

MoJ Reducing Reoffending Third Sector Advisory Group (RRTSAG)
A Report from the Task and Finish Group on
“Competition, Commissioning and the VCS”

1. Background

- 1.1** At the members-only discussion which followed the RRTSAG meeting in May 2011, it was agreed that Clinks would convene a time-limited “Task and Finish Group” (TFG) which would produce a report and recommendations for RRTSAG to consider on “Competition, Commissioning and the VCS”. (See TFG membership at Appendix 1.) This exercise was to include consideration of the relationships between primes and VCS organisations, the level playing field, working capital, scale, risk, TUPE and other relevant issues. Members voiced particular concerns about the governance of sub / prime relationships, given that there is currently no national framework, ombudsman, data collection system, or appeals process to help ensure fairness in these relationships.
- 1.2** Clinks subsequently issued a “call for evidence” through its weekly e-bulletin, *Light Lunch*, to inform the work of the TFG. Respondents from all Sectors were invited to submit views / examples of the barriers and opportunities for VCS organisations to engage in competitive tendering for contracts. Opinion was also sought on how these arrangements could best be commissioned and managed in a Payment by Results (PbR) model where prime/sub-contracting arrangements are likely to feature heavily.
- 1.3** Ten submissions were received (9 VCS; 1 NOMS). Some of these referred Clinks to existing documents including VCS responses to the Green Paper, *Breaking the Cycle*; others reflected the frustrations of individual VCS organisations with existing NOMS contracting practice or concerns about new policy, e.g. on PbR. These contributions informed an initial Clinks scoping paper that was further developed by the TFG at its meetings on 30 June and 9 September 2011, resulting in the current report.
- 1.4** The report also reflects ongoing work by an NCVO special interest group, to consider and represent the direct experience of VCS organisations acting as sub-contractors in the new DWP Work Programme.
- 1.5** Since the TFG started its work, a number of important policy documents have been published, including: the MoJ/NOMS Competition Strategy for Offender Services¹; the Open Public Services White Paper²; and the House of Commons Justice Committee’s report on the role of the Probation Service³. The TFG’s report takes account of these developments. However, other key documents, such as the new NOMS commissioning framework and the detailed competition strategy for probation and other non-custodial services, are not yet available.

¹ Published July 2011. See <http://www.justice.gov.uk/downloads/publications/policy/moj/competition-strategy-offender-services.pdf>

² Published July 2011. See <http://www.cabinetoffice.gov.uk/resource-library/open-public-services-white-paper>

³ Published July 2011. See <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmjust/519/51902.htm>

2. Approach to the task

- 2.1** In light of these various timings the TFG felt it could not wait on other events and publications in order to complete its own work, especially since the policy implementation landscape will continue to lack detail for some time.
- 2.2** The group therefore decided to take a more proactive approach to its task and, within the current policy context, as set out in *Breaking the Cycle* and other key Government papers, develop its own recommendations to inform future commissioning and contracting policy and practice in the CJS. For this purpose the TFG assumed that, by 2015, VCS organisations will be operating within a more locally-driven system in which joint commissioning of services for offenders, market diversification, PbR, a revolution in rehabilitation and the driving down of reoffending rates are realities.
- 2.3** The recommendations to RRTSAG set out in this report, and summarised at the end in the TFG's *Recommendations and Action Plan*, seek to address the current concerns of the Sector and to ensure that VCS organisations, large and small, are enabled to play their full part in this new landscape, and that the needs of diverse groups and the voices of service users are properly attended to⁴.

3. Commissioning: An overview

- 3.1** In approaching this work, the TFG felt it was important from the outset to differentiate between “commissioning” and “procurement”, since there is often confusion between these terms. The following definitions⁵ make the distinction clear:

***‘Commissioning’** describes the process of assessing need, identifying available resources, planning how to use the resources, arranging service delivery, reviewing the service and then reassessing need.*

***‘Procurement’** or ‘the acquisition of goods and services from third party suppliers under legally binding contractual terms’, is just one part of the commissioning process. It is about commissioners ‘buying’ services that address identified needs from private, voluntary and independent organisations and other public bodies.*

- 3.2** Across the Criminal Justice System, the future commissioning landscape is as yet unclear in terms of what services will be commissioned, by whom, and at what level. This is making it extremely difficult for VCS organisations to plan effectively during the transitional period. What is clear from the new MoJ Competition Strategy, however, is that competition will be embedded in commissioning practice across all offender services, and that contracts will increasingly be let on a PbR basis.

⁴ The views expressed in this paper do not necessarily reflect or represent the views of all members of the wider VCS network.

⁵ Adapted from Children England (2011) *Why commissioning? Fact Sheet 1* at: <http://www.childrenengland.org.uk/whysheets/428>

3.3 There are indications that future commissioning will take place at three levels: national (where NOMS already has considerable experience of specifying and tendering contracts through the national procurement framework for prisons and for common core services delivered across the prison estate); sub-national (through tendering of contracts for services to be delivered across clusters of prison establishments or Probation Trusts); and local, where the role of Police and Crime Commissioners is likely to become increasingly important.

3.4 Although the balance that will be struck between these three approaches is not yet apparent, the emphasis (in *Breaking the Cycle*, in the Cabinet Office's Green Paper, *Modernising Commissioning*, and in the *Open Public Services* White Paper) is clearly on a shift to much more local commissioning. The commitment to decentralisation in the White Paper is unequivocal:

We are clear that the principle should be to decentralise power to the lowest appropriate level. For many services, this will mean the community groups and neighbourhood councils to whom power is decentralised, while for others it may be local authorities and other elected bodies such as Police and Crime Commissioners.

3.5 However, in practice, NOMS currently appears to be retaining tight centralised control over the commissioning and procurement of large scale contracts to deliver local services, even in relation to work historically delivered or commissioned locally by Probation Trusts. For example, NOMS' most recent competition for the delivery of local community payback was conducted across six cross-regional 'lets'.

3.6 This up-scaled approach was criticised by the Justice Committee in its recent report on the future role of the Probation Service:

The very large and incoherent groupings created for the community payback contracts would not be appropriate vehicles for commissioning other probation initiatives, and would undermine links between probation work and other participants in the criminal justice system, such as the police, courts, local authorities and local prisons.

3.7 Instead, the Committee advocated PbR commissioning arrangements based on local partnerships, with Probation Trusts operating as key commissioning partners:

Although on the face of it, large scale payment by results commissioning arrangements such as those used by the Department for Work and Pensions may be attractive in achieving cost savings, economies can also be achieved at a more local level, for example by probation trusts concentrating their efforts on where there is best value in contracting out other services and through local partnerships pooling their resources and investing them strategically. There is a need for careful thinking and calculation on behalf of the Government on how to strike the best balance between opening up the market to new providers and enabling trusts to operate effectively as local strategic partners, facilitating local solutions to local problems.

