

Trends & issues

in crime and criminal justice



Australian Government
Australian Institute of Criminology

No. 383 October 2009

Foreword | *Problem-oriented justice seeks to incorporate innovative court practices to tackle offenders' behaviour and problems associated with offending. Over the last decade, the primary means of implementing such practices has been through the development of specialty courts. This paper presents an overview of the challenges associated with implementing aspects of specialty courts in the mainstream criminal justice system. The key issues explored are the need to promote equity of access, resourcing and the role of the judicial officer. Generic court intervention orders, such as the Victorian Court Integrated Services Program, are reviewed and the advantages of such approaches discussed. The paper also explores the means of promoting more cost-effective delivery of justice; the issues that can arise when judicial officers adopt a more therapeutic role in the administration of justice; and the need for comprehensive evaluation of court innovations. Finally, the need for cohesive policies on the development of problem-oriented justice, whether in the mainstream criminal justice system or specialty courts, is examined.*

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Challenges in mainstreaming specialty courts

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Specialty courts were first introduced in Australia in the late 1990s as part of the recognition that the social problems which may have contributed to a defendant's behaviour may require social or therapeutic, rather than legal solutions (Freiberg 2001). Therapeutic jurisprudence is the 'study of the role of the law as a therapeutic agent' and focuses on the law's impact on emotional life and psychological well-being (Wexler & Winick 1996: xvii). Phelan (2003: 99) suggests that problem-solving courts 'represent more than just structural or process changes. They challenge the nature of courts and represent something of a revolution in the way in which courts might operate in modern, democratic societies'.

There are currently a number of specialty courts, lists, approaches and court support services in place in Australia. All jurisdictions have specific programs for dealing with defendants with drug abuse issues. As King et al (2009) note, most of these programs have been extensively evaluated, with generally positive results. In addition, cost-benefit analyses indicate the programs are no more expensive, and in some instances less expensive, than prison. There is a range of other courts and programs particularly focused on dealing with mental health concerns, family violence and Indigenous defendants. These courts have been less comprehensively evaluated and what evaluations there have been do not consistently point to reduced recidivism (see King et al 2009).

In most cases, specialty court programs deal with a small number of defendants. In particular, models such as resource-intensive drug courts tend to be focused in metropolitan areas and access is therefore restricted to urban defendants. Thus, regional and rural defendants may face disadvantage due to the comparative lack of appropriate local services. Mainstreaming the principles of problem-oriented justice or mainstreaming specific programs or practices may promote more equal access to court innovations for a greater proportion of defendants (Gray 2008). This may also have significant organisational advantages (Cannon 2007).

This paper presents the key features of problem-oriented justice and examines three challenges associated with these approaches and attempts at mainstreaming, namely,

promoting equity, resourcing issues and the role of the judicial officer.

Key features of problem-oriented justice

Problem-oriented courts act as a 'hub' to connect various 'spokes'—such as drug and alcohol treatment agencies, community-based corrections, probation services and domestic violence agencies—forming a holistic and integrated approach (Blagg 2008). There are significant differences in the structure and governance of such courts and programs around Australia but the following are common features:

- *case outcomes*—working on tangible outcomes for defendants, victims and society
- *system change*—seeking to re-engineer how government systems respond to problems, such as drug and alcohol dependence and mental illness
- *judicial monitoring*—active use of judicial authority to solve problems and change defendants' behaviour
- *collaboration*—engagement of government and non-government partners (eg social service providers and community groups) in reducing the risks of re-offending
- *non-traditional roles*—this may include altering aspects of the adversarial court process, as well as ensuring defendants play an active role in the process (see Berman & Feinblatt 2001; Freiberg 2001; King et al 2009; Popovic 2006).

Key challenges in mainstreaming problem-oriented justice

There are a number of practical and conceptual challenges to bringing problem-oriented justice into the mainstream. Farole et al (2004) found that some of the key challenges to applying problem-oriented justice in mainstream courts were resource constraints and judicial philosophy and experience. This paper explores these issues further, as well as considering the extent to which mainstreaming can promote

greater equity within the criminal justice system. It should be noted, however, that there are a number of other challenges which would also need to be addressed to enable successful mainstreaming, for example, legal and constitutional constraints on what can or should be done in a conventional court.

