

**What went wrong with attempts to outsource probation?
Lessons from the Transforming Rehabilitation programme
in England and Wales.**

PHILLIPS, Jake <<http://orcid.org/0000-0002-7606-6423>>

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Published version

PHILLIPS, Jake (2019). What went wrong with attempts to outsource probation? Lessons from the Transforming Rehabilitation programme in England and Wales. *Archbold Review* (7), 5-10.

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Introduction

In 2014 the Government pushed through significant reforms to probation. Known as Transforming Rehabilitation (TR) the reforms were supposed to result in around 70 per cent of the probation caseload being taken on by 21 newly created Community Rehabilitation Companies (CRC). Most CRCs are private companies working for a profit, the only exception to this is Durham and Tees Valley CRC which is run by a mutual company made up of local non-profit organisations. The remaining 30 per cent of the case load was intended to move to the auspices of newly formed National Probation Service (NPS). The caseload was split along the lines of risk of harm, with CRCs being responsible for managing low-medium risk offenders and the NPS taking responsibility for high risk offenders as well as the initial risk assessment and court work (i.e. writing pre-sentence reports and prosecuting breaches). CRCs also provide some services to NPS cases if referred and are responsible for delivering Unpaid Work - thus, high risk offenders sometimes come under the purview of CRCs. TR was implemented on 1 June 2014 as part of the Offender Rehabilitation Act 2014 (although the foundation stones were laid in the Offender Management Act 2008 which allowed for the outsourcing of probation services in the first place). The Act also extended post-release supervision to everyone sentenced to prison for one day or more which meant that the probation caseload grew by around 40,000 people within a year of the reforms being implemented. In the words of the Secretary of State for Justice Chris Grayling MP at the time;

These reforms will make a significant change to the system, delivering the Government's commitment to real reform. Transforming rehabilitation will help to ensure that all of those sentenced to prison or community sentences are properly punished while being supported to turn their backs on crime for good – meaning lower crime, fewer victims and safer communities.¹

The immediate aftermath

Grayling was correct (not something many people have written): the reforms did lead to significant change in the system. Unfortunately, as has now been well documented and will be discussed in this essay, not necessarily with the desired effect. As early as December 2014, there were signs that the reforms were not going as well as planned. In its first TR 'early implementation report' Her Majesty's Inspectorate of Probation raised concerns about the implementation, especially around inadequate staffing in some areas, problems around information sharing and IT.² In subsequent reports, the Inspectorate found these issues persisted and raised concerns about the measurement of risk which was used being used to allocate cases to CRCs and the NPS. By the time of its fifth and final report in May 2016 the Inspectorate had considerable concerns about the work being done in courts, inconsistent supervision process in place in CRCs as well as problems around the assessment of risk.³ Meanwhile, the Parliamentary Justice Select Committee began to take an interest and discussed the

¹ Ministry of Justice, 'Transforming Rehabilitation: A Strategy for Reform.' (Ministry of Justice 2013) Cm 8619 5 <<https://consult.justice.gov.uk/digital-communications/transforming-rehabilitation/results/transforming-rehabilitation-response.pdf>>.

² HMI Probation, 'Transforming Rehabilitation. Early Implementation' (HMI Probation 2016).

³ HMI Probation, 'Transforming Rehabilitation. Early Implementation 5' (HMI Probation 2014).

possibility of an inquiry. A special issue of *Probation Journal* also drew attention to some of these early issues with researchers raising problems with the use of payment by results in the justice sector especially in relation to women⁴, the impact on staff of working with high risk offenders⁵ and the implications of using assessments of risk to allocate cases⁶. The Chief Inspector of Probation's annual report published in December 2017 said that the reforms had created a two-tier and fragmented system which was undermined by a series of problems inherent to the model itself.⁷ In March 2018 the Public Accounts Committee published a report which revealed that in 2016 the Ministry had made additional payments of £342m to CRCs to keep them afloat.⁸

The results of the Justice Select Committee Inquiry were published in June 2018. The Committee had very little positive to say about the reforms: they had not reduced reoffending, had not opened up the market adequately, it was considered a mistake to implement TR without testing and piloting and they considered the use of risk as a way of allocating cases as fundamentally flawed. In July 2018, in the aftermath of the Justice Select Committee inquiry, the Secretary of State for Justice acknowledged that probation was not performing to expected levels and a consultation was launched with a view to further reforms. Whilst the Government acknowledged the issues, the consultation offered very little in the way of actual change: more NPS divisions and fewer CRCs were the only real change, and the Government seemed still set on using private companies to deliver a considerable element of probation provision. This became known as TR2 and represented more of an evolutionary than revolutionary approach to TR.

