

**PUNISHMENT AND REFORM:
EFFECTIVE PROBATION SERVICE CONSULTATION
RESPONSE ON BEHALF OF THE CRIMINAL BAR ASSOCIATION**

Introduction

The Criminal Bar Association represents about 3,600 employed and self-employed members of the Bar who prosecute and defend in the most serious criminal cases across England and Wales. It is the largest Specialist Bar Association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. Their technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts, ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

Executive Summary

This consultation, alongside “**Punishment and Reform: Effective Community Sentences**”, seeks primarily to reduce reoffending rates by reforming and improving community sentences and the Probation Service. This consultation focuses on the latter. It seeks to shift the emphasis from centralised to localised delivery of services by an increased use of the expertise and local knowledge of all sectors. It considers the best way for probation to utilise and incorporate that expertise. It aims to extend the principles of competition already applied within the prison estate, and introduce payment to community sentence providers by results. Finally it seeks to increase the role of Probation Trusts in commissioning competed probation services and consults on different models for the oversight of probation services and improving the accountability of probation services at the local level.

The CBA comprises of practitioners in the Magistrates and Crown Court, and as such observes at first hand the hard work and expertise of Probation officers. They perform very important work on behalf of the public. Core duties include the assessment of whether an offender is a danger to the public, managing offenders in the community and/or on licence, and assisting in the rehabilitation and punishment in the community of offenders.

Probation Trusts, like many areas of the Criminal Justice System have suffered cuts to their budget and numbers. It has become increasingly challenging to maintain an efficient and effective service.

The objectives set out in the Consultation concern fundamental proposed changes to these Probation Trusts. There remains a deep unease and concern that the introduction and implementation of 'competition' in the provision of these core duties is suitable. The competition referred to in the paper in the Prison Service is in its infancy and there is little information in the public sphere reviewing and evaluating those models. This would seem to be an important starting point before considering broadening the implementation of payment by results in the Probation sphere.

The Consultation does not dispel these concerns, as it lacks real substance and detail. Regrettably this is a feature of a number of the recent consultations that have been issued under the umbrella of the Criminal Justice System by the Ministry of Justice. The CBA, like many of the consultees wishes to engage and contribute. The circumspect nature of these consultations inhibits such a response. With those observations in mind, the CBA has responded as set out below. It will become apparent that a number of the questions posed were outside the ambit of the CBA. We therefore have focused our responses to those areas consistent with our expertise.

Summary of Response

The CBA recommends that any proposed changes made to 'competing offender management' should be introduced in stages so that the progress can be reviewed. At present there is a significant lack of information available to make an informed view. Only once external providers have expertise in the provision of specified programmes and activities should expansion of competition into the area of offender management be considered.

The CBA is also concerned that there may be a fundamental conflict between payment by results and the duty to enforce breaches of an order (q.1)

In addition, if competition encompassed the management and supervision of an offender, there would be occasions where an external provider would be responsible for the initial breach for non-compliance, and the Probation Trust would be tasked to conduct the breach proceedings. This may cause difficulties in relation to exchange of information and re-consideration and response to representations made at court (q.2).

It is suggested that to encourage small and medium sized enterprises and the voluntary sector to participate, a straightforward application process should be put in place. Suitability for any participating enterprises must be thoroughly checked to ensure that payment by results does not distort the proper priorities that should be applied (q.9). To ensure that “payment by results” is effective, there must be ongoing analysis of pilot programmes as well as re-offending rates and the complex array of factors which cause re-offending. (q.11).

Substantive Response

- 1. What are the key issues in competing the management of offenders and how should they be resolved? For example, where should we strike the balance in deciding how far to compete offender management?**

The Consultation raises fundamental questions as to the future of the provision of Probation Services.

Should there be any circumstances where an external provider deals with questions of setting licence conditions, breach and recall of offenders? The Consultation proposes that the management of low risk offenders be available for competition (paragraph 38). There is no information as to the anticipated percentage of offenders who would fall within this category. There are concerns that such a course may actually increase the risk to the public.

An alternative course would be to introduce these changes in tranches whilst reviewing progress.

The first stage would be to introduce competition in the provision of specified programmes and activities. In doing so, external providers could build expertise in the area. Only then should there be a careful review of an expansion of competition into the more sensitive area of offender management.

A further concern is the funding of external providers. Is there a fundamental conflict between payment by results and the duty to enforce breaches of an order? Would a provider have a financial disincentive in taking such a course? In those circumstances, the intention for effective community sentences would be undermined substantially.

2. What arrangements will best enable Probation Trusts to take effective action against offenders who breach their sentence in cases where they do not directly manage the offender?

If competition encompassed the management and supervision of an offender, there would be occasions where an external provider would be responsible for the initial breach of an offender for non-compliance. In those circumstances, the Probation Trust would be tasked to conduct the breach proceedings.

