

Clinks response to Ministry of Justice Transforming Rehabilitation Payment Mechanism July 2013

About Clinks

Clinks is the national infrastructure organisation supporting Voluntary, Community and Social Enterprise (VCSE) Sector organisations working with offenders and their families. Our aim is to ensure the Sector and all those with whom it works, are informed and engaged in order to transform the lives of offenders and their communities. We do this by providing specialist support, with a particular focus on smaller VCSE organisations, to inform them about changes in policy and commissioning, and to help them build effective partnerships and provide innovative services that respond directly to the needs of their users.

We are a membership organisation with over 500 Members, including the Sector's largest providers as well as its smallest, and our wider national network reaches 4,000 VCSE contacts. Overall, through our weekly e-bulletin Light Lunch, we are in contact with over 9,500 individuals and agencies with an interest in the Criminal Justice System (CJS) and the role of the VCSE in the resettlement and rehabilitation of offenders. Though Clinks has not been able to carry out a comprehensive survey of Members' views for this particular consultation response, it has drawn upon previous submissions and members' views expressed at a variety of Clinks and Ministry of Justice (MoJ) events, including the recent MoJ Transforming Rehabilitation market engagement events.

Introduction

Clinks is grateful to MoJ and National Offender Management Service (NOMS) for providing some detail on the payment mechanism and for their commitment to sharing their thinking on the Transforming Rehabilitation reforms with potential providers prior to the formal Invitation to Tender. It is clear that issues of feedback from the Work Programme have been recognised and steps taken to address them.

However, we feel that the payment mechanism is a fairly complex document, and may ultimately leave potential providers with more questions than answers. This is particularly true for VCSE organisations which are likely to be concentrated in Tiers 2 and 3. It is imperative that MoJ and NOMS share more detail of how this payment mechanism will apply to subcontracted partners and any restrictions or protections that may be applied for the benefit of organisations in the lower tiers of the supply chain. This level of detail is vital to enable small to medium sized organisations to make an informed decision about whether or not they wish to participate as a provider in the reformed system. Clinks would specifically request more detailed numerical information on all aspects of the payment mechanism (including the respective proportions of the Fee for Service (FFS) and Payment by Results (PbR) elements), more information on how primes will be discouraged from passing down undue levels of financial risk and a clearer indication of what proportion of outcomes payments will be linked to binary and frequency reductions in reoffending respectively.

Clinks would also like to stress the importance of clarifying the outcome measurements which will be used to determine payments for the PbR proportions of the contracts and to urge MoJ and NOMS to reconsider how they may reward the achievements of organisations which specialise in delivering intermediate outcomes to support desistance.

Are there elements of the proposed payment mechanism which are not clear? Where would you like additional clarity?

Tier 2 and Tier 3 subcontracted partners

It is unclear what much of the detail in the payment mechanism means in practice for Tier 2 and Tier 3 subcontracted providers, which are likely to include a number of VCSE organisations. Clinks would therefore urge MoJ and NOMS to share their thinking around how the payment mechanism relates to the market stewardship proposals which were shared at the recent Transforming Rehabilitation market engagement events.

In particular, Clinks would recommend that potential providers are given more detailed information on the projected volumes and weightings for each Contract Package Area to enable financial planning ahead of submitting bids (see the response to the question on the FFS element below); cash flow for the PbR element of the payment mechanism; risk transfer between prime and sub-contractors; and the PbR metric.

PbR element

Clinks and other VCSE organisations have repeatedly expressed concerns that PbR mechanisms encourage prime providers to pass down undue levels of financial risk to smaller subcontracted partners.¹ In its response to the original Transforming Rehabilitation document, Clinks supported the suggestion by Social Finance that no more than 20% of a contract should be left at risk and that VCSE subcontractors should, wherever possible, receive 100% of their fee upfront or have risk diverted into a Special Purpose Vehicle.² The payment mechanism does not make any reference to the transfer of financial risk between primes and subcontracted partners, despite assurances in the Government's response to the Transforming Rehabilitation consultation document that this would be 'transparent'.³ Clinks would therefore urge MoJ and NOMS in successive iterations of the payment mechanism – and certainly in the forthcoming Industry Standard Subcontract - to clarify whether the transfer of financial risk will be left entirely to the discretion of the prime. It would also be helpful to know whether there will be a limit on the learning curve discount, or whether it is theoretically possible that a contract could eventually be funded on a 100% PbR basis.

