

Problem-Solving Criminal Justice: Developments in England and Wales

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1. Introduction and paper aims and objectives

Problem-solving justice is an umbrella term given to the court-based approaches that have grown in popularity across jurisdictions since the 1980s in efforts to tackle social, health and lifestyle problems linked to repeat patterns of criminal offending. These are particularly developed in the USA, Australia, Canada, New Zealand and the UK¹ too, and are typically applied with drug and/or alcohol dependence issues, mental disorder and youth and early independence vulnerabilities. When contrasted with traditional, adversarial court styles, problem-solving justice is found more effective in terms of addressing re-offending and is appraised as a 'fair' form of justice in the way defendants are able to engage personally and proactively in the court process and in their rehabilitation pathways.²

Different models of problem-solving justice operate in accordance with the social and health problems they are established to address, though five core elements define their purpose. Criminal court commentators writing on problem-solving justice summarise distinct features that describe the model.³ These are the primary focus on supporting an offender through a tailored treatment programme; the recognition certain lifestyle problems are causally correlated with offending; multi-agency team working that bridges specialist support across health, social and welfare services; consensual decision-making whereby sentence conditions are jointly agreed between an offender and a court judge; and the role the judge plays in monitoring and appraising a person's progress through a programme of rehabilitation. The judicial involvement embedded within the assessment process is seen as powerful, both in terms of the consistency of oversight, and the personal interest taken in an offender by a person of legal stature. Problem-solving justice is conceived of as uniquely offender-focused with an emphasis on achieving positive results that effect recidivism reduction.⁴

Problem-solving justice is not a new innovation in England and Wales. Different examples of practice have been implemented at various points since the late 1990s. Adult drug courts, mental health courts, domestic violence courts and community courts have been in place at different times, with varying degrees of enthusiasm and government support. Some have existed as pilot projects, or as short lived social experiments, and others are going through a phase of growth and expansion, such as the family drug and

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1 Three separate justice systems operate in the UK differentiated by the jurisdictions of Northern Ireland, Scotland and England and Wales. Owing to the author's research expertise, the critical commentary in this paper is specific to problem-solving justice within English and Welsh criminal court structures.

2 G. Berman & J. Feinblatt, *Good Courts: The Case for Problem-solving Justice* (2015); K. A. Kaiser & K. Holtfreter, 'Using Procedural Justice and Therapeutic Jurisprudence to Promote Offender Compliance and Rehabilitation', (2016) *Criminal Justice and Behaviour*, 43, 1, pp. 45-62.

3 Centre for Justice Innovation, P. Bowen & S. Whitehead, *Problem-solving Courts: An Evidence Review* (2016); J. C. Donoghue, *Transforming Criminal Justice: Problem-solving and Court Specialisation* (2014); J. Nolan, *Legal Accents, Legal Borrowing: The International Problem-solving Court Movement* (2009).

4 H. G. E. Verberk, *Probleemoplossend Strafrecht en het Ideaal van Responsieve Rechtspraak* (2011), available at <<https://repub.eur.nl/pub/26117/>> (English summary) pp. 301-313 (last visited 19 October 2018).

alcohol courts (FDAC) and specialist domestic violence courts.⁵ Although implementation over the years has been patchy, problem-solving justice and specialist court approaches are currently attracting interest and support across a range of interlinked social and criminal justice sectors in England and Wales.

The aims and objectives of this paper are to present a detailed critical analysis of problem-solving criminal justice with a focus on three specific forms practiced in England and Wales. These are youth sentence review panels, the FDAC and the regular adult drugs courts. The paper draws on empirical research findings to discuss the effectiveness and outcomes of these court approaches aligned with the different problems they are set up to solve.

Three main research questions underpin the paper's discussion and arguments. These are what can the experience of professionals working with specialist problem-solving court models contribute to the so far limited evidence base in terms of how success and meaningful outcomes can realistically be considered? By and large, research examining more detailed sociological understandings of behaviour change over the life course and the textured and intricate influences on whether a person continues or ceases to engage in harmful behaviours is missing from interpretations of problem-solving approaches in the English and Welsh justice system. A similar reflection on the absence of qualitative research is made by Verberk in her analysis of problem-solving justice and the USA drugs courts model.⁶ Rich, nuanced detail drawn from youth justice and court professionals is applied in this paper to illuminate issues that need to be taken into account for a more sensitive and accurate appreciation of the factors that facilitate and impede success when working with clients of these courts.

The second and third underpinning questions relate to the barriers and obstacles that prevent a more extensive application of problem-solving criminal justice in the English and Welsh system, and how this might be resolved. These are discussed within points that draw on considerations of legal principle and sentencing parameters, issues of politics and 'political will' and on aspects of legal culture. It is argued there are legal cultural impediments to advancing this approach when compared with other jurisdictions; the USA, Canada, Australia and New Zealand for example.⁷ Fundamentally, the particular system of lower court justice in England and Wales as presided over by volunteer 'lay' magistrates⁸ who are employed on a part-time basis, and hold little power in terms of local court management, presents barriers to innovation in the way problem-solving justice is found to emerge elsewhere. International reviews of problem-solving courts typically recount the founding role a single court judge has played in setting up a specialist court within their working area.

