

## **Response from the Employment Related Services Association to the Transforming Rehabilitation Consultation paper**

### **1. Introduction and overview**

- 1.1 Please accept this document as the response from the Employment Related Services Association (ERSA) to the Ministry of Justice consultation, 'Transforming Rehabilitation: A Revolution in the way we Manage Offenders'.
- 1.2 ERSA is the trade body for the employment related services sector, sometimes referred to as welfare to work. Its 120 members deliver the major government commissioned employment programmes, including the Work Programme, Youth Contract measures and Work Choice, plus a range of other smaller programmes, including the ESF Families Contract and Innovation Fund measures. The profile of membership is approximately evenly split between voluntary sector and private sector providers of services, with an increasing number of local authorities and housing associations also in membership.
- 1.3 As the trade body for the welfare to work industry it would be inappropriate to comment in detail on all areas of the consultation. Therefore the intention of this paper is twofold:
- Firstly to share officially with the Ministry of Justice some of the lessons learnt by the welfare to work sector through its experience of recently outsourced employment programmes commissioned on a payment by results basis; and
  - Secondly, to comment specifically on the potential interaction of the Ministry of Justice's rehabilitation programme intentions with existing employment services.
- 1.4 This response has been developed with the input of ERSA members and from discussion at the joint ERSA / AELP Offender Related Services Forum, which brings together a broader range of employment and skills providers, including prime contractors and subcontractors of the Work Programme.
- 1.5 Please note that ERSA would be willing to meet with the Ministry of Justice to share the learning from the employment related services sector. As part of this, it would be willing to convene groups of interested members who have particular experience which might be helpful in informing the design and management of the rehabilitation reforms.

### **2. Lessons from the employment related services sector**

- 2.1 Lessons from the employment related services sector can be divided roughly into four main areas:
- lessons from the design and commissioning process, particularly of the Work Programme;
  - lessons from the management and live running of the Work Programme and other employment programmes;
  - implications for voluntary and community sector organisations involved with payment by results contracts in the employment services arena;

- reflections on standards and compliance in relation to supply chain management.
- This paper covers each of these in turn.

### **3 Lessons from the design and commissioning process**

#### **3.1 Procurement timescale**

Putting in place a realistic procurement timetable will be essential to achieving good outcomes. The procurement timetable for the Work Programme, in particular, was very rapid. Although politically this made sense, this had a number of negative impacts:

- First, many potential prime contractors and subcontractors had insufficient time to seal subcontracting relationships prior to bids being submitted. This led to a situation whereby there were a significant number of 'in principle' type discussions, with some potential subcontractors then disappointed when these discussions did not lead to contracts. This in turn led to accusations by some smaller organisations of being used as 'bid candy'. ERSA would suggest that the Ministry of Justice consult potential providers on the proposed procurement timescales prior to the start of the competition and allow organisations to feedback any concerns.
- Rapid procurement timescales made it more difficult for some potential prime contractors to secure the financial backing they needed especially because funders were wary due to there being so many untried elements in the payment by results based contract. This was particularly the case for joint ventures and consortia, which ERSA understands are likely to be particularly encouraged under the transforming rehabilitation proposals.

#### **3.2 Financial issues**

ERSA understands the desire of the Ministry of Justice to make substantial savings over the next period, ending 2014/15. However, it should be noted that the introduction of a payment by results model may not straightforwardly equal substantial savings for the taxpayer. The experience of the welfare to work industry is that the operation of a payment by results programme, when operating on tight financial margins and high levels of working capital requirement, makes for a very cash sensitive model, where even small fluctuations in volumes of referrals or delays in achieving outcomes against original assumptions can lead to considerable financial stress to organisations at all stages of the supply chain. This may in turn lead to greater strain on working capital, potential provider withdrawal and a detrimental impact on outcomes overall. ERSA therefore welcomes the recognition by the Ministry of Justice of the need for a substantial level of attachment/service fee as part of the financial modelling

3.3 ERSA's recommendation is therefore that the Ministry of Justice works very closely with its provider base prior to agreeing the final financial model. Although it is understandable that the government will want the best deal possible for the taxpayer, too tight financial margins may make the programme unworkable overall.

#### **3.4 Programme design and target setting**

A similar important point is the need to design the programme in conjunction with industry experts, including organisations delivering services. There needs to be a shared understanding of performance assumptions and the evidence base underpinning these. Where evidence is not available, a process should be put in place for learning to be shared and performance expectations adjusted if necessary.