Promoting equity of access

One of the key concerns with specialty courts is that they afford only limited access to services for the vast majority of defendants. Expanding aspects of specialty courts and programs to the mainstream criminal justice system has the potential to overcome this lack of equitable access. Defendants who do not reside within the relevant geographical area for specialty court programs will benefit if these programs are rolled out in local courts across a jurisdiction, or nationally. In order to do so effectively, however, programs will need to be targeted to address the main needs of defendants.

Offending behaviour is complex and there may be no one primary cause of offending. Even where problems are correctly identified, multiple diagnoses may prevent appropriate action. For example, some drug court programs exclude defendants with mental health problems, exclude alcohol abuse and/or may not be appropriate for Indigenous defendants (Joudo 2008).

Mainstreaming aspects of specialty courts, and developing a more generic intervention response, may enable courts to become more effective in dealing with the range of factors that have contributed to the defendant's behaviour and tailor responses to the defendant's individual criminogenic needs. In addition, greater focus on needs assessment will ensure an appropriate level of service is matched to individual defendants' needs (although this assumes adequate resourcing).

One option for effectively mainstreaming specialty court innovations may be to adapt existing models of court intervention programs as a generic order. The Law Reform Commission of Western Australia (LRCWA 2008: 157) has noted that:

[g]eneral court intervention programs have developed as a way of facilitating court intervention where specialist programs are unavailable or inappropriate...general programs are not restricted by their eligibility criteria to a target group of offenders with one particular issue.

The model adopted in Victoria provides a key example. In 2005–06, Victoria allocated \$17m for the development of the 'Court Integrated Services Program' (CISP), with a further \$10.5m allocated in May 2009 (LRCWA 2009).

CISP builds on existing Victorian programs. It provides a coordinated, team-based approach to address underlying issues such as drug dependency, homelessness, disability and mental health problems. The LRCWA (2008: 166) argues that other than family violence, 'it is difficult to envisage a "problem" that would not fit within any of these categories'.

CISP commenced in November 2006 as a three year pilot program and by the end of June 2008, 1,951 people had been accepted into the program. In the first year, 53.5 percent of participants completed the program, but there is no information currently available on recidivism rates or other outcomes (LRCWA 2009). Evaluation outcomes are due in October 2009 and will inform the future development of the program. Its features include:

- a centralised actuarial screening and assessment process
- targeted intervention, matching the level of intervention to the level of risk of re-offending and need
- priority access to treatment and support services
- quality advice to magistrates to facilitate optimal pre-sentencing and sentencing outcomes
- consistent data collection to facilitate evaluation.

In each of the three locations where CISP is currently running, there are a number of case managers with experience in dealing with a range of issues, including drug and

alcohol abuse, mental health problems, welfare needs, acquired brain injury, housing, homelessness and Indigenous issues (Magistrates Court of Victoria 2007). Program staff will ensure participants receive sufficient support following release from custody, for example, by providing food and travel vouchers, organising temporary accommodation or paying for methadone.

CISP requires much less judicial monitoring than specialty courts, although the judicial officer may decide to monitor the defendant's progress (Magistrates Court of Victoria 2007). In practice, most participants appear in court about once a month and may appear before a different magistrate. Significantly, CISP has access to brokerage funding to provide individualised supports in a timely manner and address immediate needs to stabilise defendants. This is expected to reduce administrative costs and delays associated with applying for funding and facilitate a more accurate analysis of cost-effectiveness (LRCWA 2008).

Based in part on the CISP experience, the LRCWA has recently recommended 'establish[ing] a general court intervention program' (2009: recommendation 37). The LRCWA (2009) made a number of recommendations about the scope of the proposed program, suggesting that the eligibility criteria should be as broad as possible, that the program be available pre- and post-plea and be independently evaluated after two years.