Clinks also welcomes the fact that a proportion of the PbR payment will be paid upfront with a clawback mechanism, but would urge MoJ and NOMS to clarify whether this also applies further down the supply chain, and what measures they will be taking to ensure that the cash flow problems experienced by subcontractors in the DWP Work Programme are not repeated under the new arrangements for offender supervision.⁴

¹ L. Frazer & C. Hayes. 2011. *Competition, commissioning and the VCS*. RR3. Online: <http://www.clinks.org/sites/default/files/RR3%20Competition%2C%20Commissioning%20and%20the%20VCS.pdf%20-%20Shortcut.lnk> [last accessed 5.7.2013].

² K. O'Donoghue & L. Frazer. 2013. *Clinks response to Transforming Rehabilitation: A revolution in the way we manage offenders*. Clinks. Online: <http://www.clinks.org/sites/default/files/Transforming%20rehabilitation%20consultation%20response%20Feb%202013.pdf> [last accessed 10.7.2013].

³ Ministry of Justice. 2013. *Transforming Rehabilitation: A strategy for reform*. Online: <https://consult.justice.gov.uk/digital-communications/transforming-rehabilitation> [last accessed 5.7.2013].

⁴ NCVO. 2012. *The Work Programme: Perceptions and experiences of the voluntary sector*. p.7. Online: http://www.ncvo-vol.org.uk/sites/default/files/sig_survey_june_2012_report_17.9.12.pdf [last accessed 11.7.2013].

PbR metric

Clinks would like to raise a number of questions regarding the proposed outcomes measurement for the PbR portion of the contract.

How will the cohorts for measurement purposes be 'built'? At what stage does an individual become part of the offender cohort? Is it at the point of sentencing, at the beginning of the sentence, at the beginning of the intervention to be measured, or at some other point?

The document states that an offender cohort will not be segmented according to sentence type. For the purposes of the PbR outcome payment, will these cohorts be segmented at all to take into account, for example, individuals who may present a high risk of re-offending despite a short sentence or low risk of serious harm?

A subcontracted partner is unlikely to receive an entire 'cohort' from the prime; if its payments include a PbR element, would it be expected to create its own mini-cohort for measurement and payment purposes?

Would primes have the freedom to set their own metric for PbR when passing down risk to subcontractors?

What is the 'binary hurdle' likely to be in terms of a percentage reduction in reoffending from the baseline?

Will organisations still receive a proportion of the outcome payment if they are successful in reducing the frequency of reoffending across the cohort but fail to meet the binary target?

Will providers incur a financial penalty if an individual's level of risk escalates so that it is necessary to transfer them back to the public sector Probation Service?

Clinks is concerned that, despite the welcome reference to the need to measure the frequency of reoffending across a cohort, providers still seem to be expected to meet a substantial binary target in order to receive any outcome payment. Organisations will need to obtain a 'demonstrably significant improvement in re-offending over the agreed CPA PbR baseline'.⁵

For any change to be 'statistically significant', it will necessitate quite a large percentage change in reoffending figures and may be difficult to sustain year on year, especially when set against a benchmark cohort who may also have received interventions (see the response to the question on PbR below). Clinks has outlined in detail its thoughts in measuring outcomes for VCSE providers elsewhere, but would stress once again that organisations which specialise in delivering intermediate outcomes should have this recognised and rewarded under PbR arrangements.⁶ The lack of any reference to achieving reductions in the severity of offending – a recognised part of the desistance process for many offenders – is also a cause for concern.

⁵ Ministry of Justice. 2013. *Payment Mechanism – Straw man*. p.9. Online: <http://www.justice.gov.uk/downloads/rehab-prog/payment-mechanism.pdf> [last accessed 5.7.2013].

⁶ K. O'Donoghue, L. Frazer & C. Hayes. *Clinks response to NOMS Commissioning Intentions Discussion Document 2013-2014*. pp.3-5. Clinks. Online: <http://www.clinks.org/sites/default/files/Clinks%20Response%20-%20NOMS%20Commissioning%20Intentions%202013-14.pdf> [last accessed 10.7.2013].

Do you think the proposed Fee for Service (FFS) element of the payment mechanism is appropriate for services being contracted? If not, what are your concerns? How would you suggest the mechanism be improved?

Clinks is reassured that MoJ and NOMS have listened to, and accepted, arguments in favour of a substantial FFS element in the Payment Mechanism. The fact that this is weighted to take into account the resource implications of individual offenders is also very welcome.

However, organisations still require more information about the figures which lie behind these calculations in each CPA. In particular, potential providers will need some indication of the volume projections for the relevant CPA prior to submitting bids in the autumn, so that they can calculate their baseline FFS.

