With the highest incarceration rate of any country in the world – around five times that of Scotland – looking to the United States for lessons when it comes to criminal justice doesn’t seem an obvious thing to do.

However, this month marks 12 years since the first case came before the Glasgow Drug Court, a development that owes its roots to a concept pioneered in Miami-Dade County, Florida, in the late 1980s in response to a crack cocaine epidemic. A second drug court in Fife followed, while domestic abuse courts – first in Glasgow and latterly in Ayrshire, Edinburgh, and Falkirk – have slowly emerged; specialist courts that are, to an extent, emblematic of a broader problem-solving court model on the verge of taking shape in Scotland.

Amidst the Commission on Women Offenders’ 37 key recommendations – including demolishing Cornton Vale – understandably, perhaps, Dame Elish Angiolini’s call for a pilot of a problem-solving summary criminal court for “repeat offenders with multiple and complex needs who commit lower level crimes” did not steal the spotlight. However, almost eighteen months on from the Cabinet Secretary committing to trialling such a court, movement may be on the horizon given all eight community justice authorities (CJAs) have now been invited to submit proposals.
“In essence, problem-solving courts are about having a court service that cares about and can take action on reducing crime,” says Phil Bowen, director of the Centre for Justice Innovation (CJI), a London outreach of the New York-based Center for Court Innovation, which has been intimately involved in implementing problem-solving court projects across the Atlantic. “What in practice that means is a court treating people as people rather than just as a case to get through.

“People who present in court often will be up on, say, a street drinking charge but actually, there might be a host of issues and difficulties that have brought that person in front of the court. These could be addressed as part of a better court process rather than just giving someone a conditional discharge or a fine. So it is about trying to re-envision how the court can use the opportunity it has to effect change. What that means is often having a sense of how the court can make that difference. That often revolves around what is the assessment of the person before they come to court [and] what are the services available to court to sentence maybe a bit differently.”

In practice, problem-solving courts exhibit three core features, explains Dr Cyrus Tata, Professor of Law and Criminal Justice at Strathclyde University. “The first is it has got a particular conception of the problem underlying offending as having some kind of micro-social, quasi-medical, or psychological cause; the second is on-going judicial monitoring being done by judges, not simply by social workers; and the third interdisciplinary team working in court, which is a radical departure,” he explains. Essentially, a problem-solving court is a rehabilitation court, says Tata, that brings together a range of different disciplines such as health, addiction services, and criminal justice social work.

“Unlike the traditional conventional court model, the judge doesn’t simply pass say a Community Payback Order with certain conditions; instead what the judge does is to pass certain requirements but the person must come back in front of the court, usually back in front of the same judge, and report on their progress,” he explains. In this vein, in issuing guidance to inform proposals, the Scottish Government has advised that pilots include a “dedicated sheriff(s) engaging with offenders, monitoring and reviewing their progress with a focus on smart (but not soft) community disposals” that combine payback to the community with action to address what lies behind the offending behaviour.

This, of course, raises the question of whether judges – through the authority they have – are better placed at driving behavioural change than criminal justice social
workers. This role has been exercised intermittently to date with monthly reviews by sentencers built into Drug Treatment and Testing Orders (DTTOs), while CPOs allow progress to be gauged over time, albeit to a lesser extent given this is left to the discretion of those passing sentence. In 2011-12, fewer than one in five CPOs were imposed with a provision to conduct progress reviews.

“It is a different role [for judges], it is a more labour intensive role, and it is a time-consuming role,” says Sheriff Alistair Duff, deputy director of the Judicial Institute for Scotland, which is responsible for judicial training. “And it is true of the States that there are some judges who don’t feel comfortable with that role. To use the American expression, some judges feel that they are effectively the umpire at the baseball match whose task is to call balls and strikes, as they say. It demands different skills of judges. I am pretty confident that the modern judge will have and will embrace the skills that are needed to preside over a problem-solving court. The reaction we have had [from members of the judiciary] is that there are significant numbers who see the value of the problem-solving court model and would be happy to preside over such a court.” Has hesitancy been detected among some? “Some will be late adopters,” admits Sheriff Duff. A requirement for additional training from the institute will be inevitable, he adds, though this will not be of such an intensive nature as to test its resources.

Though Tata does not term it a defining feature, it is commonly accepted that problem-solving courts will entail a heightened level of community engagement. Indeed, responding to local needs and concerns is listed as one of five features government is seeking in any proposals put forward by CJAs over the next six weeks. “Now that brings with it a whole series of issues around judicial independence and again, there are some judges who take the view that the strictures of judicial independence probably prohibit the level of community engagement that these judges have,” says Duff.

“There are other sheriffs in Scotland, I know, who are more inclined to meet with community groups, with their local CJA, and are happy to talk about the work of a sheriff, to hear what local problems are in general and to have that level of local understanding. Again, I think it will depend very much on, if we end up with a problem-solving court, I think it will end up what model of court that we have whether any level of community engagement is expected of the sheriffs who sit.”

