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Alex Chalk MP
Ministry of Justice
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Dear Minister

The Dynamic Framework of the National Probation Service

One of those I interviewed in carrying out this review, commissioned by your predecessor Lucy Frazer, has said that the second P in HMPPS is often silent. The Dynamic Framework, or DF, is a small – in money well under 10% - part of the second P. It would be easy for DF to be silent. Reducing reoffending is famously difficult and Britain is famously bad at it. The DF can play a vital role. If the DF were responsible for a reduction of ½% in reoffending, it would pay for itself.

The move to a Unified Model for the NPS is a reversal of previous policy, and as part of it the Dynamic Framework puts to work more funds than ever before in the rehabilitation of offenders in order to reduce reoffending. Having worked with a variety of charities which have these aims I admire the vision and its boldness, and am pleased to be doing this review. The professionalism of officials in the MoJ with whom I have had contact, and the culture of integrity, fairness, collegiality and high standards, are impressive. I am grateful to officials for their help.

Some significant changes in the DF would, I believe, increase the chances that reoffending really is reduced, that society benefits and that people who have been on the wrong side of the law find a better and happier path.

The DF has a contradiction at its heart: a policy objective is to involve SMEs and VCSEs (the latter generally medium-sized or small) both for value for money reasons and because there are so many of them offering local, highly specialised, often very personal services which are likely to be the most effective in achieving the ultimate objective. But the design and processes of the DF are full of obstacles to the involvement of SMEs and VCSEs. Procurement – providing taxpayers' money to non-government entities – necessarily involves some careful, responsible, even cumbersome, procedures; but they need to be calibrated so as not to undermine the objectives they are intended to serve.

There is a big gap between the internal and the external perceptions of the DF. The DF has not yet achieved the wide participation of medium-sized and small voluntary and private sector organisations which was part of its objective. It needs modifying in order to be good for the MoJ, for the SMEs and VCSEs capable of doing valuable

work, and for the cause of reducing reoffending. In particular there needs to be a large-scale adoption of grants as the funding mechanism for some of the services; radical simplification of contracts; and a system which obliges large entities to include the more specialised smaller ones in their bids.

In a rapid and comprehensive reform, there are bound to be things which can later be improved upon. The DF is one of them. In this review I make a number of recommendations which I believe would give the DF a better chance of reducing reoffending.

Yours sincerely

Richard Oldfield

Review of the Dynamic Framework of the National Probation Service

SUMMARY

This review was commissioned in January 2021 by the then Minister for Prisons and Probation, Lucy Frazer QC MP, and its commissioning was reconfirmed by her successor, Alex Chalk MP, in May 2021.

Its purpose is to consider the structure, rules and processes of the Dynamic Framework ('DF'), which forms part of the restructured National Probation Service ('NPS'). It should, the Minister asked¹, "identify ways in which [the MoJ] can develop the Framework further to continue to encourage maximum participation and lower barriers to entry, particularly for SMEs and voluntary sector organisations." Though the DF was in its infancy, "it is important... that we... consider what further steps we can take to ensure we get the most out of the framework over its lifetime." The full terms of the review are set out in appendix 1.

The review is the indirect result of a bold volte face. The government probation policy has been reversed. It is rare for a complete change of policy to take place without a complete change of government. Moreover, the Government has recognised that the funds it had devoted to probation were insufficient and has sharply increased the amount available.

The objective of the NPS is to reduce reoffending. The NPS has an obligation to play its part in keeping the public safe through supervision of offenders who have left prison. This obligation is met in the bulk of the NPS which in future is within the Unified Model. The DF is for supplemental activities, in the fields of rehabilitation and resettlement, aiming to make optimal use of the services provided by non-government entities.

There are many hundreds of organisations which provide rehabilitation services for offenders with the aim of reducing reoffending. These include a handful of large private sector organisations and charities and a multitude of medium-sized and smaller organisations. Most of the latter are voluntary, community and social enterprise entities, or VCSEs, this being the catch-all acronym to encompass charities, social enterprises and other not-for-profit organisations trying to provide a benefit to society – in effect, anything not in the public or private sectors. More than a thousand charities, many tiny, work with offenders. Underlying the intention of the DF is the recognition that the rehabilitation and resettlement parts of probation are best handled very locally, very personally, and that the VCSE sector is full of small entities which can provide this sort of highly specialised service focused on individual circumstances and relationships.

¹ Letter from Minister, 26 January 2021

Two points of clarification: first, there is a potential red herring in recurring reference to the role of VCSEs in MoJ papers: what matters is not so much that the organisations that offer this localised, personalised service are VCSEs, but that they are frequently medium-sized (less than £10 million in turnover) or small (less than £1 million), rather than the larger organisations which can offer a valuable and comprehensive national service in particular fields of activity.

Second, there is no policy decision to move away from awarding contracts to private companies. The purpose of the DF is to maximise opportunity for the best organisations, both private and voluntary sector, to deliver rehabilitative services. This in practice means making sure that the field is open to smaller organisations the great majority of which are VCSEs. The intention to involve the VCSE sector should be seen in part, therefore, as an intention to involve many of the mass of small and medium-sized organisations – mainly, not exclusively, charities - working in probation.

The conclusion of the review is that there is a contradiction in the DF. The policy objective is that the ultimate aim of probation will be helped by bringing in SMEs and the plethora of small and medium-sized VCSEs. This objective recognises that there is a natural role for the VCSE sector as partner to the Government in reducing reoffending. But the design and processes of the DF make it extremely difficult for SMEs and small and medium-sized VCSEs to be involved. In practice, they are not yet much involved. Both these assertions are illustrated in this paper.

The transition to the Unified Model involves complex transfers of people and responsibilities. The DF's Day 1 awards have all been made before the Unified Model comes into effect. Inevitably the MoJ centrally has had to manage these multi-year Day 1 awards. To cope with the volume of awards there has been a single standard of documentation for all contracts, more complex than is needed across the board. Subsequent awards (referred to for convenience as Day 2, though there is no specific day) will be made by Regional Probation Directors and lighter touch procurement documentation is being developed for Day 2.

The pattern of Day 2 awards could therefore look different from the pattern of Day 1 awards. The 12 Regional Probation Directors ("RPDs") will generate interest in bidding more widely than was the case in Day 1. There could be an inclination to wait and see. However, I believe that the difficulties in DF procedures make it unlikely that there will be a really significant increase in participation by smaller entities, and widening of the reach of the DF, without changes which are more radical than those now contemplated internally.

The recommendations in this review are intended to modify the DF in such a way that more good SMEs and small and medium-sized VCSEs can get involved, bring to the probation service their strengths, and help to achieve a reduction in reoffending.

The key policy changes recommended are

- to encourage Regional Probation Directors to make frequent use of grants rather than contracts;**
- to require lead bidders for contracts and grants to use specified percentages in the funding of SMEs and small/medium-sized VCSEs; and**
- simplification of contract requirements and documentation.**

There are a number of subsidiary recommendations, in particular relating to the market warming documentation, a coordinated lessons-learned process, and the development of more Social Impact Bonds.

At the heart of the current processes is a lack of trust and a lack of confidence: media scrutiny does not encourage trust; past problems give rise to lack of institutional self-confidence. The MoJ has a strong culture, with able people devoted to public service. In the balance between protecting the MoJ's own reputation as an efficient organ of state and maximising the chances of effective rehabilitation of offenders and reduction in reoffending, the DF reflects a preponderant concern with the former. The UM is bold. The DF has been put together and run by people of high integrity. In amending the DF the MoJ needs to employ the same mojo which has enabled it to carry through the overall NPS reform.

This review deals with the concerns of many organisations which are outside the MoJ and the fact of its commissioning has been publicly disclosed as one way of taking account of lessons learned during the early stages of the DF. A private version which contains some confidential information internal to the MoJ has been provided to the Minister and to officials and I have recommended that it be provided also to the MoJ challenge panel and to the Minister for Efficiency and Transformation at the Cabinet Office.

I have been helped throughout this review by officials in the Ministry of Justice. Documents to which they have guided me are included in the list in appendix 2. I spoke to over 40 people and these are listed in appendix 3. To all of them I am grateful. Our conversation was on the basis that I would not quote them or attribute to them unless I came back and asked, and in the event I have decided not to quote except from documents, though their comments figure throughout.

I am especially grateful to Chris Taylor and Andreas Bickford, and to other officials in the Ministry of Justice. Reviews by outsiders are inevitably intrusive and time-consuming, and are more or less bound to result in conclusions with some of which the professionals will disagree, so I appreciate how constructive, as well as knowledgeable, their assistance has been.

INTRODUCTION

The overriding objective of probation is to reduce reoffending. Reduction in reoffending is self-evidently beneficial to society, and to a host of individuals in improving their chances of living useful lives. It is also beneficial economically: the MoJ estimates the cost of reoffending to be £18 billion and that if the number of offences committed by those who have already been found to have offended once were reduced by just ½% the saving in government spending would be £65 million, more than the cost of the DF in its first year. Preventing an offender from reoffending in any one year produces a saving of over £30k.² With an almost Utopian 10% fall in reoffending the whole of the probation service would more than pay for itself.