- 3.8** Despite these concerns, the commissioning of potential primes to deliver the community-based PbR pilots in two Probation Trust areas is currently being driven by NOMS from the centre, using a national Framework approach to identify and award the PbR contracts to prime providers that will then work with the selected local Probation Trusts to identify suitable sub-contract partners, including local VCS organisations.
- 3.9** While this ‘top-down’ national commissioning approach is clearly understandable in the short-term, given the complexities of conducting robust PbR pilots, it will not allow the selected Probation Trusts to fully test their potential as local commissioners of services delivered under PbR arrangements.
- 3.10** Overall, the TFG hopes to see a gradual loosening of the central hold on CJS commissioning over the next two years. An effective, intelligent commissioning structure will be one that locates commissioning responsibilities at the most appropriate levels to support desistance, secure reductions in reoffending, reduce the prison population, and enable reinvestment in preventive strategies, thereby creating a virtuous circle of positive change.

4. Commissioning: A mixed model

- 4.1** The TFG would therefore advocate a mixed commissioning model, operating in three tiers (national; sub-national; local). Its design should identify clearly what services / levels of provision will be commissioned at each level and by which commissioning agencies. Given the increasing importance at all levels of joining up the commissioning of young / adult offender services together with partners in Health, Police, etc., new joint commissioning structures will also need to be designed and introduced at each level.
- 4.2** Providers will then be able to start aligning themselves with the commissioning tier / structure most appropriate to their size, capacity, service function and level(s) of operation, and build relationships with the key commissioning agencies / potential primes associated with that tier.
- 4.3** It is the view of the TFG that national and sub-national commissioning should continue to focus on large scale, core services, where economies of scale and the need for standardised delivery make this the best fitting approach. However, the group considers that MoJ and NOMS should also be actively testing out and moving towards more localised commissioning models, with budgets held and deployed at the local level.
- 4.4** To support the devolution of CJS commissioning to the local level, it will be essential to ensure local commissioners have a clear understanding of Payment by Results and its implications for the various providers delivering in their area. MoJ / NOMS should put a suitable training programme in place.

Key Recommendation:

- **MoJ/NOMS need gradually to loosen their central hold over CJS commissioning over the next two years.**
 - A mixed three tier commissioning model (national; sub-national; local) should be designed that clearly identifies what services / levels of provision will be commissioned at each level and by which (joint) commissioning agencies.
 - National and sub-national commissioning should continue to focus on large scale, core services. However, MoJ/NOMS should be actively testing out and moving towards more localised commissioning models, with budgets held and deployed at the local level.
 - MoJ/NOMS should implement a training programme to ensure local commissioners have a clear understanding of Payment by Results and its implications for the various providers delivering in their area.

5. Commissioning: The need for VCS involvement in planning

5.1 Whatever commissioning structures emerge, VCS organisations are continuing to highlight the need for the Sector to be more involved in an intelligence-led approach to commissioning at all levels – one which pools and shares data, and makes best use of their direct experience of working with diverse offenders.

5.2 VCS partners at all levels (national; sub-national; local) have important knowledge and insights to contribute to the strategic commissioning process in terms of identifying needs and gaps in provision, and helping to plan the shape of future offender services. These activities precede the specification and procurement stages of the commissioning cycle and it should therefore be possible to involve the Sector without giving any competitive advantage. The TFG therefore considers that mechanisms should be put in place at every level to involve the VCS as a key strategic commissioning partner.

5.3 At the national / sub-national levels, this could be achieved by involving RRTSAG members in MoJ/NOMS strategic commissioning processes. At the local level, Clinks has demonstrated⁶ that VCS engagement and involvement in key strategic CJS partnerships can be readily achieved through the brokerage offered by VCS Local Infrastructure Organisations (LIOs), or by the formation of strong, co-ordinated local VCS/CJS Forums electing VCS representatives to sit on relevant Partnerships and Boards. Local CJS commissioning should reflect the strategic involvement of VCS partners in the planning process.

⁶ See Clinks' discussion paper, *Localising Justice* (2010) at:

<http://www.clinks.org/assets/files/PDFs/Localising%20justice.pdf> ;

See also Clinks' web page on the Home Office VCS/Integrated Offender Management Project at:

<http://www.clinks.org/services/regional-work/iom>

Key Recommendation:

- **Mechanisms should be put in place at every level to involve the VCS as a key strategic commissioning partner.**
 - At the national / sub-national levels, this could be achieved by involving RRTSAG members in MoJ/NOMS strategic commissioning processes.
 - Local CJS commissioning should reflect the strategic involvement of VCS partners in the planning process.

6. Commissioning: Specialist services for desistance

6.1 In transitioning to a more localised system there will however be difficult tensions to resolve in identifying the most appropriate level at which to commission specialist services that will best support desistance among groups of offenders with distinctive needs (e.g. women; BAME offenders). Some partners have called for the commissioning of such provision to be undertaken at national level, because of concerns that these groups will be further marginalised or overlooked within a more discretionary local system.

6.2 These tensions apply equally in the prison setting. A more joined-up, localised system would include the potential for individual prison Governors to commission more tailored services locally, as proposed in the Review of Offender Learning *Making Prisons Work: Skills for Rehabilitation* (published May 2011 by BIS and MoJ). However, there is concern that some very important services that impact on desistance, such as those for prisoners' families, might be given low priority by commissioning Governors unless reflected in performance targets.

6.3 The TFG is therefore asking for a significant debate about how to resolve these national v. local tensions and locate the commissioning of specialist services that support desistance at the most appropriate level.

Key recommendation:

- **A significant debate should take place about how to resolve the national vs. local tensions and how to locate the commissioning of specialist services (for women; BAME offenders; prisoners' families) at the most appropriate level.**

7. Intelligent commissioning: intermediate outcomes focused on desistance

7.1 As part of this debate, there should be a review of the outcomes that contribute to desistance. The new commissioning focus on outcomes (delivered on a PbR basis) presents an opportunity to strengthen the evidence base for what works to reduce reoffending and to direct funding accordingly. However, to achieve the overall outcome of reduced reoffending, the MoJ/NOMS need to design a commissioning framework that acknowledges and rewards a range of contributing interventions. For example, improved family ties or improved confidence and self-esteem should be considered acceptable intermediate outcomes, as proxy indicators of readiness to desist from offending. The commissioning of the current pilots presents an ideal opportunity to model the kind of end-to-end measures that could contribute to reducing reoffending and enable VCS organisations to play a more significant role in service delivery.

