
Finding the Eye of the Octopus: the Limits of Regulating Outsourced Offender Probation in England and Wales

*À la recherche de l'œil de la pieuvre : la difficile réglementation de la complexité
et des services judiciaires de probation après leur externalisation en Angleterre
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Mary Corcoran



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Finding the Eye of the Octopus: the Limits of Regulating Outsourced Offender Probation in England and Wales

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Introduction

- ¹ In 2013, the Ministry of Justice in the United Kingdom embarked on radical reform of the national probation service – in a policy known as Transforming Rehabilitation (TR) – by dissolving 35 public Probation Trusts and replacing them with 21 contract zones, operated by Community Rehabilitation Companies (CRCs) on a commercial, for-profit model. These CRCs ‘managed’ individuals who were sentenced to custody (including community supervision), and were assessed as posing ‘low’ or ‘medium’ risk to public safety. Clients deemed ‘higher-risk’ remained under the jurisdiction of a smaller National Probation Service (NPS) which stayed in public ownership. This was a classic private/public split, where the state remained responsible for ‘risky’ clients while the private sector secured business volume, allowing profit to be made by fee per client plus bonus payment if a client did not commit further crimes. In 2015, an oligopoly of eight consortia won all of the contracts to run probation services until 2022. By July 2019, a succession of parliamentary inquiries and regulator’s reports concluded that “*mismanagement, risk taking, and the lack of properly considered planning has badly let down offenders*”.¹ After five years of firefighting to maintain an evidently unsound structure, the end was precipitated by commercial failure: the liquidation of Working Links (which operated three contract areas) in Spring 2018, and confirmed when Interserve,

(which ran five contract areas under the brand, “Purple Futures”) went into administration in March 2019.

- 2 Shortly after, the Ministry announced the early termination of contracts (by 14 months) and the case management of clients deemed low and medium risk would return to the National Probation Service (NPS). This did not amount to the renationalisation of probation, as the revised model (Transforming Rehabilitation II (TRII)) was conceived along the same lines of competitive contracting, but with only ten contract lots on offer, which restricted competition and potentially made the state even more dependent on provider oligopoly. These proposals immediately aroused criticisms that the cosmetic changes would reproduce the same structural weaknesses as the original version. However, on June 11, 2020, the Secretary of State [hereafter Minister] for Justice made a statement to the House of Commons that all probation work was to return to the public, state-run probation service from June 2021. Community-based rehabilitative services (amounting to about a fifth of probation expenditure), which were previously undertaken by the private and charitable sectors, would revert to the state sector, along with the workforce of the private Community Rehabilitation Companies.² This renationalisation marked a full reversal of the Transforming Rehabilitation experiment.
- 3 From the very start of this affair in 2014, revelations of political incompetence and financial waste regularly reached the public domain via the findings of several parliamentary inquiries and regulators,³ but these scarcely disturbed the incumbent government, at a time when British politics was dominated by the Brexit question. At first glance, the lack of sanctions or political resignations for the momentous failure of TR provided prima facie evidence of the desensitisation of senior politicians to the constitutional obligations set out by the principle of Ministerial responsibility, and their sense of imperviousness to democratic accountability in the United Kingdom at present. (The retirement in 2018 of Michael Spurr, the Chief Executive of the National Offender Management Services (NOMS) and foremost civil servant with responsibility for probation at the time, was widely viewed as having paid a personal price for the failings of his political masters). Yet, this outward defiance of political and public disquiet did not fully prevent accountability structures from eventually providing some operational correctives and robust political counternarrative. Yet, prior to the dramatic climbdown of June 2020, legislators and regulators had been unable to prevent this unfolding “*policy disaster*”, and scarcely mitigated its worst effects.⁴ Throughout the lifetime of TR, regulatory mechanisms had seriously failed to hold government to account.
- 4 As there is voluminous commentary on the political and ideological rationales behind TR, the future shape of the probation service, and damage to the public interest as well as to probation staff, providers and clients, this paper will confine its focus to: (i) identifying the structures of accountability that were nominally in place to regulate and govern this policy; (ii) considering the robustness or weaknesses of those systems for eliciting transparency and accountability, especially given the complications generated by outsourced service markets; (iii) conclude with a discussion of the impact and limitations of regulatory interventions. Up to now, there has been little by way of explicit focus on regulatory systems and their role. This is not because of a lack of such systems. The UK has highly competent and sophisticated mechanisms for managing, steering, advising and eliciting accountability from those contracted to undertake

public works at macro (political), meso (operational) and local (quality assurance and performance) levels. The puzzle, rather, is why highly developed regulatory systems were apparently unable to fulfil elicit full accountability or make appropriate interventions to correct policy errors?

