

English and Welsh experience of marketisation, payment by results and justice devolution in the probation sector

Chris Fox

Abstract

The UK government has embarked on an ambitious programme to reform the English and Welsh probation sector. Key to these reforms has been 'marketisation' involving Payment by Results. More recently the devolution of justice has become a key theme. This paper describes key reforms that have taken place since 2010 and sets out evidence for their effectiveness. Currently, the available evidence is limited, but more evidence is available from other sectors where similar models have also been used. This evidence base is discussed with particular reference to the potential for the reforms to promote innovation.

Key words

Transforming Rehabilitation, Payment by Results, Justice Devolution, Innovation

Introduction: Transforming Rehabilitation

Rates of re-offending for offenders under the jurisdiction of the Criminal Justice System in England and Wales are relatively high and have been for a number of years. Recent figures from the Ministry of Justice (2016) relating to the period April 2013 – March 2014 show that adult offenders starting a court order had a proven re-offending rate of 34.0 percent (a slight increase of 0.1 percentage points compared to the previous 12 months) and adults released from custody had a proven re-offending rate of 45.8 percent (an increase of 0.7 percentage points compared to the previous 12 months). The rate for those released from a short prison sentence of less than 12 months was 59.8 percent.

Faced with a similar picture in 2010, the intention of the previous Coalition Government (2010 – 2015) as set out in its Coalition Agreement was as follows:

“We will introduce a ‘rehabilitation revolution’ that will pay independent providers to reduce reoffending, paid for by the savings this new approach will generate within the criminal justice system.” (HM Government 2010: 23)

The Coalition Government’s preferred strategy for reducing re-offending while also reducing costs was a combination of market testing, commissioning strategies that focus on payment by results and a diversification of the supplier base (Bannister *et al.* 2016). The intention was to create a ‘rehabilitation revolution’ with payment by results a key driver of change (HM Government 2010). Broadly speaking, this policy has continued under the administration of Prime Minister David Cameron (2015 – 2016) and Prime Minister Theresa May (2016 – present) with one significant addition: a stronger focus on justice devolution.

This paper first describes the evolution of current policy on Transforming Rehabilitation. It then describes the use of marketization and payment by results, assessing the evidence for their effectiveness. It finishes by discussing the potential of such policy levers to deliver innovation in the delivery of criminal justice.

Evolution of the Transforming Rehabilitation policy

In 2010 probation services in England and Wales were delivered by 35 Probation Trusts. Probation Trusts were consistent with a broader trend in public service reform under the previous New Labour which saw the creation of numerous ‘arms-length’ mechanisms for the management of state services, such as Foundation Trusts in the health sector and Academy schools in education (Diamond 2013).

Under the Coalition Government, early ideas on reform of the probation service envisaged a number of probation innovation pilot projects subject to payment by results and devolution of the commissioning of community offender services to the 35 Probation Trusts. The aim was to encourage new market entrants from the voluntary, private and public sectors as well as joint ventures, social enterprises and

Public Service Mutuals (Ministry of Justice 2012). Probation Trusts would continue to deliver services to high-risk offenders and could compete to run other services. This devolved strategy seemed consistent with the earlier Green Paper on criminal justice reform in which the Coalition Government set out an agenda designed to challenge a 'Whitehall knows best' approach, which was viewed as having stifled innovation at national and local levels (Ministry of Justice 2010). The Green Paper made repeated references to innovation encompassing the opportunities that reform would provide for criminal justice "frontline professionals" to innovate in their work with offenders (Ministry of Justice 2010: 11) and also the opportunities for a wide range of organisations to innovate within a mixed economy. Innovation seemed to include contributions from social entrepreneurs in local communities:

"Rather than operating under close central control, we want to unlock the professionalism, innovation and passion of experts from all walks of life who want to make their streets safer and their towns and cities better places in which to live." (Ministry of Justice, 2010: 9)