7.2 Desistance research indicates that relapse is common in the journey away from crime and a wide range of both internal and external factors have an influence on an offender's motivation to change^{7 8}. In considering proxy outcomes for the PbR commissioning framework, the MoJ/NOMS should draw upon desistance research to inform their approach. Further research into desistance is needed and should be commissioned, especially for women and BAME offenders, to support the design of a set of outcome measures adapted to their specific needs.

Key Recommendation:

- **To achieve the overall outcome of reduced reoffending, the MoJ/NOMS need to design a commissioning framework that acknowledges and rewards a range of contributing interventions known from research to support desistance.**
- Further research into desistance is needed and should be commissioned, especially in relation to women and BAME offenders, to support the design of a set of outcome measures adapted to their specific needs.

8. Local Commissioning

8.1 The current lack of progress in outlining future local commissioning systems and structures is causing particular frustration to VCS partners. Currently, albeit on a relatively small scale, the lead local commissioner of offender services is the Probation Trust. Alternative local commissioning models would include those led by: Police and Crime Commissioners; by Local Authorities (which already control local youth justice resources); or by multi-agency local commissioning partnerships including Health, bringing their funding together at the local level.

⁷ McNeill, F. & Weaver, B. (2010) *Changing Lives? Desistance Research and Offender Management*. Download at: http://www.sccjr.ac.uk/documents/Report%202010_03%20-%20Changing%20Lives.pdf

⁸ Maruna, S. (2010) *Understanding Desistance from Crime* London: Rehabilitation Services Group

- 8.2** The latter approach is currently being tested to some extent in the Financial Incentives Model pilots in Greater Manchester and London, and has the advantage of enabling a more joined-up strategy to address the most pressing local problems.
- 8.3** The model favoured by the Justice Committee, in its report on the role of the Probation Service, would be for a single offender management local commissioning body to deal with all aspects of custodial and non-custodial sentences, and to join up its local PbR arrangements with other PbR programmes, such as the DWP Work Programme. The Committee recommended the piloting of this approach within one geographical area. The TFG would echo that recommendation, as a way of developing and testing the potential of the model.
- 8.4** Some useful work in this regard was recently carried out in Gloucestershire as part of a project to develop innovative VCS involvement in local Integrated Offender Management arrangements. A ‘framework for commissioning’⁹ was developed by local CJS and VCS partners there, to help partners to prepare for local commissioning of offender services and to think about how best to engage with and involve local VCS partners from the outset. The commissioning cycle developed as part of this work is depicted at Appendix 2.

Key Recommendation:

- **As recommended by the Justice Committee, a pilot is needed within one geographical area to model and test the benefits of a single local offender management commissioning body that deals with all aspects of custodial and non-custodial sentences, and joins up its local PbR arrangements with other PbR programmes, such as the DWP Work Programme.**

9. Local Commissioning: The commissioner / provider split

- 9.1** Despite its general support for an increase in locally commissioned offender services, the TFG would have concerns about Probation Trusts continuing to act as both commissioner and provider in a more contested market. There are fears that, if the commissioner/provider split is not clearly made, the commissioning of innovation will be driven out by vested interests continuing to support more established ‘in-house’ approaches, particularly when decisions about switching scarce resources to new initiatives will be seen as high risk.
- 9.2** There is also some evidence that stronger, more knowledgeable partners are already anticipating future freedoms in the design of local commissioning systems, and are investing in structures that may give them advantage. For example, one Probation Trust has recently

⁹ Hankins, R. for Gloucestershire Association for Voluntary Action- GAVCA (March 2011) *Harnessing voluntary and community sector resources to help reduce reoffending in Gloucestershire: a framework for commissioning*. See <http://www.clinks.org/assets/files/PDFs/Lesleys%20IOM%20page/Resources%20-%20Glos%20VCS%20IOM%20Harnessing%20VCS%20resources%20-%20a%20commissioning%20framework.pdf>

steered the setting up of a new charity to tender for the delivery of locally commissioned services. Others are considering contracting with a single 'preferred provider' (the West Mercia Probation Trust/ YSS model) that will act both as a single provider and as a local prime, sub-contracting elements of service to other partners. Such initiatives run the risk of concentrating service delivery on a handful of providers and excluding other players from entering the market.

- 9.3** The TFG therefore considers that, as part of the Probation Review, if Probation Trusts retain a key role in local commissioning, there should be one local Probation body that commissions and procures offender management services, and a much smaller provider arm of Probation that is responsible for court reports, high risk offenders, and recall. This would encourage an opening up of the market and greater innovation in service provision.
- 9.4** The TFG has concerns about the potential for local CJS commissioning to become very ad hoc, inconsistent, and out of step with national policy. The sentences handed down by local magistrates following the recent riots in England showed just how easily local events and public sentiment can overturn national policy, resulting in unplanned consequences for the wider system. The TFG therefore considers that local commissioning should take place within a National Standards Framework that provides clarity about local commissioning responsibilities; sets minimum standards for market diversification; and makes local commissioners accountable for the delivery of agreed local outcomes in relation to diverse groups of offenders.
- 9.5** The TFG considers that the role of the CJS Joint Inspection Programme should be developed to encompass oversight of local commissioning arrangements and to monitor their compliance with National Standards.

Key Recommendation:

- **There needs to be a clear division between the roles of commissioner and provider at the local level.**
 - As part of the Probation Review, if Probation Trusts retain a key role in commissioning, this split should be reflected in a new structure, with one arm responsible for commissioning and procurement, and the other responsible for court reports, high risk offenders, and recall.
 - Local commissioning should take place within a National Standards Framework.
 - The role of the CJS Joint Inspection Programme should be developed to encompass oversight of local commissioning arrangements and to monitor their compliance with National Standards.

10. Procurement and contracting: current concerns about the level playing field

10.1 The TFG very much welcomes the new MoJ/NOMS Competition Strategy for Offender Services, and especially its commitments to encourage the VCS and SMEs to participate in the new market, to provide a mix of capacity building opportunities, and to run and regulate future competitions fairly using transparent processes.

10.2 VCS concerns about future contracting are largely focused on Payment by Results and the implication that only very large (private) prime contractors will be in any position to invest the necessary capital and accept the risk of contracts based on delayed payment, leaving VCS partners operating at the margins. These are amplified later in this paper.