The main thrust of the reform of the NPS in 2020 was to bring to an end the Transforming Rehabilitation programme instigated in 2013. The latter involved probation being provided very largely by non-government entities, the 21 Community Rehabilitation Companies ('CRCs'), one of them a not-for-profit organisation and all the others private sector. The 2020 reform replaces this outsourcing model with a single unified service, staff employed in the CRCs therefore transferring either to the MoJ or to potential suppliers of services on 26 June 2021.

Unifying the approach to offender management is the hallmark of the reform. The MoJ recognised the value brought by non-government sectors in certain areas. The DF is the means by which it contracts directly with specialist providers. These outsourced elements of the NPS, obtained through the DF, are proportionately a small part of the overall probation programme, and are focused on rehabilitation and resettlement services. The cost of the DF is budgeted to start at £59 million (plus one-off implementation costs) in 2021-2 (out of total NPS costs of £1.2 billion); then £75 million the following year, then £110 million, then £119 million (out of total NPS costs of £1.5 billion), and at steady state with inflation thereafter.

Though a small proportion of MoJ or HMPPS spending, by the third year of the DF the planned £110 million budget for resettlement and rehabilitation services is "probably more than ever before"³, reflecting the vision of those in the MoJ responsible for the DF.

The areas in which the DF is intended to operate⁴ are ones which are recognised to influence reoffending: accommodation; education, training and employment; finance, benefits and debt; dependency and recovery from drug or alcohol misuse; personal wellbeing; cognitive and behavioural change; restorative justice; and service user involvement; and three cohorts – women's services, services for young adults, and services for BAME groups. The essence of the DF is that organisations which want to provide services under the designated headings must first apply to be part of the framework, submitting information required and agreeing to subscribe to the

² New Philanthropy Capital: *Inside and Out*, L.Detkova and S. Sandford, October 2005 ['NPC']

³ Clinks: *Probation Reform – the View from the Voluntary Sector*, Jessica Mullen, 13 October 2020 ['View']

⁴ HMPPS: *The Target Operating Model for the Probation Service in England & Wales*, February 2021 ['TOM']

framework agreement. If they pass this stage, satisfying a variety of financial, operational and governance criteria, they are included in the list of preferred bidders. Subsequently, they may choose to bid in call-off competitions for contracts, which are then awarded and most of which are in effect for two to four years. Only organisations on the list can be awarded business. Organisations may apply, and be admitted, to the framework at any time.

Market warming events took place in the summer of 2020, much circumscribed by Covid, lockdowns, and social distancing, to familiarise potential bidders with the way in which the DF was to work and to encourage participation. The DF opened for qualification onto the approved list of suppliers in June 2020. Organisations which had registered an interest in bidding in any of the Day 1 competitions were told the dates by which they had to apply for qualification in order to be evaluated and given a place on the DF in time to bid.

The contracts for services are arranged by designated heading and by geography. The initial intention was for the DF to award contracts for rehabilitation and resettlement support across six headings – accommodation; education, training and employment; finance, benefits and debt; dependency and recovery; personal wellbeing; and women’s services. Personal wellbeing itself comprises a number of categories: social inclusion; lifestyle and associates; family and significant numbers; emotional wellbeing. Women’s services is a cohort comprising several categories.

In June 2020 as a result of the impact of Covid and lockdown, the MoJ reduced the Day 1 provision to a Minimum Viable Product (“MVP”). This involved personal wellbeing and women’s services continuing to be commissioned, each in 42 lots, at Police and Crime Commissioner level; and accommodation and education, training and employment being commissioned, each in 12 lots, at regional probation director level.

Finance, benefits and debt was excluded for Day 1 provision, instead to be delivered by probation staff supporting service users with existing service provision. Dependency and recovery was also excluded from Day 1. In Wales, a prior commitment to the Welsh government led the MoJ to continue with the commissioning of services for young adults at Police and Crime Commissioner level, in four lots. The MVP approach almost halved the number of call-off competitions planned for Day 1 from 214.

The first competitions (for education, training and employment) were launched in September 2020. 110 contracts have now been awarded, representing the full scope of the Minimum Viable Product. Contracts commence on 26 June 2021 (‘Day 1’), the date on which the reform of the Probation Service, and the creation of the Unified Model, take effect.

THE DF IN PRACTICE

The DF, as part of the overall probation reform programme, was worked up quickly and, with Covid and lockdown, in extremely difficult circumstances.

The initial implementation aims for DF fall within the overall aim “to maintain current operational delivery, protect service continuity and minimise risk of operational failures. This means minimising change for Day 1... Once we have secured the smooth transition of services, post Day 1 we will phase in further changes that move us towards the target operating model.”⁵

488 suppliers registered interest.⁶ Following applications and MoJ vetting, 226 organisations (subsequently 228⁷) were admitted to the DF. The breakdown between VCSEs and non-VCSEs, and by the contract size in which they had registered interest, is shown in Table 1.

Table 1: Suppliers admitted to the Framework⁸

<u>Supplier</u>	<u>Contract size for which interest registered</u>							
	<£100k		£100k-£1m		>£1m		Total	
	No.		No.		No.		No.	
VCSEs	44	80%	74	82%	55	68%	173	77%
Non-VCSEs	11	20%	16	18%	26	32%	53	23%
Total	55		90		81		226	

The breakdown of contracts put out for bid, and their values (assuming the maximum term of the contract and some estimates where contracts have volume bands), are as follows.

Table 2: Contracts⁹

<u>Sector</u>	<u>Number of contracts</u>			
	<£100k	£100k-£1m	>£1m	Total
ETE	0	0	11	11
Acc	0	3	11	14
PWB	0	10	35	45
WS	0	18	22	40
Total	0	31	79	110

The table¹⁰ below shows the value (over the full life of the contracts) and number of contracts awarded, and to whom.

⁵ TOM op. cit.

⁶ Source MoJ, 4 June 2021

⁷ Source MoJ, 4 June 2021

⁸ Source MoJ, 4 June 2021 There are some minor inconsistencies, which do not affect the discussion, in figures provided by MoJ in this and other tables.

⁹ Table provided by MoJ, 21 May 2021.

¹⁰ MoJ, 4 June 2021

Initially 22 contracts were not awarded because in 17 cases there was no bid and in 5 cases no compliant bid. Of these 22, 9 were in personal wellbeing, 8 in women's services, 4 in accommodation and 1 in ETE.

Four competitions were re-run and one competition (for accommodation in Wales) was split into four and re-run, all these 8 resulting in awards. There were seventeen cases in which there was no re-run and instead a direct award was made.

Table 3: Contracts awarded

	<u>ETE</u>		<u>Acc</u>		<u>PWB</u>		<u>WS</u>		<u>Total</u>	
	£m	No.	£m	No.	£m	No.	£m	No.	£m	No.
Advance*							8.0	6	8.0	6
BWC*							1.6	1	1.6	1
Catch22*					37.0	9			37.0	9
Changing Lives*							18.6	7	18.6	7
Foundation*					1.9	1			1.9	1
Ingeus	10.6	3	2.4	1	36.7	9			49.7	13
Lancashire Women*							2.4	1	2.4	1
Lincolnshire Action*							0.7	1	0.7	1
Maximus	20.8	4							20.8	4
Nacro*			10.1	3	4.5	3			14.6	6
Nottingham Women's*							2.4	1	2.4	1
PSS*							5.1	3	5.1	3
Seetec	9.8	3	14.6	4	6.3	2			30.7	9
Shelter*			5.7	1					5.7	1
St Giles Wise Ptn'p*					14.2	10	5.8	6	20.0	16
St Mungo*			6.8	1					6.8	1
The Forward Trust*			2.8	3	11.7	7			14.5	10
The Growth Company*	5.7	1			12.7	4			18.4	5
The Nelson Trust*							8.8	6	8.8	6
Thirteen*			3.7	1					3.7	1
Together Women*							6.2	2	6.2	2
Willowdene*							1.3	1	1.3	1
Women in Prison*							0.8	1	0.8	1
Women's (Derbyshire)*							2.0	1	2.0	1
Women's Community*							0.5	1	0.5	1
Women's Cornwall*							2.3	2	2.3	2
VCSEs	5.7	1	29.1	9	82.0	34	66.5	40	183.3	84
Non-VCSEs	41.2	10	17.0	5	43.0	11	0	0	101.2	26
Total	46.9	11	46.1	14	125.0	45	66.5	40	284.5	110

*denotes VCSE

These tables, and other analysis, suggest a number of conclusions.