Firstly, there would be a need to exchange information promptly between the two organisations. There is a danger that an extra layer of communication would make enforcement slower and less effective.

A protocol could be created which details the information required to support any breach proceedings. That information should be in a form, that once received can be forwarded to the prosecuting agents on behalf of the prosecution.

An issue which then arises is that the prosecuting authority (the Probation Trust) is in effect acting as an agent for the external provider. Often at court, there are times when representations made on behalf of the offender can lead to re-consideration of a

provisional breach view (i.e. revocation). Orders can be resuscitated and continue, subject currently to the views of the Probation Officer. Under the proposed scheme there would be the added complication of communicating with the offender manager who is less likely to be present, as opposed to a probation officer under the current regime

3. **What is the best approach to competing the management of prisoners released into the community on licence?**

This question is outside the ambit of the Criminal Bar Association

4. **How can we best ensure that greater competition for probation services enhances local partnership arrangements, such as Integrated Offender Management?**

This question is outside the ambit of the Criminal Bar Association

5. **What would be the right balance between commissioning services at local and national levels and how can we best achieve that balance?**

This question is outside the ambit of the Criminal Bar Association

6. **What are the main issues in separating the Trust commissioner role from the provision of competed services? How can these best be resolved?**

This question is outside the ambit of the Criminal Bar Association

7. **How can we support Trusts to develop the commissioning and procurement capability they will need in the future?**

This question is outside the ambit of the Criminal Bar Association

8. **How can we best ensure that the specific needs of women offenders are taken into account in commissioning services?**

The CBA supports the move to provide increased specialist and localised service to meet the needs of women offenders. The requirements of women offenders are often distinct to those of men, and the CBA agrees with the proposal set out at paragraph 46 of the consultation to deliver targeted gender specific and holistic services at the local level.

9. **How can we best encourage and support small and medium sized enterprises and the voluntary sector to participate in competitions to provide probation services?**

This is largely outside the ambit of the CBA; however, the CBA would observe that other enterprises and the voluntary sector would be encouraged to participate by simple and straightforward application processes that do not unduly increase the burden of paperwork upon them and impose impossible demands. In addition, it will be important to ensure that any participating enterprises are thoroughly checked for suitability and have the objectives of effective provision of community orders and the five purposes of sentencing at the forefront of their aims. To that extent, the CBA is concerned that a system of payment by results may distort those priorities unless the definition of ‘results’ is very clear and that measures to enforce compliance, such as breaches, are not deemed to undermine those ‘results’.

10. **How can we best support public sector staff in the creation of mutuals and other models for delivering probation services?**

This question is outside the ambit of the CBA, although we would observe that relevant and effective training of staff would be important in achieving innovative models of delivery.

11. **What are the most effective ways to extend service improvements and innovation through payment by results?**

The CBA supports all attempts to improve the delivery of probation services by innovative models and the opening up of provision to other specialist groups, enterprises and voluntary organisations. Payment by results does provide an incentive to success; however, just as with education, health and other less measurable areas of government policy, this needs to be carefully monitored and the system of measuring those 'results' must be flexible and holistic.

Albeit, the stated objective of this consultation is to achieve a reduction in reoffending, it should not be forgotten that there are other purposes to sentencing, such as rehabilitation and reparation. These purposes are interconnected; for example, an offender who has successfully completed educational programmes and has secured employment is less likely to reoffend, and therefore the quality of education and training provided is equally as important as the focus upon measurable achievement. Accordingly, all five purposes should be measured as part of the analysis of success. The results of any pilot programmes will be important.

Reduction in reoffending should be measured over the longer term as well as the short term, so that there is no incentive for Probation services to pour resources into an offender for the first year post-sentence, ensuring that he is fully supported, and then relinquish any interest thereafter once their target has been achieved. The best providers of services will surely achieve a sustained and longer period of non-reoffending. There is also a danger that providers will become swamped with paperwork in measuring their own success rather than concentrating on the provision of their service.

12. How can we best support the continued development of probation professionals consistent with our proposals for reform?

This question is outside the ambit of the CBA although we would note that properly resourced training, using experienced, external and specialist providers should not be compromised by the need to achieve cost reduction.

13. How can we best strengthen local probation delivery arrangements and the local leadership and skills base?

This question is outside the ambit of the CBA.

14. How might we improve partnership working and local co-commissioning, especially if we have fewer, larger Trusts?

This question is outside the ambit of the CBA.

15. What are the main issues for local authorities or Police and Crime Commissioners potentially becoming more accountable over time for probation services?

This question is outside the ambit of the CBA.

16. What do you consider to be the impacts of these proposals on those with protected characteristics under the Equality Act 2010 (race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity)?

This question is outside the ambit of the CBA.

17. Are you aware of any research and statistical evidence that will need to be considered as part of our equality analysis? Please supply the evidence sources along with what

This question is outside the ambit of the CBA.

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