A central argument of this paper is that if problem-solving justice is to advance more extensively in local and geographical areas of need throughout England and Wales, and in reaction to the social and public health problems they are found to benefit, alterations are needed to the way court innovation is enabled. This includes a change to the dominance of adversarial justice principles, in which courtroom challenge and culpability is played out between prosecution and defence argument with little weight associated to a person's wider capability and social lifestyle issues.

Problem-solving styles have been growing in popularity in both the civil and criminal courts in England and Wales. Mediation responses are increasingly applied within dispute resolution in business, commercial and workplace environments with a presumption that attempts at mediation will take place before a case has 'right of access' to adjudication in the courts. Advances in civil law problem-solving reflect those in criminal justice, and link to the benefits when directly involving affected individual parties, in matters of conflict resolution.⁹ Despite the relevance of a lengthier discussion on problem-solving in civil justice, the focus of this paper is on problem-solving justice in response to the criminal law.

5 If problem-solving justice is defined by five core elements and in particular the role a court judge performs in sentencer supervision, the specialist domestic violence courts established since the late 1990s sit outside this definition. These courts are designed to facilitate criminal convictions, rather than placing priority on problem-solving and judicial oversight of social lifestyle issues.

6 See Verberk, *supra* note 4.

7 Cf. Nolan, *supra* note 3.

8 The total number of serving magistrates at the 1 April 2017 year end (Courts and Tribunal Judiciary, 2018) was 16,129.

9 H. Genn, 'What is Civil Justice For - Reform, ADR and Access to Justice', (2012) *Yale Journal of Law and the Humanities*, 1, pp. 317-419.

2. Methodology

The narrative and arguments presented in this paper link to the author's wider research on lower criminal court practice, 'modernising' court reforms and procedural due process protections.¹⁰ This research has involved empirical data collection in the form of qualitative interviews with court justices (i.e. 'lay' magistrates and judges), police and prosecution professionals, defence lawyers, youth court justices and youth offending team specialists. Ethnographic courtroom observations across a number of London courts and in different cities were also carried out.¹¹ Various problem-solving court initiatives were come across during this research, such as sentence review panels with ten to seventeen year old offenders in collaboration with a local youth court, and an adult drugs court run by specially trained magistrates in one court area. It is the findings and evidence drawn from these problem-solving styles that inform the discussion and arguments of this paper. A critical review of the research literature relating to the FDAC is also added, due to their current growth in popularity, and the problem-solving principles they include.

Before discussing these three particular types of problem-solving justice in more detail, it is useful to set out the background context to criminal court operation in England and Wales. This is to establish the organisational environment in which problem-solving justice is seeking to gain a footing within. The criminal courts of England and Wales have been undergoing radical transformation over the last few years aligned to intentions to operate a 'modern' and efficient court system fit to function in the 21st century.¹² The most significant changes are the wide-scale closure and amalgamation of courthouses across the court estate since 2011 under a 'court rationalisation' project and the enhanced digitisation of court case management which improves the transfer of case file information between agencies (police, prosecution and the courts), but attracts attention for the growing reach of 'online' processes in place of human, face-to-face contact. There are 'speedy justice' initiatives that aim to shorten the time between arrest and conviction, but at the same time are set up to encourage 'guilty pleas', including from people with vulnerabilities and low-levels of legal awareness.

The point in setting out these ongoing changes is that while the value and benefit of implementing rehabilitative, person-centred, problem-solving justice is discussed in official policy-making circles¹³ in more progressive ways, establishing it is likely to face continued challenge amidst the current drive to achieve wide-ranging economic efficiency reforms. These are tending towards speedier, digitised forms of court justice, which run counter to the lengthier therapeutic styles of problem-solving justice.

3. Theorising problem-solving justice

Problem-solving criminal justice is theorised within understandings of 'therapeutic jurisprudence'. Conceived within the disciplines of psychology and mental health law in the 1990s, therapeutic jurisprudence is understood as 'the therapeutic and anti-therapeutic consequences of laws, legal rules, and legal actions'.¹⁴ Specifically the legal process is identified as having the ability to facilitate behavioural pattern change, as well as certain legal decisions having the potential to impede behaviour change. This interpretation suggests a level of consciousness and sensitivity is necessary within legal court decision-making to take account of these impacts.¹⁵

10 J. Ward, *Transforming Summary Justice: Modernisation in the Lower Criminal Courts* (2016); J. Ward & K. Warkel, *Northampton Youth Offending Service Review Panel Evaluation- Final Report* (2015); J. Ward, 'Are Problem-solving Courts the Way Forward for Justice?', (2014) *Howard League What is Justice? Working papers* 2/2014.

11 Between May 2014 and December 2015 empirical research was carried out across three geographical areas including London, a smaller but large English city and a county region.

12 B. Leveson, *Review of Efficiency in Criminal Proceedings. Judiciary of England and Wales* (2015).

13 Michael Gove, Secretary of State for Justice from 2015 to 2016, visited drugs courts in the USA with intentions to expand similar courts in England and Wales (O. Bowcott, 'US-style Problem-solving Courts Planned for England and Wales', *The Guardian*, 21 May 2016.). Liz Truss, Secretary of State for Justice from 2016 to June 2017 mentioned the potential of problem-solving justice, particularly the Family Drug and Alcohol Courts in a speech on criminal justice reform (L. Truss, Speech on Criminal Justice Reform by the Secretary of State for Justice delivered to Centre for Social Justice, 13 February 2017).