Again, it is unclear whether subcontractors in Tiers 2 and/or 3 will be given information on projected volumes or have their upfront fee calculated against a sophisticated prediction of sentence requirements and resources-intensiveness, or whether this will be left to the discretion of the primes.

Clinks is also concerned that the annual learning curve discount may be asking slightly too much of providers and, rather than encouraging 'continuous improvement', could actually encourage the incidence of negative behaviours associated with PbR over the lifespan of the contract. Organisations have already been informed that they will be competing in the FFS baseline and there is a real possibility that further year on year reductions in core funding, combined with stringent financial penalties for failure to reach targets, will encourage a 'race to the bottom' in service provision. There is also the possibility that organisations who have successfully met reoffending targets will become victims of their own success, with fewer resources to achieve the same results with a more 'difficult to reach' cohort. It may be that organisations will find it increasingly difficult to provide genuine rehabilitative interventions alongside 'core' sentence requirements and will pursue a 'one size fits all' model over the individualised approach which has been shown to support the desistance process.⁷

Do you think the proposed structure of the Payment by Results element of the payment mechanism is likely to incentivise providers to focus on reducing reoffending? If not, what are your concerns?

Are there any elements of the proposed payment mechanism that would incentivise the 'wrong' behaviours? If so, what are these and what behaviours could they drive?

Clinks is particularly concerned that this version of the payment mechanism does not address the phenomenon of primes passing down large amounts of financial risk to subcontractors.⁸ The majority of VCSE organisations who enter the new arrangements as providers are likely to do so in Tier 2 and Tier 3. As stated in our response to the Transforming Rehabilitation consultation document, Clinks would recommend that, where possible, subcontracted partners should receive 100% of their fee upfront with the bulk of the financial risk remaining with the prime or transferred into a special purpose vehicle.⁹ In successive versions of the payment mechanism, MoJ and NOMS should consider including information on how risk transfer will be made

⁷ F. McNeill & B. Weaver. 2010. *Changing Lives? Desistance research and offender management*. SCCJR. Online: <http://www.sccjr.ac.uk/publications/changing-lives-desistance-research-and-offender-management/> [last accessed 11.7.2013].

⁸ NCVO. *The work programme*. p.12.

⁹ K. O'Donoghue & L. Frazer. *Clinks response to Transforming Rehabilitation*. p.3.

transparent and the possibility of using social investors or other means of diverting risk away from Tier 2 and Tier 3 subcontractors.

The year on year increase in the proportion of the contract at risk may also encourage the tendency for primes to employ 'creaming and parking' or 'cherry picking' tactics and for more challenging clients who present a higher risk of reoffending being passed down to subcontracted partners. Clinks appreciates that MoJ and NOMS have proposed a number of different measures to counter such perverse incentives, but fears that the proposed annual increase in the proportion of payments which are linked to PbR, combined with less core funding and significant pressure to meet reoffending targets or face financial penalties, will make this option inevitable.

Do you have any other comments regarding the proposed payment mechanism?

Clinks would appreciate some clarity on when Tier 2 and Tier 3 providers can reasonably expect to receive upfront funding for the provision of services. There is a risk that a number of smaller organisations may fall into a funding gap in the interim, and MoJ and NOMS should consider how they will ensure that the provision of specialised, local services is not adversely affected by this.

The relative complexity of the Straw Man and the difficulty of interpreting what various models and graphs actually mean in the absence of concrete figures have made the document somewhat inaccessible for small to medium-sized organisations. Unless this part of the Sector can understand the financial implications of the proposed reforms, organisations will not be in a position to assess realistically their suitability to bid as a provider. Clinks would recommend that MoJ and NOMS reassess the language and content of the first version of the payment mechanism, ensuring that this does not present an unnecessary barrier to participation for VCSE organisations and potential subcontractors. It would also be very helpful to have a dedicated e-mail address or point of enquiry in NOMS for questions relating to the payment mechanism.

The payment mechanism does not make any reference to the collecting and monitoring of data. This is very onerous for smaller organisations involved in PbR arrangements and is likely to take resources from the frontline of delivery.¹⁰ Ideally, MoJ and NOMS should ensure that the volume calculations used for the FFS element would also take the cost of collecting and monitoring data for each offender into account.

Finally, Clinks would ask that the payment mechanism should be informed by, and make reference to the forthcoming Industry Standard Subcontract, ensuring that the market stewardship principles promised by NOMS are integrated into all key Transforming Rehabilitation documents.

¹⁰ M. Jones. *Payment by Results: Commissioning for outcomes – lessons learnt so far*. Presentation to NCVO PbR working group. 5th June 2013.

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