- There has been ample participation of VCSEs in the framework list of approved suppliers. **173, representing 77%, of suppliers on the approved list are VCSEs.**
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- For the 110 Day 1 contracts, out of the 226 organisations then on the approved list, 34 made bids and 26 received awards as a result. 85% of approved suppliers did not bid. **Compared with the approved list, the range of those awarded contracts was narrow. Those who did not bid had put substantial effort into the application procedure, and the MoJ had put enormous effort into vetting those applications to construct the framework list. These efforts may be better reflected in Day 2 awards.**
- In seeking admission to the framework, suppliers had been asked to indicate whether they were interested in contracts of less than £100k, of between £100k and £1 million, and of more than £1 million. **No contracts below £100k were awarded, and few between £100k and £1 million.**
- In total there were 58 competitions, more than half, in which the number of bidders initially was one or zero (17 with no bidder, 41 with one bidder). In personal wellbeing and women's services, in respectively 22 and 33 awards there were no bids or one bid only. In ETE and accommodation there were respectively one and two such cases. **The element of competition which is a principle of procurement was often lacking. There were notable private sector companies absent from the bidding.**
- **The initial intentions were that "all opportunities must be competed, as it is not possible to Direct Award any opportunities offered under the Framework Agreement."¹¹ In the event 17 direct awards of the opportunities offered were made, outside the framework agreement, to suppliers on the framework where no bids (or compliant bids) were received.¹²**
- Of those awarded contracts, 23 out of 26, or 88%, were VCSEs. **Of the 110 contracts ultimately awarded, 84, or 76% were to VCSEs, representing 64% of total contract value. All women's services awards were to VCSEs. There was evidently no shortage of VCSE appointments.**
- This, however, is the red herring mentioned in the Introduction. The issue is (despite the preoccupation with VCSE status in MoJ classification) not whether VCSEs or non-VCSEs get awards, but whether awards are reaching SMEs and medium-sized and smaller VCSEs. **The size of awards indicates that in Day 1 medium-sized and small organisations are generally not part of the mixture.** 6 VCSEs had contracts totalling £122m and 3 non-VCSEs contracts totalling £101m.

¹¹ MoJ: *Probation Services DF – Invitation to Participate Part A* ['ITP A']

¹² The right to direct award was reserved, as notified in the notice in Official Journal of the European Union 2020/S 114-277986 VI.3, "where there is a call-off competition failure."

- If medium-sized/small VCSEs and SMEs are not much involved at the top, lead bidder, level, they might be involved as sub-contractors. 81 organisations are mentioned in contracts (including the 26 lead bidders) and 73 of these (including the 23 VCSE lead bidders) are VCSEs.¹³ Clinks (the national infrastructure organisation supporting voluntary sector organisations working in the criminal justice system, itself a charity) has calculated that fewer than half of these have annual income of less than £1 million. Only 9 out of the 81 have income levels of less than £100k and 23 out of 81 less than £500k. In the criminal justice system as a whole 73% of organisations have an income of less than £1 million.¹⁴ **Day 1 contracts have involved limited sub-contracting, especially in education, training and employment. Day 1 contracts have not involved smaller VCSEs to the degree to which they are represented in the sector.**

None of these points should be taken as criticisms of the bids which resulted in awards or as expression of any doubt as to the quality of the services which those awarded contracts will provide.

However, the conclusions to be drawn from Day 1 experience are that despite the number of approved suppliers on the framework, there was difficulty in attracting bidders for many competitions; the fact that 77% of approved list suppliers, 88% of successful lead bidders, and 90% of organisations mentioned in contracts are VCSEs shows the vital importance of VCSEs in rehabilitation and resettlement; but the low number and large size of participating VCSEs and of private sector entities is an indication that medium-sized and small VCSEs and SMEs did not feel able or ready to participate.

After Day 1 there will be a regular pipeline of procurement activity to fill geographical gaps or gaps in services, and to provide services for particular cohorts not so far catered for by the DF, especially BAME. In addition, there is a necessity to prepare for the next generation of contracts as the first generation expires. The benefit of the list of approved suppliers, so far largely untapped, is that they are available for Day 2 appointments.

The pace of application has slowed, as was to be expected. There have been 7 additions to the framework approved list in 2021. This makes more feasible, in terms of the MoJ handling volumes, a different approach to framework qualification in future.

¹³ Clinks: *What part will voluntary organisations play on the first day of the new probation service?*, Jessica Mullen, May 2021 ['First day']

¹⁴ Ibid

PREPARING FOR DAY 2

Contracts under the Day 1 awards will last for two to four years. Direct awards made are permitted to run for not more than two years. In addition, there are gaps to fill in services originally intended for Day 1. Preparations need to be made imminently, therefore, for further competitions.

1. A co-ordinated lessons-learned process

The renaissance of a unified model ('UM') and the recognition that more money is needed have been almost universally welcomed. However, as to the small part of the reform which comprises the DF, there is a big gap between the MoJ's own perception and the perception that external stakeholders have of the DF.

In wide-ranging and many interviews with people outside the MoJ, I found appreciation of the increased effort and funding that the DF represents but no enthusiasm for the process. Even discounting for the fact that few procurement systems are popular, the gap in perception was striking. While there are certainly some doubts within the MoJ about aspects of the DF, there seemed to be a palpable sigh of relief that, in a troubled Covid year, it had gone as well as it had; a feeling of job done because contracts had been awarded, and no reflection of the external concerns that the system had been designed in so demanding a way that it would exclude many potential participants.

This sense is reflected in the MoJ press release¹⁵ announcing the contract awards: "The funding has been awarded through a new process designed to make it easier for charities and other third-sector organisations to access funding from the Government." By contrast, the providers of services, whether successful or unsuccessful bidders or providers who had not bid, were uniformly critical of many aspects of the DF. The internal perception needs a jolt of realistic outside appraisal.

There were many allusions within the MoJ to "lessons learned" and there needs now to be serious effort at collecting the lessons learned, studying them and applying them to make changes. Data analysis in a forum in which lessons are indeed learned is desirable. The MoJ noted in January 2021 that it was "committed to continuing to develop, adapt and improve" the DF over its seven years and that the Minister had commissioned an independent review – which this is.¹⁶ Changes are in the works, aimed at simplification. But the move to make these changes seems to have happened without a formalised analysis of what has gone well, what has gone badly, what could be improved. **A systematic post facto examination of how the DF has worked in practice ought to take place internally and routinely, independently of this or any other ad hoc review.**

2. The role of VCSEs in the DF

Clinks estimates that there are over 1700 voluntary organisations working in criminal justice in England and Wales and that half to two thirds of these work with people in

¹⁵ MoJ: Press release: *£200 million investment in rehab services to cut crime*, 21 May 2021 ['Press']

¹⁶ Reducing Reoffending Third Sector Advisory Group: *Summary note of the RR3 Special Interest Group on Probation* meeting ['RR3'], January 2021

the community under probation supervision and “would therefore be in a potential position to offer services that fall under the dynamic framework commissioning process.”¹⁷

These characteristics make it desirable to maximise the role of small and medium-sized VCSEs as well as private sector organisations and to establish a system in which they are not disadvantaged.

During the course of this review I gained the impression that some concerns had shifted: the initial remit emphasised the need to ensure wide participation of VCSEs; later there was an equal emphasis on medium-sized and smaller VCSEs and on the SME private sector; most recently internal reports reflect more of a concern to ensure there is a continued role for the private sector. This may be the consequence of the fact that there were only three private sector organisations receiving awards and a total of only eight private sector organisations mentioned in contracts; and of the non-participation in bidding of some large companies traditionally active in this field.

The need to encourage medium-sized and small VCSEs and SMEs to take part in the DF programme should not overshadow the desirability of a process which also attracts the larger private sector companies: the more the merrier, for a better chance of success in reducing reoffending. Currently, the complexity of the DF puts off both private and voluntary sectors, as is evident in the paucity of bids for Day 1 and the absence of some obvious candidates.

(a) The potential of VCSEs

In relation to the VCSE sector the MoJ is influenced by a number of factors, occasionally competing. There is no policy prejudice against the private sector, which often is the obvious source for the services which need to be procured. On the other hand interviews reveal a frequent personal aversion to the private sector because of past experiences and a dislike of profit-making in the probation system. This is also evident in the attitude of the National Association of Probation Officers: “no one should profit from crime and no one should profit from the delivery of Justice as a result of those crimes.”¹⁸

Conversely, more value for money is likely, on the face of it, to be obtained from VCSEs which not only do not charge a profit margin but in many cases are subsidising the services they provide with donated funds. New Philanthropy Capital¹⁹ estimates that two thirds of public sector contracts with charities involve those charities subsidising the contract through donations from elsewhere, and that the ratio may be higher in the criminal justice system.

In addition to this potential value for money advantage, the VCSE sector has the advantage of having a very wide range of providers at a local and specialised level,

¹⁷ Clinks: *The Justice Committee inquiry on the future of the probation service*, response, October 2020 [‘Inquiry’]

¹⁸ NAPO’s demands for the future of Probation [‘NAPO’]

¹⁹ NPC op. cit.

with strong community engagement and knowledge of the individual circumstances of service users. NPC has found that there was a compelling need for charitable activity in the probation sector and that charities made a significant contribution.