In February 2019 Working Links, owner of three CRCs went into administration and operations were moved to a different owner; in the following month Interserve, owner of five CRCs, followed suit (although the CRCs were not transferred to new owners due to a contingency plan put in place by the Ministry of Justice). There then came three final nails in the coffin for the TR project. In March 2019 the National Audit Office published its report on TR in which it said that the Ministry of Justice had 'set itself up to fail in how it approached the Transforming Rehabilitation reforms'.⁹ On 3 May 2019 the Public Accounts Committee published its progress review on TR and was equally scathing, saying that 'the Ministry's decision to split the probation service has let down offenders and those working in the justice system'.¹⁰ Just a few weeks later, the Chief Inspector of Probation published her final annual report in which the TR model was described as 'irredeemably flawed'.¹¹

⁴ Emily Evans, 'The Expected Impacts of Transforming Rehabilitation on Working Relationships with Offenders' (2016) 63 *Probation Journal* 153.

⁵ Jake Phillips, Chalen Westaby and Andrew Fowler, "'It's Relentless" The Impact of Working Primarily with High-Risk Offenders' (2016) 63 *Probation Journal* 182.

⁶ Christopher Kay, 'Good Cop, Bad Cop, Both? Examining the Implications of Risk Based Allocation on the Desistance Narratives of Intensive Probationers' (2016) 63 *Probation Journal* 162.

⁷ HMI Probation, '2017 Annual Report' (HMI Probation 2017).

⁸ Public Accounts Committee, 'Transforming Rehabilitation' (House of Commons 2018) HC 484 <<https://publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/484/48402.htm>> accessed 8 July 2019.

⁹ National Audit Office, 'Transforming Rehabilitation: Progress Review' (National Audit Office 2019) HC 1986.

¹⁰ Public Accounts Committee, 'Transforming Rehabilitation: Progress Review' (House of Commons 2019) HC 484 <<https://publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/484/48402.htm>> accessed 8 July 2019.

¹¹ HMI Probation, 'Report of the Chief Inspector of Probation' (HMI Probation 2019).

And so, in May 2019 the Ministry of Justice finally published its response to the consultation on probation reform.¹² Rather than persevering with the model proposed in the consultation, real change seems to be on the horizon. Under the next stage of probation reform entitled 'Strengthening probation, building confidence' the NPS will take responsibility for the supervision of all offenders regardless of risk, something which was probably influenced by similar developments in Wales. This will include work that involves risk assessment, brokering services, case supervision and court work. HMPPS will commission services from outsourced providers with a mix of local and national procurement packages to which NPS officers can refer their service users depending on need. Thus, so-called 'rehabilitative services', such as accredited programmes, RARs and Unpaid Work, will be delivered by what the Ministry is calling 'Innovation Partners'. It is worth noting and questioning the implicit assumption here that rehabilitative services are seen to be in need of innovation and not 'offender management'. Nevertheless, this is a considerable roll back from the original TR model although Government is clearly committed to some involvement of the private sector in the field of probation. Although this recent development is being lauded by some as the 'renationalisation' of probation, it is not quite that. It is also interesting to note that if this model had been proposed from the outset it would have been strongly criticised for strengthening a central grip on probation and the wholesale privatisation of interventions: it would seem that TR has shifted the Overton window of what is now seen as acceptable in probation.

The reasons for the conclusions of the myriad reports and pieces of research described above are manifold. In addition to the issues raised above, inspection reports consistently called out inadequate forms of supervision including a very heavy reliance on telephone contacts in CRCs. ORA 2014 introduced a new requirement, the Rehabilitation Activity Requirement, which replaced the old Supervision Requirement and the Specified Activity requirement. Measured in days, people on probation are sentenced to do a certain amount of activities as specified by their supervising officer. It was not until February 2019 that full guidance for what a 'RAR day' might look like was published. This meant that sentencers found it difficult to know exactly what someone might actually be doing as part of a Community Order or Suspended Sentence Order. Through the Gate support - a flagship element of the reforms which were supposed to increase the level of support provided to people leaving prison - were considered wholly inadequate in inspection reports¹³ and academic research.¹⁴ Whilst much of the criticism was directed at the CRCs, the NPS also faced severe issues. Low staffing levels meant that probation officers were struggling with high caseloads of people who pose a high risk of harm.¹⁵ Since 2014 there has been a clear decline in the use of Community Orders which some have put down to declining confidence in community sanctions amongst sentencers which stems from a perception that probation is less effective than it used to be. We have also seen an increase in the number of serious further offences. In addition to this, there has been a sharp increase in the number of people being recalled to prison as a result of the extension of post-release

¹² 'Strengthening Probation, Building Confidence' (GOV.UK) <<https://www.gov.uk/guidance/strengthening-probation-improving-confidence>> accessed 8 July 2019.