Accountability in outsourced public service markets

- 5 In public administration in the United Kingdom, systems of accountability derive from strong claims about the democratic imperative which informs the rules of transparency, regulatory fairness and political responsibility. This understanding of governance has in turn developed into a variety of more specific normative theories such as civil service independence, concepts of the public interest, or accountability for the decisions of actors acting for, or on behalf of, the state. “‘Accountability’ is a prerequisite to maintaining democracy in the Westminster system because it ties together the ‘doctrine of ministerial responsibility...which bind[s] ministers into supporting all aspects of government policy’” (otherwise known as collective responsibility) and “‘endows individual Ministers with political responsibility for the conduct of their department’”.⁵ However, from the 1990s, political scientists observed “‘the impact of a new accountability dynamics’” which followed “‘political and administrative reforms and developments that have resulted in changing modes of accountability across various levels of government within the UK’”.⁶ Public administration and service delivery involving commercial businesses as well as NGOs, outsourcing and privatisation, and the rise of mixed (commercialised) service markets in criminal justice, are making it more difficult to sustain consistent accountability, as there are far more actors and regulatory considerations in play. In parallel, the diffusion of regulatory responsibilities across state and non-state spheres, has necessitated the rise of disruptive new “‘modes of governance and New Public Management (NPM)... Increasingly there are managerialist, governance and regulatory perspectives of accountability. Thus, the very concept of accountability has become a contested one’”.⁷
- 6 Regulating outsourced public services in the UK (also called economic regulation) is a case in point where procurement of public services is now oriented towards market facilitation and management, supplanting traditional public sector management systems with New Public Managerialist (NPM) practices. Since 2011, public procurement practice in the UK has been based on the following core normative principles. First, there is the position that public infrastructures are best provided through market competition. Second, economic regulation should promote effective competition where this is possible, or provide a proxy for competition “‘where it is not meaningful to introduce competition’”.⁸ Thirdly, economic regulation should be a “‘critical enabler’” of infrastructural investment, meaning that regulation is positively disposed towards investors; and fourthly, regulation must provide the “‘right degree of clarity, certainty and consistency’” if investors are to be incentivised and if public and political confidence is to be maintained.⁹
- 7 This approach has further developed in a variety of more specific contexts, where, for example, the original regulatory framework, which was developed for transport, energy, or public utilities, for example, needed to be extended to ‘non-infrastructure sectors such as healthcare and criminal justice. Accordingly, the marketisation of erstwhile natural monopolies such as probation services necessitated the installation (or extension) of economic regulatory powers to these ‘markets’. Subsequently, “‘five

principles of good regulation” were formulated to “*inform*” both the design or reform of services, as well as to “*form the statutory basis of regulators’ duties*”. These five principles hold that any regulation should be transparent, accountable, proportionate, consistent and targeted.¹⁰ In the absence of political accountability, as in the case of TR, a sixth rule could be added, which is only tacitly assumed in the guidelines; that regulatory judgements ought to be independent.

- 8 What emerges are profound challenges for securing transparency in outsourced public service markets, in terms of establishing public rights of scrutiny, putting regulatory and reporting mechanisms in place, and keeping pace with fluid, fast-moving and changing configurations of supplier chains involving several state and non-state (business and NGO) actors in public contract delivery. These new conditions render the current hierarchical system of transparency obsolete, inducing new concepts of ‘accountability layers’ which start with “*basic answerability*”, build towards “*amendatory accountability*” (changing systems, processes or policies which have caused problems) towards “*accountability which would allow for the exposure of office holders to sanctions in cases of serious error*”.¹¹ Taking Miller and colleagues’ useful approach as a starting point, this article identifies how governance and regulation proved to be complicated projects with limited efficacy. The challenges to transparency seem to be threefold. Firstly, eliciting accountability within the political process; secondly, rendering non-state agencies accountable in the process of market regulation and thirdly; navigating system complexity in the design and implementation of the TR framework. These fields shall be analytically treated as discretely constituted by a distinct rationale or mission, set of internal procedures, formal and informal rules, and so forth. The discussion identifies the principal dynamics in their formation (the policy field, the market, the implementational field) and the subsequent influences in facilitating and implementing TR.

Political accountability in the policy field

- 9 We start with executive political authority, which in turn implies that the conventions of collective and ministerial responsibility ought to provide safeguards and constraints against acting beyond their powers or harmful executive action. This emphasis on political accountability becomes critically important for establishing the nature and source of responsibility for subsequent systemic deficiencies with TR. The impact of the work of parliamentarians exercising their powers of democratic scrutiny, mainly through the influential Justice Committee and Public Expenditure Committee of the House of Commons, is salient, and is discussed later in the paper. Given the opacity of decision-making processes with regards to TR, the analysis also draws on rare insider perspectives from within the Ministry of Justice.
- 10 By the consensus of the wide range of perspectives referred to in this article, TR is a textbook example of a policy which was implemented in the knowledge that its design, costings, funding, and delivery systems were deficient. The TR model which was launched in 2013 carried forward some of the original plans for a “*rehabilitation revolution*”,¹² but differed crucially in its object and implementation. The Green Paper on *Breaking the Cycle* (2010) was premised on addressing the:
- fundamental failing of policy [which] has been the lack of a firm focus on reform and rehabilitation, so that most criminals continue to commit more crimes against

more victims once they are released back onto the streets. The criminal justice system cannot remain an expensive way of giving the public a break from offenders, before they return to commit more crimes.¹³

