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## **Probation, Privatisation and Legitimacy**

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### **Abstract**

This article considers the recent partial privatisation of probation services in England & Wales from the theoretical perspective of legitimacy. Drawing in particular on Beetham's (2001) work, we argue that the question of legitimacy in respect of privatised probation services is a complex one which requires attention to the multiple - and different - perspectives of key stakeholders or constituencies in the probation field. We argue that in the probation context there are five key stakeholder groups: the general public; offenders and victims; ministers and civil servants; sentencers; and probation employees and their representatives. We consider what is known about the perspectives of each of these groups in turn, before concluding that privatised probation services need to be aware of both the legitimacy deficits they face and the complex dynamics likely to be involved in its cultivation with these different constituencies.

**Key words:** probation; privatisation; legitimacy; Transforming Rehabilitation; Community Rehabilitation Companies

### **Introduction**

Legitimacy has been described as a vexing concept (Ansell 2001) but it is also one which is increasingly being recognised as important in the criminological field. More than twenty years ago Richard Sparks suggested that legitimacy was "an issue for every practice of punishment or sanctioning" and one which "delimits in very large measure the very arena within which penological debate must take place" (1994: 16, 26). Since

then, criminological research on legitimacy has predominantly centred on policing (e.g. Tyler 2006; Hough 2007; Bradford et al 2014), though there has been some engagement with legitimacy in studies of imprisonment (e.g. Sparks et al 1996; Liebling 2004; Crewe 2007); the criminal courts (Shute et al. 2005); and penal policies (Bottoms 2003; Snacken 2013). Meanwhile, in the probation field, questions of legitimacy have received scant attention (though see Digard 2010; McNeill & Robinson 2013; Irwin Rogers 2015) and, to date, have not been brought explicitly to bear on the dramatic reconfiguration of probation services which occurred in June 2014 under the Coalition Government's *Transforming Rehabilitation* (TR) reform programme (Moj 2013a, 2013b).

The TR programme has entailed the replacement of the 35 English and Welsh public sector Probation Trusts by a new National Probation Service (NPS) responsible for the supervision of high risk offenders, and 21 new Community Rehabilitation Companies (CRCs) responsible for the supervision of medium and low risk offenders. Both the NPS and CRCs are new organisational entities in the criminal justice field, but whilst the NPS remains in the public sector, contracts to run the 21 CRCs have been awarded to eight new providers, seven of which are private sector companies or partnerships led by private sector interests<sup>i</sup>. CRCs are now responsible for the lion's share of offender management work: the National Audit Office estimates that around 80% of new cases are allocated to CRCs, and that in July 2015 they managed some 61% of the 243,000 offenders under supervision (NAO 2016).

This significant step toward the outsourcing of criminal justice services has received remarkably little attention from the media (Phillips 2014; Hedderman & Murphy 2015) or from scholars beyond the probation field; yet it is a move that is deserving of serious critical attention, and which coincides with growing academic interest in the

outsourcing of other aspects of criminal justice, most notably policing (e.g. White 2014; Lea & King, forthcoming; Lister & Hucklesby, forthcoming). This article thus aims to contribute to critical scholarship in the probation field, but also to inspire further attention to the dynamics of legitimacy in other criminal justice contexts, particularly those affected by outsourcing.

In this article it is argued that the question of legitimacy in respect of privatised probation services is a complex one which requires attention to the multiple, and different, perspectives of key stakeholders in the probation field. The article begins by setting up a theoretical framework for thinking about legitimacy which draws in particular on Beetham's (2001) work but also looks to the literature on organisational legitimacy for useful resources. This framework adopts an empirical rather than a normative approach to the question of legitimacy: that is, it does not seek to evaluate legitimacy with reference to a set of norms or criteria specified by us. Rather, it suggests that legitimacy is best understood as a social process: a product of the evaluations of social audiences or constituencies who may bring different norms, values and expectations to bear on their judgements. The article goes on to consider the main constituencies who are implicated in an analysis of the legitimacy of probation work. Inspired by Rod Morgan's (2003) reflections on the main users and beneficiaries of probation work, it is argued that these include: the general public, offenders and victims, ministers and civil servants, and sentencers. However, we contend that there is another important constituency which merits consideration: that of probation employees and their representatives, who have tended to be ignored in discussions of legitimacy in criminal justice contexts. In the remainder of the article we consider the perspectives of each of these five groups in turn, with reference to extant evidence from our own and

others' empirical research<sup>ii</sup> and from a variety of recent reports from sources including the National Audit Office and HM Inspectorate of Probation. We argue that the legitimacy of privatised probation services cannot be determined in any objective sense: legitimacy is a social construct and thus subject to fluctuations over time as well as differences of perspective. Nonetheless, in light of our analysis, we argue that CRCs clearly have legitimation work to do, and need to be aware of both the legitimacy deficits they face and the complex dynamics likely to be involved in its cultivation.