¹³ HM Inspectorate of Probation, 'An Inspection of Through the Gate Resettlement Services for Short-Term Prisoners: A Joint Inspection by HM Inspectorate of Probation and HM Inspectorate of Prisons.' (HM Inspectorate of Probation 2016)

<https://nls.lids.org.uk/welcome.html?ark:/81055/vdc_100042640528.0x000001> accessed 14 May 2018.

¹⁴ Stuart Taylor and others, 'Transforming Rehabilitation during a Penal Crisis: A Case Study of Through the Gate Services in a Resettlement Prison in England and Wales' (2017) 9 *European Journal of Probation* 115.

¹⁵ Phillips, Westaby and Fowler (n 5).

supervision¹⁶ as well as an increase in the number of people dying after release from prison which increased fourfold compared to a caseload which 'only' doubled.¹⁷

Why did it go so wrong?

All of this begs the question: why did it go so wrong? Were the reforms 'irredeemably flawed' or was the failure merely a case of poor and rushed implementation? Certainly, things were not helped by the speed of the reforms and the lack of piloting but there were undoubtedly more issues at play than this.

The flaw of delineating services along risk

Risk is measured in a range of ways with risk assessment tools which use of a combination of static (such as age at first conviction) and dynamic factors (such as drug use or accommodation status) to calculate the risk of someone reoffending and the risk of someone causing significant harm. There is a degree of disagreement about how accurate such tools are but it is generally well accepted that however you measure risk it is subject to change. Thus, using risk to allocate cases to a CRC or the NPS means that there will have to be movement between the two organisations as people's risk increases and decreases. Indeed, in cases where risk has escalated and a move to the NPS is necessary, the model creates disruption when continuity is most important. On a practical level TR increases the need for administrative support to facilitate the moves between CRCs and the NPS. It also increases the chances of information going missing or not being passed on when people were transferred. Relatedly, placing the responsibility for court work in the NPS means that NPS staff are prosecuting people for the breach of an Order even though the organisation has, possibly, had no contact with them for up to three years. Anecdotally, this has led to poor quality breach reports. This method of case allocation also fails to take into account the fact that people originally assessed as low or medium risk also commit serious further offences¹⁸: another example of the fallacy of using risk in such inflexible ways to allocate resources. More fundamentally, the model undermines one of the key principles of 'good' supervision: a long-lasting and consistent professional relationship between the person under supervision and their officer. This professional relationship - if allowed to develop - can facilitate a reduction in reoffending and longer term desistance from offending.¹⁹ It is difficult to ensure that people on supervision have continuity in terms of who their supervisor is, but TR made this aspiration considerably more difficult to achieve.

A lack of regard for proportionality and due process

The move to extend post-release supervision to those serving short prisons was a good idea in principle. After all, the previous situation - whereby people were released from prison with nothing

¹⁶ Mary Bulman, 'Number of Offenders Recalled to Prison Surges Following "disastrous" Probation Reforms | The Independent' (*Independent*, 17 January 2019) <<https://www.independent.co.uk/news/uk/home-news/prison-probation-reform-recalls-women-chris-grayling-jail-overcrowding-stewart-ministry-justice-a8732486.html>> accessed 8 July 2019.

¹⁷ Jake Phillips, Loraine Gelsthorpe and Nicola Padfield, 'Deaths While under Supervision: What Role for Human Rights Legislation?' [2019] *Political Quarterly*.

¹⁸ Jackie Craissati and Oliver Sindall, 'Serious Further Offences: An Exploration of Risk and Typologies' (2009) 56 *Probation Journal* 9.

