

(10th September 2018)

Introduction & recap

We are now half way through the Government's consultation timetable on "TR2", aka the "Strengthening Probation, Building Confidence" consultation. Napo is preparing a formal response to the questions it asks. However, the timescale and the leading nature of the questions presented by Gauke and Co, suggest this isn't a genuine listening exercise. In this series of papers, I'm looking at the big problems thrown up by Grayling's failed Revolution and asking some of the questions Gauke and Co are missing.

Having recognised that a key failing in TR was how rushed and ill-planned it was, Napo's alarmed that the scale and complexity of putting things right is being under-estimated. As the voice of the probation profession, Napo will not allow these questions to go un-asked or allow Ministers to force through further irresponsible change unchallenged – during the consultation period and beyond it.

Briefing #1 set out the case for reunification of local probation services and the need to factor in pay reform to financial planning, which has been amplified by the now on-going pay reform negotiations. Briefing #2 asked:

- if the MoJ could be trusted to manage contracts given their track record;
- if the consultation is a smoke screen to hide how much more current CRC owners will be given to square off the existing shambolic contracts;
- if anyone has ever costed the NPS; and
- if Government or parliament have any idea how much effective service delivery costs before they begin negotiations for new contracts.

Briefing 3 asks specifically where responsibility for provision and staff will eventually rest and links deciding upon this to the catastrophic toxic legacies embedded into the probation system by the failed TR contracts.

In Briefing #4, I'll explore these staffing questions in more detail – finishing the series on the most important big questions around staff, because without a committed, professional workforce any future model of service delivery is doomed.

Who will probation staff work for?

This should seem like a straight forward question but it is possibly the most complicated question asked or un-asked in the current debate. The question matters because staff matter and because the probation workforce both understand and take responsibility, whoever employs them. Probation is a people business and success relies upon the workforce.

If they continue to be under-resourced, under-paid and unloved then recruitment and retention problems, already acute in some large urban areas, will become unsustainable.

Winning or Losing the Competition for Staff

Whilst those who bought CRC contracts now have a greater understanding of what it will cost to deliver a sustainable profit (i.e. much more than they've been paid up until now) staff are increasingly aware of their value in a "market place" that never previously existed. When the split happened, at a point when the MoJ owned both CRCs and the NPS, staff were 'allocated' and had nowhere else to go except outside probation. Staff movement has been restricted by:

- the National Transfer Agreement protecting existing staff terms and conditions;
- broadly maintaining the national pay framework across CRCs and the NPS (via contract management and the support of the unions); and
- penalising existing staff who transfer (by reducing their pay if going into the NPS or reducing maternity leave and holiday entitlements for transferees into CRCs).

This is now barely holding with stiff competition for staff in both the NPS and CRCs – both having hugely under-estimated how many staff they'd need in the post-TR world. It will be very difficult to hold all these restrictions. If staff are facing a transfer in 2020, they'll likely have a real choice about moving to their new owner or leaving to join someone else.

Wise management from Government would recognise this early and do two things –

1. Assess existing and future contract bidders on their employment records far more than they did in 2014. They could ask existing staff how content they are working for their current provider and how likely they would be to stay if someone else was offering the same or better terms locally or elsewhere. Levels of staff anxiety should inform their choice of contractor.
2. Seek to minimise the risk by imposing and maintaining national standards - in terms of professional outputs and service quality but also pay, pensions and wider terms and conditions. This could easily be done through contract regulation and price management. If they don't - and the NPS get fleeced in the contract negotiations by an established cartel of existing contract owners aiming to drive the contract price up and their risks down to maximise an actual profit in TR2 – the Government could find itself losing the competition for staff.

Or they could do the most radical and cost effective thing that is also the most rational and logical – although the one Gauke seems least willing to consider – namely reunify probation locally to minimise competition and potentially remove the added complexity and cost driver completely.