### **Legitimacy and the probation field: a theoretical framework**

In common with many objects of social science, 'legitimacy' is a contested concept: no single or agreed definition exists. Beetham (1991) explains that this is largely explicable due to the variety of professional/academic groups sharing an interest in the subject, each approaching it from a slightly different perspective. Beetham identifies three main groups, each with their own 'take' on legitimacy. For legal experts, he argues, legitimacy is equivalent to legal validity: power is legitimate to the extent that its acquisition and exercise conform to established legal rules. For moral and political philosophers, however, power can only be regarded as legitimate when the legal rules underpinning it conform to moral or political principles that are rationally defensible. In other words, legitimacy from this perspective is that which is morally justifiable or rightful. Finally, for the social scientist, interest lies principally in attempting to explain why people comply with, obey or disobey rules, or more broadly accept relations of power in particular contexts. For Beetham, each of these three dimensions of legitimacy is important and contributes to a full understanding of the concept. Power, he argues, is legitimate to the extent that: (i) it conforms to established rules; (ii) the rules can be justified by reference to beliefs shared by both dominant and subordinate groups; and

(iii) there is evidence of consent by the subordinate to the particular power relations (1991: 16). There are thus, for Beetham, three levels or dimensions of legitimacy, “each of which provides moral grounds for compliance or cooperation on the part of those subordinate to a given power relation” (1991: 20). For power to be legitimate, Beetham argues, all three conditions must be met.

Beetham acknowledges however that the extent to which these conditions will be realised in any given context will be a matter of degree:

Every power relation knows its breaches of the rules or conventions; in any society there will be some people who do not accept the norms underpinning the rules of power, and some who refuse to express their consent, or who do so only under manifest duress. What matters is how widespread these deviations are, and how substantial in relation to the underlying norms and conventions that determine the legitimacy of power in a given context (1991: 20).

Legitimacy then “is not an all-or-nothing affair [...] [it] may be eroded, contested or incomplete” (Beetham 1991: 19-20). Beetham’s approach also emphasises the subjective nature of legitimacy: it is not an objective feature of social entities but rather one which must be earned and endowed by relevant individuals or groups. To put this another way, legitimacy is best understood as a *social process*: a product of evaluation or ‘cognitive construal’ (Johnson et al. 2006). It is also fundamentally relational, a point which Bottoms & Tankebe stress in their *dialogic approach*, which sees legitimacy as an “iterative process of claim and response” (2012: 129).

As a political scientist, Beetham’s own work on legitimacy concerns relations of political power within societies: it is not directly concerned with the legitimacy of organisations.

However, many of the same ideas can be found in the organisational studies literature, where there is a wealth of research on the theme of organisational legitimacy. It is well beyond the scope of this article to review that literature here, but for present purposes the following is helpful:

An organization is said to be legitimate to the extent that its means and ends appear to conform with social norms, values, and expectations (Ashforth & Gibbs 1990: 177).

According to this view, a 'legitimate organisation' is one that is perceived to be pursuing socially acceptable goals in a socially acceptable way: the importance of this normative dimension means that efficiency and performance alone are not sufficient to confer legitimacy on an organisation (Ashforth & Gibbs 1990). Legitimacy is, however, always problematic, because social norms and values are often contradictory, ambiguous or unclear – but also because organisations are sometimes answerable to a number of different constituents, who may have conflicting expectations or perceptions. This is sometimes referred to as an organisation's 'polyarchic context' (Zald 1978).

This begs the question: who or what makes up probation's polyarchic context? We can begin to address this question by considering Rod Morgan's (2003) analysis of the main 'users' and 'beneficiaries' of probation services. Morgan identified four groups of key constituents in relation to probation services: the public, offenders and victims, ministers and civil servants, and sentencers. We see this as a useful starting point for our analysis. However, we depart from Morgan's framework by introducing a fifth group who we see as a key constituency in probation's polyarchic context. This is the constituency made up of probation workers and their representatives – trade unions, professional associations and other groups of 'experts' associated with probation work.

We contend that, as a large part of the population of subjects of the TR reforms, and as employees and representatives of the new organisational entities, their importance in the reconfigured probation field should not be underestimated.

We proceed by considering each of these five main constituencies in turn, starting with the public.

### **The public**

Morgan made some interesting observations about probation's relationship with the public that are still of relevance today. He began by observing that the average member of the public could not be considered a 'user' of probation services, although they may be a beneficiary; hopefully being better protected from victimisation as a result of the work probation services do. Furthermore, evidence available at that time suggested that most citizens knew very little (if anything) about probation: to the general public probation was arguably little more than "part of the background fabric of the state" (Morgan 2003: 9). The public, Morgan continued, did not relate to 'probation' in the ways that they related to the police, whom they were much more likely to have had some direct contact with (e.g. as witnesses to or victims of crime). The same could be said for other services like education and health, with which citizens regularly interact. With Morgan's comments in mind, can it be said that the general public has any particular expectations, norms or values in respect of the means or ends of probation work?

In his work on the rise of the private security sector, White (2010) has argued that there exists in civil society a generalised norm or sensibility around the provision of security as something that should be monopolised by the state and, in particular, the public



police service. Given this deep-seated political norm, White observes that the private security industry has struggled for legitimacy: the very idea of private security and the interference of commercial interests in the provision of security for citizens offends against this general sensibility, and creates a cultural resistance to the security market and those who wish to enter it. Of course, Morgan's observation that probation is generally perceived as part of the 'background fabric of the state' – and presumably also as part of a criminal justice system - could suggest some generalised expectation on the part of the public that probation services are or should be delivered by the state, and it could follow therefore that the contracting out of probation services might offend a social norm around criminal justice as rightful state territory. However, given Morgan's observations about the public's very different relationships with (and awareness of) police and probation services, we should exercise caution in pushing this argument too far.