¹⁹ R Burnett and F McNeill, 'The Place of the Officer-Offender Relationship in Assisting Offenders to Desist from Crime' (2005) 52 *Probation Journal* 221.

more than a £46 discharge grant to get them through to their first pay cheque or benefit payment - was far from ideal. However, the way this new form of supervision was set up created two key problems. Firstly it increased the number of recalls to prison significantly. As mentioned above, the number of recalls to prison has risen in recent years and this has largely been driven by recalls of people sentenced to short prison sentences with women being recalled at a disproportionately worrying rate.²⁰ Whereas short term sentenced people made up 3 per cent of recalls prior to TR they now make up 36 per cent of recalls.²¹ This has implications for the prison population and places a greater demand on prisons and probation services in terms of processing these recalls. The extension to post-sentence supervision also raises considerable concerns in terms of proportionality and legitimacy. Prior to TR someone sentenced to, for example, a 6 month prison sentence would spend three months in prison and 3 months in the community with little more than the threat of recall should they commit a further offence. Post-ORA 2014 a six month sentence becomes 3 months in prison, 3 months in the community on licence plus 9 months on post-sentence supervision all the time subject to enforceable requirements – with the threat of breach action for both failure to comply and further offending. Thus, the sentence becomes 15 months long instead of 6 months raising a considerable issue in terms of proportionality and fairness. A consequentialist might be able to justify this additional supervision if adequate support were provided to help people reduce their offending. It becomes even more difficult to justify this development from a just deserts or ontological perspective.

Doing more with less

Although ostensibly about rehabilitating offenders more effectively - TR had its origins in a so-called 'rehabilitation revolution' first initiated by Ken Clarke MP in 2010 - it is worth remembering TR was also an important part of the government's austerity agenda. At the time of its implementation, the Ministry of Justice was facing a budget cut of around 30 per cent. Thus the move was undoubtedly part of the government's drive to do 'more with less'. In this case, there was a lot more to be done with a lot less money. This proved problematic on several levels. Firstly, when the 'split' occurred staff were allocated according to a prediction by the MoJ on how many people would be assessed as low-medium and high risk. Thus, CRCs had more staff than the NPS. As it turned out, this calculation was wrong and in reality about 59% of people were allocated to CRCs - much less than the anticipated 70%.²² Thus, CRCs were not profitable due to lower caseloads and the NPS was understaffed and overworked. In conjunction with the tight profit margins built into contracts, the CRCs' solution to this was to make people redundant - some CRCs made one third of their staff redundant. In the NPS, meanwhile, levels of sickness absence and people leaving the service rose making the situation even worse. This is not to criticise those who suffered from stress due to high workloads, but to highlight the increasingly pressured environment in which they were working.

This inaccurate prediction of allocation had ramifications for the budgets of the CRCs leading to the bailout mentioned above as well as playing a part in the eventual liquidation of two CRC owners mentioned above. There was clear short sightedness in believing that probation providers could deliver good quality services to an additional 40,000 people with no extra resource. This was made

²⁰ Prison Reform Trust, 'Broken Trust' (Prison Reform Trust 2018).

²¹ HMI Probation, 'Post-Release Supervision for Short-Term Prisoners: The Work Undertaken by Community Rehabilitation Companies' (HMI Probation 2019).

²² National Audit Office (n 9).

even more difficult by asking them to do so immediately after such significant structural reform and in the contexts of contracts which were not for purpose.

Add in a profit motive and PbR

As mentioned above, CRCs were commissioned on a Payment by Results bonus payment mechanism. This means that they are given a fixed fee for the delivery of a service and can earn a bonus payment if they meet certain targets around reducing reoffending. They also face penalties for not meeting targets and performance indicators including being penalised if they initiate breach proceedings against a service user. Many problems arose from this funding mechanism.

Firstly, reconviction is an unsatisfactory measure of 'success' for probation although, at least, the contracts do take frequency of offending into account; if a CRC service user reoffends less frequently the CRC can get some credit. Secondly, the change in reoffending is being measured against a benchmark reoffending rate from 2011. This has worked well for some but less well for others and so the law of diminishing returns and/or regression to the mean comes into play. In 2011, for example, the reoffending rate in South Yorkshire was lower than in others which means that South Yorkshire CRC has struggled to achieve a statistically significant reduction in reoffending hitherto. Thirdly, the incentives built into the system have shaped some poor decision making. For example, when HMI Probation uncovered evidence that pressure to meet targets was affecting risk assessment decisions Dorset, Devon and Cornwall CRC was accused of crossing an 'immutable line'.²³

There is a fundamental problem to this too. We know from the desistance literature that an individual's chances of successful 'rehabilitation' depends as much upon their own agency and willingness to change as it does on the services provided by organisations such as probation²⁴ Payment by Results places the emphasis for success on the provider rather than the service user who gets no credit. It is also worth remembering that service users frequently have multiple needs and are involved with many providers: the model takes no account of the role of other agencies. The TR model, then, wholly undermines service user agency which we know is key to success and fails to take other organisations' efforts into account.