- 11 Future reforms, therefore, would comprise “*an intelligent sentencing framework coupled with more effective rehabilitation*”, with the proposition that businesses, social enterprises, local authorities, and NGOs (third sector) would be contracted to provide programmes and services as agents of rehabilitation. In order to make room for this innovation “*a comprehensive competition strategy for prison and probation services*” (i.e. future outsourcing of public resettlement services would follow in 2011).¹⁴
- 12 There is insufficient space to recount the revision from a mixed market approach which “*continued to envisage a coherent and wholly public service*” to the later version where “*localism [and] the continuing centrality of public sector probation of the earlier period shifted dramatically to a form of heavily centralised contracting-out to the private sector*”.¹⁵ TR offered a seemingly comprehensive solution to a cluster of political exigencies including crime, chronic recidivism (reoffending), supposedly failing public probation (and prison) services, and the cost of crime, for example. The Probation Service was a more vulnerable political target for radical dismantling than more publicly visible services, such as prison or policing.¹⁶ Spending reviews (2010-11 and 2014-15) cut all public expenditure in the UK by 27 per cent. In order that the Ministry of Justice could adhere to heavy budgetary reductions, it became a political imperative to establish that outsourced probation could be ‘cost neutral’, i.e. pay for itself with savings accrued. Yet, some of these core premises were either wrong, or at best: “*highly questionable and evidence for them thin and lacking ... Like most politicians, Grayling avoided the salient issue on crime in our time: its collapse*”.¹⁷
- 13 These comments from the former Director of Finance for Prisons reflect a degree of animus for the legacy of Chris Grayling, Secretary of State for Justice (2012-15), who moved the legislation for part privatisation of the probation service, the Offender Management Act (2014).¹⁸ Grayling pursued probation reforms along the hardest of centralised, marketised lines with singular determination, contrary to the available evidence or advice of his officials and by circumventing protocols for signing off on the national implementation of policies.¹⁹ Trials of the programme and of the payment-by-results system which were held in two prisons (HMP Doncaster and HMP Peterborough) were terminated after interim findings reported marginal impact on reconviction rates, and questioned whether the model could be replicated nationally.²⁰ The Ministry was subsequently censured for making “*a mistake*” in proceeding with “*reforms without completing thorough piloting*”.²¹
- 14 More serious was the culture of secrecy, exemplified by the suppression of a risk assessment conducted by the Major Projects Authority in 2013.²² This body, which appraises cost and logistical risks for major government projects, placed TR at the highest levels of risk in several categories including estimations of an 80 per cent risk of unacceptable drop in performance and a 51-80% risk that the programme would not save public funds.²³
- 15 Interviews with legislators and senior civil servants at the Ministry during this period bring into sharp focus how overdetermined ministerial resolve can “*destabilise the system, knocking out the whole system of checks and balances*”.²⁴ Annison’s ethnographic research with Ministry of Justice officials revealed “*the monomaniacal fervour to get probation reforms through*”, and a culture of unrelenting pursuit of goals despite rational

grounds for doubt as to their viability.²⁵ Yet Annison shows the nuanced approach of public servants who balanced “*the delivery perspective*” with their traditional civil service code which constrained them from crossing into ‘political’ decision-making terrain. Julian Le Vay, an architect of prison outsourcing and enthusiast for competition, also witnessed at first hand the transition from reform to ideological mission:

There was a strong case for exposing some probation services to competition ... [but] ... The TR changes lack compelling rationale or evidence; are uncoded; require extremely rapid implementation of new, highly complex organisational and relational models for all participants simultaneously; use payment mechanisms that are entirely untested and carry major risks of unforeseen consequences; rely on new and untested suppliers; require high levels of competence in contracting and contract management that the [Ministry of Justice] has recently been shown to lack; and are being implemented at breakneck speed for no reason – and there appears to be no recovery plan if TR goes badly wrong.²⁶

- 16 Throughout the period of privatisation/outsourcing of probation, there was always a divergence between ideology and the capacities that were achievable given existing economic and political constraints. This does not reflect a simple technocratic/political divide, as throughout the lifetime of the programme to the present, TR was a contested field where technocracy and politics combined and divided, sometimes along unfamiliar lines, sometimes creating unexpected alliances and outcomes in others. Nevertheless, the policy can be viewed as an example of hubris (generated at the behest of an intractably punitive, pro-free market, right-wing Minister), which created the context for later confrontation with his own officials, with parliament, with civil society, and eventually with the Community Rehabilitation Companies and subcontractors, including charities, who were servicing the TR system.
- 17 The “*rushed implementation*” of TR introduced significant risks that its chosen commercial approach “*left it badly placed to manage.*”²⁷ The consequences are far-reaching, so we now turn to examine questions of transparency, leading to risk management and damage limitation exercises.

Accountability and the probation market

- 18 Perspectives on the relationship between public service markets and accountability fall into three broad positions: the first is that transparency is a functional necessity for making markets work – by facilitating the exchange of accurate information, which in turn underpins informed decisions and competitiveness – and therefore compliance is in actors’ self-interest. The question for this approach is whether regulatory accountability is as effective, or necessary, as free (i.e. unregulated) market forces can be. Whilst deregulation is often spoken of as a means to achieving free market ends, these means can generate conflicting outcomes which merit closer analysis when applied to probation service markets. Firstly, outsourced public services are not fully competitive markets, but quasi-markets, that is, artificial economic hybrids that are partially protected from full exposure to supply and demand. Those favouring the discipline of free markets find fault with the impurity of quasi-markets on the grounds that they increase the likelihood that the government will step in to protect strategic public services, thereby creating actor complacency, leading to market failures or operational laxity.²⁸ By this logic, however, transparency ought to be even necessary in

the case of such monopsony (a market situation in which there is only one ‘customer’ – the state, in this case) or oligopoly (dominance by a few market leaders), yet market homogeneity is rarely a target of regulatory scrutiny.