However, a change of Secretary of State midway through the Coalition Government resulted in these approaches being discontinued (Bannister *et al.* 2016) as the more radical Transforming Rehabilitation (TR) strategy was advanced (Ministry of Justice, 2013a and b). The *Transforming Rehabilitation: A Strategy for Reform* (Ministry of Justice 2013b) reiterated the Ministry of Justice's intention to introduce a widespread programme of competition for probation services. The Probation Trusts would be abolished and the majority of community-based offender services (community sentences and licenses) would be subject to competition. In a reversal of the earlier emphasis, there would be a national competition for geographical 'bundles' of resettlement services in the form of Community Rehabilitation Companies (CRCs). Contracts for CRCs would include an element of payment by results. Existing probation services would be allowed to join the competition by setting up new independent entities (such as employee-led mutuals). Work with high-risk offenders, assessments and court reports would pass to a new National

Probation Service. The split between the National Probation Service and CRCs took place in 2014 and contracts were signed with the successful bidders in February 2015.

Payment by Results

An important element of reform of probation services has been the use of Payment by Results (PbR). Over recent years there has been increasing interest in 'Payment by Results' (Pay for Success in the US) as a model for commissioning services in the public sector. A PbR contract links payment to the outcomes achieved, rather than the inputs, outputs or processes of a service (Cabinet Office 2011). The Coalition Government committed to "introducing payment by results across public services" (Cabinet Office 2011: 9) and has introduced schemes across diverse areas of policy including welfare to work, substance misuse, criminal justice, family interventions and overseas development. In a thorough review of the current situation in the UK the National Audit Office (2015) identified over 50 schemes containing an element of PbR and worth a combined total of at least £15 billion. This report was published before the contracts for Community Rehabilitation Companies were signed, all of which have a PbR element (Ministry of Justice 2013b).

The Coalition Government articulated various advantages for PbR initiatives. First, it was hoped that they would demand less micro-management and so enable greater innovation. Freeing up providers to deliver services in different ways, the deployment of PbR would both drive down costs and encourage greater innovation (Ministry of Justice, 2013b). As part of its strategy to enable PbR commissioning in the probation sector, the Coalition Government (Ministry of Justice, 2011) revised the national probation standards, significantly relaxing central government direction. Later, Section 15 of the Offender Rehabilitation Act 2014 introduced the Rehabilitation Activity Requirement (RAR) for Community Orders and Suspended Sentence Orders. While the court decides on the length of the RAR and the number of days (intensity), the Community Rehabilitation Company determines the most

appropriate interventions to deliver. Second, PbR was seen as a way of tackling complex social issues (National Audit Office, 2015), and as a mechanism to focus attention on preventative measures (Mulgan *et al.*, 2010).

Third, PbR was seen as a means to transfer risk by making some or all of the payment to a service contingent on that service delivering agreed outcomes. Given the need to reduce public sector spending, the transference of risk and the deferment of payment for services were attractive propositions for the Coalition (Fox and Albertson, 2012). Fourth, the PbR model was seen as a way of encouraging new market entrants, eliding with the Coalition's commitment to increase the proportion of specific public services delivered by independent providers (both private and not-for-profit), harnessing their 'creativity and expertise' (Ministry of Justice, 2010: 41). Finally, PbR was seen as a model to increase accountability. In its White Paper on *Open Public Services* the government stated that, 'Open commissioning and payment by results are critical to open public services ... Payment by results will build yet more accountability into the system – creating a direct financial incentive to focus on what works, but also encouraging providers to find better ways of delivering services' (Cabinet Office, 2011: paragraphs 5.4, 5.16.).

It is too early to know how effective PbR has been as a driver of change in the English and Welsh criminal justice system. At the time of writing, because of the lag in calculating re-offending rates, re-offending rates for the first year of CRC operation were not available. However, a recent National Audit Office (2015) review found lack clear evidence that they delivered the potential benefits their supporters advocated, and cautioned that without such evidence, "commissioners may be using PbR in circumstances to which it is ill-suited, with a consequent negative impact on value for money" (National Audit Office, 2015: 8).

A Social Impact Bond (Pay for Success Bonds in the US) is a class of PbR contract where the finance needed to make the contract work is provided not by the service provider but by private investment, usually social investors. The Cabinet Office's Centre for Social Impact Bonds reports that there are now 32 Social Impact Bonds

across the UK, supporting tens of thousands of beneficiaries in areas including criminal justice, youth unemployment, mental health and homelessness¹.