14 D. B. Wexler & B. J. Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996), p. xvii.

15 Ibid.

It is now commonplace for problem-solving courts to be discussed within a therapeutic jurisprudence paradigm. Mclvor's scholarly work on Scottish drug courts, but interpretations of problem-solving justice more broadly, says 'Under traditional court models rehabilitation may be an *aim* of criminal justice processing, but within a model of therapeutic jurisprudence it is *intrinsic* to the process.'¹⁶ Nolan, providing a background to the USA drugs courts movement, noted the conception of therapeutic jurisprudence within psychology in the 1990s, which was in parallel to the emerging drugs courts practice with therapeutic principles at its core.¹⁷ It is no thin point made by Nolan that the concept of therapeutic jurisprudence is under-theorised in the English and Welsh context.¹⁸ This can largely be associated with the limited depth research that has examined the experiences of people going through problem-solving court programmes.¹⁹ With some exceptions, the research that has been carried out tends to focus on process evaluation analysis and the experiences of professional staff, with limited inclusion of court users experiences.

Other theories of problem-solving justice have emerged, such as that of Kaiser and Holtfreter.²⁰ They write on the theoretical underpinnings driving success of the 'specialised court' model. They develop an 'integrated theory' incorporating the values of therapeutic jurisprudence and 'procedural justice', arguing the two combined are the explanatory power behind the success of specialist courts. They apply Tyler's concept of 'procedural justice' relating to perceptions of fair procedure in 'third party decision-making',²¹ and how value is attached to opportunities for participation in the court process. Kaiser and Holtfreter analysed studies assessing specialist court client's perceptions of fairness. They found 'judicial factors' were the best predictors of perceived overall fairness highlighting features of connection, listening and the human responsive element within the court interactions. Kaiser and Holtfreter concluded that the success of the problem-solving court model is the combination of the therapeutic style with court procedures that clients experience as fair and just.

Verberk from her research on the USA drugs courts and problem-solving justice²² links it to notions of 'responsive justice'; one of the three types of law distinguished by Nonet and Selznick in their book *Law and Society in Transition*; the other two types being 'repressive law' and 'autonomous law'.²³ Verberk analyses the drugs courts and writes of 'problem-solving as a new paradigm of criminal law'.²⁴ She states that in a 'responsive legal order, law is shaped to meet social needs and aspirations. Responsive law is purposive, it is result-oriented and to that end law becomes a more open system, integrating other sources of knowledge'.²⁵ She cites other 'sociological jurists' who from 'a previous historical period envisioned a legal order responsive to the needs and problems of society and promoting a jurisprudence inspired by the actual social effects of law'. A key question Verberk asks within her research is to what extent and 'in what way do the risks linked to responsive law manifest themselves in drugs courts'? With this, the emphasis is on the departure from 'rigid law' and the overlap with social work that responsive law might fall vulnerable to. Here she makes important points about fears of discretion relating to repressive law connected to the potential for excess, and concerns with respect to responsive law with lenience in sentencing. Thus, notions of paternalism are associated to rehabilitative problem-solving models. An overlap with this theme is located within my research and is set out further later.

Boone and Langebroek similarly link the current forms of problem-solving justice to responsive justice narrated in Nonet and Selznick's three types of law. They state: 'Problem-solving justice focuses on the conflict behind the legal dispute and aims to solve the underlying problems in order to reach long-term effects.'²⁶

16 G. Mclvor, 'What Can We Learn From Drug Courts', (2014) *Halsbury Law Exchange*; G. Mclvor, 'Drug Courts: Lessons from the UK and Beyond' in A. Hucklesby & E. Wincup (eds.), *Drug Interventions in Criminal Justice* (2010), p. 135.

17 J. Nolan, *Reinventing Justice: The American Drug Court Movement* (2001), p. 185.

18 See Nolan, *supra* note 3.

19 Cf. Verberk, *supra* note 4.

20 Kaiser & Holtfreter, *supra* note 2.

21 T. R. Tyler, 'Procedural Justice and the Courts', (2008) *Court Review*, 44, pp. 25-31.

22 Verberk, *supra* note 4.

23 P. Nonet & P. Selznick, *Law and Society in Transition: Toward Responsive Law* (1978).

24 Verberk, *supra* note 4, p. 301.

25 *Ibid.*, p. 303.

26 M. Boone & P. Langbroek, 'Problem-solving Justice - seminar overview paper' (unpublished), 6-17 June 2016, p. 2.

There is not wide coverage of problem-solving justice approaches across the English and Welsh system, although related practice that broadly fits the rehabilitative, ‘negotiated justice’ style of problem-solving courts is in place. This comes under the broad rubric of ‘alternative dispute resolution’ (ADR) and includes restorative justice techniques, family group conferencing and victim mediation styles. To date, these are mainly used in the youth justice sector, but are being considered for application in adult offending, and in more serious criminal offending cases. This in particular connects to the empowering benefits restorative justice can bring for crime victims.