The suggested advantages of a general intervention program include:

- *increased access to court intervention programs*—general programs that supplement existing specialty courts are vital to maximise the opportunity for all defendants to participate in effective intervention programs, thereby substantially eliminating equity issues
- *enhanced early intervention*—general programs do not require a defendant to plead guilty, but merely a willingness to address one or more underlying problems. Accordingly, participants can commence treatment or assistance before finalising the key legal issues, which may reduce the risk of offending on bail

- *saving on resources*—establishing general programs is said to be the most cost-effective way to increase the opportunity to participate in court intervention programs, as they do not require separate program staff and administrative structures for each jurisdiction
- *improved and expanded knowledge*—establishing general programs throughout the criminal justice system is a means of improving the knowledge and experience of all judicial officers, police prosecutors and lawyers, which will in turn increase awareness of the benefits of such programs and facilitate a better understanding of the factors underlying offending behaviour (LRCWA 2009; 2008).

New South Wales is currently trialling a program—Court Referral of Eligible Defendants Into Treatment—for high-risk defendants, which will use an actuarial tool developed by the NSW Bureau of Crime Statistics and Research to target defendants at local courts who are at a high risk of re-offending. The program is voluntary and will involve a face-to-face interview with the defendant to pinpoint the causes of their criminal behaviour and determine if they are suitable for ongoing participation in services. Participants will then undertake programs and treatment to address relevant issues including drug and alcohol problems, mental health issues, and education, employment and accommodation needs. Two of the key features of 'problem-solving courts' that are proposed to be adopted in this program are:

- utilising processes and sanctions that encourage rehabilitation over retribution
- building partnerships with agencies as part of the court process to better integrate social, welfare and health services for defendants.

The Victorian, NSW and proposed WA programs have the potential to significantly increase access for defendants to relevant services, thereby promoting greater equity within the criminal justice system.

Resource issues

Many problem-oriented approaches are resource intensive, requiring specialised

staff, money and access to medical, social and other services. Providing these resources will obviously have significant cost implications, particularly if rolled out across a jurisdiction or nationally. Conversely, if court interventions can be shown to be effective in reducing recidivism and promoting defendant wellbeing, including health and employment, costs are likely to be saved in other areas of government expenditure.

By way of example, the NSW Magistrates' Early Referral into Treatment (MERIT) program is a drug diversion program available in 80 percent of NSW magistrates' courts. An independent evaluation estimated that for every dollar spent on the program, at least \$2.41 was saved on costs for prison and probation. An estimate of potential savings, taking into account police investigation and hospitalisation costs, as well as savings from reduced crime, indicated that as much as \$5.54 could be saved for every dollar spent on the program (Northern Rivers University Department of Health 2003).

Victoria's justice framework stipulates that when funding is allocated for 'problem-solving' programs, money must also be given to enable appropriate data collection for evaluation purposes. There is a strong need to ensure that major systemic changes to the ways in which Australian courts administer justice are properly documented and evaluated. In particular, well-designed studies are required that measure appropriate outcomes to determine the cost effectiveness of specialty court programs. Evaluation approaches should also ensure comparable control groups and accurately identify genuine program effects (Payne 2005).

To date, the Australian evidence on the cost effectiveness of problem-oriented approaches to justice is inconclusive, but the LRCWA (2008: 36) has asserted that

successful court intervention programs will result in cost savings to other areas; for example, savings to the health system from reductions in drug/alcohol use and mental health problems, and savings to the welfare system because of increased employment.

Another issue is that it is problematic when defendants' access to the limited resources of social services comes at the expense of members of the community who are not involved in the criminal justice system. Accordingly, the LRCWA (2008) suggests that it is not appropriate to reallocate existing resources, which could potentially reduce the availability of treatment for people not involved in the criminal justice system, thereby creating equity issues. Instead, adequate additional resources should be allocated, as occurred with the Illicit Drug Diversion Initiative.

There are also issues in relation to direct costs to the criminal justice system. The LRCWA has observed that high caseloads in traditional courts mean that sentencing proceedings are invariably conducted quickly, noting that 'court intervention programs [were] developed in the United States as a response to "assembly-line" justice or what has been described as "McJustice"' (LRCWA 2008: 24).

It would therefore seem to follow that judicial officers spending more time with each defendant and being involved in case conferencing will necessarily add to court time. However, this may not translate to increases in court administration time. For example, none of the 59 magistrates surveyed by the Judicial Commission of New South Wales thought that their involvement with the MERIT program had significantly impacted their judicial workload, with two-thirds of respondents indicating it had had little impact (Barnes & Poletti 2004).