**3.5 Social finance**

It is worth noting that ERSA members currently tell us that it is easier to access mainstream funding from commercial lenders than social finance institutions, although the former is still a significant challenge with an untested programme. ERSA therefore recommends that the Ministry of Justice enters into dialogue with social finance organisations at a very early stage to test the overall financial model of the rehabilitation programme and consider whether there is a need to facilitate dialogue between the social finance world and potential bidders for the programme.

**3.6 Lot size and number**

ERSA recommends that the Ministry of Justice is clear at an early stage about the number of lots for which providers can bid. This was not clear at the commencement of Work Programme commissioning, with potential bidders unaware that the overall number of successful bids would be capped. This may have been the right decision, but the potential market needed to be aware of these rules at the outset.

3.7 The most obvious way to ensure a larger number of prime contractors are drawn from the not for profit sectors is to reduce the lot size. However, it is noted that the Ministry of Justice has already determined that economies of scale mean that there are likely to be 16 larger lots around the country. This has a range of implications, particularly for voluntary organisations, which are set out below.

**3.8 Assessment criteria**

There are a range of factors that need to be considered in relation to the assessment criteria for successful bids. Some of these are set out below:

- The manner in which organisational financial capacity is assessed needs to be carefully considered. A common concern from mid size and not for profit ERSA members during the procurement of the Work Programme was that government methodology did not accurately reflect their capacity in this respect.
- The balance between price/quality needs to be most carefully considered, with a recommendation from ERSA that at least 70% of the bid needs to be judged on quality. The Ministry of Justice will need to ensure that the design and content of its bidding forms do not lead any organisation to submit financially unsustainable bids.
- ERSA would suggest that the Ministry of Justice examine whether it might be possible to take track record into account, although ERSA recognises there are pros and cons with this. Track record, including in specific geographies, was not a factor in the assessment of bids for the Work Programme. Although this did have the advantage of bringing some very good players into the market, it also led to a great change in providers across the regions and huge TUPE flows of up to 10,000 staff. This had a serious negative impact on the early days of Work Programme delivery. It is also worth noting that some of the most highly performing Work Programme contracts feature providers who had built up a solid infrastructure and partnerships in their Contract Package Area under the Flexible New Deal and other predecessor programmes.

#### **4. Lessons from the live running of the Work Programme**

##### **4.1 Implementation timescales**

A key lesson from the early months of the Work Programme is that major change takes time. Although launched in June/July 2011, it took until approximately January 2012 for the Work Programme to be fully up and running. The intervening months were taken up with opening offices, managing TUPE and concluding contracts with subcontractors. Work Programme performance expectations however did not take into consideration the need for such ramp up. The recommendation to the Ministry of Justice is therefore to recognise that programme implementation on the scale envisaged is likely to take several months and therefore ensuring that existing provision is not run down over that period will be essential. ERSA suggests that Ministry of Justice consult with potential providers in relation to implementation expectations.

##### **4.2 Managing TUPE implications**

The TUPE implications of the start of the Work Programme were, as mentioned above, immense. A salary and benefit survey coordinated by ERSA in 2012 found that:

- 41.2% of respondents lost between 101-500 members of staff as a result of TUPE in the 12 months prior to April 2012.
- 23.5% of respondents had over 20 different sets of terms and conditions operating in their organisations.
- The complexity of managing the transfer process meant that 82.4% of respondents did not, as of April 2012, have terms and conditions harmonised within their organisations.

In addition, the uncertainty caused by the transfer of staff led to a significant proportion leaving the industry, with the subsequent impact on the profile of staff skills.

4.3 It is therefore recommended that the Ministry of Justice, as the commissioner, takes a leadership role in relation to managing TUPE. In the case of the Work Programme, ERSA provided the space, through its HR Forum, for up to 60 industry professionals to agree between them the probable applicability of TUPE, keeping in mind of course that this is an individual employment right. It may be therefore that the Ministry of Justice (a) takes and communicates a view on the applicability of TUPE regulations; (b) provides the space for industry co-ordinating conversations to take place; (c) provides information in a timely fashion, including details of public sector staff who may be transferring out to other providers; (d) considers and mediates the impact of the transfer of any public sector pensions schemes.

##### **4.4 Departmental relationship**

It is assumed that the Ministry of Justice relationship with its prime contractors will be a close one. However, ensuring that the Ministry of Justice has some mechanism to engage with subcontractors as well as prime contractors would also be a sensible move. Subcontractors will wish to have some level of dialogue with the department face to face, although their commercial relationship will obviously be with their prime contractors. It is acknowledged that this could lead to some level of complication, but it is felt that this could be managed with the right parameters in place.