4. Problem-solving justice in England and Wales

The following section provides an account of specific forms of problem-solving justice in place in England and Wales with an emphasis on -youth sentence review panels, FDAC and the adult drugs courts. Interview data is drawn from different actors involved in delivering these initiatives, to advance an argument on the effectiveness and outcomes of problem-solving justice interventions for the people receiving them. The discussion is organised around the questions posed earlier on what contribution to evidence can problem-solving justice practitioners provide in respect to success that is not reported in the published literature? And what barriers and obstacles are presented in advancing these initiatives further, and how this might be resolved? This refers to the constraints in sentencing law, politics and ‘political will’ and legal cultural issues; specifically the limitations presented in the ‘lay’ and adversarial justice systems in the English and Welsh context.

Over the last few years within the youth justice system of England and Wales, concerted attention has been placed on identifying more appropriate ways to respond to young people who offend, instead of ready resort to criminal prosecution as a means of deterrence. It is now recognised young offenders are frequently themselves victims of troubled, and sometimes violent, childhood backgrounds, and/or have spent time ‘looked after’ in the state care system,²⁷ positioning them as a vulnerable group rather than a strictly hostile one. Such shifts in thinking have assisted a 70% decrease in the under 18 youth custody population since 2008.²⁸ Further, a range of high-level expert reviews incorporating youth justice interests have been carried out with recommendations that problem-solving approaches are developed for delivery with young offenders. The Carlisle youth court review highlighted wide support among youth justice specialists and the young offenders who informed the review.²⁹ He referred to the limited means of the youth courts to address the ‘range of welfare issues that underlie a child’s offending’,³⁰ suggesting a judicial monitoring and case continuity model with powers to ‘ensure children’s underlying needs are met’.³¹ Taylor’s youth justice system review similarly concluded problem-solving justice styles should be established proposing ‘Children’s Panels’ where youth court judges have ongoing involvement in a young person’s sentence, including trying to comprehend the root cause of the offending.³² Taylor similarly referred to the current lack of scope in the English and Welsh system to engage in any meaningful way in a young person’s sentence and rehabilitation pathway. He referred to the benefits that could be gained if able to ‘reward success or to amend the terms of the sentence where the child is not responding’.³³

The 2017 Lammy review on the outcomes of Black, Asian and Minority Ethnic people in the criminal justice system suggested ‘deferred prosecutions’ for some first time offenders.³⁴ Deferred prosecution is not problem-solving justice as such, but identifies an area within the criminal justice process in which negotiation (‘negotiated justice’) can be introduced; in this case at the prosecutorial decision-making stage.

27 D. Porteous et al., *The Development of Specialist Support Services for Young People who have Offended and who have also been Victims of Crime, Abuse or Violence: Final Report* (2015).

28 The under 18 youth custody population in England and Wales has declined from an average of 2,900 in 2007 to an average of just under 870 at the year ending March 2017 (Youth Justice Board/Ministry of Justice, *Youth Justice Statistics 2016/17* (2018), p. 31).

29 Carlisle of Berriew, Lord, *Independent Parliamentarians’ Inquiry into the Operation and Effectiveness of the Youth Court* (2014).

30 *Ibid.*, p. x.

31 *Ibid.*

32 C. Taylor, *Review of the Youth Justice System in England and Wales* (2016).

33 *Ibid.*, p. 28.

34 D. Lammy, *The Lammy Review: An Independent Review into Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System* (2017).

Allen, writing on the current high interest in problem-solving justice, noted the already developed ‘pre-court’ diversionary practice that could mean the police and prosecution are ‘better agents of change’ in using problem-solving than the courts.³⁵ This is an important point to emphasise. If we are scrutinising the way more beneficial styles of adjudication can be introduced into existing organisational and legal structures to effect real reductions in offending, it is necessary to ascertain where this can most successfully be achieved. The pre-prosecution stage is argued as one.

Despite the different recommendations made in these reports, systematic implementation has so far been limited at the national level.³⁶ This can in part be linked to the period of political turbulence the UK has been experiencing. This, alongside fiscal austerity and swingeing cuts to public services, is a situation that has hampered the passage of important criminal justice policy,³⁷ including the court reform ideas for problem-solving justice.

4.1 Youth sentence review panels

Nonetheless, pockets of youth focused problem-solving court activity can be identified. One is within the Northampton Youth Offending Service (NYOS) who implement a problem-solving approach through youth sentence review panels.³⁸ The panels bring specially trained youth court magistrates alongside the statutory youth offending team (YOT) to meet with young people sentenced by the courts to a ‘youth referral order’ (YRO). YROs are ‘high-level community orders’ assigned to ten to seventeen year old offenders and are usually set for periods of six months up to two years. The orders are overseen by youth offending team staff and incorporate elements of restorative justice and/or reparation, combined with multi-agency working to address the young person’s wider social welfare needs. The initiative seeks to improve a young person’s engagement over the length of a youth court order, and to produce positive outcomes in terms of desistance from crime. Assisting participation in education, training or employment is also prioritised.