Reducing reoffending and rehabilitation are the province of a large number of charities and other VCSEs, often very small and often founded or staffed by former offenders, prison officers and others involved in the judicial system, frequently with a fondness for double meanings: Beating Time, Inside Job, Revolving Doors. 29% of criminal justice specialist VCSEs have annual income of less than £100k, compared with 14% of non-specialist organisations.²⁰ Their *raison d'être* is often their smallness: housing in Rotherham for three or four offenders, charities with a staff of half a dozen dealing with violence in relationships in Leeds, a couple of ex-prison officers supporting prisoners into work, alcoholics in recovery providing a fitness-based social enterprise in Dover, a former vicarage provided by the Church of England for accommodation for half a dozen ex-prisoners in Ramsgate. To make best use of these, the system has to facilitate their participation.

(b) The DF commitment to VCSEs

The commitment to involve VCSEs to the fullest extent is a clear priority in the conception of the DF. The Target Operating Model aims at “increased use of voluntary and charitable sector services, increasing value for money” and, in case there be any doubt about whether this could acceptably mean services concentrated in a few large VCSE hands, treats as a performance indicator “the number of local voluntary sector organisations involved in delivery of rehabilitative services via the DF which we anticipate will increase.”²¹

But within the detailed papers there is very little emphasis on VCSEs. In the Provider’s Guide, “we encourage SMEs and specialist providers to be on the framework in their own right”²² – no mention of VCSEs. There was no mention of VCSEs in the titles of any of the market warming exercises and little mention in the text. The MoJ advised that it could not favour any particular sector; this is understandable in the context of the evaluation of bids and making awards but less so in terms of market warming where the interpretation of the legal position has been unnecessarily zealous in the market warming materials and more practical in other documents. There were explicit efforts to encourage SMEs to qualify or find a lead bidder, for example a market warming exercise entitled “Probation dynamic framework – SMEs and specialist providers.”²³

The National Audit Office’s advice is that “while procurement practices should not involve preferential treatment for third sector organisations, there needs to be a level playing field. It is important to ensure that third sector organisations are aware of procurement opportunities,... and that there are no barriers to their participation.”²⁴

²⁰ Clinks: *State of the sector*, 2019 [State]

²¹ TOM op. cit.

²² HMPPS: Provider’s Guide [‘Guide’]

²³ Probation dynamic framework – *SMEs and specialist providers* – October 2020 [‘SMEs’]

²⁴ HMG: National Audit Office: *Successful Commissioning Toolkit: How to secure value for money through better financial relationships with third sector organisations* [‘Toolkit’]

The eight principles on commissioning include “ensuring that, alongside other consultees, you engage with the third sector organisations, as advocates, to access their specialist knowledge.” Guidance to RPDs includes encouragement “to engage voluntary community groups with relevant experience... to seek their input on service and contract design and appropriate bundling”²⁵ – this might be regarded as pushing the boundaries of the level playing field and is certainly at the other end of the spectrum from choosing to disguise VCSEs with the soubriquet of “specialist providers”.

Market engagement needs to attract VCSEs as vigorously as this commissioning guidance suggests; this does not mean that evaluation of bids should favour them. The DF’s cautious approach to VCSEs is reflected in procedures which the largest VCSEs can cope with, but not the smaller ones; and in DF reporting which, in classifying between “VCSEs” and “non-VCSEs”, blurs the distinction between smaller and large organisations so that the part played in the DF by smaller organisations (which are primarily VCSEs) is obscured. Large VCSEs and large private sector organisations may be well suited to many contracts, but if services are often best provided by small local organisations, then the policy objectives are not well served if almost all VCSE organisations that receive contracts are large national charities unless there is substantial sub-contracting to smaller ones.

(c) The obstacles for medium-sized/small VCSEs

Clinks in their response in October 2020 to the Justice Committee inquiry on probation reform commented: “Much of the optimism that had tentatively been restored by the decision to reunify probation, and the clearly stated and very welcome policy intentions around improving engagement with the voluntary sector, has been diminished through the experience of navigating a hugely complex procurement process. As it stands, we do not believe that the new model offers a sufficiently level playing field for small and specialist voluntary sector organisations, and there is a real risk that many organisations simply won’t participate. The impact on service provision in each area could be devastating.”²⁶

Following the Day 1 awards announcement, Clinks welcomed the fact that 88% of lead providers are VCSEs, receiving two thirds of contract value; but reiterated their concerns: “it’s time voluntary organisations were recognised as truly valued partners to deliver probation services. But, many are again being shut out or given a back seat... The process was so complex that organisations chose not to or were unable to get involved. There are no Welsh organisations leading delivery in Wales, and low involvement in supply chains of very small and local organisations, those led by and focused on racially minoritized people, and Welsh organisations.”²⁷ The risk that the policy objective of involving medium-sized and small VCSEs and SMEs would not be met was recognised upfront.

²⁵ MoJ: *Commissioning and re-commissioning of rehabilitation and resettlement services: Model and guidance for NPS* (draft), 24 November 2020 [Model]

²⁶ Inquiry op. cit.

²⁷ First day op. cit.

Day 1 was necessarily centralised, with, therefore, a smaller number of contracts and generally larger suppliers than will be necessary thereafter, when RPDs are making the awards. There could be an inclination to wait and see. However, given the complexity of the procurement process and of contracts as currently structured, there is little hope that smaller charities or other organisations will frequently be included directly as successful bidders in the DF. They may be included as sub-contractors by lead bidders, but without mandating their inclusion there is no guarantee of this, and thin profit margins incentivise lead bidders to maximise the amount of funding they employ internally, irrespective of the merits of smaller organisations to which they could outsource.

With the full encouragement of the MoJ the Greater Manchester Combined Authority and the Greater Manchester RPD have set about the new probation environment in a different way.²⁸ One of their objectives is to avoid fragmented delivery and improve holistic support: to avoid the situation in which a service user has half a dozen appointments with different people involved in rehabilitation and resettlement services in a short time; another is not to “place an emphasis on large-scale outsourcing of provision but instead explore local provision... more closely integrated with and responsive to activity and needs in Greater Manchester”; a third is “embedding the importance of the VCSE in everything the GMCA does, [with] consistent engagement with the VCSE sector through the key stages.”²⁹ “We considered maximising social value to be a mandatory part of commissioning and much more than a requirement or an add-on to the commissioning process: it is a core component embedded across all parts of commissioning activity.”³⁰ Although the GMCA will be late in commissioning most services, its model differs from the standard DF model in its much more explicit emphasis on VCSEs, as well as greater involvement of service users in design of the system.

(d) Removing the obstacles

The central contradiction between objectives and implementation can be mitigated in several ways. First, the process, and documentation, could be simplified. Second, funding could be more by grant. Third, as planned, RPDs will be developing their own strategies and networks, and commissioning in a local and specialised way; and they will be able to make use of the Regional Outcomes and Innovation Fund (“ROIF”). Fourth, large organisations may be awarded the contract, but they frequently rely on small subcontractors, and often VCSEs. Those commissioning could set targets for the minimum percentage of funding which could be fulfilled by medium-sized and small VCSEs and SMEs. Each of these is discussed below.

Both the individual caution about profit-making organisations and enthusiasm for the third sector, and the construction of an elaborate process which puts off the third sector except in its largest manifestations, are products of the same thing, a very high degree of risk aversion. Trust implies an institutional self-confidence in the MoJ

²⁸ *Memorandum of Understanding between the Greater Manchester Combined Authority and Ministry of Justice for the co-commissioning of rehabilitative and resettlement services*, December 2020 [‘GMCA MOU’]

²⁹ GMCA: GM IRS: *Quality assurance in our commission processes* [‘GM IRS’]

³⁰ GMCA MOU op. cit.

that allows it to take some risks in the expectation that on balance this method of proceeding will allow better results overall, because of the personal knowledge and personal touch which the small organisations can have, and the commitment and willingness to engage at a very local level and in an imaginative and innovative way. If more is to be entrusted to smaller organisations including especially VCSEs, there needs to be a workable route: grants.