##### **4.5 Ability to adapt and evolve**

Once the programme is fully up and running, it is recommended that the Ministry of Justice should be willing to change elements of the design, including potentially elements of the financial model,

in the light of substantially different circumstances and/or new information. In the case of employment programmes, the payment by results model has proved particularly susceptible to changes in the mix and flow of referrals. It is understood that the pipeline of referrals should be easier to predict with the Ministry of Justice's programme, however, lessons from Payment Group 9 of the Work Programme (JSA prison leavers mandated from day one of release) indicate that a substantial number of prison leavers 'do not attach', leading to a lower than expected cohort of jobseekers in this group on the programme. There are a number of reasons for this, not least geographical mismatch between place of release and ex offenders' actual home. Ensuring that the Ministry of Justice's programme can adapt as and when similar information comes to light is essential.

#### 4.6 **Local partnerships and payment by results**

ERSA also notes and welcomes the government's intention to develop integrated partnerships of organisations to support clients at local level. It is important to note, however, that at local level some of the types of service that could be most helpful to supporting clients of the programme have faced substantial funding cuts, particularly from local authorities. This has implications for the Ministry of Justice's payment by results contract. To give an example, if there is a local service (say drug rehabilitation) which has received funding cuts and it is asked to provide services to a client of the Ministry of Justice's new programme, it is likely that they will expect payment for this from the organisation who will eventually receive the outcome fee for reducing that person's reoffending. In the past, it may have been possible to combine funding streams around individuals. In an age of austerity this may not be possible in quite the same way. This therefore means that the Ministry of Justice's programme may need to be sufficiently well funded to provide for such relatively expensive services. This has failed to be the case with the Work Programme and a new pilot, which provides additional income around alcohol and drug dependency, has now been introduced.

### 5. **Implications for voluntary and community sector organisations involved with payment by results contracts in the employment services arena**

#### 5.1 **Financial issues**

ERSA strongly welcomes the Ministry of Justice's intention to ensure that the expertise of voluntary organisations is strongly utilised by its rehabilitation revolution agenda. Undoubtedly some of the most effective organisations in supporting ex offenders are community based. As such, the Ministry of Justice's acknowledgement of the difficulties such organisations would face in terms of accessing working capital and managing cashflow on a payment by results contract, even with a relatively generous up front payment, is welcome.

5.2 ERSA also notes that the Ministry of Justice is interested in voluntary organisations acting in a prime capacity, either singly, in joint ventures or in consortia, potentially utilising the financial assets of commercial partners to make this commercial viable. Again, such arrangements would be strongly welcomed, particularly if models could be developed which could in turn inform providers of employment related services for future use.

5.3 However, ERSA would caution against the Ministry of Justice backing a model which ruled out some level of risk sharing in the supply chain. First, many larger providers in supply chains can bear some level of financial risk. Secondly, requiring the prime contractor to bear all or the substantial amount

of risk may perversely stop high performing voluntary organisations, either singly or in partnership with other voluntary organisations, acting as prime contractors.

#### 5.4 **Contracts**

The Ministry of Justice should be careful when drawing up contract terms. Very one sided contracts in terms of penalties and liabilities may scare off potential bidders from the voluntary sector in particular as well as potential funders. Contract terms should also avoid any 'gagging' type clause at prime contractor level. First, some of the prime contractors may well be campaigning charities, who need an independent voice. Secondly, contract terms have a way of being cascaded down supply chains and therefore this may end up putting off voluntary organisations at that level. Be prepared to allow difference.

#### 5.5 **Supporting subcontractors**

ERSA has undertaken considerable work to try to ease the burden on subcontractors in future. In particular, it developed, in partnership with both prime contractors and subcontractors, a standardised Expression of Interest (EOI) form which is just about to be fully automated on the Merlin Standard webportal. Some subcontractors for the Work Programme submitted over 100 Expressions of Interest. This level of work load on subcontractors should absolutely not be replicated again through the Ministry of Justice contracts. Developing a standardised EOI up front, in partnership with potential providers, is therefore strongly recommended.

5.6 Similarly ERSA has developed a 'Things you should know' self assessment check list to help potential subcontractors assess whether entering into a supply chain relationship is the best thing for them. ERSA would be happy to share this, along with the EOI, with the Ministry of Justice<sup>1</sup>.

5.7 ERSA is particularly pleased that the Ministry of Justice is already recognising the need to build capacity among the voluntary sector in order to play their part in these contracts. This was not done with the employment related services sector in time. ERSA would urge that such capacity building should cover understanding contract terms and financial modelling, both of which have been a strain for some smaller voluntary organisations.