The Northampton sentence review panels were come across during my wider courts research. The review panel initiative was established by the team manager linked to his long-standing professional practice in youth offending and familiarity with the often complex circumstances in broader adolescent lives. To gain knowledge of how the sentence reviews operated in practice, observations of two panel meetings were carried out in January and April 2015. Five young people aged between fifteen and seventeen years attended. Interviews were conducted with youth court magistrates involved in the initiative. The involvement of the magistrates was appraised as an important example of ‘judicial input’ in the court sentences dispensed to under 18 year olds. The magistrates contrasted the review panel work with their regular youth court role and how this provided opportunity for more meaningful interaction with the young people. One commented on the frequently seen learning needs such as ADHD and early independence problems saying ‘when a young person is seen back in court for breaching the conditions of their Order, it is clear the Order is something they have not been able to achieve’. Youth court magistrates are often from social work and education backgrounds³⁹ and the youth sentence review work was regarded as highly valuable in terms of the positive steps forward with the young people.

The Northamptonshire regional youth court chairman, himself immersed in the implementation of the sentence review project, commented on the important place judicial input can play in youth sentencing and oversight. This, he connected to youth orders remaining active until completion and linked it to notions of wider social justice responsibility. Though he acknowledged the view is not universal or shared across

35 R. Allen, ‘Unlocking Potential’, Reformingprisons.blogspot.co.uk (2016).

36 The UK Centre for Justice Innovation; a third sector organisation promoting ‘better court practice’, launched a systematic evaluation of youth problem-solving justice approaches in 2017 (C. D’Cruz, ‘Youth Court: The Original Problem-solving Court’, blogpost, The Centre for Justice Innovation (2017)). The findings are to help shape ideas towards a national level problem-solving justice framework for young offenders.

37 R. Morgan & D. J. Smith, ‘Delivering More with Less: Austerity and the Politics of Law and Order’, in A. Liebling et al. (eds.), *The Oxford Handbook of Criminology* (2017).

38 Ward and Warkel, *supra* note 10.

39 Ward (2016), *supra* note 10.

the judiciary. This attaches to certain criticisms of problem-solving justice, in the way that legal judging is interpreted by some as blurred with a social work type role. He said:

(...) for a magistrate to sentence a young person and then not to care a jot about what happens afterwards seems to fly in the face of what the magistracy and what society is all about. (...) Some members of the judiciary might say that once a sentencer has sentenced that is their job done unless the matter comes back to court. My view is that that is extremely clinical and it severs the social responsibility of the judicial exercise.

The youth sentence review panels can be viewed as closely linked to the visions set out in the Carlisle⁴⁰ and Taylor⁴¹ reports that push for taking account of the complex needs in young offenders' lives, and the centrality of effective social care responses in this regard.

While the sentence review panels yielded important results and outcomes for the young people involved, existing sentencing legislation was identified as an obstacle in cementing the style of operation on a more established footing. There are rules of criminal procedure that require amendment if court judges are to be granted powers to bring clients back before the courts to reward sentence compliance and progress. This, in the context of the Northampton set up was considered important for the capacity to revoke a young person's two year order in cases of good behaviour. In the current sentencing framework, court judges do not have further sentencing powers beyond that which has been dispensed in court at the point of establishing guilt.

It is the judge's ongoing sentencing powers in the USA drugs courts that can reward compliance and good progress, but equally reprimand lapse in positive behaviour change that attracts attention. Donoghue, in writing on specialised courts, notes the 'carrot and stick' or reward and reprimand approach legitimised in the USA model, which is not legal in court sentencing frameworks of England and Wales.⁴² The 'reprimand' aspect of the USA drugs courts is criticised by some as overly punitive for the 'jail time' that can be added for drugs abstinence failure.⁴³ There is obvious reservation in the UK with authorising sentencing law reform that could extend powers of sentencing; concerns which link closely with the potential for overzealousness by judges and magistrates in their individual interpretations of behaviour. Important safeguarding questions are raised in regard to defendants' rights and due process protections.

4.2 Family drug and alcohol courts

Another area of courts activity that can be defined as problem-solving justice and framed within principles of therapeutic jurisprudence are the FDAC established across areas of England and Wales.⁴⁴ Following their success, these courts now operate as a collaborative enterprise between the family courts, the health service, the charitable sector and the government. The FDAC began in the Westminster Family Court through District Judge Nicholas Creighton in 2008. These courts provide support to drug and/or alcohol dependent parents in attempts to reduce patterns of problem drug use, so child custody can be retained, rather than removal into state care.⁴⁵ The family welfare approach emerged out of the high number of children taken into state care each year as a result of 'parental neglect' linked to drug and/or alcohol misuse.⁴⁶

The FDAC evaluations report on families who receive intensive support through the court model contrasted with families subject to the same child protection order, but who do not receive a specialised intervention.⁴⁷ The evaluation found a higher rate of child-parent reunification among families receiving the intervention, compared to those who did not. Further, more mothers and fathers ceased drug use than those in the non-intervention sample. The narratives set out by parents going through the court proceedings

40 *Supra* note 29.

41 *Supra* note 32.

42 Donoghue, *supra* note 3.

43 Transform Drug Policy Foundation, 'A Cause for Celebration or a Misguided Attempt at Progress', Transform-drugs.blogspot.co.uk (2013).

44 <www.coram.org> (last visited 1st October 2018).

45 C. Baksi, 'Family Drug and Alcohol Court: Breaking the Habit', *The Law Society Gazette* (2014).

46 S. Bambrough et al., 'The Family Drug and Alcohol Court Service in London: A New Way of Doing Care Proceedings', (2013) *Journal of Social Work Practice: Psychotherapeutic Approaches in Health, Welfare and the Community*.

