and relevant local agencies to oversee the development process, as has happened in FDAC. These groups should have clear reporting lines to local bodies like LCJBs.

To guide the pilot sites, a delivery partner, with experience, expertise and the time commitment to devote to the sites, could assist the implementation by providing set up advice such as reviewing draft protocols, providing information on practice in other areas and the evidence base, training/briefings for practitioners and judges, refreshing, promoting and making available problem-solving courts toolkits and guidance, and establishing common monitoring systems to collate data across pilot sites.

5. Develop a clear and realistic evaluation strategy

Obviously, part of the resources earmarked for these pilots would need to be dedicated to evaluation. As the White Paper states, one of the purposes of piloting problem-solving court models is to evaluate the effectiveness of the approach and resources required in order to inform decisions on any potential wider roll-out.

We would recommend commissioning an evaluator as early as possible to then work with the delivery partner and policy officials to ensure evaluation goals are set early and data collection tools are designed effectively.

The evaluation strategy, as indicated in the 2016 working group report, needs to have clearly defined success criteria that go beyond reoffending, and that cater for the differing aims of each pilot. These measures should include: (i) compliance; (ii) changes in criminogenic needs/ measures of wellbeing; (iii) harm reduction in substance misuse; (iv) victim safety/satisfaction (for DA); (v) cashable saving, cost avoidance and/or cost/benefits.

We assume this would be a multi-stage evaluation, looking first at process and stakeholder perspectives and then outcomes (vs an appropriate counterfactual), and finally cost/benefits. It is possible that the outcomes evaluation will require significant numbers of individuals to be seen through the different courts and may take several years.

Conclusion

Problem-solving courts hold out the prospect of finding solutions to enduring problems; that there can be keys to overcoming the seeming inevitability of high re-offending rates by repeat and prolific offenders; that there can be antidotes to the pessimism felt right across the whole justice system at the pointlessness of short custodial sentences; that there are cures for the suffering of offenders trapped in an endless cycle of deprivation and punishment. The White Paper's call for problem-solving courts is, therefore, indirectly the rejection of a pessimistic view of a justice system in which the revolving door of imprisonment is an inevitable, unalterable and grim fact of life.

Needless to say, we see this commitment to new pilots as a golden opportunity. Based on our experience and expertise in this area, we have outlined the key lessons that must guide the implementation of this reform— most importantly, to use this opportunity to embrace and build from existing innovation on the ground, to provide the pilots the best chance of success and sustainability.

Endnotes

1. Ministry of Justice. (2020). A Smarter Approach to Sentencing. Available at: https://www.gov.uk/government/publications/a-smarter-approach-to-sentencing
2. See national website for more information: https://fdac.org.uk/
3. Bowen & Whitehead. (2015). *Problem-Solving Practice: An Evidence Review*. Centre for Justice Innovation: London.
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5. Rossman S.B., J. Roman, J.M. Zweig, M. Rempel, C. Lindquist. 2011 The Multi-site Adult Drug Court Evaluation. Volumes 1-4 Washington D: Urban Institute.
6. Bowen & Whitehead. (2015). *Problem-Solving Practice: An Evidence Review*. Centre for Justice Innovation: London and see: The Multi-Site Adult Drug Court Evaluation: The Impact of Drug Courts, Volume 4, p 106. Available at: https://www.ncjrs.gov/pdffiles1/nij/grants/237112.pdf
7. The probationer themselves are likely to be supervised within one of the many pre-existing Integrated Offender Management schemes (IOM). This team would report on progress at the review hearings and adjustments could be made more flexibly, either to reward progress or to provide additional restrictions.
8. Ofori. (2020). Integrated Domestic Abuse Court: Evidence and practice briefing. Centre for Justice Innovation. Available at: https://www.justiceinnovation.org/sites/default/files/media/document/2020/IDAC.pdf
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15. The Multi-Site Adult Drug Court Evaluation: The Impact of Drug Courts, Volume 4, p 106. Available at: https://www.ncjrs.gov/pdffiles1/nij/grants/237112.pdf
16. Proven reoffending statistics: January to March 2018, Ministry of Justice, 2020

About the Centre for Justice Innovation

The Centre for Justice Innovation seek to build a justice system which all of its citizens believe is fair and effective. We champion practice innovation and evidence-led policy reform in the UK's justice systems. We are a registered UK charity.

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