3. Simplification of processes

The Government Green Paper on Procurement, published in December 2020, has a go at the complexity of government procurement practices: “Modern and innovative approaches to public procurement have been bogged down in bureaucratic, process-driven procedures.” There are “complicated and stifling rules... It is often the choice of procedures that drives the procurement, not the needs of the procurement that drive the procedure.”³¹

NAPO is concerned that “the National Probation Service is now overly bureaucratic and follows a top-down ‘command and control’ culture. This means that the responsiveness to local priorities that was once a key feature of probation has been lost.... Probation is about people and people exist in communities.... What works in one village, town or city might not work elsewhere. There must be a facility to respond to local needs and priorities and to shape service delivery to suit. Frontline practitioners must be empowered to work in a way that meets the needs of both their client and their community rather than to an agenda set centrally... Large contracts are not the way to deliver... innovative and responsive partnerships as smaller third sector organisations cannot compete with large companies that are able to offer cash guarantees and present artificially low bids.”³²

(a) Market warming and information

All official procedures are met with a motherhood-and-apple pie cry that they should be simplified, and simple is not necessarily easy to accomplish. Nobody sets out deliberately to produce something which is utterly complicated. However, the quality of the market engagement and information materials is mixed. Much of the market warming documentation is characterised not only by a gravitational pull to complicate but by a tendency to innumerable internal links and web references, so that the web is a maze. Although the MoJ reported positive feedback about market warming presentations, outsiders (some privately while mentioning meaningfully that the MoJ is in a powerful position as a monopoly customer) regarded them less positively. An audience to which a presentation is being made cannot accommodate very crowded pages, and some of the presentation slides³³ contained more than 300 words. The density and circularity of the market warming documentation are hinted at in this piece of guidance:

³¹ HMG: Green paper: *Transforming Public Procurement*, December 2020 [‘Green’]

³² NAPO op. cit.

³³ HMPPS: *Overview of the DF and commissioning of rehabilitation and resettlement services*, August 2020 [‘Overview’]

“There are two sets of documents for you to review: Probation Dynamic Framework Market Warming... you don’t need to read these...”³⁴

Clinks noted at one of the co-ordinating VCSE meetings that “many organisations have reported how complex and time-consuming these processes have been,”³⁵ with a lack of clear information and bid outcomes delayed. **The MoJ is conscious that market warming is not a job done: information for the market on how the DF works will need to be revised to take account of comments, general and specific, for Day 2. A “red team” should be on the receiving end during the drafting and trialling stages.**

Interviewees found the term “market warming” patronising; “market engagement” might be better used.

(b) Application for inclusion in the framework

The main issues with the DF are substantive ones regarding content, rather than presentational.

Applicants for inclusion in the preferred bidder list have to complete an application form, the “Selection Questionnaire” (‘SQ’). This is straightforward. No organisation would have much trouble completing it.

At the application stage suppliers must also subscribe to the Framework Agreement. “Potential Providers must accept the terms and conditions of the Framework Agreement as presented in order to become a Provider on the Framework Agreement.”³⁶ They must read,³⁷ in order to be on the list, the basic Framework Agreement of 91 pages; and 24 schedules with a further 494 pages, plus the call-off competition ITT (invitation to tender template) and call-off contract with 105 pages. The schedule of definitions alone has 71 pages.³⁸ It is unrealistic to expect medium-sized and small organisations, charitable or otherwise, to cope with legalese the length of *Great Expectations* – and moreover not merely to cope but to pay a lawyer to cope. The MoJ has opted for one-size fits all, and the one-size is enormous. The suggestion in internal documents that the standard selection questionnaire has been designed with both small and VCSE organisations in mind is unrealistic given the requirement to subscribe to the Framework Agreement and its 24 schedules.

Suppliers which have been providing services to the MoJ for many years have found that they had to go through the intensive and time-consuming application process. This is inevitable once a framework structure, with an approved list, has been decided on. However, the qualification process need not be so cumbersome. Some of the same suppliers have relationships with other public sector entities, such as the NHS, where registration involves a simple application form. Clinks gave evidence to

³⁴ Guide op. cit.

³⁵ RR3 op. cit., January 2021

³⁶ ITP A op. cit.

³⁷ Guide op. cit.

³⁸ Framework Agreement [‘Agreement’]

the Parliamentary Justice Committee inquiry on the future of the probation service in October 2020 that “small organisations are so daunted by the dynamic framework they are resigning themselves to only playing a small part in supply chains so that they don’t need to register independently.”³⁹

The DF team acknowledged that the documentation was complex, particularly for the potential SME/VCSE market. The model service contract used for all contracts, the MSC, is recommended for use for complex large services contracts with an average annual value of over £20 million. A single contract of course is convenient for the MoJ, but a complex contract suited to values of over £20 million is not convenient for or familiar to a market with many potential small and medium-sized contractors and in which none of the Day 1 contracts was for as much as £20 million and none is likely to be.

(c) Economic and Financial Standing

Applicants for the framework list also need to fulfil certain financial criteria. The MoJ has applied higher standards of economic and financial standing than mandated in Cabinet Office procurement rules. Their rationale for this is that the standards that they have applied are more rigorous – indeed they are, but it is not clear why they should be more rigorous than those which government generally applies, with a result acknowledged to be more onerous for both bidders and evaluators.

The EFS requirements are written to apply to the private sector, not to the VCSE sector. The ratios demanded include operating margins – a charity may have zero margins – and two ratios which refer to earnings before interest, tax, depreciation and amortisation, a formulation which does not exist in the charitable world. The market warming documents⁴⁰ say that the MoJ will adjust to take account of the inappropriateness of these ratios to VCSEs if the VCSEs explain in text the inapplicability of them “in light of the company [sic] strategy.”

The decision was taken to measure EFS at SQ stage – at the stage of qualifying to be on the list of potential bidders. Given that so many qualified and so few bid, and that each EFS review of a supplier interested in contracts adding up to more than £1 million requires three hours of analysis within the MoJ, this has absorbed too much time of the MoJ and also of the great majority of those qualifying. The MoJ reckoned that there would be 32 contracts with values of more than £1 million and on the basis that there might be three bidders per contract estimated that the finance team would need to set aside 288 hours to review.⁴¹ This is an acknowledgement that the MoJ were prepared to spend three times as much time as necessary on this exercise. Moreover, as a maximum two-year window between qualification and call-off competition was recommended before retesting of EFS, the EFS test would have to be done again anyway.

³⁹ Inquiry op. cit.

⁴⁰ HMPPS: PDF FAQs, 3 July 2020 [‘FAQs’]

⁴¹ In the event there were 79 contracts with a value of more than £1 million. 75 suppliers indicated interest at that level. 23 suppliers were awarded contracts of more than £1 million.

(d) Simultaneous bidding and application for admission to the framework

The DF team considered the possibility that EFS testing be done not at the selection questionnaire stage, in qualifying for entry onto the approved list of suppliers, but at the call-off competition stage. A preferable more comprehensive alternative is to remove entirely the gap between framework qualification and call-off competitions. This is already possible but has not been encouraged: all the impetus has been for suppliers to get onto the approved list and then wait to see whether they want to bid in competitions. **For future service delivery, applications to join the supplier list could be made at the same time that a bid is made.** Now that the core list of suppliers is in place, the volume of applications will not tax the MoJ unduly, with fewer suppliers coming into the system. The only disadvantage is that, should a supplier fail to qualify first time round (as has happened in some cases – the rules are that a supplier can have two more goes), it will miss out on a particular competition. Nonetheless, application to qualify at the same time as bidding would be more efficient both for suppliers and for the MoJ. No change in DF rules is required. There would, however, need to be a change in the thrust of market engagement guidance.

(e) Contract simplification

Reporting obligations are so important that it is probably difficult to simplify; but governance provisions are, for smaller contracts, over the top: a board – in fact two boards, a Service Management Board and a Contract Strategy Board - to supervise each contract meeting at least quarterly, with two supplier representatives and two customer representatives.⁴²

In the procurement procedure known as PQP – price per quality point - the contract price bid by bidders is divided by the quality score deriving from an evaluation. Typically the quality score is between 40 and 86.6, and the bid with the lowest number resulting from this calculation gets the contract. In the procedure known as HQC - Highest Quality Conforming – there is a price fixed by the customer, and the bid of highest quality gets the contract.

The DF team considered using HQC for all awards. There was a compromise: the decision was that HQC could be adopted for the roughly one-third of contracts valued at less than £1 million; otherwise PQP. There was concern that smaller organisations and VCSEs might be deterred from bidding by the use of PQP and that HQC represented a simpler mechanism, preferred by the market. It would be sensible to reconsider whether HQC should be used for all contract awards.

The DF team has now had time to embark on an effort at simplification, including new guidance to make the process less daunting to new entrants for Day 2 and it must be hoped that the simplification will be substantial. The market warming materials are being revised wholesale. In terms of qualification onto the framework, the DF team is now reconsidering application of the nine economic and financial standing ratios in future, and is planning to

⁴² Agreement op. cit.: Schedule 8.1 Governance

propose reduction to four or five. The one-size fits all approach to the contract format has been revised and it is now proposed to have low and medium complexity bid templates to allow for quicker and lower value procurements.

Government guidance is that “procurement processes should be of proportionate duration and effort to the size and complexity of the contract opportunity so as not to create a barrier to entry for SMEs and VCSEs.”⁴³ Even if contracts are simplified so that they no longer follow a one-size approach, they will remain complicated enough to remain out of reach for small entities. A move to more grant funding would be the major change that would facilitate their participation in receiving awards directly from RPDs.