10.3 Prior to the publication of the Strategy, VCS organisations identified some fundamental issues connected with NOMS' existing procurement and competitive contracting practice which, if not addressed in the implementation of the Strategy, will continue adversely to affect organisations tendering for contracts. Decision making bodies in procurement are believed currently to show little transparency or independence, in that there are no neutral chairs or members, and feedback to bidding organisations is scant. This has made it difficult for VCS organisations to have confidence in the fairness of the process.

10.4 In 2009, RRTSAG members compiled a report to accompany the first annual review of the Third Sector Action Plan in which they advocated strongly for NOMS policy to recognise that the VCS was disadvantaged in the bidding process by the lack of a level playing field, relative to other providers. The reasons for this included the existence of hidden subsidies for core and bid costs in public sector bids and the VCS's lack of significant working capital, compared with the private sector.

10.5 The Group at that time urged better management of the market to compensate for these obstacles, and a deliberate policy of commissioning a significant amount of work from VCS partners to develop and strengthen the VCS market and give it a stronger base from which to compete on more equal terms with other providers. It also recommended that:

- when services for offenders and their families are put out to tender, bidders should be required to show that they have experience in practical front line delivery of services to these groups and a record of success in such delivery, or alternatively show that they will sub-contract with other organisations that have such experience.
- pre-qualifying and tendering processes should be proportionate to the size of the contract.
- bidders from all sectors should be required to disclose the full costs of their bids to mitigate the problem of unfair advantage as a result of "hidden subsidies".
- NOMS should obtain and regularly publish figures showing the proportion of front line services for offenders and their families that are delivered in partnership with the VCS.

- 10.6** Many of the issues raised by the Group in 2009 appear still to be very much alive for VCS organisations. In particular, Clinks has been advised of two recent NOMS contract awards in which the existing VCS provider lost the contract to a new entrant (one VCS, one private), on the basis of issues that were not stated in the contract specifications. It was reported that, in evaluating the bids, NOMS took little account of the bidders' track records of delivering the existing or a similar service. Although this approach undoubtedly provides an important opportunity for new entrants to the market, it would appear to be too heavily weighted towards price and to be placing too little value on the knowledge, skills and experience of the tenderers.
- 10.7** A further concern relates to contracts for women-specific services and the need to ensure that these are not awarded to generic service providers that have no track record of delivering specialist services to women offenders.
- 10.8** Other VCS organisations have commented that the current tender process does not allow sufficient time for VCS organisations to respond and prepare for interview, where successful. A recent example was given of successful second stage candidates being notified on Friday for an interview in London on the following Monday. This did not allow for partners in the bid to meet and plan their interview response, to free up staff time or book train tickets.
- 10.9** The MoJ/NOMS Competition Strategy undoubtedly addresses some of these issues. It makes a firm commitment to creating a level playing field, for example by requiring adjustments to public sector bids to reflect the full direct and indirect costs of providing the service. It also endorses the refreshed Compact. These strategic intentions are very welcome and should open up some exciting future opportunities for VCS organisations to participate in the market. However the TFG believes the Strategy now needs to be converted into published procurement guidance, setting out in greater detail the transparent processes that NOMS will adopt in inviting and assessing bids.
- 10.10** The current 'one size fits all' approach to contracting also seems unlikely to open up the market. Overall it is felt that access to information and guidance about the tendering process must be widely disseminated and made more easily accessible by organisations across the VCS. Particularly in large scale contracts where large primes are competing for contracts alongside myriad potential VCS sub-contractors, potential partners will need a simple mechanism to identify one another and enter into dialogue.
- 10.11** If smaller VCS organisations are to have the opportunity to compete, they will need support to help them access and complete PQQs/bids/online portals. As amplified in the PbR section of this paper, they are also likely to need considerable advice and support in relation to the legal and contractual implications of sub-contracting within PbR contracts, to help them assess and manage organisational risks / benefits.

Key Recommendation:

- **The broad ambitions set out in the new MoJ/NOMS Competition Strategy, to create a level playing field, now need to be converted into published procurement guidance, setting out in greater detail the transparent processes that NOMS will adopt in inviting and assessing bids.**
 - Information and guidance about the tendering process should be widely disseminated and made more easily accessible.
 - Potential primes and subs will need a simple mechanism to identify one another and enter into dialogue.
 - Smaller VCS organisations will need additional advice and support to participate in the market, especially within PbR. Clinks should therefore develop more specialised advice and support to meet these needs.

11. Contracting: the transfer of public sector services

11.1 It is clear from *Breaking the Cycle* that some of the offender services currently provided by public sector agencies could in future be outsourced to other providers, as discussed in Clinks' paper, *Criminal justice outsourcing: what is the potential role of the VCS* (December 2010).

11.2 VCS organisations have long identified current TUPE legislation as one of the main barriers to outsourcing public sector services, not only in the CJS but across all public services, because of the requirement for the new contractor to accept all the financial employment liabilities (transferring staff's salaries, terms and conditions, pensions, and potentially any redundancy entitlement that should ensue). These requirements not only risk distorting the new contractor's organisation, where the existing VCS staff typically have less advantageous salaries, terms and conditions than the transferring public sector staff, but impose financial liabilities that most VCS organisations are ill equipped to accept.

11.3 The TUPE requirement to consult widely before the transfer is completed may also lead to long delays and potentially put the service at risk as the existing provider will have little incentive to maintain it.

11.4 In its response to the joint BIS and Cabinet Office Task Force report, *Cutting red tape*, NCVYS therefore called for a review of TUPE arrangements, to make transfer of staff across statutory and non-statutory agencies easier.

11.5 A number of the TFG members have successfully taken over services under TUPE arrangements and consider that blocks to entering this market can be overcome. The key issue here is for VCS organisations to be very aware of their potential liabilities, and to undertake careful due diligence tests and risk assessment, before entering into negotiations. In their view, commissioners are well aware of the problems that TUPE poses for VCS organisations and should understand the need for pricing to reflect the TUPE bill including future pension costs and any changes that need to be made to the service.

Key Recommendation:

- **VCS organisations should be made fully aware of their potential liabilities under TUPE and undertake careful due diligence tests and risk assessment, before entering into negotiations.**
- Commissioners should understand the problems that TUPE poses for VCS organisations and the need for pricing to reflect the TUPE bill including future pension costs and any changes that need to be made to the service.

12. Contracting: new provider models

12.1 The Open Public Services White Paper details Government plans to give public sector workers a right to provide services outside the public sector, either as an employee owned mutual or as a mutual joint venture with a VCS or private sector partner. MoJ is currently working with NOMS to look at where there may be potential for employee mutuals to offer value for money within prison and probation services.