- 19 A second perspective reflects the status quo whereby regulatory structures are thought to be pragmatic necessities for protecting public assets as well as the public interest, but this duty must be balanced against unjustified disruption to the market or to market actors. This paper has already discussed this approach, so will not elaborate further.
- 20 A third position correlates state-created market building in offender resettlement with corporate welfarism in the guise of privatisation and outsourcing.²⁹ In denaturalising claims that healthy self-interest incentivises market actors to abide by ‘light touch’ or self-regulation, Ludlow remarks that free markets are misnomers in at least two senses. The first is that the “free” market does not go unregulated; it means regulated in ways to which most neo-liberals do not object.... The second sense...is that where public services are subjected to competition, the market needs to be created and cultivated by its single customer, the state: a public service market does not spontaneously arise.³⁰
- 21 Another version of this critique inverts the “*fabricated image of a lazy state and a dynamic private sector*”, pointing instead to the state’s largesse in creating de-risked rent-extraction opportunities where the public interest ultimately loses out: “*when the appropriation of rewards outstrips the bearing of risk in the innovation process, the result is inequity.*”³¹ Aspects of each of these arguments manifested in the internal incoherence of the market model for probation, the features of which are discussed below.
- 22 But first, to reprise the rationale for adopting a market model, it is official policy that private sector companies can be a highly effective option for public service delivery, but their performance depends on the competitive pressures of the market. It is believed that they perform at their peak when there is a financial incentive to do so, but that more than one provider should ideally be contracted to perform similar tasks to maintain competitive discipline. Competition, in turn, introduces a source of friction into the operation of the sector in question. The commissioning framework for probation, accordingly, comprised potentially conflicting objectives. The first entailed attracting providers with significant resources, up-front capital and large-scale operational capacity, and therefore signalling that large corporations or ‘supercharities’ could be preferred Lead or Prime contractors. This model envisaged a classic, trickledown subcontracting pyramid where the prime contractor (or contractor consortium) handed out subcontracts to smaller, local outfits who would deliver the programmes, while taking overarching control for delivering the contract. At the same time, however, the Ministry also wanted the competitive benefits of “*a market model that supports a wide range of lead providers, and partnerships which*”³² “*will encourage providers to draw on local expertise with the voluntary and community sectors and local delivery agencies*”³³ by introducing a widespread programme of competition and inviting “*providers from the private and voluntary sectors to deliver the majority of current probation services*”.³⁴

Squeezing out public and charitable sectors

- 23 The early phase of preparing the market for probation (2012-13) was structured around commitments to creating diversified and inclusive markets which would comprise “*a mix of expertise*”, and signalled that bids from not-for-profit prime contractors were encouraged.³⁵ The ministry invested in “*capacity building*” for the market, reportedly spending £15 million (€16.8m) on management consultants and £4m (€4.48m) on legal services between March 2012 and April 2013.³⁶ A reported £10 million (€11.21m) was spent on hiring financial services consultancy firms to provide training and advisory services to small social enterprises and charities requiring support to work up potential bids as contractors or subcontractors, in order to equalise their chances against the superior forces of large multinational corporate bidders. Diversifying the market was thought to fulfil varying premises: to assure NGOs that they had a realistic stake, to expand the competitive base, and to allay public disquiet at the oligopolistic dominance of large transnational security corporations. Opening up the marketplace did not apply to public sector probation trusts, who were barred from bidding for contracts unless they formed consortia to prepare bids as Probation Mutuals.³⁷

Oligopoly

- 24 As it transpired, all but one of the CRC contracts were awarded to large consortia headed by for-profit companies. One probation mutual was successful. Ministry sources briefed that unsuccessful bids were “*due to [the] more limited resources and (lower) appetite for risk*” of charities and non-profits.³⁸ However, unsuccessful bidders argued that the competition had been stacked in favour of for-profit/large charity consortia who could absorb financial risks; had made multiple bids for different areas; and could deliver to economies of scale. For charitable and probation mutuals, “*the rushed process*” lacked “*genuine consultation*” and affected their “*capacity to understand and influence what was going on*”, especially as new criteria were being demanded “*up to the deadline for tenders.*”³⁹ Finally, at an advanced stage in the competition (in 2014), the Ministry introduced a requirement that each bid should have a Parent Company Guarantee (PCG), a mechanism whereby bidders had to “*stake assets equivalent to the size of the annual contract value as a precondition for ownership of a CRC.*”⁴⁰ This requirement is standard practice in defence or large capital spending contracts, where it acts as security against supplier bankruptcy, but in this case it effectively priced charitable, medium sized for profits and mutual bidders out of the market.

