scottish justice matters

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CHANGING TIMES

Special features on the reforms facing Scotland's criminal justice system

Also

Problem-Solving Courts

Interview with HM Chief Inspector of Prisons, Hugh Monro

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Beyond the Revolving Court Door

Is it time for Problem-Solving Courts in Scotland?

Cyrus Tata considers new ideas about the way courts might work with offenders.

IS IT TIME for a radical re-think in the way in which the justice system deals with offenders? Are there better and more constructive ways of dealing with the problem of offending at its roots, or are we stuck with a revolving door of reoffending? The 2012 Angiolini Report of the Commission on Women Offenders (see article on page 3 of this issue) recommended a pilot 'Problem-Solving Court' (PSC) for "repeat offenders with multiple and complex needs who commit lower level crimes." That recommendation, accepted by the Scottish Government, was followed by the visit of three senior PSC judges from the USA who gave a public lecture at Strathclyde University and had discussions with the Justice Secretary, senior officials, members of the judiciary and others.

But what exactly is a Problem-Solving Court?

Sometimes PSCs are confused with specialist courts or being 'fast-track' or being responsive to the community, but none of these are necessary or defining features (Nolan 2009). These are the three core defining principles of PSCs.

1 PSCs have a particular conception of what 'the problem' is

In the PSC model, the 'problem' of offending is identified as having a micro-social, medical, or psychological cause. A simple example is addiction to drugs – tackle this and you have a real chance of tackling offending. The PSC strives to tackle this cause at its roots through a more imaginative approach. Experienced readers will quickly spot that this idea holds much in common with the 'old' idea of rehabilitation. So it is, perhaps, no surprise that PSCs have become so widespread in the USA from 1989 onwards in direct response to the failures of the 1980s and 1990s 'war on crime' and 'war on drugs' which seemed to decimate rehabilitative services.

2 Ongoing judicial monitoring

PSCs rely on the authority of the judge to achieve behavioural change in the person who has offended. PSCs do not simply pass the person on to community-based services but rather incorporate monitoring of the person (a traditional function of social work) into the court. At present, judicial sentencers get little feedback as to how the sentence they selected has actually worked. Could PSCs offer a way of providing judicial sentencers with this sort of feedback as to how sentenced individuals respond?

3 Inter-disciplinary team-working

PSCs strive to solve the root causes of offending through an integrated approach, typically involving social work, a specialist (such as addictions workers), and often (but not always) with the prosecutor. Crucially, the judge is chair of that team. This team does not provide information and advice to the judge remotely but rather meets together in the style of a case conference. Clearly, this affords the chance for certain rehabilitative messages and values to become ingrained in practice. This is a radical departure from the (nominally) adversarial model of criminal justice. On the other hand, is there sufficient possibility for challenge? Defence lawyers, for example, tend to have a fairly marginal role.

Other potential features include:

PSCs often have a prominent role in public debate.

PSCs may seek to change public attitudes about crime and punishment. Indeed, the very novelty of the PSC approach attracts interest across the political divide and certainly in the USA has been a vehicle to smuggled rehabilitation back into mainstream national discourse.

Community responsiveness

PSCs can be a way of incorporating local community concerns and values into what they do. For some, this is a valuable example of responsiveness; for others, this can spell a dangerous populism. However, in the US many judges are elected and are used to this sort of community engagement. On this side of the Atlantic, it is harder to imagine judges doing this.

Key questions about PSCs

In the PSC model, are judges playing at social work?

Some critics of PSCs argue that the model encourages judges to think of themselves as better able to understand, challenge, motivate offenders to change than probation. On the other hand, supporters of PSCs would argue that good practice always recognises the limits of the judge's expertise and acknowledges and respects the expertise of other disciplines. Much may depend on how the roles are defined and the relations between the individuals. The Glasgow Drug Court experience suggests that this can be done in a way that is respectful of different disciplinary expertise (McIvor et al 2006).

Are PSCs more 'effective' at reducing offending?

Recent research (Rempell et al 2012) shows that Drug Courts are more effective than conventional courts in reducing re-offending and in helping people get off drugs (see also Belenko 1998). That is perhaps unsurprising – one would hope and expect that specialist courts should perform that better. The more challenging question is this: do good PSCs outperform good non-court-centred social work?

As yet, there has not been a controlled research study devoted to this specific question. One hypothesis, implied by research into how people desist from offending, is that offenders can and do respond to the perceived authority of the judge (McNeill and Weaver, 2010). In a world which can seem callously indifferent to offenders' troubles, a judge who takes the time to show genuine interest and empathy may have a more motivating effect than social work alone. That authority, combined with the public character of courts, can make for a uniquely powerful experience in encouraging and celebrating a person's achievements on the rocky road away from offending. In that way, the idea of public recognition to mark a person's desistance from crime (such as 'graduation desistance ceremonies') may be highly meaningful for a person in publicly and authoritatively affirming change.

Will PSCs use custody more sparingly?

Does the channelling of rehabilitation through a court-centred model lead to penal parsimony? As critics in the 1970s and '80s amply demonstrated, rehabilitation is nonetheless a form of punishment: it is about control (albeit for benign ends). We cannot assume that a PSC will automatically be less punitive than a conventional one. Courts have to use some sort of threat for non-compliance/breach. So much depends on how and where the tolerance thresholds are set. If that tolerance may, in significant part, be determined by perceptions of the prevailing penal climate, how can PSCs be insulated from the capricious winds of penal populism?

'Courtification'?

Critics of PSCs argue that their effect is to focus only on individual responsibility and micro factors as the causes of offending. By their nature courts cannot address the more fundamental issues of poverty and disadvantage that are associated with 'individual' problems like addiction. In this way, the critique says, PSCs distract attention from larger factors, such as social disadvantage. PSCs convert social problems into ones of individual discipline (Miller 2007, also 2012). It is hard to deny that law tends to convert social problems into individualised ones. That said, the counter-argument is that we have to start somewhere and having PSCs is better than doing nothing, or, waiting for the arrival of properly resourced social services and social equity.

On the other hand, if the PSC model becomes too attractive, is there a danger that it could distort the allocation of resources by hoovering up resources that might have been allocated to community justice services and indeed social services more generally? If clear limits are not set, could there be a temptation to prosecute a person with serious personal needs through a PSC, but who has committed only relatively minor offences, in order that s/he can get the help they need? That would be a disastrous outcome and it would make no financial sense. It is vital that the PSC approach targets cases that are deemed to be at risk of receiving a custodial sentence.

A New Model Judge?

As a society we demand a great deal of our judges and PSCs demand even more. Under the conventional system values of impartiality, independence and even apparent indifference, are valued. If the PSC model is to work there is an emphasis on some emotional connection between the bench and the offender, as well as professional collaboration and team working. Much hinges on these values being achieved and somehow the judge has to balance a display of his/her individual personality with impartiality; and empathy with authority. All of this is possible, as the Glasgow Drug Court sheriffs have shown, but we should be in no doubt that it is asking an awful lot.

PSCs offer new and exciting challenges: the possibility of escaping the revolving court and prison doors. At the same time, it is easy to get carried away by the evangelical zeal of some US PSC proponents: there are real dangers if clear purposes and limits are not set out. Perhaps, as Miller suggests, employing the traditional 'Scottish virtues of canny restraint and circumspection' will serve us well.

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