12.2 New social enterprises (typically in the form of Community Interest Companies) are also currently springing up in response to the interest among commissioners in the development of new, sustainable models of service delivery, for example in offender training and employment. Some of these are being started up by Probation Trusts and prisons in response to identified gaps in the market.

12.3 These developments clearly represent new opportunities for VCS partners to adopt new social enterprise approaches and to work collaboratively with ex public sector staff to deliver more effective, joined up services. However, they also represent a threat to some existing VCS providers that may be struggling to retain their place in a more diverse, competitive market.

Key Recommendation:

- **Clinks should provide advice to VCS organisations to help them develop new social enterprise approaches and to work collaboratively with ex public sector staff to deliver more effective, joined up services.**

13. Payment by results (PbR): An overview

13.1 While there is broad support across the sector for an approach to contracting that is focused on achieving and demonstrating positive outcomes for offenders, rather than micro-managing processes and outputs, many VCS organisations approach PbR with some trepidation. The Sector's position has been cogently argued in VCS responses to *Breaking the Cycle*, including those from RRTSAG members, Clinks, NCVYS and many others. The TFG therefore welcomes the commitment in the MoJ/NOMS Competition Strategy to reduce the barriers faced by small VCS and SME organisations in engaging with PbR contracts.

14. PbR: Developing the model

14.1 The TFG is aware that a number of pilots, trialling different models of PbR in the CJS, are currently in development or underway. Piloting PbR offers an opportunity for new models of delivery at local level to evolve and innovative partnerships to emerge. It is vital that the pilots are designed to facilitate participation from a range of providers, including the VCS as key strategic and delivery partners.

14.2 As discussed in the *Commissioning* section of this report, there is concern that the contracting of the two community PbR pilot areas to nationally selected primes will locate innovation with just a few very large providers, at the expense of new local consortia, existing local partnerships and VCS markets. Members of the RRTSAG have therefore offered to be involved in the design of the community pilots to advise on the best ways of involving VCS organisations in delivery.

14.3 The TFG also considers that a key part of the evaluation of the community PbR pilots should be to monitor and measure the impact of this nationally commissioned / prime contractor approach on local areas. *Unshackling Good Neighbours*¹⁰, the recently published report of the Red Tape Task Force, made this type of impact assessment one of its top ten commissioning recommendations:

Prime contractors should be required formally to consider the impact of their contracts on the neighbourhoods in which they are delivered. Particular consideration should be given to the impact on community venues, existing informal provision, local social capital, local volunteers, access and travel requirements of users, integration of provision and the role of communities in evaluating services with a view to strengthening these where possible. All government contracts should aim to leave neighbourhoods socially stronger than they found them.

14.4 The investment model used in the pilots will be a key factor in determining the ability of VCS partners to engage with them. The Social Impact Bond (SIB) is, in some respects, the ideal PbR model from a VCS perspective. In the Peterborough pilot, independent investors have contracted with VCS providers over a six year period to deliver resettlement support for short term prisoners in innovative ways that aim to achieve a reduction in reoffending. The VCS providers are paid 100% up-front, and all risk is carried by the investors, who will receive a return on investment from Government proportionate to the outcomes achieved.

14.5 However, the complexity of the outcomes metric in this model, the need to compare outcomes with a large matched sample of offenders elsewhere who are not in receipt of support, and the levels of capital required, make it improbable that this model will be rolled out extensively. It is unlikely, for example, that the Big Society Bank or a wider coalition of charitable funders would be able to advance capital to anything like the level that would be required to support this model across the country. Furthermore, the first evaluation of the Peterborough pilot, published recently, concluded that small-scale SIBs, including that in

¹⁰ Cabinet Office May 2011. See <http://www.cabinetoffice.gov.uk/sites/default/files/resources/unshackling-good-neighbours.pdf>

Peterborough, are unlikely to generate any substantial cashable savings for the MOJ or other government departments. The evaluators suggested these will only be achieved through a significant reduction in the prison population or number of court cases.

- 14.6** The PbR model that is due to be piloted by MoJ/NOMS in two community settings seems likely to adopt an approach similar to that already operating within the DWP Pathways to Work Programme, in which there is typically a combination of an up-front fee for service and a deferred outcome payment that is 'at risk'. The implications of this for VCS partners, and the TFG's preferred financial model, are further explored in Sections 15 and 16.

Key Recommendation:

- **The PbR pilots should be designed to facilitate participation from a range of providers, including the VCS as a key strategic and delivery partner.**
 - MoJ/NOMS are asked to involve members of RRTSAG in the design of the community pilots, to advise on the best ways of involving VCS organisations in delivery.
 - In commissioning the community PbR pilots, a key part of the evaluation should be to monitor and measure the impact of the nationally commissioned / prime contractor approach on local areas. This should be built into the pilot specification from the outset.

15. PbR: Building the Supply Chain

15.1 Under DWP payment by results contracts, the deferred payment system has meant that only very substantial organisations (mostly private, few VCS), with large amounts of working capital at their disposal, have been able to take the risk of becoming prime contractors. This has left VCS organisations largely sub-contracting from big private sector prime contractors.

15.2 Evidence from the welfare to work market shows that primes defer as much risk as possible to subcontractors. A number of VCS providers, both large and small, have had to withdraw from the programme because of the cash flow difficulties created by the staggered payment model (typically a combination of up-front fee for service and delayed outcome payment). Primes may also take as much as 40% in management fee, as well as deducting a management fee before passing on service fees and outcomes payments to sub-contractors. This means a significantly reduced amount is passed down the supply chain for service delivery.

15.3 Some sub-contractors also reported that they were used as 'bid candy', having been characterised in bids by potential primes as 'delivery partners' after only very limited contact and superficial relationships, which subsequently did not convert into a paid role. Some primes were also found to be citing one another as sub-contractors in bids, effectively creating a cartel in which other partners were sidelined. The potential danger in this scenario for small, local VCS organisations working with offenders is clear.

- 15.4** Large VCS organisations have equal qualms about the shift to very large PBR contracts with private primes. They have asked what recourse there will be to resolving these matters in a straightforward way that does not detract from service provision – either financially or by having organisational energy and capacity diverted to address problems. Many VCS partners have therefore called for the development of a clear and detailed code of conduct, resembling the Department for Work and Pensions (DWP) Merlin Standards, to regulate prime and subcontractor relations within the CJS. The TFG would endorse the need for such a code of conduct, to complement full implementation of the refreshed Compact.
- 15.5** The TFG welcomes the expectation in the Competition Strategy that bidders wishing to act as primes should demonstrate open and constructive relationships with sub-contracted organisations at the launch of each competition.
- 15.6** It will be vital to ensure that the appropriate infrastructure is in place to support organisations entering the market as subcontractors. This could include, for example, model service level contracts, guidance on referral mechanisms and access to affordable mediation. VCS organisations have also raised concerns that the NOMS bidding process needs to be addressed and improved to ensure transparency. There have been examples of organisations, approved as potential sub-contractors following the PQQ, receiving no information about the potential primes. The MoJ/NOMS could helpfully run market place events to ensure access to the market for all potential subcontractors.