4. Grants and contracts

The private sector and large VCSEs are vital partners in the DF fields of activity and should continue to be encouraged to compete for business. But the medium-sized and small VCSEs should cease to be discouraged by circumstances from competing. The VCSE sector is a natural partner for the MoJ in reducing reoffending because of the number and range of charities involved, at a local and specialised level, in rehabilitation and resettlement. To be fully involved two things are needed: first, awards need to be smaller and more localised. This is planned with the move to RPD responsibility. Second, awards need to be primarily, and as far as possible, by way of grant. This is not planned, and would represent a major change for the MoJ which is focused on contracts.

The distinction between grants and contracts is sometimes portrayed as another red herring, a distinction without a difference. Grants can be as complex and onerous as contracts, the grant regime having tightened in part because of Kids Company – or to put it another way, contracts can be as non-complex as grants. From the point of view of the MoJ, genuine, large-scale simplification as discussed above could possibly make DF contracts no more demanding for the MoJ to administer than grants. But that is not the only issue: there is also the question of what will draw in optimal participation by the medium-sized and small entities available to work in rehabilitation and resettlement. **No single step could symbolise more a determination to forge a partnership with medium-sized and small VCSEs, alongside the private sector and large VCSEs, than a move to the widespread use of grants. If RPDs were not just permitted but encouraged to make grants, properly based on conditions and properly competed, it could transform the scale and reach of involvement with the Government’s effort at rehabilitation. Donors to VCSEs would be encouraged by the evidence of Government backing to give more, leveraging up the rehabilitation effort. Local, specialised, personal VCSEs could have significantly more impact. Reoffending would stand the best possible chance of falling.**

⁴³ HM Government: *The Sourcing Playbook*, May 2021 [‘Playbook’]

Within the whole of the probation network there is uncertainty and ambiguity about the use of grants, highlighted in Clinks' evidence to the Justice Committee inquiry.⁴⁴ There is frequently an understanding that grants are limited to amounts of less than £10k. This is not the case. There is also an understanding that the DF can only be delivered by way of contract. This too is not the case. In some quarters there is an understanding that the ROIF will also be deliverable only by contract except for amounts below £10k. This is not so. Finally, there is a concern that "enforceable" services – that is to say, activities which are enforced by the courts on service users – can only be provided by contract. This needs thorough consideration both by lawyers and in discussion with the Cabinet Office since it does not appear to be correct.

(a) Practical advantages of grants

In other areas of the MoJ grants are a standard part of the offering and the application procedure is relatively brief and simple - for example the procedure for grant funding in the Local Leadership and Integration Fund Prison Leavers Project⁴⁵. Clinks itself, the convening entity for the VCSE sector, receives an annual grant of £550k, resulting from a competitive bid with key performance indicators specified.

The method of evaluation is generally, though not necessarily, simpler for grants than for contracts. Some contract processes within the MoJ are relatively straightforward – fewer quality questions (for example, three rather than the DF standard 13), and contract documents with a length a fraction of those of the DF. The DF contract process is extremely elaborate, designed with avoidance of legal challenge primarily in mind.

The practical effect of a grant or a contract may be pretty much the same: the requirement for an organisation, in return for a sum of money, to provide a particular service for a particular period. Suppliers in a contract can be held legally liable if defined and measurable outcomes are not provided, whereas a grant only obliges a supplier to use best efforts to supply. However, this statement understates grant-making powers: a grant payable over, say, three years, can simply be discontinued if the aims, in terms of measurable outputs, are not being met.

(b) The DF preference for contract

The DF papers push towards contracts: The Executive Summary: Target Operating Model contemplates RPDs "overseeing regional contracts to deliver service outcomes and value for money." There is no mention of grants.⁴⁶ The full Target Operating Model states that "the DF will primarily be used to award contracts, however, there is flexibility built into the framework agreement to extend this to grants if required."⁴⁷

⁴⁴ Inquiry op. cit.

⁴⁵ MoJ: *Technical Envelope Tender Response Form, for Grant Funding for Local Leadership and Integration Fund (LLIF) Prison Leavers Project* ['Tender']

⁴⁶ HMPPS: *Executive summary: Target Operating Model for the future of probation services in England and Wales* ['Executive']

⁴⁷ TOM op. cit.

Clinks have been “concerned that guidance issued to RPD seems to state that contracts are the norm and grants are the exception, which could damage the ability of smaller organisations to engage”. The MoJ response was that there is “flexibility in the system”.⁴⁸ The nature of the DF is to plunge into the thickets of procurement contracts at once, without initial guidance as to the distinction between contracts and grants.

Generally what grants get in DF papers is silence. The document on commissioning⁴⁹ of which the draft was circulated in November 2020 to RPDs is an exception, tackling the subject explicitly in a brief paragraph labelled “Grants vs contracts”: “The Dynamic Framework allows commissioning via contracts or grants. When a specific service is being commissioned, a contract should be used so that there is clarity and accountability for the service which is required. A grant should only be used where the service to be delivered may not have predefined parameters/outcomes and there is significant flexibility in how the organisation can spend the funding.... The business case for any grant must be led by the commissioner however deciding on whether a grant is appropriate should be taken [sic] in conjunction with the MoJ Commercial Business Partner.” This guidance heavily weights against the use of grants. Any grant, as with any award of money, should have “predefined parameters” and there should be accountability for the service provided.

In the centralised Day 1 process, there was a preference for everything to be by way of contract. The reduction in the Day 1 round to the MVP made it clear that grants were possible, though as a last resort. Simultaneously the MoJ was advising potential bidders: “the Authority recognises that the voluntary sector working in criminal justice includes small and local organisations that are dependent on grant funding. The Authority retains the right to award grants through the DF, however, there are no current plans to do so and our intention is that all Day 1 competitions will be awarded as contracts.”⁵⁰ This statement seems to acknowledge, since some voluntary organisations were seen to be “dependent” on grants and no grants were planned, that such organisations were to be excluded. In the event, the scope of Day 1 services was reduced, but only the contract route was pursued.

For Day 2, the use of grants in the DF is envisaged alongside contracts: RPDs “could use grants as well as contracts, as appropriate.”⁵¹ “The DF will be used to promote grant agreements, but these will be awarded outside of the DF” – the meaning of this is that grants will not follow the contract procedure but that the framework list of suppliers can be used.⁵² It leaves prospective grantees in a strange position: in applying for inclusion on the framework list they agree to subscribe to an elaborate framework agreement with 24 schedules if awarded a contract; but they do not expect to bid for contracts, only for grants.

⁴⁸ RR3 op. cit. January 2021

⁴⁹ Model op. cit.

⁵⁰ FAQs op. cit.

⁵¹ Overview op. cit.

⁵² ITP A op. cit.

(c) Services procurable by grant

Cabinet Office guidance⁵³ is not anti-grant and not even anti-large grant. The guidance is to ensure a proper process and to consult government resources: “departments shall ensure they have a robust grants approval process group spends over £100,000... New government grants, including those that are high-risk and novel and contentious, as well as those undergoing a step change in scope or funding, should be considered for submission to the New Grants Advice Panel for scrutiny and advice from subject experts.” The Government Grants Centre of Excellence was launched in 2020 to “help build the capability... to manage grants effectively.” There should be “robust grant agreements” with “outputs agreed and longer term outcomes defined”, and there should usually be competition. None of this is incompatible with awards under the DF.

In deciding between grant funding and contract procurement, the Cabinet Office advises that “one key consideration in deciding which model is appropriate to the delivery of a policy is whether a department is purchasing a product or service, or if it is merely supporting an activity that aligns with departmental policy.” This distinction needs elucidating. A Clinks-convened stakeholder group was told that “anything designed as a specific service requires a contract”⁵⁴ but definition as to what is a specific service has not been provided. It would be helpful if the Cabinet Office would provide more definition in this area.

There is acknowledgement in the MoJ that there are areas in which outputs and outcomes are more suited to grant funding than to contracts. Personal wellbeing, finance, benefits and debt, and recovery and dependency, as well as women’s services, are areas in which medium-sized and small VCSEs predominate and which are suited to grant treatment. The experience to date in relation to bidders shows that in personal wellbeing and women’s services the great majority of provision is likely to be by VCSEs. Contracts could be predominantly for awards of over £1 million and in categories such as education, training and employment where the service provided tends to consist of structured courses of standard design and available nationally.

(d) Enforceability

Services which are not required by order of the court but instead are imposed at the discretion of the responsible probation officer could certainly be provided by VCSEs funded by grant. There is more ambiguity about the appropriateness of grants because of the issue of enforceability which has guided the DF towards contracts. There are two layers of enforceability: first, the enforceability of the arrangement between commissioner and supplier; and second, the enforceability on the service user of a court order.

⁵³ Cabinet Office: *Guidance for General Grants*, 30 June 2020 [‘Grants’]

⁵⁴ RR3 op. cit.

