

Market-based justice?

Dexter Whitfield examines the increasing 'marketisation' of criminal justice.

The government's modernisation strategy is being implemented with equal vigour in the criminal justice system as it is in health, education and other public services. New Labour's neoliberal ideology means that there can be no special case or recognition of different principles in the police, courts, probation or prison services. The criminal justice agenda is competition, commissioning, contestability and 'managed choice for clients' with all reforms 'directed towards achieving a market-based outcome'.

It is important to stress at the outset that reform and reorganisation to improve the criminal justice system is not being challenged but the government's obsession with a market-based approach and deregulation of the legal services sector.

The marketisation of criminal justice is happening in five ways.

Firstly, services are revised and changed so that they can be specified and packaged in a contract, thus extending outsourcing and offshoring. Each function or service is clearly identified and separated from others so that standards, organisational and management structures, equipment and assets can be allocated to the service and thus identified in a contract.

Secondly, the organisation of work, staffing levels, rotas, local terms and conditions of service are reviewed alongside the specification of the service so that each task can be allocated the minimum number of trained or qualified staff. Working practices, procedures and the use of information and communications technology are reviewed to minimise the labour content.

Each function or service will have an assigned staffing level which facilitates their transfer or outsourcing to another employer. The TUPE regulations provide staff with a degree of protection but also contribute to the commodification of labour by assisting their transfer between employers.

Thirdly, government departments and public sector organisations are restructured so that they can accommodate competition and market mechanisms. This includes reorganisation, changing financial systems, mainstreaming procurement and contracting for all services, changing regulations and engaging directly with private companies.

Commissioning requires the separation of client and contractor roles with the client/commissioner being responsible for planning, procurement and contract management. Although in-house bids were common in market testing in the 1990s, the commissioning role frequently does not include the preparation of in-house bids. In other words, commissioning is outsourcing.

Organising the procurement process is a key part of the commissioning role. It requires preparing specifications and contracts, advertising and managing procurement, evaluating bids and monitoring contracts whilst complying with European Union and British public contracting regulations. Many public bodies hire management consultants, lawyers and financial advisers to help them through this process which means that procurement is usually a costly process.

NOMS and the corrections market

The National Offender Management Service (NOMS) was launched in 2004 to combine the prison and probation services with the aim of reducing reoffending. NOMS is designed to be a commissioning organisation and has appointed ten regional commissioners to manage the procurement process. "Opening up the 'corrections market' will allow many more organisations to bring their skills and expertise to bear in helping offenders to turn away from crime" is how the Home Office describes this (Home Office, 2005).

The NOMS Strategic Business Case identifies key work areas which include a switch to commissioning, 'performance testing' of prisons where they are challenged to improve or are market tested or contracted out, market testing of probation services, and future investment and estate rationalisation to increase competition and a wider range of suppliers. "The market in NOMS community services is less well developed and we will devise a targeted market testing strategy to improve quality and value for money" (*ibid*).

The first stage of prison tendering started last year with the tendering of a cluster of prisons on the Isle of Sheppey. The 'Performance Tests' or market testing were won by the in-house teams which led to the Home Secretary reassuring the private sector that he "remained fully committed to encouraging a fully contestable and plural market" (HM Prison Service, 2005). The three prisons got three-year Service Level Agreements, a very short period compared to long-term private sector contracts.

Probation services

Despite strong opposition to the tendering of probation services, the government has merely delayed the timetable. Performance assessments will be carried out in each probation area in the next twelve months and where standards are not met services will be put out to tender. A contestability prospectus is expected to be published shortly which will set out how competition will be introduced in

the prison and probation services over the next five years. The government is keen to build up the capacity of voluntary sector organisations so that they can bid to provide public services, and more specifically probation services. This has included specific grants and support.

Market reforms for legal aid

A national roll-out of competitive tendering is planned to start in April 2009. Prior to this a national programme of peer review assessments is expected to start in January 2007 'for all firms seeking a place in the new market'. 'Suppliers' will be encouraged to provide a wider range of civil and family law services. The Legal Services Commission must draw up new contract boundary areas and a new methodology for allocating criminal defence work. A new police station procurement scheme based on fixed fees per case (including travel and waiting time) will be introduced and the fixed fees model will also apply to civil and family work.

Last autumn's *Future of Legal Services* White Paper accepted Sir David Clementi's recommendations to establish a new regulatory framework for legal services 'to put the consumer first'. The new framework is intended to deregulate the legal services sector, abolish anti-competitive rules and set up a new Legal Services Board with statutory powers. A new Office for Legal Complaints will deal with 'consumer complaints'.

Wider use of private finance

By March 2006 there were 44 Private Finance Initiative (PFI) projects in the prison, police and court services accounting for £1,120m capital expenditure with many more at the planning and procurement stages. PFI has enabled private companies to expand the range of outsourced services in the criminal justice system.

The fourth aspect of marketisation is that democratic accountability and user involvement is restructured – services and functions are transferred to quangos; arm's length companies and trusts and privately controlled companies are established within public bodies.

Probation Boards will be replaced by probation trusts which will have contracts with NOMS. Probation staff will be transferred to trusts which will also be able to negotiate terms and conditions, possibly resulting in the end of national pay bargaining.

Finally, business is more involved in the public policy making process and also promotes national, European and global liberalisation of public services.

So the same market mechanisms which are being introduced into health and education are also being implemented in the criminal justice system – trusts, commissioning, market testing, outsourcing, deregulation and private finance. They are packaged in neoliberal ideology and language which treats all service users as customers.

New Labour's plans are rooted in their belief that:

- Competition drives down costs.
- The private sector is more efficient than the public sector.
- Competition helps to limit producer power (by which they mean trade union power).
- Individual choice in public services will improve the quality

of services.

- It is essential to provide choice for the middle class who will otherwise opt out of public services, which will be reduced to residualised services.
- Choice will reduce inequality because market forces are a more equalising mechanism than political voice, which the middle classes have traditionally used to benefit most from public services.
- Local authorities and public bodies should be restricted to commissioning in order to create the space for the private sector to develop more innovative ways of delivering services.

The consequences of marketisation

A costly consequence of marketisation will be that resources will be diverted into transactional costs. The *Carter Review* of legal aid noted that the cost of administering legal aid has risen rapidly to five per cent of the budget – but procurement and contracting costs alone are almost certain to exceed five per cent. The *Partial Regulatory Impact Assessment* for NOMS estimated competition costs for new prisons of £1.1m per prison, market testing prisons £0.7m, performance testing prisons £0.35m, market testing 42 probation areas £12.5m, contract compliance £2.1m and contract management costs of 1.2 per cent, a total cost £17m per annum (NOMS Partial RIA, November 2005). These are very low compared to transaction costs in other public sector organisations.

Other impacts could include: the loss of public service principles, values and ethos and the increasing dominance of a contracting culture; more fragmented services and disjointed delivery as services are divided into a plethora of contracts and some contractors fail to achieve the required standards; and new intensive pressure on jobs, terms and conditions and trade union representation and fragmentation having to cope with a plethora of potential new employers. A public monopoly is likely to be replaced by a private monopoly as transnational companies gain market share, and democratic accountability will be eroded as regulators and arm's length trusts form new barriers to scrutiny and transparency. ■

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