Further research is required to examine the time taken to deal with defendants when adopting a more problem-oriented approach to justice. It would be beneficial to examine the court time required per defendant for a range of court intervention programs, especially the general models discussed above. The impact on the resources of the criminal justice system as a whole should also be considered.

Greater judicial involvement in defendant case management may ultimately promote efficiency in the administration of justice. Freiberg (2003: 12) suggests that judicial officers are able to act more 'quickly, decisively [and] conclusively' than

community corrections officers and other justice agencies, thereby saving time and money in other aspects of the justice system. It could therefore be argued that some of the apparently time-consuming practices of problem-solving courts could be accommodated within existing timeframes as a result of efficiency dividends in court processes.

In a recent review of court delays, Payne (2007) detailed a number of international initiatives to promote more efficient case management which might also serve to counteract some of the additional burdens on court time which problem-oriented approaches necessarily require. These initiatives save time (and inferentially, money) in the standard listing and processing of criminal matters and would free up additional time and resources for the more onerous aspects of problem-oriented models of justice. Some examples which would flow from more problem-oriented approaches and/or complement such methods include:

- improving the quantity, quality and timeliness of information and communication between the key players, that is, investigation, prosecution, defence and the court
- promoting earlier discussion of pleas and improving incentives for guilty pleas
- improving certainty in listings
- improving services for victims and witnesses and encouraging greater participation in the trial process (Payne 2007).

Role of the judicial officer

One of the key features of problem-oriented justice is the more interventionist role adopted by the presiding judicial officer. However, this raises a number of philosophical and ethical issues including:

- the (im)propriety of judges both meting out and supervising sentences
- challenges to judicial independence and the separation of powers through teaming up with the executive arm of government
- impaired judicial neutrality by involvement in extra-judicial activities such as community planning

- the need to praise and reward participants where this may conflict with judicial independence and impartiality
- if an intervention is a paternalistic intervention, this may be anti-therapeutic because it undermines people's autonomy in making decisions about their own lives.

Notwithstanding these concerns, judicial case management can be carried out in a way that does not compromise traditional values of judging. Indeed, the judicial role needs to adapt to social change and to the discovery of new knowledge concerning the human psyche, human behaviour and social need (King & Wager 2005). This will require a change in thinking by judicial officers, together with

a concomitant realisation that the traditional role of judicial officers is evolving to meet the changing needs of the communities they serve (Popovic 2003: 120).

Courts may actually enhance their reputation by modifying their processes to better deal with the social problems that they confront, 'as long as they do so in a way consistent with their primary role of maintaining the rule of law' (Cannon 2008: 219). In recognition of this, WA country magistrates have unanimously resolved to apply therapeutic jurisprudence principles in their courts (King & Wager 2005).

There is clearly a balance to be struck in terms of the appropriate level of judicial intervention. One critic of US drug courts has stated 'I cannot imagine a more dangerous branch than an unrestrained judiciary full of amateur psychiatrists poised to "do good" rather than to apply the law' (Hoffman 2000: 1479). The LRCWA (2008) responds by saying that judicial officers taking a 'problem-solving' approach will still be performing a judicial function, rather than being social workers.

It is not suggested that judicial officers will 'cure' mental illness or addiction, but that they will 'be aware of and understand these problems' (LRCWA 2008: 32). Furthermore, judicial officers do not make their decisions about defendants' treatment in isolation but with a team of different agencies. While employing judicial officers as de facto

therapists and social workers is unlikely to be either effective or efficient, there is scope to better utilise 'the authority of the judicial officer [as] arguably more effective than the authority of a community corrections officer' (LRCWA 2008: 25).

Conversely, it may not always be appropriate for judicial officers to be involved in active case management. In fact, there is considerable scope for involving judicial officers in the defendant's progress under an intervention program and thereby obtaining the benefit of the gravitas which accompanies the judicial officer's standing, without requiring them to be the primary agent in the ongoing monitoring process. As a key example of this, in MERIT and similar programs, the magistrate is a 'core element' of the program and provides encouragement, guidance and supervision, but is not involved in treatment decisions (LRCWA 2008), thereby minimising concerns about extensive judicial involvement in defendants' case management.