A contract is legally enforceable on the supplier in a way that is not true of a grant, but any restriction to contracts for court orders enforceable on the service user results from MoJ policy rather than law.

If the court makes a community order, the probation officer, as the “responsible officer”, must “make any arrangements that are necessary in connection with the requirements imposed by the order, and... promote the offender’s compliance with those requirements.”⁵⁵ Courts often order a particular number of days’ “rehabilitation activity requirement” (“RAR”). These orders give substantial discretion to probation officers as to what the offender is required to do, provided that it is “with a view to promoting the offender’s rehabilitation”. Some services fulfilling RARs are in the categories within the DF, and there is nothing in legislation which restricts these to being contracted services rather than services being provided as a result of a grant. There may be more specific orders for drug or alcohol rehabilitation. For these too, contract is not legally necessary.

In relation to this second layer of enforceability – on the service user –the Cabinet Office has guided towards contracts where the service concerned involves interventions or appointments which are “enforceable” on the service user. But in recent conversations I have found there is flexibility in this view and that it is felt that the primary focus should be on seeking the best outcomes for offenders and on the reducing of reoffending.

A grantee can be required by RPDs to provide RARs and in other ways interventions which allow probation officers to enable service users to comply with court orders: “Enforceable means a Session which the Responsible Officer instructs the Service User to attend as part of a Community Order, Licence or Post Sentence Supervision and which, if not complied with, renders the Service User liable for Warning, Breach Action or Recall as assessed appropriate by the Responsible Officer.”⁵⁶ Probation officers can monitor grantees to ensure that the requirement is fulfilled. Discussion with a RPD suggests that this is practicable. Monitoring of RARs might still be by means of the RPD’s contract management system. Grantees need to agree to record and share information on service user attendance at enforceable appointments.⁵⁷ A substantial proportion of RPD DF activity could therefore be by way of grant, allowing smaller organisations to take part to a much greater extent than is likely to be the case if awards are limited to contracts on the DF basis.

(e) The case for grants

In summary the DF allows grants; for compliance with court orders grants are legitimate as well as for non-enforceable services; grants will allow RPDs the greatest freedom to commission from the widest range of suppliers of localised and specialised services; and the cause of reducing reoffending is thus best served by enabling grants to be widely used by RPDs.

⁵⁵ Sentencing Act 2020, para 214 (the “Sentencing Code”) [Code’]

⁵⁶ Agreement: Schedule 1, Definitions

⁵⁷ As intended in GMCA MOU op. cit.

I recognise that there is widespread hesitation within the MoJ about broader use of grants in the NPS. I think that this comes principally from concerns about enforceability and that these concerns may be misplaced. I echo Clinks' recommendation in their evidence to the Justice Committee inquiry that the MoJ and HMPPS should work with the voluntary sector to create specific guidance for RPDs on grant giving which in my view is essential to the full participation of the VCSE sector and therefore the optimal exploitation of all the rehabilitation resources that are available to society.⁵⁸

5. Social Impact Bonds

As NPC says, "given the wide range of agencies involved in the lives of people in prison and upon release, and other factors such as family relationships, it can be difficult or impossible for charities to gauge the degree to which their intervention resulted in a desired effect." The problem of measurement of effect is not limited to charities. It is this which leads policy-makers to devise programmes which measure outputs such as interventions – appointments kept, courses taken – rather than outcomes such as at the macro level a reduction in reoffending, and at the micro level individuals sorting out their lives.

With the abundance of data and the sophistication of means of its analysis as a result of technological progress, these hurdles should increasingly be capable of being overcome. The likelihood of improving performance outcomes will be increased if performance measurement in these terms is built into the arrangements between commissioners and providers. One method of making such performance measurement intrinsic to delivery is by means of Social Impact Bonds. The MoJ was the pioneer in this field with the SIB at Peterborough prison in 2005, and has followed this with others.⁵⁹ But enthusiasm has waned because SIBs are complex: they require the finding of a control group to compare the group receiving the particular service, and establishment of relevant and realistic outcome targets to measure and a means of measuring them.

However, there is a strong logic to the creation of more SIBs within the MoJ because this is an area in which the economic benefit of success - reducing reoffending - is large, and potentially much larger than the cost of the services to achieve success. The MoJ should take advantage of all the progress in data availability and management to pursue more SIBs within the DF. The MoJ's Justice Data Lab produces statistics which would facilitate SIBs, including comparatives between cohorts receiving attention from particular charities and control cohorts not receiving this attention. The reoffending results of such funding could be compared with regions in which there was no such funding. The Secretary of State for Justice has expressed his appetite for SIBs. It will require some concentrated effort within the MoJ.

6. Regional Probation Directors ("RPDs")

⁵⁸ Inquiry op. cit.

⁵⁹ National Audit Office: *Outcome-based payment schemes: government's use of payment by results*, 19 June 2015 ['Outcome']

Part of the Unified Model reform is the appointment of Regional Probation Directors, covering 12 regions in England and Wales. The intention is that these RPDs will make awards under the DF after Day 1. RPDs, with local understanding of their communities and of services available, will be able to use their discretion to make more use of the services provided by local VCSEs and SMEs.

(a) Resourcing RPDs

It will be vital to effective devolution to the RPDs that they have enough resources: they will have both contract management teams and commissioning and partnership teams and will be supported by heads of community integration. Commissioning should be firmly in the hands of RPDs. They will have the local knowledge of smaller organisations and the ability to make awards to them.

Leadership development of RPDs will be important: the network of RPDs will enable best practice and ideas for innovation and knowledge of services to be shared. The challenge panel consisting in part of the non-executive directors of MoJ could be retained beyond their current due date (the end of 2021), and included in assessment and comparison of RPDs' procurement activities.

Each RPD could be encouraged to appoint a development officer to foster contacts with VCSEs and broker relationships, encouraging them to bid alone or in consortia. VCSEs are often so local that only in consortia could they hope to cover a wide area.

(b) ROIF

The Regional Outcomes and Innovations Fund ("ROIF") is planned as an ancillary to the DF. The ROIF is clearly intended for non-core services. ROIF allocations will be administered directly by RPDs, with considerable discretion.

Because the ROIF is a novelty, it is work in progress. The ROIF starts small - £2 million in 2021-2 - and is due to expand to £20 million in year three; it could be expanded further. This would allow more services to be obtained with the greatest flexibility.

The Target Operating Model (February 2021) and the Full Business Case (October 2020) are uninformative in detail about the ROIF. The most useful summary to date appears to be in the draft, clearly written, document on Commissioning⁶⁰ circulated to RPDs, although an aspect which is not clear is whether RPDs using ROIF can commission services from providers who are not on the framework (other evidence suggests that they can).

The February 2021 Target Operating Model envisaged that by Day 1 "RPDs... will understand the rules and process for commissioning and co-commissioning including what the ROIF funding may/may not be used for." **In spite of the general clarity of the Commissioning document RPDs appear to be in confusion about the ROIF and to want more explanation from the MoJ.**

(c) Resource allocation by geography and category

⁶⁰ Model op. cit.

The allocation of funds geographically and across the different headings and categories within the DF is the function of past experience of caseloads. The reform of the NPS is such a sweeping transformation that to do otherwise would not have been practicable. Beyond Day 1 it will make sense to consider whether this allocation is optimal. There are considerations both as to geography and as to the type of services being provided through the DF.

In interviews a recurring theme was that the geography of Wales needed to be taken more into account. The same amount of £100k was provided for women's services in Gwent which has an area of 600 square miles and in Dyfed Powys which is 4000 square miles. There are similar contrasts in England. If service users are required to travel long distances frequently for appointments with their probation officer or for interventions, they are set up to fail. Funding needs to be appropriate to these differences, to allow truly local provision. The attempt at consistency across the country can lead to anomalies. RPDs are in a position to make these distinctions which large centrally directed contracts cannot, but since resource allocation is central there needs to be a mechanism which allows regional variations to be fully considered by including RPDs in a forum in which these differences can be taken into account at the centre.

7. Lead bidders

The route to SMEs and smaller VCSEs can be through large organisations acting as lead bidders, sub-contracting to smaller ones. This could be ensured by a requirement of lead bidders that they use specified percentages in the funding of SMEs and medium/small charities.

The DF provisions currently fall short of ensuring any particular degree of involvement as sub-contractors by SMEs and small and medium-sized VCSEs. The DF requires bidders to give details of proposed subcontractors and contracts, and it also requires quarterly reporting by suppliers post facto on the volume of business done with subcontractors.⁶¹ Naturally, however, as the framework documents suggest, "volumes may fluctuate."⁶² Awards (both contracts and grants) could be sufficiently specific that the bidders cannot merely include charities and VCSEs in their bid as bid candy, to decorate and embellish.

8. Service user involvement

Service user involvement is two-way: engagement of service user representatives in the design and operation of the DF; and engagement of the MoJ with service users.