Ownership or Commissioning – Responsibility v Influence

How politicians talk about crime tends to depend if they are in power or opposition. When in opposition, they tend to talk about politicians needing to take responsibility for what is happening on ‘their streets’ and in ‘their communities’ and take ‘ownership of the problems’. When in power they have a tendency to shift back, mentioning responsibility ‘resting with those committing offences’ and look for who else to shift accountability on to – be that police, probation staff, community groups, etc. When criticised, most Ministers will trot out what that they’re ‘spending more than ever’ so it can’t be their fault (even if both may be untrue). This consultation is only happening because Government ran out of hiding places having tried to blame everyone but themselves for TR’s increasingly evident failings, and because they can’t explain to Parliament, the NAO or PAC how much it is costing taxpayers.

I believe that the assumption of most assessing the consultation, is that staff will transfer to whoever is accountable for managing local budgets and delivery. This is a misplaced assumption. You can be accountable to a body without being their direct responsibility. Understanding why tells you a lot about what’s at the heart of why TR has gone wrong and points towards credible, workable solutions for a post-2020 model.

Accountability – The Options

In the debate about who should be accountable for managing probation services almost no-one is arguing for the status quo - where the NPS is accountable to Parliament and CRCs accountable to the NPS via opaque contract management arrangements and where CRCs control local commissioning via their TR contract monopoly. Nobody is locally accountable within the community’s probation serves, or at least there is no scope for community influence or input into priority spending and/or commissioning of support services to help deliver training, housing, additional drug and alcohol programmes, etc. There has been particular criticism around charities being forced out – the complete opposite of Grayling’s stated intention. Something has to change.

Different options are being presented and championed including:

- transferring all of probation to the State and the MoJ (the nationalisation model under a reunified probation service);
- establishing some form of reconstituted local Probation Boards, with accountability for a reunified service devolved from Westminster to local elected bodies.

This could take different forms. The Welsh model in Gauke's consultation is an example, with the consultation saying lessons from this **will be** incorporated into wider contracts. Wales has a ready made National Assembly, but this model could replicate to the Greater London Authority or any of the Regional Mayoral areas. Some Police and Crime Commissioners have also expressed an interest in taking responsibility for commissioning local probation services.

The idea of the MoJ permanently absorbing all of probation without some form of local accountability seems unlikely, even given the increasingly Stalinist tendencies of insecure Tory Ministers, as seen recently by Gauke's decision to take control of all Serious Further Offence (SFO) investigations instead of passing these to an independent Inspectorate. This option will likely terrify many probation staff because of the obvious risk that probation will always be second in the MoJ to the loud, unruly and disruptive older child, aka the Prison Service – as has been seen to an extent already in the NPS.

Frankly, total nationalisation is also worrying given how the MoJ has struggled to manage the NPS to date – it seems inevitable the Government would insist on removing any outstanding differences in terms and conditions between probation staff who transferred to the NPS and other civil servants. Napo is currently preparing legal challenges against attempts to minimise notice pay for staff being dismissed after long term illness or on Ill Health Early Retirement. VISOR vetting and draconian sickness absence policies are just two further recent examples of imposed policies by dictate from on high that have unsettled staff. PAYE and pension collection failures by the MoJ's outsourced shared service centre and the Kafkaesque struggles to put these errors right further amplify the risks of full nationalisation – at least to an MoJ that can't effectively control and run anything it currently has responsibility for.

Probation academics, stakeholders and commentators have offered more widespread support for devolving accountability and contractual oversight to local Mayors or even PCCs, although the Howard League have seemingly expressed concern about swapping one set of politicians for another, especially given the PCCs natural bias towards the police – taking the argument towards a fully re-constituted Probation Board / Trust model. Napo members would overwhelmingly support that as the most rational, logical and proven model - but it is unlikely to garner any political support without a change of Government. It is to be seen if Lord Ramsbotham's recommendations focus on this option.

Napo would still want the local accountability to sit with a body that has enough political clout and influence to stand up to Government, whether taking full responsibility or gaining local influence as a commissioning body. We'd also want them to have the political visibility for there to be a genuine risk to their own power and credibility if they got probation wrong.

We'd also expect them to include staff representatives in their decision making, especially if they have no previous knowledge or expertise in probation, alongside welcoming scope for a stronger role for user voice and the lived experience.