That said, the public were not absent from the government's TR rhetoric. Values of 'public interest' and 'public protection' featured heavily in TR policy documents, and appear to have been central concerns in demarcating the separate territories of the new NPS and the CRCs. In other words, in the specification for the new architecture of probation services, these values were invoked to explain what areas of probation work would remain with the public sector arm of probation, and thus fall outside the scope of the CRCs. So, in the interests of 'public protection', it was made very clear that the NPS would assume responsibility for the supervision of offenders assessed as posing the highest levels of risk of serious harm to the public<sup>iii</sup>:

We will not take any risks in protecting the public and the public sector

Probation Service will retain ultimate responsibility for public protection [...]

The Probation Service performs a vital role in protecting the public and managing risk – I am determined to preserve that (Grayling 2013: 6).

It was also made clear that those aspects of probation work involving decisions made in the public interest – about the allocation and/or duration of punishment - would be retained in the public sector. Thus, probation work in the courts (including the provision of pre-sentence reports and the enforcement/prosecutorial role) and the provision of reports to the Parole Board were designated as roles for public probation, thus avoiding the introduction of commercial interests at important decision points.

Despite low public awareness of the reconfiguration (and part-privatisation) of probation services under TR, then, both Government rhetoric and the design of the new architecture for probation services communicated a strong message about ‘rightful’ remit of the state in the delivery of probation services, and a ‘guardianship’ role for the state in demarcating the acceptable territories of the CRCs. However, it is difficult to find support for the idea that the public recognise themselves as stakeholders in probation work, let alone that they have particular views about how, or by whom, such work should be conducted. All that we can safely say about the values and expectations that the public bring to probation work in general and to CRCs in particular are somewhat opaque.

### **Offenders and victims**

Morgan (2003) had little to say about victims, except to comment that although the provision of some specific services to victims had been assumed by the probation service since the early 1990s, they could not be regarded as a core constituency at that time. Under *Transforming Rehabilitation*, victim services is one of the areas of work

which was reserved for the public sector NPS, although CRCs are contractually required to support the NPS as required in the implementation of the Victim Contact scheme (MoJ 2013c). The allocation of victim services to the NPS is justified on the basis that having one organisation responsible for the scheme “is in the best interests of the victim” (MoJ 2013c: 7). Clearly the idea that a single organisation should also be responsible for the supervision of offenders met with a different conclusion.

Turning to offenders, Morgan (2003) argued that, whilst they could and should not be regarded as the ‘customers’ of the probation service (because of the involuntary nature of their engagement), they were nonetheless an important constituency, having (in contrast to the general public) *direct* dealings with it and thus being in a position to hold informed views about the quality of probation services and their staff. A body of recent research on offenders’ experiences of probation supervision has increased our knowledge of what offenders do (and don’t) value in their interactions with probation, and this in turn informs our understanding of how offenders evaluate the legitimacy of probation services (e.g. see Shapland et al 2012: 12-15).

One thing we know from this body of research is that those under supervision value continuity in terms of having the opportunity to build a relationship with a supervisor. This emphasis on the relational aspect of probation supervision, and the importance of continuity to compliance and cooperation, was recognised in the *Offender Engagement Programme* (OEP) launched by NOMS in 2010 (Rex 2012). Paradoxically, one of the immediate effects of the TR programme which succeeded it (and arguably brought the OEP to a premature close) was the rupture of some supervisory relationships, where probationers found that ‘their’ supervisor had been allocated to a part of the new organisational structure, whilst they had been assigned to another. This was an issue

which practitioners in our case study of the transition of staff from one probation Trust to a CRC reflected on in the immediate aftermath of the reorganisation (Robinson et al. 2016). Several participants in the study talked, in interview, about the pains of separation from service users with whom they had built good working relationships but who were now in the process of being transferred to the NPS due to their 'high risk' status. In another study, which involved interviews with offenders subject to intensive probation supervision, Kay (2016) found that the initial implementation of TR presented the potential for considerable barriers to compliance and longer-term desistance for some of the probationers in his sample.

Meanwhile, HM Inspectorate of Probation found that the extent to which attention had been paid to helping service users make the transition from Trust to NPS or CRC varied between the four areas they inspected in April-May 2014 (HMIP 2015a). In one area leaflets had been drawn up and letters sent to all affected service users to explain the process; elsewhere the emphasis was on trying to arrange three-way meetings to hand over supervision – though there was not always time to accomplish this. Between them, the areas estimated that about one third of service users would experience a change of supervisor as a result of TR (HMIP 2015a: 16). Consistent with this suggestion, a survey of 251 service users carried out by User Voice for the National Audit Office in 2015 revealed that a third of respondents appeared not to know which organisation was managing their supervision, and more than 40% reported that they had experienced at least one change of supervisor (User Voice 2015)<sup>iv</sup>.

Of course, any initial 'pains of separation' will inevitably diminish over time, and many of those made subject to probation supervision post-2014 may have no prior experience on which to draw. However, many of probation's 'involuntary clients' are repeat users

of probation services, and may well question why it is that they are reporting to a CRC, or why the author of their pre-sentence report is not subsequently able to supervise them because they work in a different organisation altogether. Under the terms of their contracts, CRCs are required to elicit feedback from service users every 6 months via a standardised questionnaire, and results at the end of 2015 indicate variations in levels of satisfaction across CRCs, from 70% to 88% (NOMS 2016). This will form a useful baseline for future comparison.