The first SIB was in the criminal justice sector and started at HMP Peterborough (a prison) in 2010. The Ministry of Justice signed a contract with Social Finance (2010) to attempt to reduce the reoffending of three cohorts of 1,000 adult males who would be discharged from HMP Peterborough having served sentences of less than 12 months in custody. The outcome measure was a binary one of whether offenders were reconvicted or not (Disley *et al.* 2011: iv). Disley *et al.* (2011) report that investors² raised £5m to fund the rehabilitation work and that they could earn a return of up to £8m from the government and the Big Lottery Fund if re-offending falls by 10 per cent per cohort, or, if the rate of re-offending for all 3,000 offenders falls by at least 7.5 per cent. If a reduction in re-offending beyond 7.5 per cent was delivered investors would receive an increasing return capped at 13 per cent over an eight year period (Social Finance 2011:3). Conversely, if offending did not fall investors would potentially lose all their money. Changes in national criminal justice policy led to the HMP Peterborough SIB being curtailed after two cohorts.

The independent evaluation of the SIB matched 936 offenders released from Peterborough (the first cohort) with 9,360 released from other prisons. The analysis found an 8.39 percent reduction in reoffending rates within the first cohort, which was insufficient to trigger payment for the first cohort (Jolliffe and Hedderman 2014). Based on this reduction the Ministry of Justice (2014b.: 2) reported: "This means that the provider is on track to achieve the 7.5% reduction target for the final payment based on an aggregate of both cohorts". However, interim analysis of the second cohort has thrown doubt on this prediction. A Ministry of Justice (2015) statistical bulletin provides early analysis of the progress of the second cohort. Although only convictions within six months of release, rather than the usual 12 months, are reported, the results are disappointing and cast doubt on whether a

¹ https://data.gov.uk/sib_knowledge_box/home [Accessed 14-03-15]

² Our reading of Disley *et al.* (2011) is that they are social investors and none are from the private sector.

payment will be made at the end of the second cohort. There was only a small reduction in the frequency of reoffending – an average of 84 reconviction events per 100 offenders compared to a national rate of 86.

The wider evidence-base in relation to SIBs is still limited. There are few formal evaluations of SIBs to draw on. Much of the literature is either analysis of the concept (eg Mulgan 2010, Fox and Albertson 2012) or reviews of the literature, sometimes combined with small-scale surveys of stakeholders (eg Ronicle et al. 2014). In a recent, structured review of the literature on SIBs Tan et al. (2015: 5) searched a number of databases but found “little empirical data about SIBs has been produced to date.”

Devolution

While some elements of reform of the probation sector have arguably been centralising, other reforms in the English and Welsh criminal justice system have been decentralising. Here we discuss two distinct, but related models: Justice Reinvestment and Justice Devolution.

Allen argues that, in general, JR has two key elements. First, it seeks to develop measures and policies to “improve the prospects not just of individual cases but of particular places” (Allen 2007: 5). Secondly, JR adopts a strategic approach to the prevention of offending and re-offending by collecting and analysing data to inform commissioning decisions (*ibid.*). The Justice Reinvestment movement started in the US at around the turn of the new millennium with analysis identifying ‘million dollar blocks’: certain communities where states were spending up to a million dollars per block to “cycle residents back and forth from prison each year” (Cadora 2007: 11, Allen 2007). Early Justice Reinvestment projects explored whether some of this million-dollars per block might be better spent on other criminal justice or, ideally, broader social justice interventions, “to invest in public safety by reallocating justice dollars to refinance education, housing, healthcare, and jobs.” (*ibid.*). Latterly, argue Fox *et al.* (2013) Justice Reinvestment has tended to shed its more radical

aspirations to deliver social justice and instead focus more narrowly on system 're-engineering', in process losing perhaps the characteristics of a movement for social innovation.