Duff touches on a salient point: the speculative nature of the process. CJAs along with local partners have been invited to consider problems distinct to their area that
could be tackled more effectively by a problem-solving approach, though a fully worked up model is not expected at this stage. Government, which has said it may be able to fund more than one trial, has committed to providing start-up funding for a problem-solving court, while it is expected the London-based CJI will provide technical assistance.

“A key area of our discussions at this very early stage is not just around what type of problem solving we could look at but also whether it is actually about trialling a problem-solving summary court, i.e. a physical court, or whether it’s about trialling a problem-solving approach,” says Rob Strachan, chief officer of Lothian and Borders CJA. “They could be compatible but it’s whether the Government actually mean a physical court to trial the problem-solving approach or whether it’s about trialling a problem-solving approach to justice more widely, and not necessarily in a court setting. That seems to be a key question that we are grappling with when pulling proposals together.”

CJAs were initially afforded little more than a month to draft proposals and achieve buy-in from their local Sheriff Principal. That deadline has since been extended from 22 November to 6 January after CJAs requested more time to work on bids with local partners.

“The timescale was extremely challenging to speak to all the various partners,” says Anne Pinkman, chief officer for Fife and Forth Valley CJA. “Just taking my own area, I have got six sheriff courts and everybody has busy diaries – it was a very challenging timescale to be met and the Scottish Government thankfully have extended that timescale and that will be extremely welcome.”

In truth, the delay has not been limited to a mere six weeks. The Cabinet Secretary for Justice’s first annual progress report to parliament on steps taken to implement recommendations of the Angiolini Commission outlined a view to establish at least one problem-solving summary criminal court pilot by May of this year. Only in October, five months later, was the step actually taken to invite proposals from CJAs. “We have spent time over the past months working with partners to agree an understanding of what the approach to problem-solving courts would be,” said a Scottish Government spokeswoman. “This preparatory work was critical to ensure that any bids received are appropriate and financially sustainable.”
It is no secret the Community Justice Division inside St Andrew’s House has had its hands full with reform of CJAs, a decision on which is expected by the end of this year. Movement of key personnel inside government and time taken to cajole certain senior officials not fully convinced the change represented value for money were also said to have been salient factors. The suggestion that efforts to bring judges round to the idea has delayed matters is dismissed by Sheriff Duff. “I can’t speak for the Cabinet Secretary but under no circumstances, I would have thought, has it got anything to do with that,” he says.

Timing, more generally, is a common thread running through the Scottish narrative. The long-term future of CJAs in their current form remains uncertain, while a process of closing ten sheriff courts across the country commenced this month. Court closures and the subsequent increase in court business for those that remain could make introduction of a problem-solving court more challenging, suggests Pinkman. “There seems to be a keenness to look at problem-solving courts and what it might mean for justice, although I do sense that partners are tempering their enthusiasm with the realities of a fast-paced public service reform landscape and considerations around system capacity,” adds Strachan. “These issues obviously need to be taken into account when you’re going through these types of discussions.”

_Holyrood_ understands a decision has already been taken by the Sheriff Principal not to submit a bid in North Strathclyde due to resources already being under strain given the normal summary court diet. Likewise, Fife and Forth Valley has found itself at a crossroads given Fife Drug Court is set to cease operations inside the next fortnight. The Scottish Government had raised the prospect of continued funding if Fife Council and its partners agreed to develop a wider problem-solving court, though existing pressure on court business meant the Sheriff Principal didn’t feel able to support such a development. The problem-solving model is of interest but Dunfermline – which housed a satellite of the larger drug court in Kirkcaldy – will not be put forward for consideration. The picture nationwide remains less definitive, though_Holyrood_ understands early indications are that Lothian and Borders and Tayside are being tipped as those most likely to take forward bids.

Though the Scottish Government has vowed to give consideration to all proposals received irrespective of how ambitious they may be, resources dictate that any trial taken forward will almost certainly look to existing courts with spare capacity rather than a new building per se.
In effect, it will be a balancing act that requires the right amount of regular court business to ensure a problem-solving approach is put to good use but not overused. “A problem-solving court probably does need a critical mass of cases for it to be effective,” says Tata.

“It is really vital that problem-solving courts approach and target cases where a custodial sentence is definitely on the cards, but not inevitable. In other words, marginal custody/non-custodial cases, we need to target those cases. It would be folly to end up putting cases through a PSC if the person might otherwise have got a fine or might not even be prosecuted through court. If clear limits are not set, there could be an understandable temptation to prosecute a person through a PSC where the offence isn’t that serious in order that they can get the help they need. That would be disastrous. Without clear limits we could end up putting people through the courts in order that people can access high quality social services.

“Now I think in Scotland we’re sensible enough not to do that, but there is a danger. It is really, really important that we say: this is what a problem solving court is for; it needs to be for cases where a custodial sentence is definitely on the cards but not inevitable. Those are the cases that need to be put through a problem-solving court.”