Clearly, offenders and victims are more prominent stakeholders than the general public as far as probation services are concerned, in that they experience these services directly and their experiences will likely shape their legitimacy evaluations. From the perspective of CRCs, this is important because positive experiences are more likely to create the conditions for genuine engagement with probation services and, in turn, enhance the likelihood of positive outcomes in terms of reduced reoffending. As we shall see in the following section, the stakes are high for CRCs when it comes to outcomes for offenders. The ‘success’ or ‘failure’ of those individuals on supervision will dictate the level of payments received and ultimately the survival of CRCs and their current owners in the new contractual environment.

### **Ministers and civil servants**

Morgan’s (2003) article was written prior to the creation of the Ministry of Justice or the National Offender Management Service (NOMS), so there are aspects of his commentary which are somewhat outdated. Nonetheless, his observation that ministers and civil servants “exercise some command” over probation services (2003: 9), particularly in respect of the setting of budgets and priorities, remains relevant today.

Responsibility for the reconfiguration of probation services ultimately lies with ministers, most notably Chris Grayling, who as Secretary of State for Justice from September 2012 to May 2015 saw the process of TR through. It was NOMS (as an executive agency of the Ministry) which managed the competition and which subsequently let and now manages the CRC contracts (NAO 2016). The process of procurement of CRC providers began in May 2013 and contracts were signed in February 2015. The procurement process was, according to the NAO, “highly challenging”, not least because the CRCs were new entities with limited track records and available data, and some of the potential providers were new to the sector (2016: 18). Initially more than 700 organisations from the private, public and third sectors had registered an interest, suggesting success in respect of the Ministry’s objective to create a market for probation services. Ultimately, however, contracts were awarded to just eight providers, albeit reportedly with a view to ensuring that none captured more than 25% of the market (NAO 2016)<sup>v</sup>. As previously noted, only one CRC was won by a contractor outside the private sector.

Although this process attracted little media attention, ministers from non-Coalition parties did raise some concerns. For example, in comments to the *Guardian* in May 2014 the then Shadow Justice Minister Sadiq Khan (cited in Strickland 2016: 7) described the Government’s actions as ‘undemocratic’: most notably because of a clause in the CRC contract which made it almost impossible for a new government to reverse the policy without incurring significant financial costs.

Subsequently, a debate in Parliament on 28 October 2015 aired concerns about the perceived risks associated with a fragmented probation service, to which Andrew Selous (then Minister for Prisons, Probation and Rehabilitation) responded:

We have very robust contract management for every CRC and will hold them to account on what they have said they will do (cited in Strickland 2016: 17).

This is a telling retort, in that it clearly exposes the Government's approach to legitimacy: CRCs now exist and operate within a regulatory framework which in other contexts has been described as 'anchored pluralism' (Loader & Walker 2006). According to this model, the existence of multiple providers is legitimated by central (state) control of regulation. In the case of CRCs, their legitimacy, from the perspectives of Government ministers and civil servants, derives from their ability to deliver on a common framework of contractual obligations, and reward structures are closely aligned with performance against these measures. As the NAO (2016) explains, the payment structure for CRCs has three elements: a *fee for service* (for the satisfactory delivery of statutory activities); a *fee for use* (which covers work done for other parties, e.g. where the NPS commissions CRCs to provide services for its own higher-risk offenders)<sup>vi</sup>; and *payment by results* (to be triggered if CRCs achieve specific, measurable reductions in reoffending after 2 years).

Although initially planned to be a larger proportion of projected CRC income, the payment by results element represents only about 10% of total predicted payments. Leaving aside the many problems associated with payment by results mechanisms (e.g. see Hedderman 2013), as the NAO (2016) point out, this potentially places more of an emphasis on meeting the performance targets – so-called 'service levels' – specified in the fee for service part of the contract<sup>vii</sup>. This emphasis on service levels is further emphasised by the risk of 'service credit deductions' which can penalise under-performance to a maximum of 15% (NAO 2016: 23). Thus, "the design of the fee for service is more significant in incentivising the right behaviours" (NAO 2016: 23), and in

this context the 'right' behaviours have been constructed along very specific lines. To put this another way, the legitimacy of CRCs will be judged by ministers and civil servants with reference to very specific expectations around their performance: the timeliness, completion and 'quality' of delivery of statutory requirements first and foremost, and (only secondarily) the achievement of rehabilitative outcomes.

## **Sentencers**

Morgan's (2003) analysis identified sentencers as the principal 'commissoners' of probation services and probation's key constituency. Arguably this remains true today, despite all the intervening changes: in the absence of demand for probation services from the courts, probation services would be obsolete. It is therefore important to understand what sentencers expect from and value about probation services if demand is to be maintained, and it is equally important to ensure that sentencers have a good knowledge of what probation services are offering. Robinson (2011) has referred to probation's work in courts as the 'shop window' for probation services: it is here that "the available penal product range" is most obviously on display (Morgan 2003: 10) and it is in the courts that information about what probation services are and how they are delivered can be communicated. Throughout their history, probation services have sought to cultivate relationships of trust with sentencers, and in the context of court work, the iterative, dialogic process of legitimation described by Bottoms & Tankebe (2012) was played out.