Alienation of social investors

- 25 The ambition that TR would be cost neutral (i.e. would not cost the Treasury because of savings by outsourcing) prompted government to reach out to social entrepreneurs and philanthropic investors. Funders who had invested heavily in special investment bonds to part-finance the Peterborough and Doncaster trials were subsequently alienated when the Ministry terminated them early. Philanthropic trusts had initially shown interest but eventually offered lukewarm and qualified responses towards investing in TR. This was reportedly (by NOMS) based on their supposedly ideological objections to privatisation *per se*. However, their refusal to invest was because many perceived that

they would in effect be ‘subsidising’ the profitability of private sector CRCs, which was incompatible with their covenants and missions.⁴¹

Built-in design failures

- 26 By 2016, it was publicly acknowledged that a number of CRCs were losing money. The CRCs attributed these losses to flaws with the payment-by-results mechanisms and inaccurate forecasts by the Ministry of Justice which allegedly inflated the figures for referrals (clients) that they would receive (which depressed their client turnover, and thus decreased payment per client). An alternative perspective, vindicated by events, argued that the incoherent and ill-considered payment-by-results formula which underpinned the contracting system meant that the economics of TR were unworkable).⁴² In late 2017, it was reported that several CRCs had approached government to favourably adjust payment mechanisms and for additional money to compensate for losses and to “*provide greater financial certainty and to support the delivery of core operational services*”.⁴³ News that the Ministry was engaged in “*rolling contract negotiations*” with the CRCs – in effect, renegotiating the terms of their original contacts – confirmed earlier suspicions that companies had originally under-estimated costs in their tenders in order to win contracts, or factored in significant losses in the expectation that they could press for more favourable terms once this vital strategic service was in their hands. Estimated extra payments cost £476 million (€531.5m) in 2017 alone but the Ministry of Justice has not disclosed particulars on the grounds of commercial confidentiality.⁴⁴

Barking watchdogs eventually bite

- 27 Because the part-privatisation of probation was so novel and controversial, it was in the sights of parliamentary, regulatory and quality assurance scrutineers from the outset.⁴⁵ Therefore, we encounter a contradiction whereby the problems with TR did not proceed unseen, but carried on despite regulatory hyperactivity. This puzzle can firstly be addressed by reference to ministerial disregard for conventional rules and procedures, and the exclusion of contrary advice from senior civil servants (in this sense, TR presages what has become normalised since the 2019 election). As the administrative debacle unfolded, parliamentary committees seemed to be the only bodies with powers to hold a non-compliant political executive to account.⁴⁶ The watershed began when the Justice Committee of the House of Commons published findings from its inquiry into Transforming Rehabilitation (2018). The Committee opened with the statement that members felt obliged to seize the momentum for obtaining overarching parliamentary accountability, in the light of a succession of critical reports from regulators and inspectorates, which, however insightful, were limited in their powers of scrutiny and recommendation:

*At the beginning of this Parliament we agreed that in light of... the generally poor reports... (both inspection reports of specific Community Rehabilitation Companies and National Probation Service areas as well as cross-cutting thematic reports) and oral evidence taken by our predecessor Committee in March 2017, that an inquiry into Transforming Rehabilitation would be one of the first inquiries that we launched in the 2017 Parliament.*⁴⁷

- 28 Once oversight moved to the more adversarial domain of parliament, it was anticipated that the issue would become susceptible to political partisanship. Yet, bipartisanship

prevailed on TR partly due to Grayling's loss of political capital within his own party, and partly because the executive "knew internally that [TR] was a mess", according to his own Minister of State (junior minister).⁴⁸ These damning verdicts added political weight to a rising wave of censorious reports which reached a tipping point in May 2019, when the outgoing Chief Inspector of Probation, Dame Glenys Stacey, pronounced that TR was "irredeemably flawed" and "not fit for purpose."⁴⁹ The source of this criticism was significant, as the probation and prison inspectorates have generally enjoyed credibility on basis of their rigorous and balanced scrutiny (although there is also a tradition of trenchant parting commentary from departing chief inspectors). In this instance, Stacey's comments and final report carried significant moral authority that breached the government's previously impervious stance.

- 29 The contemporary struggle over accountability also derives from the system complexity which is introduced to the hybridised market-state. Outsourcing changes the shape of the state, in the process shifting loci of accountability from central government to external and non-state actors. The paradoxical outcome is that, far from decreasing, state power is reproduced and multiplied through the diffusion of obligatory accountability to greater numbers of agents who carry out public welfare or penal work in the local state or in civil society.⁵⁰
- 30 Whilst this iteration of neo-liberal, penal governmentality produces governmental net-widening via non-state actors, TR also facilitated the growth of *state* bureaucracy in two ways. Firstly, marketisation and privatisation led to the creation of new bureaux and workforces to monitor outsourced public contractual activity. Contract management was not only prioritised as an activity within HMPPS/NOMS⁵¹, but the only workforce in the prison and probation services that expanded was a new stratum of employees with specialist contract and market management skills drawn from the financial sector to strengthen contract management and address "*capability gaps*".⁵² These were supplemented with "*senior commercial professionals*" (consultants) were as well as secondment of specialists from the Cabinet Office.⁵³ The investment and size (84 full-time equivalent employees) of the contract management team was critically contrasted with working conditions for prison regulators by Peter Clarke, Chief Inspector of Prisons:

*We are surprised that it costs HMPPS and HMPPS Wales more staff and money to manage the Ministry's contracts with the 21 CRCs, than HMI Prisons has to inspect more than a hundred prisons, as well as young offender institutions, secure training centres, immigration removal centres, short-term holding facilities, police custody, military detention and court custody.*⁵⁴