Key Recommendation:

- **MoJ/NOMS should raise the profile of the refreshed Compact and develop a code of conduct (similar to the DWP Merlin Standards) to ensure fair treatment of the supply chain.**
- Infrastructure must be in place to support VCS organisations wishing to compete in the PBR market.
- The MoJ/NOMS should run market place events to ensure access to the market for all potential subcontractors.

16. PbR: Financing models and pricing

- 16.1** One of the most significant barriers to the VCS participating in PbR models is access to working capital. The TFG would support a model in which the service fee (payment of delivery costs) is available up-front. In some of the PBR pilots, the full contract amount has been paid up-front with a portion of 10 – 30% at risk, subject to a percentage of the cohort reaching particular outcomes at pre-agreed intervals in the contract. This is the structure of the Doncaster Prison pilot, where the full payment is made to the prime each year with 10% at risk, to be repaid in the event of failure to reduce reoffending by the targeted amount. The Youth Justice Board/MoJ pilots will similarly invest 100% up-front in Local Authority youth offending teams, with the possibility of ‘clawback’ penalty payments if the target of reducing the number of young people in custody is not met. The TFG believes that where

only the service fee is paid up-front, with the expectation of outcome payments at a later stage, at least 70% should be available up-front. This release of working capital would allow a diverse range of providers to bid as primes or sub-contractors for PbR contracts within adult CJS services, while maintaining the incentive to achieve outcomes.

16.2 Some transitional funding, perhaps in the form of seed-corn grants, would also give the Sector an opportunity to adapt during the transitional period. A blended approach to PbR, with some grant and loan funding secured, would support the VCS to test new working models. It is vital that the level of risk is proportionate to the potential reward, with an understanding that different organisations have different levels of risk appetite and capacity.

16.3 It is critical for both service providers and service users under PbR contracts that the pricing reflects the profile of the cohort and the level of input required to achieve outcomes. VCS organisations are often best placed to make a real difference with those offenders who are the hardest to reach. During the recent bidding process for the DWP Work Programme, there was evidence of sub-contractors walking away from negotiations on the basis that pricing was too low to deliver a tailored package.

16.4 There is substantial evidence from DWP that outcome-based contracting can incentivise ‘creaming and parking’ or ‘cherry-picking’, whereby harder to reach clients are neglected. Pricing will therefore need to reflect the existence within the cohort of offenders who will require more expensive provision, in order to incentivise providers to work with them.

Key Recommendation:

- **The service fee (delivery costs) in PbR contracts should be available up-front, with 10 – 30% of the contract at risk.**
- Government should take a blended approach to PbR, with some grant and loan finance available to support the transition to a new commissioning environment.
- Pricing should reflect the existence of offenders within the cohort who will require more expensive provision.

17. PbR: Distinct and diverse needs

17.1 There is uncertainty within the Sector about what it would mean to tailor the approach of PbR for specific groups of offenders, including those with complex multiple needs who may require co-ordinated support across many local agencies. Can a holistic and flexible approach to individuals be maintained at the local level under PbR? The Financial Incentives Model may be one way of ensuring that pooled funding is brought to bear by multi-agency commissioning partnerships, using a modified PbR approach.

- 17.2** There is wide support for a more tailored approach to BAME offenders, women or young adults whereby PbR is adapted to the size of the group and a needs based approach is taken. A needs based approach on a PbR basis would mean tailoring the outcomes that are considered valid and payable in relation to the group.
- 17.3** The TFG takes the view that a tailored approach is required for women offenders, reflecting the call in the Corston Report for a distinct, holistic and women-centred approach. Given the proportionally small number of women in the CJS, their marginalisation within the system, and the difficulty of accommodating their needs within a generic PbR contract, the TFG believes a national approach will continue to be required for the commissioning of women's services.
- 17.4** A tailored approach to other groups of offenders means ensuring that small and specialised service providers are able to operate in the future PbR environment, at whatever level, to provide a holistic and flexible service. It is critical that an individualised approach is taken that has resonance with the service user, particularly for people with complex overlapping needs that require input from many different local services. Consideration of these issues should form part of the debate that the TFG has called for in Section 4, to resolve the tensions regarding national v. local commissioning.
- 17.5** Safeguards are also needed to ensure that particular offender groups are not overlooked within a PbR-focused commissioning system. For example, this issue should be considered in the review of Indeterminate Sentences for Public Protection (IPPs)
- 17.6** Whatever the outcomes of these debates, the TFG considers that primes must undertake an effective and meaningful Equality Impact Assessment, including a system for identifying unmet needs and ensuring extra support.

Key Recommendation:

- **Further debate is needed about the best ways to tailor PbR to meet the needs of specific groups of offenders, including those with complex multiple needs who may require co-ordinated support across many local agencies.**
 - A distinct, national approach to PbR and commissioning is required for women offenders.
 - Primes must undertake an effective and meaningful Equality Impact Assessment.

18. Involving users in commissioning and contracting

- 18.1** If services are to become more locally responsive and tailored to local needs and circumstances, it will be essential for the user voice to be enabled and heard by both commissioners and contracted providers, including prime / sub-contractors delivering services under PbR contracts. Providers should therefore be required to demonstrate a track record of effective service user involvement.

- 18.2** The user voice remains under-developed within the Criminal Justice System compared with health and social care fields. NOMS' current work with Clinks to map user engagement activity across prisons and probation, and to identify good practice, marks an important shift in this respect. Service user involvement should be identified as a strategic priority at both central and local levels and built into the commissioning cycle.
- 18.3** The TFG also considers that a network is required for mapping and sharing good practice around service user involvement.

Key Recommendation:

- **Service user involvement should be identified as a strategic priority at both central and local levels and built into the commissioning cycle.**
- A network is required for mapping and sharing good practice around service user involvement.

Lesley Frazer, Policy Manager
Clare Hayes, Policy Officer
Clinks Secretariat to the RRTSAG Task & Finish Group
6 November 2011

**MoJ Reducing Reoffending Third Sector Advisory Group (RRTSAG)
Task and Finish Group on “Competition, Commissioning and the VCS”**

Action Plan

This Action Plan draws directly on the linked report from the Task and Finish Group on “Competition, Commissioning and the VCS”. The report’s key recommendations are grouped here thematically (Commissioning; Procurement; PbR etc.) with some broad suggested timescales attached. Both the Action Plan and report are intended to form the basis for further discussion and agreement with MoJ and NOMS at the next meeting of RRTSAG in October 2011. Please note that the TFG’s suggested timetable is purely notional at this stage, pending a formal response from MoJ/NOMS.