Unfortunately, we know little about sentencers' views of private sector provision (Allen 2013), or how judges and magistrates might feel about passing community sentences in the 'reconfigured field' of probation. What we do know, however, is that the new architecture of probation services has ruptured the relationship between sentencers



and the main providers of probation services. This is because CRC staff are excluded from direct work in and with the courts, which is the preserve of the NPS (Robinson 2016). At best, this will serve to restrict sentencers' knowledge of the people and the services involved in the supervision of community sentences (and post-custodial supervision) and, at worst, it may reduce their confidence in the delivery of such sentences. Indeed, in his evidence to the House of Commons Justice Committee's 2013 inquiry into the Government's *Transforming Rehabilitation* proposals, the Deputy Chair of the Magistrates' Association commented that:

The main risk is one of trust and confidence. Sentencers [...] need to build a relationship – which we have done with the Probation Service – both inside and outside the court, and that does not happen overnight. (Monkhouse, cited in House of Commons Justice Committee 2014: 8).

These concerns need to be considered in light of a decline in the use of community sentences that stretches back a decade to 2006, and a 7% drop in new community orders commencing in the 12 months to September 2014 (Ministry of Justice 2015).

Sentencers, then, continue to be an extremely important constituency as far as probation work is concerned, and CRCs ought to pay serious attention to potential means of cultivating meaningful communication and relationships with sentencers in their area, as well as with the NPS staff who represent them in court contexts.

### **Probation workers and their representatives**

*Transforming Rehabilitation* is not the first set of probation 'reforms' ever to prompt significant internal disquiet or challenge from within probation ranks. When in the mid-1990s the then Home Secretary, Michael Howard, declared his intention to sever

probation training from its social work roots, there was considerable opposition from within probation and a lively normative debate ensued in the academic literature centred on 'probation values' and the potential consequences of probation's independence from the social work profession (e.g. Nellis 1995; James 1995). The 1990s also saw strong probation opposition to electronic monitoring, the surveillant function of which was seen as incompatible with the service's traditional values around promoting change and rehabilitation<sup>viii</sup>. More recently, changing representations of community service work – specifically its transformation from a socially beneficial, reparative activity to a punitive sanction - have met with negative commentary; as did the contracting out (to Serco) of community service work in London in 2012 (Harding 2013).

With such a history, the spectre of partial privatisation as part of the TR reforms was an obvious normative bone of contention for the probation service and its supporters, and it was this issue which was most prominent in the national campaign to 'keep probation public' which was launched by trades unions representing probation staff in January 2013. The early months of this campaign coincided with news that two major private companies – G4S and Serco – had been overcharging the Ministry of Justice on their contracts for electronic monitoring, had been forced to pay back £20 million, and were being investigated by the Serious Fraud Office (Chambers 2014; NAO 2016). This of course came hot on the heels of G4S's failure to provide sufficient security at the 2012 London Olympics. Not surprisingly, supporters of probation were keen to keep this 'moral taint' away from other probation services, as was the Ministry of Justice, which had little choice but to ban both companies from the TR competition in late 2013. The MoJ was also keen to stress the involvement of the voluntary sector in bids for

probation contracts, and made resources available to enable probation staff to develop bids from probation staff mutuals. These steps did little, however, to quieten doubts about the motivations and potential trustworthiness of other potential private actors seeking to enter the probation field.

Nor did it help that the TR agenda was roundly perceived within the service as ideologically driven rather than evidence based. Although senior probation leaders were reportedly banned by NOMS from voicing concerns about government policy<sup>ix</sup>, academic commentators sympathetic to probation were quick to argue that the more positive objectives of the TR programme – such as the extension of post-custodial supervision to short-term prisoners and the development of a ‘through the gate’ resettlement service – could have been achieved by the existing public sector probation Trusts which, in the MoJ’s own assessment, were performing very well in the run-up to TR (e.g. Senior 2013). In October 2013, members of the Trade Union and Professional Association for probation workers (Napo) voted overwhelmingly in favour of strike action, for only the third time in the organisation’s 101-year history<sup>x</sup>. Napo’s General Secretary Ian Lawrence said of this move:

Napo does not take strike action lightly, but we strongly believe that decimating the award-winning public sector Probation Service and selling it off to the likes of G4S and Serco will result in increased re-offending rates, a lack of continuity in risk management, and will see the privateers making huge profits at the expense of victims, offenders and taxpayers (quoted in the *Independent*, 18 October 2013).<sup>xi</sup>

Both Lawrence’s statement and the history of probation’s dissent from Government policy reveal something important about professional values in the probation context,

which is that they centre on both the means and the ends of probation work. Indeed, research on how probation workers construct 'quality' in their practice has demonstrated that they care about how the work is done; that it is done by 'the right kind of people'; and that it is done in the interests of offender rehabilitation and public protection (see Robinson & McNeill 2004; Robinson et al 2014; Deering & Feilzer 2015). Lawrence's statement indicates concerns about 'the wrong kind of people' entering the profession; about the reorientation of the 'ends' of probation work to the pursuit of profit and interests of shareholders; and (relatedly) the potential of outcomes that are antithetical to rehabilitation and could increase risks to the public.