47 J. Harwin et al., *After FDAC: Outcomes Five Years Later. Final Report* (2016); J. Harwin et al., *Changing lifestyles, Keeping Children Safe: An Evaluation of the First Family Drug and Alcohol Court (FDAC) in Care Proceedings* (2014).

reported valuing and benefiting from the judge's personal input and oversight of their case. This was for the knowledge and awareness it gave judges of them as parents, and the motivation the more human-centred, compassionate style gave. What needs to be highlighted though from the outcome findings was as few as a third of the families receiving the specialist intervention were reunited with their children after going through the programme. The evaluation mentioned the one-year follow-up sample. Just 32 out of the 106 families were eligible for reunification. This illustrates the majority of families engaged in the FDAC have their children placed in permanent alternative care, despite the problem-solving support they receive.

A criticism can therefore be levelled at the FDAC model for the relatively short time frame parents are given to rectify substance misuse problems. The official health definition of drug dependency is cited as a 'as a chronic relapsing condition',⁴⁸ and is generally understood to involve lapse and relapse in pathways to drug abstinence. The FDAC intervention has an 18 week 'trial for change' period, during which the mother, father or both engage in various assessments and must demonstrate drugs abstinence, or stabilising on opioid maintenance drugs. The 'trial for change' period can extend to 26 weeks where progress has been made, but further proof is required.⁴⁹ What is pointed to therefore, when analysing the FDAC, is whether sufficient time is given for a person to alter patterns of entrenched negative behaviours and bring about personal lifestyle change? While addressing important care and welfare needs of very young children, these courts can in part be interpreted as 'anti-therapeutic' for the short 'trial for change' period.⁵⁰

The personal trauma resulting from enforced child removal due to failed drugs abstinence goals is likely to be deeply enduring. The families in the FDAC evaluation had multiple, long-standing problems with histories of problem drug use, incarceration, previous child removal and their own backgrounds of state care. Even if an extended time period of change is granted, there are obviously not guarantees this will work for the benefit of the child, but the scientific evidence relating to drugs 'recovery' and relapse and supporting behaviour change over time needs to be applied within problem-solving approaches that involve coercion, such as the FDAC model. Verberk, writing about problem-solving approaches with drug users in the Dutch criminal justice systems, states 'abstinence is not necessarily the final goal; making addiction problems manageable can be a suitable alternative for the most problematic users'.⁵¹

4.3 Drugs courts

Adult drugs courts are another example of problem-solving justice currently being practiced within the English and Welsh court system. Drug courts in England and Wales came into official practice with the Dedicated Drugs Court (DDC) pilot introduced in 2004/2005.⁵² This involved six specialised drugs courts across six magistrates' courts of England and Wales.⁵³ Magistrates working in an adult drugs court, indeed one which formed the initial DDC pilot, were interviewed as a part of my courts research.

Mirroring the USA model, drugs courts in the English and Welsh context oversee community-based drug treatment orders (drug rehabilitation requirement order) through co-ordinated multi-agency working (i.e. health, welfare and social services). The approach is practiced in preference to committing drug dependent people with lower range offending patterns to terms in prison. More importantly they are beneficial for the impact drugs rehabilitation can have on reducing drug-related offending.⁵⁴ The DDC evaluation reported positive service delivery results, such as limited additional running costs due to the use of existing courtrooms for the drugs court sessions, and employing already serving justices instead of recruiting new drugs court

48 T. McSweeney et al., 'Drug Testing and Court Review Hearings: Uses and Limitations', in (2008) *Probation Journal*, 55, 1, pp. 39-53, p. 55.

49 J. Maycock, 'The FDAC Trial for Change – Combining Expert Assessment and Intervention During Proceedings', *Family Law*, 24 January 2017.

50 Wexler and Winick, *supra* note 14.

51 Verberk, *supra* note 4, p. 312.

52 Detail relating to the precise timeline and different form of drugs court practice going on at earlier points, such as drugs testing within community-based sanctions (i.e. drug treatment and testing orders) introduced under the Crime and Disorder Act 1998, and sentenced offenders being called back before the courts for sentence progress reviews is dense, and is not included in this paper.

53 J. Kerr et al., 'The Dedicated Drug Courts Pilot Evaluation Process Study', (2011) *Ministry of Justice Research Series 1/11*; T. McSweeney et al., 'The Feasibility of Conducting an Impact Evaluation of the Dedicated Drug Court Pilot', (2010) *Research Summary 2/10*.