Key Recommendations and Actions	Timetable
Commissioning: A mixed model	
1. MoJ/NOMS need gradually to loosen their central hold over CJS commissioning over the next two years.	Reflected in Strategy by Dec 2011
a. A mixed three tier commissioning model (national; sub-national; local) should be designed that clearly identifies what services / levels of provision will be commissioned at each level and by which (joint) commissioning agencies.	By April 2012
b. MoJ/NOMS should be actively testing out and moving towards more localised commissioning models, with budgets held and deployed at the local level.	Reflected in Strategy by Dec 2011; implemented from April 2012
c. MoJ/NOMS should implement a training programme to ensure local commissioners have a clear understanding of Payment by Results and its implications for the various providers delivering in their area.	By April 2012.
Commissioning: The need for VCS involvement	
2. Mechanisms should be put in place at every level to involve the VCS as a key strategic commissioning partner.	By April 2012
a. At the national / sub-national levels, this could be achieved by involving RRTSAG members in MoJ/NOMS strategic commissioning processes.	By April 2012
b. Local CJS commissioning should reflect the strategic involvement of VCS partners in the planning process.	By April 2012

Commissioning: Specialist services for desistance	
3. A significant debate should take place about how to resolve the national vs. local tensions and how to locate the commissioning of specialist services (for women; BAME offenders; prisoners' families) at the most appropriate level.	Debated by Dec 2011; reflected in Strategy and implemented from April 2012
Intelligent commissioning	
4. To achieve the overall outcome of reduced reoffending, the MoJ/NOMS need to design a commissioning framework that acknowledges and rewards a range of contributing interventions known from research to support desistance.	Reflected in Strategy by Dec 2011; Implemented from April 2012
a. Further research into desistance is needed and should be commissioned, especially in relation to women and BAME offenders, to support the design of a set of outcome measures adapted to their specific needs.	As above
Local commissioning	
5. As recommended by the Justice Committee, a pilot is needed within one geographical area to model and test the benefits of a single local offender management commissioning body that deals with all aspects of custodial and non-custodial sentences.	Reflected in Strategy by Dec 2011
The local commissioner / provider split	
6. There should be a clear division between the roles of commissioner and provider at the local level.	Reflected in Strategy by Dec 2012; Implemented from April 2012
a. As part of the Probation Review, if Probation Trusts retain a key role in commissioning, this split should be reflected in a new structure, with one arm responsible for commissioning and procurement, and the other responsible for court reports, high risk offenders, and recall.	As above
b. Local commissioning should take place within a National Standards Framework.	As above
c. The role of the CJS Joint Inspection Programme should be developed to encompass oversight of local commissioning arrangements and to monitor their compliance with National Standards.	As above

Procurement and contracting	
7. The broad ambitions set out in the new MoJ/NOMS Competition Strategy, to create a level playing field, should be converted into published procurement guidance, setting out in greater detail the transparent processes that NOMS will adopt in inviting and assessing bids.	Oct-Dec 2011
a. Information and guidance about the tendering process should be widely disseminated and made more easily accessible.	From Oct 2011
b. Potential primes and subs will need a simple mechanism to identify one another and enter into dialogue.	From Oct 2011
c. Commissioners should understand the problems that TUPE poses for VCS organisations and the need for pricing to reflect the TUPE bill including future pension costs and any changes that need to be made to the service.	From Oct 2011
Payment by Results: Developing the Model	
8. The PbR pilots should be designed to facilitate participation from a range of providers, including the VCS as a key strategic and delivery partner.	From Oct 2011
a. Include members of the RRTSAG in the design of the community pilots to advise on the best ways of involving VCS organisations in delivery.	From Oct 2011
b. In commissioning the community PbR pilots, a key part of the evaluation should be to monitor and measure the impact of the nationally commissioned / prime contractor approach on local areas. This should be built into the pilot specification from the outset.	From Oct 2011
PbR: Building the Supply Chain	
9. MoJ/NOMS should raise the profile of the refreshed Compact and develop a code of conduct (similar to the DWP Merlin Standards) to ensure fair treatment of the supply chain.	Reflected in Strategy by Dec 2012; Implemented from April 2012
a. Infrastructure must be in place to support VCS organisations wishing to compete in the PbR market	Developed from October 2011
b. MoJ/NOMS should run market place events to ensure access to the market for all potential PbR subcontractors.	From Oct 2011
PbR: Financial models and pricing	
10. The service fee (delivery costs) in PbR contracts should be available up front, with 10 – 30% of the contract at risk.	In pilots and across all PbR services by 2015

a. The Government should take a blended approach to PbR, with some grant and loan funding secured, to support the transition to a new commissioning environment.	In pilots and other trialling of PbR services 2012-2015
b. Pricing should reflect the existence of offenders within the cohort who require more expensive provision.	In pilots and other trialling of PbR services 2012-2015
PbR: Distinct and diverse needs	
11. Further debate should take place about the best ways to tailor PbR to meet the needs of specific groups of offenders, including those with complex multiple needs who may require co-ordinated support across many local agencies.	By Dec 2011
a. A distinct, national approach to PbR and commissioning is required for women offenders.	Reflected in Strategy by Dec 2012; Implemented from April 2012
b. Primes must undertake an effective and meaningful Equality Impact Assessment.	In pilots and across all PbR services by 2015
Service User Involvement	
12. Service user involvement should be identified as a strategic priority at both central and local levels and built into the commissioning cycle.	Reflected in Strategy by Dec 2012; Implemented from April 2012

VCS infrastructure support needs

The Task and Finish Group identified new needs for VCS infrastructure support in the emergent commissioning and contracting environment. The following recommendations are therefore made for the Sector’s infrastructure organisations, such as Clinks, to take forwards.