Service users are missing from the list of stakeholders shown in the Target Operating Model with whom the MoJ consulted in putting together the DF, despite an opening statement in the Executive Summary about "strengthening the importance we place on feedback from people that are subject to probation"⁶³ and similar statements elsewhere: the Clinks-convened stakeholder group was told that

⁶¹ Agreement op. cit., clause 17

⁶² Ibid, Schedule 4.3 Sub-contracting

⁶³ Executive op. cit.

“HMPPS recognises the importance of service user involvement” and wanted to strengthen their input.⁶⁴ Service user involvement was not part of Day 1 provision but is intended for Day 2.

In the frontline of probation, in the empirically extremely difficult business of rehabilitation and reducing reoffending, what is striking is that ex-offenders are often diverted onto a more positive path because of a spark of inspiration provided by a single probation officer or an individual working for a charity or other organisation – the individual’s trusted relationship with the ex-offender is what pushes the ex-offender to find enough self-motivation to give up a life of crime fuelled frequently by addiction. A government procurement process is necessarily depersonalised. Many senior people within the MoJ have been through the prisons or probation service but some at all levels have not, and **more outreach activity with VCSEs and other suppliers, to familiarise with the frontline, would help to maintain the ambition to reduce reoffending.**

⁶⁴ RR3 op. cit. January 2021

RECOMMENDATIONS

This review has two principal policy recommendations and a reporting recommendation:

- 1. that the use of grants be encouraged explicitly and be the first choice for awards of less than £1 million, and especially in categories such as personal wellbeing, women’s services, and finance, debt and benefits.**
- 2. that contracts should frequently require a specified percentage of funding to be deployed to VCSE and/or SME sub-contractors.**
- 3. that the Minister should require regular reports in relation to future services to show the breakdown between grants and contracts, between large entities and SMEs and medium-sized/small VCSEs, and between lead bidders and sub-contractors; and reports showing the time taken to agree contracts and grants, both in terms of the period from start to finish and in terms of MoJ/NPS person-hours spent on the process.**

These recommendations have two goals: first, to maximise the potential for medium-sized and small VCSEs as well as private sector companies and large VCSEs to be a real partner to the MoJ in reducing reoffending; second, to maximise the amount of money within the probation service which is available for delivery of service.

There are a number of other suggestions in this review contained in the section on Preparing for Day 2. These include suggestions regarding a formalised “lessons learned” process, the use of Social Impact Bonds, further explanation of the ROIF, moderation of EFS requirements and of the payment mechanism, and simplification of contracts. I ask that these be considered within the MoJ and by the challenge panel.

The DF, with increased funding for rehabilitation and resettlement, gives an opportunity to make an impact on Britain’s reoffending figures, much of which could be lost by what the Government Green Paper calls “complicated and stifling rules.” I believe that the changes identified in this paper, if embarked upon seriously, will help to enable the opportunity to be grasped.

Appendix 1

Proposed scope for Probation Services Dynamic Framework review

Purpose

- To identify changes that could be made to the structure or rules of the Probation Services Dynamic Framework to optimise end-to-end operation and potential market participation, particularly in the VCSE sector

Scope

- Given where we are in the plan for procurement of contracts for day one services, the scope of the review should be focused on what learnings we can take from all the work done to date to help us improve the running of the framework for **future service delivery** (i.e. recognising that we cannot make changes at this stage to live procurements)
- This could helpfully focus on:
 - Structure of the framework – in particular, ease of process to qualify
 - Framework commercial terms and principles
 - Call-off competition principles and rules
 - Process for qualification and call-off

Potential information sources

- We would not wish to limit the remit of the reviewer in terms of access to information or interviewees, but would suggest the following as a starting point:
 - Market engagement and market warming materials produced to date
 - Framework and call-off competition procurement documentation
 - Access to Competition and Commercial teams
 - Views of the Probation Reform Programme’s Challenge Panel
 - External stakeholders: Clinks; active and potential participants in the market; other parties with an interest in the benefits of rehabilitative services (e.g. Police & Crime Commissioners)

Timing

- Formal engagement with reviewer by end January
- Initial internal ‘fieldwork’ – review of workstream documentation, internal interviews etc. during February
- External ‘fieldwork’ March-April
- Final report by end May: This means any recommendations can be implemented ahead of “day two” competitions
- The next IPA review of the Probation Reform Programme is scheduled to take place in mid-April; the timings set out above would allow the reviewer to incorporate any relevant recommendations or findings from the IPA’s review.

Constraints

- Any recommendations would need to recognise the legal and commercial boundaries that the framework can operate in – i.e. the extent to which the framework can be amended without need to launch a new framework, as subject to the Public Contracts Regulations (2015).
- We therefore propose that the reviewer is supported by advice from the Cabinet Office Commercial Continuous Improvement team, who own the commercial standards that govern central government procurement.

Appendix 2

Documents referred to or consulted, and abbreviations used in footnotes

[Ministry of Justice ('MoJ'), National Probation Service ('NPS' or 'PS') and Dynamic Framework ('DF') are abbreviated throughout.

Other internal MoJ and Cabinet Office documents have been consulted.]

Agreement:	Framework Agreement and Schedules
Bidding:	MoJ: <i>PDF – Bidding Models</i> , 26 August 2020
Code:	The Sentencing Act, 2020 (“The Sentencing Code”)
Completing:	HMPPS, <i>Qualification on to the DF: Completing the selection questionnaire</i>
Contract:	Call-Off Contract template
Cyber:	MoJ: DF: <i>Information Assurance and Cyber Security Requirements for SMEs</i>
Executive:	HMPPS: <i>Executive summary: Target Operating Model for the future of probation services in England and Wales</i>
FAQs:	HMPPS: <i>Probation Dynamic Framework: FAQs</i>
First Day:	Clinks: <i>What part will voluntary organisations play on the first day of the new probation service?</i> Jessica Mullen, May 2021
GM IRS:	GMCA: GM IRS: <i>Quality assurance in our commission processes</i>
GMCA MOU:	Greater Manchester Combined Authority: <i>Memorandum of Understanding</i>
Grants:	Cabinet Office: <i>Guidance for General Grants</i> , 30 June 2020
Green:	HMG: Green Paper, <i>Transforming Public Procurement</i> , December 2020
Guide:	HMPPS: <i>Provider’s Guide</i>
Inquiry:	Clinks: <i>The Justice Committee inquiry on the future of the probation service</i> , response, October 2020
ITPA:	MoJ: Probation Services DF – <i>Invitation to Participate Part A</i>
ITPB:	MoJ: Probation Services DF – <i>Invitation to Participate Part B: Selection Questionnaire</i>
ITT:	Call-Off Competition ITT template, 10 June 2020
Model:	HMG: National Audit Office: <i>Commissioning and re-commissioning of rehabilitation and resettlement services: Model and guidance for NPS</i> (draft), 24 November 2020
Multi-service:	MoJ: <i>PDF Multi-service Call-off Competitions</i> , 26 August 2020
NAPO:	<i>NAPO’s demands for the future of Probation</i>
NPC:	New Philanthropy Capital: <i>Inside and Out</i> , L. Detkova and S. Sandford, October 2005
Outcome:	National Audit Office: <i>Outcome-based payment schemes: government’s use of payment by results</i> , 19 June 2015
Overview:	HMPPS: <i>Overview of the DF and commissioning of rehabilitation and resettlement services</i> , August 2020
Playbook:	HMG: <i>The Sourcing Playbook</i> , May 2021
Press:	MoJ: Press Release, <i>£200 million investment in rehab services to cut crime</i> , 21 May 2021
Qualification:	HMPPS: <i>Qualification onto the DF</i> , August 2020
RR3:	Reducing Reoffending Third Sector Advisory Group, <i>Summary Notes of the RR3 Special Interest Group on Probation meetings</i> 1 December 2020, 14 January 2021
Security:	<i>DF Security Standards v1.1</i>
SMEs:	MoJ: <i>PDF – SMEs and specialist providers</i> , 16 October 2020
State:	Clinks: <i>State of the Sector</i> , 2019
Tender:	MoJ: <i>Technical Envelope Tender Response Form, for Grant Funding for Local Leadership and Integration Fund (LLIF) Prison Leavers Project</i>
Terms:	<i>DF Terms</i>
TOM:	HMPPS: <i>The Target Operating Model for the Probation Service in England and Wales</i> February 2021

Toolkit: National Audit Office: Successful Commissioning Toolkit: *How to secure value for money through better relationships with third sector organisations*

View: Clinks: *Probation Reform – the View from the Voluntary Sector*, Jessica Mullen, 13 October 2020

Visibility: Crown Commercial Service: Procurement Policy Note: *Supply chain visibility*, 10 April 2018

Voluntary: Clinks: *Probation Reform – a Voluntary Sector Perspective on the Commissioning of Future Services*, Will Downs, 15 February 2021

Warming: Clinks: *Probation Reform – Market Warming Materials for the DF*, Clinks, 8 June 20

Appendix 3

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