54 Mclvor, *supra* note 16.

specialists. The evaluation did however establish the limited impact the courts alone can have on the drug use patterns of entrenched users with complex issues.⁵⁵

Comments provided to the present author in interview by the drugs court magistrates revealed successes achieved with their clients, and what they considered contributed to these. The aspects identified as influential were the intensive support tailored to the individual person's drug-related circumstances and as other research finds, the consistency and judicial oversight of a person's case over time. The perception that the straightforward quality of someone taking an interest and providing encouragement was considered the most powerful for achieving motivation:

(...) a lot of them are from backgrounds where nobody has taken an interest in them. (...) certainly there's one particular person springs to mind, (...) and I said 'you can congratulate yourself, you've done very, very well indeed' and just as he was walking out of the court he said, 'you know you're the first person that's ever said well done to me'. (Drugs Court Magistrate)

The same point of allowing sufficient time for behaviour change emerged within the drugs court interviews. They found the time and flexibility given to a person to demonstrate motivation towards change produced positive results and embedded realistic and achievable goals, opposed to firm time-limited drugs abstinence expectations. Connected to this, they had their own measure of 'success', which was that at the end of a six or nine month drugs order, a person had reached a point where they were on a 'sustainable path to being drug free'. Based on this definition, the proportion of the usual client group (n=60) achieving success was estimated at just over half at 57%.

Detail was added on who was most likely to succeed in the drugs court programme, with 'developing maturity' an influential factor of success. The late twenties was considered the age point when people were more likely to achieve alterations to entrenched drug misuse patterns. This is typically a life stage when critical 'turning points' occur, and impetus is experienced differently when compared to that at younger ages:

(...) somebody that has had two or three previous drugs orders, I say to them 'look you've had three before, what's different if we give you one this time'. And the sort of thing, 'I'm reaching a milestone of age', or 'I've become a father or a mother', or something like that, is often a key trigger for success, they've got a reason to succeed. (Drugs Court Magistrate)

The oversight of clients within the drugs court came to an end on completion of the six or nine month order. Knowledge therefore on the proportion who remained drug free and/or had not re-offended over a longer period was missing. This is an important link because the official re-offending rate measure used in criminal justice is based on 'proven re-offending' within the two-year period following sentence completion. Moreover, it aligns with policy statistics on successful or failed 'rehabilitation' and recidivism calculations.⁵⁶ These measures are a moot point, because official discourse does not differentiate between low-level anti-social re-offending, and more persistent serious forms, which tell very different stories about personal correction pathways. Despite this flawed measure, the two year period is used as a benchmark and what is regarded as effective programme outcomes are closely tied to it.

This section has provided a critical descriptive analysis of problem-solving approaches drawn from empirical research involving youth and drugs court justices and youth offending team professionals. Comments on effectiveness and outcomes have been included in this section. The following paragraphs address this further.

5. Critiquing effectiveness and outcomes

What is central to an official acceptance of problem-solving court approaches and commitment to this at the government level is that they achieve reductions in criminal offending. It is the high levels of criminal

⁵⁵ Drugs courts were not rolled out as a national project.

⁵⁶ Ministry of Justice, *Proven Reoffending Statistics Quarterly Bulletin, Jan 2016 to March 2016* (2018).

offending and re-offending that presents persistent challenges to successive UK governments. In ongoing efforts to arrive at effective solutions, scientific evidence-based practice is prioritised and indeed it is requirement that drives much criminal justice service funding. Yet, it is this impact that problem-solving courts have found difficult to prove.⁵⁷ Reflecting the limited extent to which problem-solving courts have been implemented in England and Wales, cited outcome findings are often drawn from USA based studies with it sometimes considered that programme completion rates are lower than hoped, and re-offending not significantly reduced.⁵⁸ However, decreases in individual drug use levels are recorded, which correlates to offence reduction,⁵⁹ and is seen as an achievement in itself.

In terms of appraising what ought to be considered effective outcomes with problem-solving justice, the Northampton manager commented on aspects of the young people's progress that could be attributed to the sentence review approach they were practicing. He made crucial points in respect to the need to look beyond immediate 'hard outcomes'. To him, the achievements of engaging a young person in trouble, more than they previously had been, was critical for the avenues of communication that opened up, and on which more work could be built:

(...) there is mixed success in terms of hard outcomes. (...) my personal view is that hard measurements in this area of work often miss the humanity of the enterprise and the notion that even a small benefit for just one person can justify the effort and resources. It is also possible that even for the young people who are not doing so well, their engagement with the Youth Offending Service has been sustained so that we can do further work with them, and the panels may have contributed to this. (Youth Offending Team Manager)

As noted with the court examples I provide, it is crucially important when measuring the success of an initiative such as problem-solving courts not to use the standardised measure of re-offending or unchanged offending as the sole measure for success. It is necessary to take the small but cumulative gains a person is making within their life that assists to build self-esteem, self-coping and resilience; attributes that help shape more participatory, inclusive ways of life. Drug and alcohol dependence in particular are difficult health issues to address and it needs to be acknowledged that time is required for a person to make the significant life changes that bring about change. A definitive finding therefore is that measuring success in terms of hard outcomes, such as achieving drug abstinence or employment for a young person, over what are insufficient time frames are not useful. Stabilising rather than drug abstinence might be an aim in itself.⁶⁰

Qualitative empirical data based on the contribution of criminal court practitioners and court users' experience is hard to come by in the scholarly literature on UK problem-solving justice. This has much to do with the overall patchy implementation of initiatives, but also connects to the limited evidence on the power of the courts to bring about personal motivation and change. Research with court users, who have been through programmes of problem-solving court justice and which gauge personal experiences of managing the conditions attached to a sentence, the changes to lifestyle behaviour that are occurring and the aspects of their lives that need stabilising to assist compliance would be valuable additions to the knowledge base. These are areas of research that should be developed more fully, to inform and help shape evidence-based policy. It is by collating this material that it would be possible to argue more compellingly that problem-solving justice approaches attain important gains that can affect overall offending profiles.