Infrastructure support needs	
1. Clinks should provide advice to VCS organisations to help them develop new social enterprise approaches and to work collaboratively with ex public sector staff to deliver more effective, joined up services.	From October 2011
2. VCS organisations should be made fully aware of their potential liabilities under TUPE and undertake careful due diligence tests and risk assessment, before entering into negotiations.	Reflected in strategic plans by Dec 2011; Implemented from April 2012
3. Smaller organisations will need additional advice and support to participate in the market, especially within PbR. Clinks should develop advice and support to meet these needs.	Reflected in strategic plans by Dec 2011; Implemented from April 2012
4. Clinks should monitor the availability of affordable mediation for sub-contractors.	From April 2012
5. A network is required for mapping and sharing good practice around service user involvement.	From April 2012

**Membership of the RRTSAG Task and Finish Group on
“Competition, Commissioning and the VCS”**

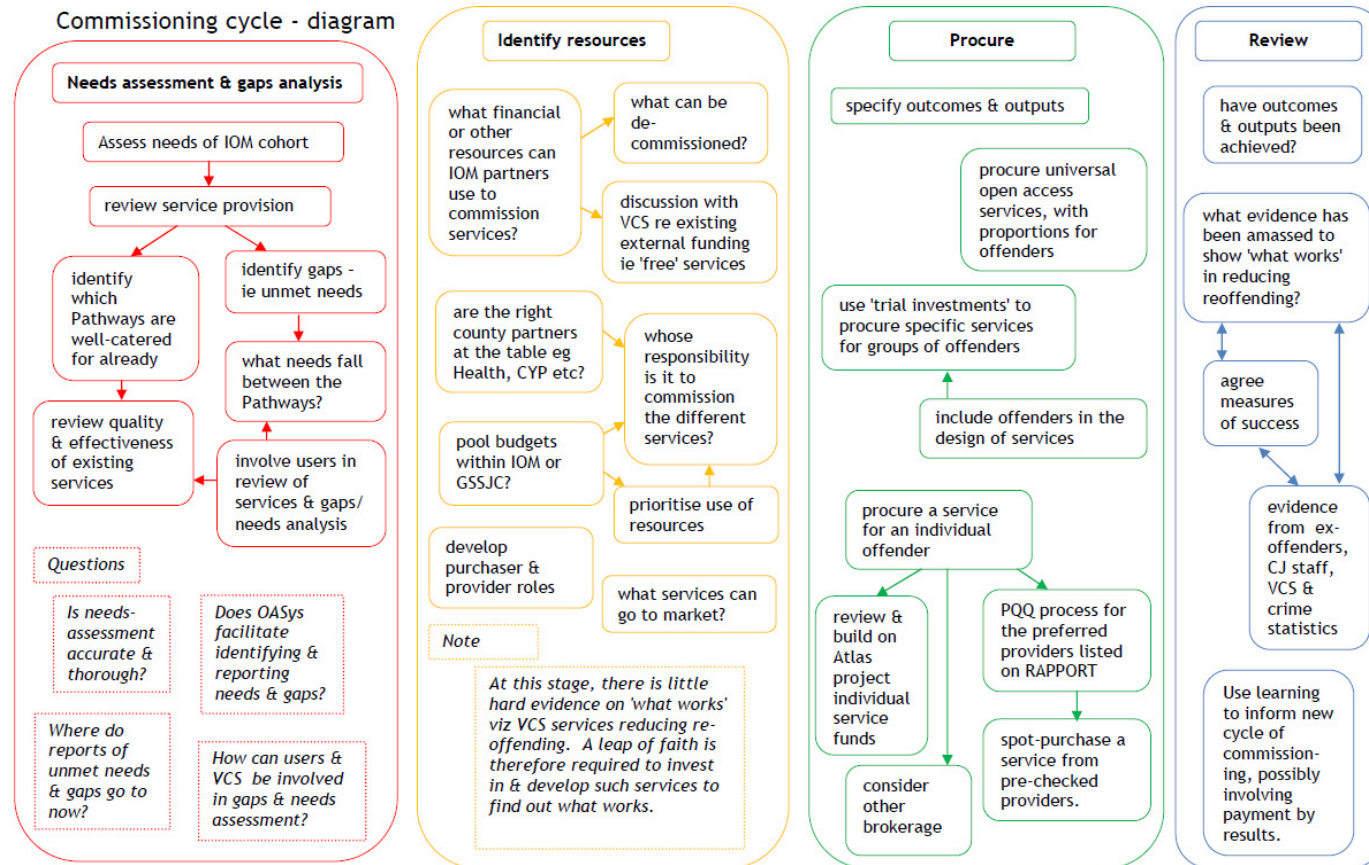
Ingela Andersson	<i>National Council for Voluntary Organisations</i>
Deborah Cowley	<i>Action for Prisoners’ Families</i>
Diane Curry	<i>Partners of Prisoners and Families Support Group (POPS)</i>
Frances Flaxington	<i>Catch 22</i>
Lesley Frazer	<i>Clinks</i>
Clare Hayes	<i>Clinks</i>
Clare Jones	<i>Women’s Centre</i>
Martin Kinsella	<i>P3</i>
Clive Martin	<i>Clinks</i>
Robert Morrall	<i>Cementafuture</i>
Simon Pellew	<i>Time for Families</i>
Jackie Russell	<i>Women’s Breakout</i>
Chris Wright	<i>Catch 22</i>

Membership of the RRTSAG:

Graham Beech	<i>NACRO</i>	<i>[from October 2011]¹¹</i>
Helen Cantrell	<i>SOVA</i>	<i>[from October 2011]</i>
Deborah Cowley	<i>Action for Prisoners’ Families</i>	
Jeremy Crook	<i>Black Training and Enterprise Group</i>	<i>[from October 2011]</i>
Norma Hoyte	<i>Plias Resettlement</i>	
Mark Johnson	<i>User Voice</i>	<i>[from October 2011]</i>
Clare Jones	<i>Calderdale Women Centre</i>	
Martin Kinsella	<i>P3</i>	
Robert Morrall	<i>Cementafuture</i>	
Rob Owen	<i>St Giles Trust</i>	<i>[from October 2011]</i>
Tim Robertson	<i>Arts Alliance</i>	<i>[from October 2011]</i>
Cathy Stancer	<i>LankellyChase Foundation</i>	
John Trainor	<i>London Action Trust</i>	
Simon Pellew	<i>Time for Families</i>	
Chris Wright	<i>Catch 22</i>	
Steve Wyler	<i>Locality</i>	

¹¹ Please note: These members joined RRTSAG after the Task and Finish Group had completed its work.

Appendix 2



Source: Hankins, R. for Gloucestershire Association for Voluntary Action- GAVCA (March 2011) *Harnessing voluntary and community sector resources to help reduce reoffending in Gloucestershire: a framework for commissioning*. See

<http://www.clinks.org/assets/files/PDFs/Lesleys%20IOM%20page/Resources%20-%20Glos%20VCS%20IOM%20Harnessing%20VCS%20resources%20-%20a%20commissioning%20framework.pdf>