This discussion considers one aspect of problem-oriented justice, namely, the role of the judicial officer. It must also be borne in mind that there are a number of other key players in the criminal justice process, including registrars, police officers, prosecution and defence counsel, social workers and drug and alcohol counsellors, whose roles and responsibilities will also be transformed by a transition to mainstream problem-oriented justice.

Conclusion

This paper considers some key issues in expanding problem-oriented and specialty court programs into the mainstream criminal justice system, namely, cost considerations, equity of access and the role of the judicial officer. Other considerations include the need to improve communication and ensure procedural fairness, effective community and inter-agency collaboration, and the need for comprehensive evaluation and research.

Adopting problem-oriented approaches should not be regarded as a panacea

or certain means of reducing recidivism and they are not appropriate for all court matters. Some of the processes discussed in this paper lack transparency and afford defendants no right of appeal (Popovic 2006). There are also issues with ensuring quality service provision, which may be difficult to attain in rural and remote areas; conversely, it will be detrimental to move program participants too far from their community networks. Further, for some more serious offenders, a brief generic intervention program will be inadequate to address their needs, although it should still assist in identifying needs and commencing the treatment process.

Notwithstanding these reservations, Phelan (2004) criticises the existing system, saying it is not progressive, customer-focused or relevant; in addition, it is inefficient and tolerant of gaps in services. Victorian Deputy Chief Magistrate Popovic regards specialist and problem-oriented lists and courts as 'an effective, accessible and cost-efficient innovation' (2006: 69). Blagg (2008: 26) notes that a problem-oriented approach to justice requires willingness on the part of participants in court processes to break with some traditional beliefs about their role and embrace a more collegiate style of working, suggesting that therapeutic jurisprudence 'is geared towards making the existing system work better rather than replacing it with something else'.

As discussed above, all jurisdictions have embraced diversionary court programs to some extent, but many operate on an ad hoc basis with limited and non-recurrent funding. Most jurisdictions also lack a cohesive policy on the future of problem-oriented justice. Victoria, by contrast, has a significant commitment to the philosophies underpinning such programs and courts and has developed a number of policy documents to further their development, including the *Policy framework to consolidate and extend problem-solving courts and approaches* (Department of Justice Victoria 2006).

The Attorney-General's *Justice statement: new directions for the Victoria justice system 2004–2014* (Department of Justice Victoria

2004) also articulates four principles that should guide the development of the framework, namely:

- *cooperative practices*—cooperation with service providers; with the courts in imposing sentences, with police, corrections and human services agencies
- *policy consistency*—consistency with overall strategies, for example with Aboriginal justice and health strategies, with crime prevention and correctional strategies now in place
- *minimum necessary intervention*—applying the principle of parsimony and using appropriate (or alternative or diversionary) options or interventions
- *responsive procedures*—emphasising procedural justice and the importance of fair and participatory processes.

Victoria recently released its *Justice Statement 2*, which notes, inter alia, that '[t]he next challenge is to unify problem-solving courts into a comprehensive model for suburban and regional courts' (Department of Justice Victoria 2008: 8). There is scope for other jurisdictions to follow suit in developing a similar overarching policy framework. To this end, the LRCWA has recently recommended the introduction of a Court Interventions Program Unit and the introduction of a legislative framework for such programs in Western Australia (2009: recommendations 1 & 2).

It is beyond the scope of this paper to prescribe a set list of problem-solving practices and principles that should be adopted in any particular jurisdiction or nationally. Nevertheless, the issues discussed here may assist in reviewing and responding to the key challenges in implementing problem-oriented approaches in Australian courts. Wexler and Winick (2003: 6), the founders of therapeutic jurisprudence, contend that problem-solving courts may actually be 'a transitional stage'

in the development of 'an overall judicial system attuned to problem solving'. This paper outlines some of the issues to be addressed in this current transitional stage which will hopefully assist in the criminal justice system's evolution towards an effective problem-oriented model.

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