CLINKS RESPONSE

supporting voluntary organisations that work with offenders and their families

Clinks response to Ministry of Justice consultation on the Industry Standard Partnering Agreement

February 2014

About Clinks

Clinks is the national infrastructure organisation supporting Voluntary, Community and Social Enterprise (VCSE) sector organisations working with offenders and their families. Our aim is to ensure the sector and all those with whom it works, are informed and engaged in order to transform the lives of offenders and their communities. We do this by providing specialist support, with a particular focus on smaller voluntary sector organisations, to inform them about changes in policy and commissioning, and to help them build effective partnerships and provide innovative services that respond directly to the needs of their service users.

Founded in 1993, and registered as a charity in 1998, we have over 600 member organisations, including the sector's largest providers as well as its smallest. Our vision is of a vibrant and independent voluntary sector working with informed and engaged communities to enable the rehabilitation of offenders.

About this response

Clinks' interest in the Industry Standard Partnering Agreement (ISPA) stems from our role in supporting and representing the wider VCSE sector; we are not a potential provider of services under Transforming Rehabilitation (TR).

The ISPA is the key practical document for voluntary organisations who are considering entering the new supply chains. Although it is designed to govern subcontracting arrangements in any future Ministry of Justice (MoJ) contracts, it has been keenly awaited with specific reference to TR since the start of the competition.

Clinks has therefore taken a keen interest in the ISPA and its role in ensuring that the VCSE sector is able to participate to its full potential in the new rehabilitation landscape, in line with the Government's original vision of "opening up the market to a diverse range of new rehabilitation providers, so that we get the best out of the public, voluntary and private sectors, at the local as well as national level".[1]

In our response, we have opted to concentrate on giving a general overview of our thoughts and suggestions, largely responding to questions 2, 3 and 6, though this will also cover the specific points raised in questions 4 and 5 (on length of contract and the questionnaire). We have no specific comments to make in answer to question 1, as we consider the explanatory guide to be clearly written, though it will be clear from the substance of our response that we also feel it lacks detail in some areas.

We refer to contractors as "Tier1s" throughout, in line with the pre-existing TR terminology, and to maintain clarity for our members in reading this response.

[1] Ministry of Justice (2013:6), 'Transforming Rehabilitation: A Strategy for Reform', Online: https://consult.justice.gov.uk/digital-communications/transforming-rehabilitation, last accessed 20/02/2014.

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Risk questionnaire and market stewardship

When the market stewardship core principles were published, at the Pre-Qualification Questionnaire stage of the competition in September 2013, the commitment was given that subsequent contract documentation, including the ISPA, would "embed the market stewardship principles robustly."[2] This followed the pledge in "Transforming Rehabilitation: A Strategy for Reform" that contracts would "ensure fair, reasonable and transparent treatment aligned to best industry practice of all those involved in the direct and indirect provision of services."[3]

One of the key areas covered by the market stewardship principles was risk. This should be "appropriately managed" which includes "not passing risk down supply chains disproportionately, the management of volume fluctuations and other events and the management of intellectual property rights."[4]

We communicated this to our members, indicating that we hoped for more detail on how disproportionate risk would be defined and prevented when the ISPA was published, and that it should at least "require the Tier 1s to stipulate how much risk they intend to pass down."[5]

Clinks therefore welcomes the fact that the ISPA includes a questionnaire, to be completed by both parties, setting out how risk will be allocated and quantified, which the Tier 1 provider will then discuss with the MoJ. This is a positive step towards transparency between the contracting parties.

However, the questionnaire does not by itself ensure that disproportionate risk will not be passed down, especially given the significant inequality of bargaining power between a large Tier 1 provider and a much smaller VCSE organisation. Without safeguards against subcontractors being put under pressure to accept inappropriate risk, the questionnaire may instead cause that pressure to intensify around the specific moment of signing it. There are currently no requirements for the market stewardship principles to be honoured, either during negotiations leading to the questionnaire being completed, or for the life of the contract afterwards. We believe that this is an area where protections need to be strengthened, and for the statutory bodies to be more pro-active.

Recommendation one: We therefore recommend that specific and ongoing obligations on the Tier 1s to behave in line with the market stewardship principles should be added to the ISPA, and that a similar obligation should also apply during the negotiation stage. These obligations should be monitored by MoJ and NOMS, and should also appear explicitly within the agreement itself, so that the Tier 2 would have access to some form of redress.