6. Discussion and conclusion

This paper has set out an overview of problem-solving criminal justice as practiced in England and Wales with a focus on three particular types – youth sentence reviews, FDAC and regular adult drug courts. It sought to answer three main research questions – firstly, what can practitioners and court justices whose

57 McSweeney et al., *supra* note 53.

58 Donoghue, *supra* note 3.

59 Rossman, S. B., Rempel, M., Roman, J.K., Zweig, J. M., Linquist, C. H., Green, M., Mitchell Downey, P. Yahner, J., Bhati, A. S., Farole, D. J. (2011) *The Multi-site Adult Drug Court Evaluation: The Impact of Drug Courts*. USA: Urban Institute Justice Policy Centre, p. 4.

60 Verberk, *supra* note 4.

work utilises problem-solving justice contribute to our knowledge of achieving successful outcomes among their respective client groups? In light of the current limited qualitative data available, this provides an important perspective. It is apparent from the pockets of problem-solving justice approaches operating within the different sectors of youth justice, family justice and drugs health treatment rehabilitation that adequate time periods for realigning behaviour are allocated, which in essence acknowledges that drugs recovery and stabilisation are complex, often lengthy journeys. Thus, realistic expectations in terms of what is considered 'success' for who those who are engaged in problem-solving justice and judicial review of sentences is needed. A level of generosity with the time period given to a person who is attempting to address negative and harmful social lifestyle issues, such as becoming drug free, or a young person making efforts to establish conventional pathways and desist from crime, is essential.

The second and third questions this paper sought to address are what are the barriers and obstacles to a more extensive application of problem-solving criminal justice approaches in the English and Welsh system, and how might these be resolved? From the literature, it appears setting up and running problem-solving courts as evidenced in other jurisdictions takes the initiative of certain individual court judges. In countries such as the USA, Australia and New Zealand, professional judges preside over the bulk of lower criminal court work, and have influence in court innovation. These, through their court judging see reoccurring social and health problems that fundamentally affect the lives of families, child well-being and the life chances of young people.

Indeed, Nolan writes about the legal cultural impediments of the English and Welsh court system connected to the unique system of lay justice and the predominance of the magistracy in lower criminal court work.⁶¹ This is in contrast to the much smaller number (approximately 173) of legally qualified judges employed in the lower courts.⁶² This can be analysed as the absence of a dynamic lower court judicial culture that could hold the power to affect social justice change. Given England and Wales has a lower court system mainly operated by volunteer lay magistrates who are employed on a part-time basis, it is important to find a way within the courts structure to utilise their lay legal professional expertise and seize the opportunity of leadership in court innovation they can provide.

If problem-solving justice is to advance more extensively in local and geographical areas of need throughout England and Wales, and in reaction to the social and public health problems they are found to benefit, alterations are needed to the organisation of lower court working. A system is required to establish closer working relations between salaried professional judges so that the large pool of magistrates who have the inclination, relevant experience and time in their working lives to engage in new innovations, such as the design of problem-solving court models, in a more regular and committed way, are enabled and remunerated to do so. This requires significant design planning, but in efforts to seek real and meaningful solutions for the large number of people in court with health and lifestyle problems, should be tried for.

Legal cultural barriers are also present in the parameters of sentencing law with a degree of resistance among judicial members to bring 'emotion' and therapeutic decision-making into the court judging role. The emotional style of problem-solving courts which embed expressions of praise have come under-criticism and link with what Nolan refers to as the legal cultural obstacles in the English and Welsh system.⁶³ Importantly though these barriers are mostly associated with the potential for the departure from the 'rigid law' in the way overzealousness in sentence review could be introduced. If problem-solving criminal justice approaches are to develop more fully in England and Wales, it is essential the therapeutic, rehabilitative efforts of the initiative are foregrounded and prioritised with safeguards and assurances that retributive and deterrence objectives of justice do not overshadow the social care intentions of problem-solving justice.

Issues of politics and 'political will' are also alluded to in this paper. There is definite enthusiasm and support for extending the use of problem-solving justice in England and Wales, and across the different arenas in which social life problems crystallise, as voiced by high-level youth justice experts and government ministers. Yet, there is less activity on the ground to reflect this. Much room therefore remains to act on

61 Nolan, *supra* note 3.

62 See Ward (2016), *supra* note 10.

63 See Nolan, *supra* note 3.

the benefit this style of justice offers, and to engage the role of court judges in sentencing review and rehabilitation pathways in a more expansive way.

Indeed, the extended period of political and economic upheaval occurring in the UK has led to interruptions in continuity of core criminal justice functions. This coupled with a rigorous programme of financial austerity since 2010 has impacted on the delivery of many health, welfare and criminal justice services. This can arguably be considered reason for the lack of progress in advancing problem-solving justice, despite the expressed support for it. Criminal justice problem-solving is being discussed in a positive light within official policy-making circles, yet it is likely to remain a challenge to establish a prominent place alongside the many and varied economic efficiency court reforms being made. These favour speedier, digitised forms of justice which contrast sharply with the interactional, longer-term therapeutic styles problem-solving criminal justice seeks to embed. ■