Napo and its sister trades unions went further than raising normative concerns around TR, however: in fact, they sought on more than one occasion to challenge the legal legitimacy of aspects of TR. Firstly, in February 2014, UNISON, Napo and the GMB reported the UK Government to the International Labour Organisation, claiming that its plans to outsource unpaid work to private sector companies would be in breach of the ILO's Forced Labour Convention<sup>xii</sup>. Subsequently, in October 2014, Napo challenged the legal legitimacy of the Secretary of State's plans to contract out the CRCs<sup>xiii</sup>. Napo's application for a Judicial Review had two strands: a public law strand centred on the Government's failure to publish evidence that it was safe to proceed to share sale; and a private law strand related to a lack of duty of care by the employer to ensure the safety of staff, service users and the public. Although this legal action was concluded in December 2014 when the Secretary of State for Justice agreed to provide details of the steps planned to address Napo's concerns, subsequent news about under-performance of some CRCs (HMIP 2016b) in mid-2016 fuelled further criticism from Napo<sup>xiv</sup>.

*The problem of consent*

If, as Beetham (1991) argues, legitimate authority requires the consent of its subjects, and if it is agreed that CRC staff can be conceived as subjects of TR, then there can be little doubt that CRCs, as new organisational entities, started out with a legitimacy deficit from the perspective of their employees. In our case study, not only did the vast majority of probation staff employed in the probation Trusts fundamentally disagree with the proposal to split the service, seeing it as an 'unwanted divorce' (Robinson et al 2016: 167), but they also took issue with the process whereby staff were allocated between the two new structures (see also Deering & Feilzer 2015). Although staff were invited to express a preference for a post in either the new NPS or the CRC, allocation decisions were made by senior managers and centred on an analysis of the risk profile of individual practitioners' caseloads on a randomly chosen date in late 2013.

There is a large body of research which indicates the value of procedural justice in people's normative judgements about the exercise of authority (e.g. Tyler 1990; see also Bottoms & Tankebe 2012: 145). The concept of procedural justice includes consideration of the quality of decision-making, incorporating matters such as allowing people to have a say in decisions that affect them and the consistency of decision-making in similar cases. In our case study, we interviewed several individuals who had chosen the National Probation Service but been allocated to the CRC, who felt that they had been dealt with unfairly and/or not listened to, and that they had ended up in the 'wrong' organisation. Some staff, thus, felt an element of coercion in their allocation to the CRC – which is significantly at odds with the idea that legitimate authority requires the consent of its subjects (Beetham 1991). In our case study area we encountered a number of probation officer grade staff who had been allocated to the CRC but who subsequently applied for and obtained positions in the National Probation Service.

The frustrations of many staff who experienced the splitting of their former organisation were captured in an anonymous letter by a probation officer which appeared in a special edition of the British Journal of Community Justice prior to the split:

In the next few weeks we will be 'automatically assigned' to a new role. This, in my opinion, will either be as an automaton, inputting data, regimented risk assessment, adherence to a plethora of targets and processes, onto new computer systems as civil servants with no capacity to say, 'Stop, this is not right'. Or alternatively, I will be assigned to an, as yet unknown, organisation that cares only to maximise shareholder profits. My esteemed colleagues and I are being treated as commodities, our clients as commodities, not for the public good but for shareholder profit maximisation (Anon 2013: 206).

Consistent with the service's history of opposition to privatisation, and the views expressed by the anonymous PO quoted above, many of the interviewees in the case study area – though by no means all – also expressed grave concerns about the prospect that 'their' CRC might be destined for private ownership well before this became a reality for the new organisation. Some explicitly voiced objections to the idea of probation for profit or the 'commodification' of probation work (McCulloch & McNeill 2007), which they feared was wrong in principle and/or likely to mean cuts to resources and the result of a poorer quality service to offenders and the public. Concerns about commodification were exacerbated for some during the research when senior managers began the process of designing the required 'rate cards' for the pricing and packaging of CRC services for sale to the NPS mentioned above. In the words of one very experienced probation officer, "It's not supposed to make a profit, is it?". This is an

expression of what has been termed *ideological proletarianization* (Derber 1982): that is, the worker's loss of control over the purposes or ends to which his or her work is put.

This probation officer was not alone in her objection to the potential reorientation of her work toward economic ends and in favour of company shareholders, rather than (or as well as) the 'traditional' beneficiaries of probation work: offenders and the public.

Nor was she alone in worrying about the potential barriers to legitimacy in the eyes of existing statutory and non-statutory partner agencies that the future privatisation of the CRC could present<sup>xv</sup>. Conscious that the new organisation in which they were now working had been stripped of its 'probation' label, many worried that its acquisition by a private company might bring a new moral taint to its identity, thereby exacerbating the CRC's struggle to win recognition and gain a legitimate foothold in an already crowded and complex criminal justice field (see also Robinson et al 2016).

#### *'Making a difference' and the promise of innovation*

Some of the interviewees in our case study area were however relatively unconcerned about the prospect of private ownership, and even cautiously optimistic that it might enhance the organisation's effectiveness (see Robinson et al 2016; Burke et al 2016).