- 31 With this double movement the asymmetry was made clear; market management not only took precedence over conventional regulatory concerns with prison conditions, standards of treatment for prisoners, safeguarding and maintaining public transparency, etc., but the apparatus of market management exceeded the scale and resources of established regulatory bodies.
- 32 This expansion also refuted the orthodoxy that marketisation dispenses with unnecessary bureaucracy. Productivity monitoring of TR generated multiplying lines of accountability which are characteristic of outsourced public services as all providers must become arms of complex audit and reporting regimes. CRCs complained that they were accountable to a plethora of governing bodies, structures and protocols. The House of Commons Justice Committee accepted that providers had been subject to

“overlap, duplication, differences in recommendations from... different auditing bodies auditing at the same time”.⁵⁵ One contractor, Sodexo, itemised the typical inspection and contract regime with which they had to comply: submit data for monthly (desk-based) scrutiny by the HMPPS/Ministry of Justice Contract Management unit; produce monthly data in relation to contract oversight for Relationship Management Groups (held quarterly), produce quarterly performance reports for HMPPS Operational Assurance Audits. Additionally, contractors had to fulfil the requirements for HMPPS Accredited Programme Audits and Ofsted Inspections (the inspectorate for schools and educational providers); attend and produce material for Accuracy meetings, Contract and Performance meetings, and prepare for Joint Targeted Area inspections.⁵⁶ In turn, these companies harvested from their subcontractors – often charities and smaller social enterprises – voluminous and often meaningless data in order to meet criteria for claiming payment.

- 33 Here the discrepancy between deregulatory ideology and what the market wants is clarified. The conceptual mistake comes from the neoliberal rhetoric which conflates deregulation with freeing up markets, whereas the former is highly selective in demanding only ‘freedom from’ obligations such as taxation,⁵⁷ employment rights and conditions⁵⁸ and pension and labour costs.⁵⁹ In other respects, market players require clear regulatory structures (albeit in preferential terms) in order to formalise their interests vis-à-vis that of the buyer (the state).
- 34 Ludlow’s rebuttal of the “*fictitious divide*” between regulatory and market interests applies here because the market demands and relies on credible terms, conditions and protections in order for contestability or outsourcing to work. Substantial sweeteners and guarantees were necessary to attract potential private providers. This was evident during the market-building preparations for TR which sought to ensure that the right contractors (i.e. large capital providers) were incentivised, and where terms were subsequently renegotiated.
- 35 Additionally, risk mitigation (underwritten by the state) is a prerequisite for offering the market reassurance of profitable and stable business when they tender for and win public service contracts. This can be defended as the state acting properly in ensuring the continuity of critical public services which have been outsourced. However, the state concedes considerable bargaining power in proffering further and further assurances. Contracts can be written to deter perverse outcomes, for example, where payment-by-results incentivises ‘cream skimming’ (where contractors select clients most likely to reach targets). However, such constraints on profit may have to be offset with supplementary payments for higher-risk clients.

Conclusion

- 36 It is ill-conceived to position regulation in binary opposition to market efficiency in public services. In practice, for-profit contractors are more or less reconciled to viewing regulation as a pragmatic necessity – where it services their interests – and this question of degree of regulation remains a core contention. The regulatory burden is a trade-off for the greater rewards of obtaining access to markets (for contractors) in exchange for creating saving for the state (although savings do not accrue in many cases). Deregulatory agendas seek to eliminate conditions that are deemed to be unnecessarily expensive where contractors are allowed to operate more cheaply by

taking fewer precautions to protect workers, consumers, standards and society. In other respects, bureaucratic overkill did not arise because of incessant state regulation, but because it was supplemented with actuarial governance in the form of target-setting, performance measurement and data-harvesting which are characteristic of payment-by-results regimes in marketised public services.

- 37 To return briefly to Miller and colleagues' accountability layers, we can see that the rule of 'basic answerability' was satisfied to the degree that participants were obliged to produce elementary and routine data about performance outputs, where information of importance might be subsumed within the details. Nevertheless, this level of accountability is slippery as answerability is displaced onto 'front line' and peripheral actors. "*Amendatory accountability*" which is gauged towards securing "*the redress of grievances and correcting errors*" likewise occurred reactively and after the fact, where regulators were able to identify "*instances of proven error causing difficulties for clients or service users*".⁶⁰ Here, commissioners had recourse to contract management techniques with a view to disciplining contractors through the use of financial sanctions, although ultimately contract leverage worked to the advantage of corporate welfare by subsidising and shoring up strategic markets. Our inquiry thus rests on whether the problem lies with the 'wrong kind' of regulation or whether TR characterised systemic lacunae in the regulatory structures. Certainly, the pursuit of political accountability by parliamentarians potentially allowed for the censure of office holders, although little by way of sanctions were applied in cases of serious error. Even parliamentary committees reached their limits of sanction in the face of a strong ministerial will to proceed in defiance of evidence or normative rules and procedures.
- 38 The privatisation of probation in England and Wales revealed strains in regulatory systems as conventional methods of oversight proved inadequate to holding complex, networked supply chains of contractors and subsidiary agents to account. The public management of outsourced public services is now a complex and multi-layered prospect where conventional state regulatory agencies need to be augmented by new para-state governmental techniques, ranging from commissioning to new public managerialist-style performance measurement to micro-management at the point of service delivery. While conventional regulators are restricted to scrutiny and making recommendations, new managerialist technocratic measures create proliferating demands which give the *appearance* of regulating while failing to elicit robust accountability on the substantive problems. Although many critics focused on the weaknesses of outsourcing, fewer paid attention to the limits of accountability in the context of an ideological assault on probation. The lesson is that regulatory accountability and governance structures are limited in their capacity to trump bad policy or rectify structural asymmetries and systemic flaws.