### 6. **Reflections on standards and compliance in relation to supply chain management**

6.1 The need for an effective standard for supply chain management is essential and ERSA welcomes the recognition of this in the Ministry of Justice's paper. However, it believes that not only should the standard 'align' with the existing Merlin Standard, but should be the Merlin Standard, with whatever adjustments are needed to suit the new market. There are two reasons for this view. First, the Merlin Standard, took over four years to develop by a partnership of organisations, including ACEVO who first recommended its development, and has had considerable investment by government. It was always intended to be a pan government standard and therefore to risk confusing and adding costs to the market by introducing a parallel standard would be nonsensical. Secondly, Merlin is now one year into its operation. It is therefore timely to review its effectiveness and make adjustments to ensure that it is fit for purpose. There is therefore an open invitation from the Merlin Advisory Board to the Ministry of Justice to review and adapt the standard to meet

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<sup>1</sup> See ERSA's ['Checklist for organisations considering becoming subcontractors'](#) (2012)

its intentions rather than invest in the development of something else which has exactly the same objectives.

## 7. Interaction with existing employment programmes

7.1 The desire set out in the Ministry of Justice's consultation paper on ensuring that the rehabilitation programme to be put in place and existing employment programmes is helpful. ERSA asks that the following points be considered:

- It would be helpful if lot boundaries were coterminous with Work Programme Contract Package Areas.
- Data sharing between the criminal justice system and employment related services providers has been problematic, particularly in relation to offender learning information and employment aims. The introduction of this programme may provide an opportunity to put in place the protocols which will ease transition between different elements of provision<sup>2</sup>.
- The ESF Families programme provides not only potentially useful provision, but could potentially provide support to other family members of those accessing the Ministry of Justice's provision.
- There are likely to be a number of different agencies working with prison leavers. Based on ERSA's early review of the implementation of Payment Group nine on the Work Programme we strongly recommend that one agency should be given the leading role to coordinate support and improve the flow of information between the different support agencies<sup>3</sup>.

7.2 ERSA is willing to work with the Ministry of Justice to scope and model the range of potential interactions with employment programmes through its members.

## 8. Conclusions and checklist of recommendations

8.1 In conclusion, ERSA is strongly supportive of the Ministry of Justice's aims and believes that the introduction of a carefully designed and measured payment by results programme featuring strong partnerships of expert organisations has the potential to decrease the levels of offending in society. However, there are risks. ERSA's main recommendations are therefore set out below:

### Design and commissioning

1. Ensure there is a sufficient procurement timescale in order to allow potential prime contractors and subcontractors to progress dialogue and access finance.
2. Develop the financial model in partnership with providers and other experts. Understand the potential sensitivities in the model to levels of change and the implications of these on providers and delivery.
3. Base performance assumptions on evidence and share the basis on which targets are being set with the industry.
4. Enter into dialogue with social finance institutions at an early stage and facilitate dialogue to maximise the chance of social finance being able to play its part as a investment mechanism.

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<sup>2</sup> See ERSA's paper on '[Recommendations for improving data sharing arrangements](#)' (2012)

<sup>3</sup> See ERSA's paper on '[Early review of JSA Prison Leaver provision via the Work Programme](#)' (2012)

5. Think carefully about tender assessment criteria. Weigh the balance between assessment on quality versus price 70% in favour of quality. Look carefully at the way in which financial capacity is assessed. Explore taking track record into account when assessing bids.

#### **Implementation and live running**

6. Be realistic about implementation timetables and the scale of change providers may need to manage in the early days of the contracts.
7. Provide leadership in relation to TUPE.
8. Ensure there is a mechanism for some level of departmental relationship between the commissioning department and subcontractors.
9. Be willing to adapt and evolve the model in the light of new information.

#### **Voluntary sector implications**

10. Allow some level of financial risk sharing with at least some subcontractors. Expecting the prime contractor to take all/most risk is likely to prove a barrier to mid size organisations, including many who are from the voluntary sector to act as a prime contractor, either singly or as part of a joint venture or consortium.
11. Take the pain out of the bidding process for subcontractors. Build on ERSA's work and provide a standardised Expression of Interest form.
12. Be careful in the balance of liabilities and indemnities. Contract terms have a habit of flowing down supply chains.
13. Invest in significant support for smaller potential subcontractors, particularly around financial modelling and understanding contracts.

#### **Supply chain management standards**

14. Ensure that robust supply chain management terms are in place. However, build on the Merlin Standard rather than duplicating the standard. The Merlin Advisory Board is issuing an open invitation for dialogue about how it can be adapted to suit the Ministry of Justice aims.

#### **Interaction with employment programmes**

15. Think carefully about the interaction with employment programmes. In particular, how can data sharing between the criminal justice system and employment related services providers be facilitated.
16. Use ERSA as a conduit for dialogue with the employment related services sector about interaction with employment support programmes.

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