These staff placed a higher normative value on doing the job and 'making a difference' in the lives of offenders than on other values around public service, and they felt energised by the prospects of improved IT systems, the relaxation of national standards and a renewed emphasis on rehabilitation. As one middle manager in our study expressed it:

The reason I find this change exciting is because the system that I loved and always wanted to be a part of, I found stifling. I've always felt like I'm working with shackles on, that it's so rigid and it's so prescribed, and it didn't allow for

me, as an individual who has ... I'm an ideas kind of person; creative ideas and creative ways of working, which the probation system didn't allow for. Basically, TR goes, "let's just cut those chains off you".

These and similar comments were made in the early months of the CRC's operation, prior to share sale and the knowledge of who the new owners would be. Some two years on, however, they need to be read in the context of emerging knowledge about how CRCs have actually been operating. Much of what we know about the national picture of the reconfigured probation field, and the performance of CRCs, comes from the work of HM Inspectorate of Probation, and in particular the series of five reports on the early implementation of TR (HMIP 2015b, 2015c, 2015d; 2016a; 2016b). All of these reports have been quite critical of the work of CRCs in their first two years, and do not, collectively, suggest that there has been much emphasis on innovative approaches.

Other valuable evidence about the operation of CRCs in their first two years is provided by the National Audit Office (2016). Its report considers, among other issues, how the performance of CRCs may have been shaped by the new regulatory mechanisms and fee structures discussed above. As the report's authors point out, because the fee structures in the CRC contracts place such a major emphasis on meeting 'service levels' (i.e. quantitative performance targets), they limit the incentive on providers to focus on innovation/outcomes, which are rewarded by the (much smaller) PbR element. The NAO report offers an example from Warwickshire & West Mercia, where the former probation Trust and the new CRC (in its early months) had shifted their activities away from the delivery of established accredited programmes and moved toward the provision of more vocational services which it proposed would be more effective for most types of offender. The NAO reports that:



under the fee for service the CRC will lose £1.4 million of the payment it would have received for delivering accredited programmes, and will not recover the £1.1 million it had planned to spend on vocational rehabilitation (NAO 2016: 24).

This finding reflects our own research in a different CRC, where the Trust's recent and very enthusiastic development of non-programmatic desistance-based practices had to be abandoned in the context of the turmoil generated by TR, leaving staff to hope that the new owners would ultimately enable them to reinstate these. In light of the Warwickshire & West Mercia example, it seems likely that these staff will be disappointed. Somewhat perversely, then, it seems that CRCs may in practice be less likely and less 'free' to innovate in the pursuit of effectiveness than their predecessors (the Trusts) were.

The NAO report also reveals the very important fact that CRCs are experiencing significantly lower volumes of cases than was anticipated when their bids were being prepared. For a variety of reasons, volumes are reportedly down by between 6% and 36% against projected figures, and this may impact on the extent and pace of CRCs' plans for transforming their services, including plans for innovation (NAO 2016: 43-45). It may also of course trigger staff redundancies, which have already been experienced in some CRCs.<sup>xvi</sup>

### **Conclusion: a complex dynamic**

In this article we have introduced a framework for thinking about legitimacy in the probation context and sought to apply it to the contemporary issue of privatised probation services. Our framework emphasises the subjective nature of legitimacy and the multiplicity of stakeholders whose evaluations may be considered important. We

have argued that, for privatised probation services (CRCs), the pursuit of legitimacy is complicated by virtue of their particular polyarchic context (Zald 1978): unlike most commercial firms, which have a product to sell to identifiable customers whose demands or needs can be reasonably easily ascertained, CRCs have multiple constituencies to satisfy. These constituencies bring their own norms, values and expectations to bear on the evaluation of CRCs' legitimacy and, perhaps unsurprisingly, these do not necessarily map neatly onto one another. Furthermore, as we have endeavoured to demonstrate, we know rather more about the norms, values and expectations of some audiences than we do about others. For example, despite their importance as stakeholders, we currently know almost nothing about sentencers' perspectives on the legitimacy of CRCs; nor about whether or how these may be impacting on sentencing behaviour.

We have also shown that all constituencies are not equal, either in terms of the potential power of their legitimacy evaluations, or the precise implications (for CRCs) of their unfavourable judgements. Our analysis has highlighted the particular importance, for CRCs, of the expectations embedded in their contracts with NOMS. When these are not met, income is reduced, with potentially difficult consequences. However, our analysis suggests that CRCs should avoid focusing *all* their attention on this audience. We have argued that probation workers should be considered as a key constituency in probation's polyarchic context: their buy-in is key if CRCs are to retain a skilled and experienced workforce and wish to enhance their ability to deliver the sorts of services that offenders say they appreciate. We have also argued that the moral obligation to help improve offenders' lives which has animated probation work throughout its

history is now sharpened by a new instrumental imperative to deliver profits for shareholders.

All new organisations arguably face challenges in terms of establishing or building their legitimacy (Ashforth & Gibbs 1990; Suchman 1995; Zimmerman & Zeitz 2002) and, as new entities in the probation field, Community Rehabilitation Companies are no exception. They must grapple with the 'liability of newness' (Stinchcombe 1965), but also the liabilities associated with replacing an existing organisational entity with a long history, an established reputation and a loyal workforce. On the basis of the foregoing analysis, we suggest that CRCs have legitimation work to do<sup>xvii</sup>. We know little, however, about the extent to which CRCs and their senior representatives may be aware of the legitimacy deficits they potentially face, or the complex dynamics likely to be involved in its cultivation with different audiences.