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NOTES

1. House of Commons Public Accounts Committee, *Transforming Rehabilitation: Progress Review* (London: House of Commons, 2019), p. 3.

2. House of Commons Hansard, *Probation Services: Statement by the Right Hon. Richard Buckland, Secretary of State for Justice*, 11 June 2020 (London: HMSO, 2020). Vol 677, cols 425-427.
3. See: National Audit Office, *Transforming Rehabilitation: Report by the Comptroller and Auditor General* (London: National Audit Office, 2016); House of Commons Committee of Public Accounts Committee, *Transforming Rehabilitation: The 17th report of Session 2016-17* (London: HMSO, 2016); HM Inspectorate of Prisons & HM Inspectorate of Probation, *A joint inspection by HM Inspectorate of Probation and HM Inspectorate of Prisons* (London: HMPPS, 2016); HM Inspectorate of Prisons & HM Inspectorate of Probation, *An Inspection of Through the Gate Resettlement Services for Short-Term Prisoners*, October 2016 (London: HMPPS, 2016); HM Inspectorate of Prisons & HM Inspectorate of Probation, *An Inspection of Through the Gate Resettlement Services for Prisoners Serving 12 Months or More, June 20* (London: HMPPS, 2017); Communities and Local Government Committee, *Third Report of Session 2016-17, Homelessness* (London: HMSO, 2017); House of Commons Work and Pensions Committee, *Fifth Report of Session 2016-17, Support for ex-offenders*, (London: HMSO, 2016); HM Inspectorate of Probation, *Report of the Chief Inspector of Probation* (London: HMIP, 2019).
4. Harry Annison, "Transforming Rehabilitation as Policy Disaster", *Probation Journal* 66.1 (2019), pp. 43-60.
5. Karen Miller, Duncan McTavish, Robert Pyper, "Changing modes of official accountability in the UK" in Taco Brandsen and Marc Holzer (eds.) *The Future of Governance* (New Jersey: Rutgers University, 2009), pp. 187-206.
6. Miller, *Changing Modes*, *ibid.*
7. Miller, *Changing Modes*, p. 188.
8. Department for Business, Innovation and Skills (DBIS), *Principles for Economic Regulation* (London: DBIS, 2011), p 1.
9. *Ibid.*, p 3. emphasis added.
10. *Ibid.*, p. 7
11. Miller, *Changing Modes*, p. 189.
12. The 'rehabilitation revolution' was devised by the Ministry of Justice to launch the 'Transforming Rehabilitation' programme. This kind of grandiose language for reforms reflects a typical strategy for popularising controversial policies that came in with the era of New Labour.
13. Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (London: HMSO, 2010), pp. 1-2. .
14. Ministry of Justice, *Breaking the Cycle*, para. 38.
15. Annison, *Policy Disaster*, p. 48.
16. Lawrence Burke, Stephen Collett, Stephen. and Fergus McNeill, *Reimagining Rehabilitation: Beyond the Individual* (London: Routledge, 2018).
17. Julian Le Vay, *Competition for Prisons: Public or Private?* (Bristol: Policy Press, 2016), p. 240.
18. Le Vay is being polemical here: overall recorded crime was decreasing, but recorded violent crime rose, as did the number of serious offences committed by offenders on parole after privatisation. Technically, this meant that fewer community-based and short sentences, coupled with higher risk assessments, jeopardised client turnover and therefore undermined the business model of commercial probation providers. Le Vay's overall thrust, however, is against the seriously compromised design and implementation of TR.
19. Annison, *Policy Disaster*, pp. 52-54.
20. National Audit Office, *Report by the Comptroller and Auditor General. Ministry of Justice: Transforming Rehabilitation*. (London: HMSO, 2016), p. 13
21. House of Commons Justice Committee *Transforming Rehabilitation, 9th report of the session 2017-19*, (London: HMSO, 2018), para. 18.
22. Le Vay, *Competition*, p. 250.
23. This author has seen a copy of the report which was accurate in its calculation of most major risk variables. The claim that such information was subject to commercial confidentiality

subsequently reappeared to obstruct disclosure both to the public, researchers and parliamentary committees of inquiry.

24. Annison, *Policy Disaster*, p. 47.

25. *Ibid.*, p. 49.

26. Le Vay, *Competition*, p. 251.

27. HM Probation & Prison Service, *Transforming Rehabilitation: Progress Review*. (London: HMPSS, 2019), para. 9.

28. Julian Le Grand and Will Bartlett, *Quasi-markets and Social Policy* (Basingstoke: Macmillan, 1993), pp 13-34.

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31. Mariana Mazzucato, *The Entrepreneurial State: Debunking Public vs Private Sector Myths* (London: Penguin, 2018) pp. 28, 199.

32. Ministry of Justice, *Transforming Rehabilitation: A revolution in the way we manage offenders. Consultation Paper CP/1* (London: HMSO, 2013), p. 16.

33. Ministry of Justice, *Transforming Rehabilitation: A revolution*, p. 10.

34. *Ibid.*, p. 11.

35. *Ibid.*, p. 6.