We'd also say that retaining a divided local delivery model should be something politicians are either likely to oppose or hide behind if and when things go wrong – any gains from increasingly local accountability are risked by maintain opaque and complex operational divides and unhealthy competition. **Accepting any need for increased local accountability points towards a reunified local provision.**

Reunifying local delivery to help devolve wider commissioning also focusses in on needing to know where the boundaries of a reunified core service should rest. In Wales, it seems to be everything other than Community Payback, but there is no strong justification for why community payback is to be competed from either Parliament or Wales. This shouldn't necessarily be a given just because it's at least better than a wider split.

Equally, given that probation worked well with local charities for decades prior to the split it would be churlish to argue that there is no role for commissioning, although the profit motive will always be inherently inefficient all other things being equal.

In deciding on a preference between PCCs, Mayors or a new local body the answer will be influenced by if all of the budget and staff are devolved or if there's just some quasi-regulatory and commissioning role. No other public bodies map across to the 10 regional contracts mentioned in the consultation, except London and the GLA. Staff transferring to PCCs would hugely increase PCC budgets and staffing demands, and lead to complicated governance issues inside the presumably PCC partnerships about staffing legacies, pension responsibilities etc with one PCC area or a newly constituted legally entity needed to co-ordinate (again very much like a Probation Board or Trust). If you were doing that, then why not create a Board and encourage PCCs onto it? If the Tory Government ruled this out on "principle" then PCCs taking over staff doesn't seem a workable option.

Nobody expects to take in probation staff

However, what Napo have already realised during discussions with regional politicians and PCCs is that this isn't the offer they are making. They do not want responsibility for local probation services. Some are insistent that this is a "deal breaker". Why?

Firstly, no local politician will take on something as complex as probation without being certain they are not being set up to fail. That means knowing what in practice will be expected; how much that will cost; and that funding to deliver and sustain high quality provision is guaranteed. All of those Napo have spoken to have stated categorically that none of these are known.

Secondly, they'd need to trust who they were working with and again, even Tory PCCs have said they can't trust the MoJ.

In particular, the MoJ can't explain with any confidence, the legacy costs new owners would inherit from TR1 if they did take staff. These public bodies are already struggling from imposed austerity, and regardless of their political colouring and party loyalties, trust in Westminster is very limited. Taking on future pension and employment risks that can't be accounted for would be irresponsible and prohibitive, however thirsty Mayors or PCCs are to raise their profile by expanding their range of influence.

However, that public bodies are saying this out loud doesn't mean that this concern is limited to the public sector. This fact – namely that the MoJ hasn't worked out what the TR employment legacy issues are - will multiply the cost of any second wave of contracts as much as it is scaring off would be public sector partners from taking staff. Privateers will also want to know what these are and the MoJ will struggle to tell them - meaning bidders will either walk away (thus limiting the competition and driving up the price) or want additional monies to cover their unknown risks.

This also suggests these legacies will continue to be an area of dispute and fear for staff for years to come, whoever and whatever the next operating model ends up looking like unless the MoJ come clean about the current contracts, identify the legacy risks being passed on again and agree to meet costs through clear and transparent processes. Even if they promised to do so, staff and bidders may not believe them, such is the level of mistrust - especially when key architects from TR1, such as Spurr and Poree, are still in place.

Conclusion

Who staff will be working for shouldn't be one of the most uncertain bits of a change programme when the service is a people based business. Nor should it be the last bit people get to after making decisions. It should be something at the heart and centre of the debate, driving the direction of the final decisions.

So far in this consultation, as in TR 1, staff are still an after-thought, apart from potential partners like PCCs, Councils and Mayors who have said they don't want the added responsibility taking staff brings. Unless this changes, the costs will escalate and the staff will continue to be undermined and feel insecure, as with TR1 – itself undermining the long term chances of maximising probations potential.

Government and potential contract owners should be asking themselves:

- ***Do we know what the legacy costs we will be inheriting are and who'll be meeting these after 2020?***

- ***Is competition around staff a good thing in this market and what is the long-term cost to the programmes of staff competition?***
- ***Does re-unification of local provision reduce costs and risks around staffing?***
- ***What are the standards that need to be set into any model relating to pay, pensions, terms and conditions and working practice models and how can these be standardised to minimise complexity and help expand local engagement and accountability?***