An important conclusion to draw from our analysis is that the legitimacy challenges faced by CRCs are likely to fluctuate over time, as well as between constituencies. As McNeill & Robinson (2013) have argued, legitimacy may be characterised as fluid or 'liquid', such that it can ebb and flow in light of interactions and experiences which may alter – for better or worse - perceptions of the authority in question. For example, the effects of severing some supervisory relationships when staff and offenders were allocated between the new NPS and CRCs will now have subsided significantly, as will the intense dissatisfaction of some CRC staff who have now found jobs in the public sector NPS. By the same token, the passage of time will likely introduce new legitimacy issues, as the new owners bed in and implement their own particular changes. At the time of writing, CRCs are a little over two years old, and their new owners have been in place for almost eighteen months. To date, information about how the eight different

owners are approaching the task of managing 'their' CRCs is very limited; although one (Sodexo Justice Services which, with 6 CRCs, won the largest number of contracts) has already attracted considerable negative publicity for making immediate redundancies, introducing open-plan reporting centres and proposing to replace probation staff with kiosks that allow offenders to check-in electronically (Raynor & Vanstone 2015; Leftly 2016). It is, we think, particularly likely that probation workers and their representatives, and potentially sentencers, as well as ministers and civil servants, will begin to differentiate *between* CRCs as they accrue more direct and indirect experience of their practices, cultures and performance.

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## Notes

<sup>i</sup> CRCs operated as companies in public ownership for eight months, whilst bids to run them from a range of potential providers were scrutinised. On 1 February 2015 they transferred to eight providers under contracts worth around £3.7 billion over 7 years. They include Sodexo Justice Services (winning contracts for 6 CRCs) and Purple Futures, an Interserve-led partnership, winning 5 contracts. Durham Tees Valley is the only CRC not under private ownership (see NAO 2016).

<sup>ii</sup> Our own recent research examined the experiences of probation staff as they moved from one Probation Trust to a new CRC. This ethnographic study began in March 2014 and finished in June 2015, and involved over 100 individual and focus group interviews and approximately 120 hours of observations, engaging staff at every level within the new organisation. For more information about the study and its findings in respect of workers' identities and probation occupational cultures, see Robinson et al (2016) and Burke et al (2016).

<sup>iii</sup> The idea that offenders can be separated into categories of high, medium and low risk and that only the supervision of the former group constitutes 'public protection work' has been heavily criticised (e.g. see Robinson 2016).

<sup>iv</sup> Interviews with CRC and NPS service users carried out by HM Inspectorate of Probation as part of its programme of inspections of the early implementation of TR do not paint a particularly negative picture – though methodological issues mean that the samples interviewed are likely to be weighted towards more cooperative and perhaps more satisfied individuals (HMIP 2015b, 2015c, 2015d, 2016a, 2016b).

<sup>v</sup> The NAO (2016) report reveals that in the case of 5 CRCs, there was only one compliant bid at the final stage of the competition.

<sup>vi</sup> This has required the agreement of so-called 'rate cards' specifying and pricing relevant services (NAO 2016).

<sup>vii</sup> The CRC contracts specify 17 service levels and 7 'assurance metrics' for monthly reporting of performance. Activities are heavily weighted in favour of completion of unpaid work, accredited programmes and Rehabilitation Activity Requirements (NAO 2016: 25; see also NOMS 2016).

<sup>viii</sup> This opposition paved the way for the subsequent wholesale contracting out of electronic monitoring to private companies (Nellis & Bungerfeldt 2013).

<sup>ix</sup> <https://www.theguardian.com/society/2013/mar/21/probation-officers-social-media-gag-outsourcing> (accessed 27/09/16).

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<sup>x</sup> <https://www.theguardian.com/society/2013/oct/18/probation-officers-vote-strike-protest-privatisation> (accessed 10/08/16).

<sup>xi</sup> <http://www.independent.co.uk/news/uk/home-news/probation-officers-vote-for-strike-8888815.html> (accessed 10/08/16).

<sup>xii</sup> <https://www.theguardian.com/society/2014/feb/10/unions-challenge-sale-of-probation-service> (accessed 10/08/16).

<sup>xiii</sup> <https://www.napo.org.uk/sites/default/files/PR14-14%20Judicial%20Review.pdf> (accessed 10/08/16).

<sup>xiv</sup> <https://www.napo.org.uk/probation-union-warns-continuing-public-safety-concerns> (accessed 10/08/16).

<sup>xv</sup> The many statutory and non-statutory partners of probation services make up another external constituency that has not been considered in detail in this article, though see Clinks (2016) for perspectives on the post-TR probation field from the voluntary sector.

<sup>xvi</sup> For example, see: <https://www.napo.org.uk/news/sodexo-hits-probation-services-massive-redundancies-press-release> (accessed 19/08/16).

<sup>xvii</sup> The idea that authorities or rulers devote considerable time to the activity of justifying their power to themselves and constructing 'legitimizing identities' is explored by Barker (2001). A discussion of what is known about how CRCs seek to legitimate themselves is beyond the scope of this paper, but see Thumala et al (2011) for an engaging analysis of legitimation work in the private security sector.