The Local Justice Reinvestment Pilot which was run by the Ministry of Justice from 2011 to 2013 had at its heart a local financial incentives approach to reward a successful reduction in demand on the criminal justice system (Wong et al 2013). It was piloted in six sites: Greater Manchester (an urban conurbation comprising ten local authorities with a combined population of 2.69 million according to the UK Office of National Statistics) and five individual London boroughs. The aim of the pilot was to reduce demand on the criminal justice. The total cost of demand at each site was calculated by multiplying agreed demand metrics by prices for each metric agreed prior to commencement of the pilot and held at the same level for both years (Ministry of Justice 2013c). The Justice Reinvestment pilots represent a clear intention to decentralise and empower local delivery agencies. However, the system of metrics and payment regimes established by the Ministry of Justice have been critiqued as overly complex and providing insufficient incentive to encourage local agencies to invest or to make substantial changes to practice that were not already being planned (Wong *et al.*, 2013). Payments were made, amounting to several million pounds in the case of Manchester, but still representing a tiny proportion of overall criminal justice spending across Greater Manchester.

Justice devolution has been taken forward through a number of initiatives. The Coalition Government introduced Police and Crime Commissioners (PCCs): elected officials to hold police forces to account stating that:

“PCCs bring an opportunity for collective local leadership to galvanise police, local authorities, the Crown Prosecution Service and courts to work together to prevent crime and reduce re-offending.” (Ministry of Justice 2013a: 26)

Turnout for the elections of the first PCCs was low and the Independent Police Commission described them as an “experiment that is failing” arguing that it was “Difficult to envisage how a single individual can provide effective democratic

governance of police forces covering large areas, diverse communities and millions of people” (The Independent Police Commission 2013). Nevertheless, PCCs have survived and more recently the Cities and Local Government Devolution Act (2016) has allowed for the creation of ‘metro mayors’ who are able to undertake the functions of Police and Crime Commissioners – a model implemented in London several years earlier. Local areas who create metro-mayors can also negotiate with central government for the devolution of a different areas of public spending Greater Manchester has negotiated one of the most far-reaching justice devolution settlements. It covers a number of areas. Those most relevant to the future of probation include:

- A greater role in the commissioning of offender management services, alongside the National Offender Management Service (NOMS), to allow more local flexibility, innovation and better coordination with other local services including healthcare and accommodation.
- Linking adult education and skills training provision in the community with education provision in prisons.
- Explore options for regional pilots of GPS and sobriety tagging to improve supervision of offenders in the Greater Manchester area and to aid rehabilitation.
- Greater involvement in future plans for the local courts estate, supporting HM Courts and Tribunals Service (HMCTS) to consider alternative ways to make local justice more efficient and effective, for example more innovative use of venues and testing of problem-solving court approaches.

The devolution agreement comes into effect in 2017 so its results are not yet known. One of its most intriguing elements is a commitment, set out a Memorandum of Understanding between the Ministry of Justice and the Police and Crime Commissioner that:

‘For the first time Greater Manchester will take on a greater role in the commissioning of offender management services, alongside the National

Offender Management Service (NOMS), to allow more local flexibility, innovation and better coordination with other local services including healthcare and accommodation. *This will include giving Greater Manchester greater influence over probation and the Manchester division of the Community Rehabilitation Company (CRC) (emphasis added)*". (Greater Manchester Combined Authority 2016: 6).

At the time of writing the full implications of this are not known but they would address one criticism of the original Transforming Rehabilitation policy: namely that contracts to run CRCs were commissioned by central government.

Discussion: Do marketization and decentralisation encourage innovation?

A common theme in the reforms described above is to create incentives for innovation in the delivery of offender rehabilitation services such that 'more is delivered for less'.

Innovation can take many forms. The use of payment by results in TR is a form of financial innovation in the funding of public services with the potential to provide access to new capital and to incentivize providers to develop innovative solutions to intractable social problems (National Audit Office 2015, Fox and Albertson 2012). It is too early to say whether PbR has achieved its aims in the English and Welsh probation sector. However, looking at the wider experience of PbR in UK public service reform the limited evidence available suggests caution. The National Audit Office (2015) having reviewed available evidence was sceptical of the potential for PbR to stimulate innovation:

"[W]e found expert opinion differs on the extent to which using PbR promotes innovation. Government has typically used PbR to tackle difficult social problems that lack ready solutions – such as reducing reoffending. Some commissioners hope PbR will give providers the freedom to innovate, which might lead to new, long-term solutions to intractable problems. However, some providers told us that, given the risks associated

with it, PbR is best suited to issues to which there are known solutions and where the commissioner's overarching aim is to reduce costs; they indicated that PbR is unlikely to encourage innovation because exploring new approaches is costly and increases the provider's risk. This suggests that where commissioners want innovation, providers are likely to expect additional financial incentive." (National Audit Office 2015: 21)

The National Audit Office supported this statement with evidence from the major UK PbR schemes that they reviewed in preparing their report.