The final problem to arise in this context is a reduction in services provided to people with specific needs. Consideration of the needs of different groups - for example, the needs of women or people of colour - was largely absent from any of the original TR documents. As such, specific services designed for these groups have all but disappeared. TR has had a significant impact on the voluntary sector that provide services to women in the criminal justice system with many women's centres closing down or no longer being funded to work with these groups.²⁵ Add to this the broader context of reduced public spending in areas like health, substance abuse treatment, housing and we can really begin to see why TR has had a significant impact on the level of service provided to certain groups.

What next and will it work?

²³ HMI Probation, 'An Inspection of Dorset, Devon and Cornwall Community Rehabilitation Company' (HMI Probation).

²⁴ Sam King, 'Transformative Agency and Desistance from Crime' (2013) 13 Criminology & Criminal Justice 317.

²⁵ All Party Parliamentary Group on Women in the Penal System, 'Is It the End of Women's Centres.' (Howard League for Penal Reform 2016).

TR has had a disastrous effect on probation services in England and Wales and so any change to reverse some of these effects is welcome. Under the new model - to be implemented in Spring 2021 - all 'offender management' work will move to the NPS and newly created 'innovation partners' will be responsible for delivering unpaid work and rehabilitative services. The new model will no longer require supervision to be allocated along lines of risk and payment by results will not be used as a payment mechanism - these positive developments overcome some of the issues discussed above.

But the next stage of reform is not going to solve everything. Unpaid Work and programmes are to remain in the private sector yet if TR has shown us anything it is that it is hard to turn a profit from probation. One can only assume that someone, somewhere, disagrees and that Unpaid Work and programmes are seen to have some profitability. It is also the case that government has an unwavering belief that market competition raises standards. I would hazard a guess that to make rehabilitative services profitable they have to be delivered at scale. They will probably also need to be organised at a regional rather than local level – a structure which favours larger contracts with private companies over commissioning smaller local third sector groups. Such structures and imperatives will require a heavy reliance on group work, a one size fits all approach and an unwillingness to provide services to groups of people whose numbers are relatively low such as women on Unpaid Work, or the groups of people who have specific needs related to their ethnicity or sexuality, for example. Such a delivery model will also be less effective for people whose circumstances make groupwork inappropriate such as those with mental health problems and learning difficulties - prevalent issues amongst people under probation supervision.

The public mood for outsourcing appears to be shifting in the aftermath of the high profile collapse of Carillion and the liquidation of Interserve. Indeed, at the time of writing, one of the main items in the news is the fine given to Serco for defrauding the government by charging for electronically monitoring people who were dead, in jail or had left the country. Politically speaking, I would question the sense in persevering with this course of action.

TR has been deemed a 'policy disaster'²⁶ and it is clear why from this, albeit brief, overview of the last five years. If the Government genuinely wants to create a more effective probation service it would do well to learn from these lessons. It will also need to learn from academic research which is consistent in its critique of short prison sentences which do not reduce reoffending, something which the Government's own analysis also shows.²⁷ TR was supposed to reduce reoffending and introduce innovation to the delivery of community sanctions. On the whole, neither of these aims have been achieved, although there is still good practice going on and staff are dedicated and knowledgeable on how to work with people on probation. The evidence suggests such innovation would have been more effective had it begun with the reduction of short prison sentences in the first instance. Instead, TR resulted in more people being punished, by under-resourced providers in a flawed system. One does not have to look too far to find examples of 'good', or even bold, innovation - for example, Scotland is seeking to reduce the use of short prison sentences through a

²⁶ Harry Annison, 'Transforming Rehabilitation as "Policy Disaster": Unbalanced Policy-Making and Probation Reform' (2019) 66 *Probation Journal* 43.

²⁷ Aidan Mews and others, 'The Impact of Short Custodial Sentences, Community Orders and Suspended Sentence Orders on Re-Offending' (Ministry of Justice 2015).

presumption against sentences of up to twelve months which was implemented in July 2019.²⁸ If Government refuses to learn these lessons and continues to ignore the evidence, members of the public will be at risk due to poor supervision and inadequate rehabilitative services. Moreover, people on probation will not receive the support they require to successfully desist from offending. The next two years, although difficult and uncertain for those working in the field, is an opportunity for Government to reverse some of its previous poor decisions. It is possible to create a system which improves the delivery of community sanctions: the evidence and ideas are there, the Government just needs to act on them.

²⁸ Dr Hannah Graham, 'Pragmatic Plan and Cross-Party Consensus' *Press and Journal* (Aberdeen, 2 May 2019) <<https://www.pressandjournal.co.uk/fp/opinion/columnists/1738847/pragmatic-plan-and-cross-party-consensus/>> accessed 8 July 2019.