36. *Independent* (2013) "Fury over £15m bill for consultants on probation deal", 13 November, 2014 <https://www.independent.co.uk/news/business/news/fury-over-15m-bill-for-consultants-on-probation-outsourcing-9859922.html>, consulted 5 February 2020.

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38. House of Commons Public Accounts Committee, *Transforming Rehabilitation: The 17th report of Session 2016-17*, (London: HMSO, 2016) sections: 4.15.

39. James Noble, *The Transforming Rehabilitation Tier 1 Tendering Process: The Voluntary Sector Perspective*, (London: New Philanthropy Capital (NPC), 2015), p. 5.

40. Noble, *TR Tendering Process*, p. 3.

41. Interview data held by this author.

42. Kevin Albertson and Chris Fox, "The marketisation of rehabilitation: Some economic considerations", *Probation Journal* 66 (1), (2002) pp. 25-42.

43. House of Commons Public Accounts Committee, *Written Evidence from the Ministry of Justice* (London: HMSO. 2019), para 42.

44. House of Commons Justice Committee *Transforming Rehabilitation, 9th report of the session 2017-19* (London: HMSO, 2018), para. 42.

45. The privatisation of probation services is not unprecedented outside of the UK, and the existence of a single, public national service is not the universal norm, even in European countries. In the United States, Florida and Maryland have outsourced their parole and probation services since the 1970s to corporations and to large charities, notably the Salvation Army. Direct privatisation (as distinct from grant funded service delivery) in England and Wales was experienced as a cultural and political shock.

46. Margaret Hodge, *Called to Account: How Corporate Bad Behaviour and Government Waste Combine to Cost us Millions* (London: Little, Brown, 2016).

47. Justice Committee, *Transforming Rehabilitation - 9th report*, paras 7-9.

48. Kate Proctor, "Tories knew probation service was 'a mess', says ex-minister", *The Guardian*, 17 September 2019. <https://www.theguardian.com/politics/2019/sep/17/tories-knew-probation-service-was-a-mess-chris-grayling-says-ex-minister-phillip-lee>, consulted 11 June, 2020.

49. HM Inspectorate of Probation, *Statement from Dame Glenys Stacey*. Press Release. May 24 (London: HMIP, 2019).
50. Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York: Zone Books, 2015).
51. HM Prison and Probation Services (HMPPS) replaced the National Offender Management Service (NOMS). Each body was the executive agency sponsored by the Ministry of Justice, with responsibility for overseeing probation and prison services.
52. Justice Committee, *Transforming Rehabilitation – 9th report*, para. 50.
53. Supplementary written evidence, Rory Stewart MP, Minister of State for Justice: Ministry of Justice TRH0118 (London, HC Justice Committee, 2018).
54. Justice Committee, *Transforming Rehabilitation – 9th report*, para. 79.
55. *Ibid.*, para 52.
56. *Ibid.*, 80.
57. Hodge, *Called to Account*, pp. 75-107.
58. Ludlow, *Privatising Public Prisons*, pp. 83-88.
59. Le Vay, *Competition*, p.169.
60. Miller, *Changing Modes*, p. 189.

ABSTRACTS

This article discusses the constraints on, and conflicts over, the oversight and regulation of mixed public-private entities, using the part-privatisation of the probation service in England and Wales – a policy called Transforming Rehabilitation (TR) – as its case study. The article shows how TR embodied a policy and set of practices that effectively undermined both institutional and political forms of scrutiny. Actions informed by neoliberal political dogma effectively strained regulatory systems, and short circuited the most important dimension of accountability in a liberal democracy – accountability of ministers to parliament. Ironically, although TR was subject to extensive regulatory scrutiny, the article concludes that these mechanisms were controverted by ministerial disregard for rules, procedures or the advice of civil servants, demonstrating that regulatory structures struggle to trump willfully pursued but ill-advised policy.

Cet article analyse les contraintes et conflits qui entourent la supervision et la régulation des partenariats public-privé, en prenant comme étude de cas la privatisation partielle du système de liberté conditionnelle en Angleterre et au pays de Galles, programme baptisé *Transforming Rehabilitation*. L'article montre que ce programme, par l'orientation et les pratiques qu'il a instaurées, a dans les faits fragilisé les mécanismes de régulation politiques et institutionnels. Des actions entreprises au nom de la doxa politique néolibérale ont ainsi mis les systèmes de régulation sous pression, et court-circuité l'incarnation la plus importante de la transparence dans une démocratie libérale – la responsabilité des Ministres devant le Parlement. Bien que le programme *Transforming Rehabilitation* ait, paradoxalement, fait l'objet d'importants dispositifs de régulation, l'article conclut que ces mécanismes ont été contournés par des ministres qui ont fait fi des règles, des procédures et des conseils de hauts fonctionnaires, ce qui montre finalement que les systèmes de régulation ne parviennent pas à prendre le pas sur des actions politiques menées avec beaucoup de volonté mais peu de clairvoyance.

INDEX

Mots-clés: privatisation, liberté conditionnelle, néolibéralisme, transparence politique, pouvoir exécutif

Keywords: marketisation, probation, neoliberalism, political accountability, executive power

AUTHOR

MARY CORCORAN

Keele University, UK

Mary Corcoran is Reader in Criminology at the University of Keele, England, UK. She has published widely on resistance and political imprisonment, women in penal systems, and the role of civil society and third sector actors in criminal justice. Her current work focuses on privatisation and marketisation in criminal justice fields.