Innovation can take other forms. As Fox and Grimm (2015) note, many of the potentially 'game changing' reforms in criminal justice have been, in one way or another 'social innovations'. One example, widely cited in the social innovation literature is Restorative Justice. Social innovation is social impact driven. It has been described as 'the generation and implementation of new ideas about how people should organise interpersonal activities or social interactions to meet one or more common goals' (Mumford, 2002). Defined in this way, social innovation implies new sets of social relations to deliver products and services. These may include new partnerships across sectors (Kania and Kramer 2011), flattening of hierarchies, co-production and personalisation (Leadbeater 2004).

On the face of it, the Transforming Rehabilitation (TR) agenda does not seem particularly conducive to social innovation. Under TR innovation remained a stated aim of criminal justice reform but, compared to the 2010 Green Paper (Ministry of Justice 2010) the scope of innovation seems to have narrowed. As Fox and Marsh (2016) note, in the Transforming Rehabilitation Strategy there was one reference to giving "front-line professionals the flexibility and resources to innovate and do what works" (Ministry of Justice 2013b: 3) and five references to setting up the conditions to allow commissioned service providers to innovate. It is noticeable that these references all assume that innovation will come from commissioned service providers, not from the new National Probation Service. There were three

references to innovation around payment mechanisms and financing. It was assumed that much innovation would come from the application of technology to improve business processes, and this coupled with a focus on achieving outcomes, would drive innovation and success. (Ministry of Justice 2014a). There were no references to innovation involving social entrepreneurs and local communities (Fox and Marsh 2016).

Key to social innovation are new processes that make use of social relations, implying that the natural location for the social innovation is 'the local', but TR saw the abolition of 35 Probation Trusts and the centralised commissioning of 21 CRCs by the Ministry of Justice/National Offender Management Service. Bowen and Donoghue (2013) argued that while local and community justice can enable an innovative and responsive local justice framework within which criminal justice practitioners regain discretion and are able to design more balanced, creative, and potentially more effective solutions, the marketization trend in TR was unlikely to be conducive to local and community justice. Also central to social innovation is the utilisation of non-financial, social resources to achieve important social goals, but TR involved a payment by results model that has generally favoured large, private sector organisations able to make the long-term financial commitments required. Only one CRC is led by a consortium in which the main contractor or 'prime' is a not-for-profit organisation. Social innovations often emerge bottom-up from front-line service delivery staff, service users or communities (Murray et al. 2010). Yet employee-led mutuals or staff Community Interest Companies were part of only 7 out of 21 winning bids to run CRCs.

However, other elements of TR seem more promising for creating an environment conducive to social innovation.

- As part of its strategy to enable payment by results commissioning in the probation sector, the Coalition Government (Ministry of Justice, 2011) revised the national probation standards, significantly relaxing central government direction. Later, Section 15 of the Offender Rehabilitation Act 2014 introduced the Rehabilitation Activity Requirement (RAR) for

Community Orders and Suspended Sentence Orders. While the court decides on the length of the RAR and the number of days (intensity), the CRC determines the most appropriate interventions to deliver, providing more flexibility for CRCs to innovate.

- When the preferred bidders for CRCs were announced in 2014 the Ministry of Justice emphasised that 20 of the 21 CRCs would be run by partnerships that involved charities and other not-for-profit organisations and that around 75 percent of the 300 subcontractors named in successful bids were voluntary sector or mutual organisations (Ministry of Justice 2014b).
- Recent Justice Devolution agreements hold out the potential for local government and local communities to become more involved in designing and commissioning justice services.

As the reform process develops it will be interesting to see whether different forms of innovation, particularly social innovations find a 'space' in the complex commissioning landscape that has been created.

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