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[2] Ministry of Justice (2013:8), 'Principles of Competition', Online: http://www.justice.gov.uk/downloads/rehab-prog/competition/moj-principles-of-competition.pdf, (last accessed 20/02/2014)
[3] Ministry of Justice (2013:6), 'Transforming Rehabilitation: A Strategy for Reform', Online: https://consult.justice.gov.uk/digital-communications/transforming-rehabilitation, last accessed 20/02/2014.
[4] Ministry of Justice (2013: 7), 'Principles of Competition', Online: http://www.justice.gov.uk/downloads/rehab-prog/competition/moj-principles-of-competition.pdf, (last accessed 20/02/2014)
[5] Clinks (2013) 'TR So Far (3): Does it give a fair deal to the VCSE sector?' Online: http://www.clinks.org/community/blog-posts/tr-so-far-3-does-it-give-fair-deal-vcse-sector , (last accessed 20/02/2014).

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Resolving disputes

In addition to the risk questionnaire, there are some key areas of the ISPA where we feel there is still the potential for unfairness because no resolution process other than legal action is provided. VCSE organisations have fewer resources in order to bring legal proceedings, and it is of course in all parties' interests to avert this where possible.

One of the key concerns for VCSE organisations in the day-to-day running of services is dealing with fluctuations in the volume of referrals received. In the event that the Tier 1 and subcontractor cannot agree on how fluctuations have affected the fees that the subcontractor should be paid, mediation is mentioned as a solution in the ISPA, but is not currently binding. Clinks believes that there is scope for VCSE organisations to be seriously damaged by reductions in referrals, given that many providers are very small and have limited reserves, and would argue for a clearer dispute resolution process.

Two other key areas of potential disagreement with significant consequences are over material breach, and dependencies giving rise to Relief Events. Material breach is not defined either in the ISPA itself or in the explanatory guide; our understanding is that "material breach" is a comparatively low bar and might lead to contract termination for very minor infractions by the subcontractor. We believe that an alternative of "substantial material breach" might be preferable, but in any case would again want to see further consideration of how to resolve disputes over whether a breach meets the criteria.

Similarly, there is currently no detail in the ISPA of what might constitute a dependency, which would lead to a Relief Event if the Tier 1 failed to carry it out. The explanatory guide currently indicates that it will fall to subcontractors themselves to identify dependencies; it also places the burden of proof upon the subcontractor to persuade the Tier 1 to its "reasonable satisfaction" (as per Clause 8.1(c)(iii)) that they should qualify for a relief event. There is a risk of unfairness, which is exacerbated by the fact that the subcontractor will have a limited timeframe in which to qualify for a Relief Event: staff and volunteers in VCSE organisations are more likely to work on a part-time basis and hence to have difficulty meeting this kind of deadline. Again, Clinks would like to see more provisions in place for dealing with any disputes more equitably.

The final two examples relate to the specific culture and ethics of voluntary organisations. Public trust in the sector's reputation is one of the key factors in its success, and this extends to how it approaches partnership, and with whom. The ISPA currently provides for the Tier 1 to be replaced by the contracting authority in certain circumstances, even though the ISPA itself remains in place. This would mean the VCSE providers may find themselves in a relationship with a wholly different organisation, and can only then terminate for this reason with the authority's consent. We believe that there should be provisions for the subcontractor to be consulted and raise any concerns in such cases.

We suggest that this does not reflect the "alignment of ethos" market stewardship principle, which recognises that "there should be an understanding of what is important to both parties and this should go on to form part of the contractual agreement ... this is an important expectation for

many organisations and key to building trust, especially in the early stages of such business relationships."[6]

Similarly, the current confidentiality provisions do not in our view make appropriate provision for the whistle-blowing role that the public would expect the sector to play, in cases of mistreatment or bad practice by Tier 1 organisations. In our understanding, even flagging such concerns to NOMS might put the subcontractor in breach. For this reason, we again suggest that a dispute resolution process is needed for cases where subcontractors feel that there is a legitimate reason to share information.

Recommendation two: Our second recommendation is therefore that a process for resolving disputes on key aspects of the subcontracting relationship be developed as part of the final ISPA. This could take the form of binding mediation, or a specific independent adjudicator or ombudsman being identified. We believe that this would help to ensure both that legal proceedings are not commenced unnecessarily, and that VCSE organisations do not come under undue pressure to accept unfair or damaging behaviour.

Minimum volume levels

In addition to the question of volume fluctuations, we note that the ISPA does not currently require the Tier 1 to provide any guarantee that the subcontractor will receive referrals at all. This of course poses even more serious risks to VCSE subcontractors than reductions in predicted volume do. It also prevents good planning and resource allocation, and hence threatens to make subcontracting relationships less efficient for the Tier 1.

Recommendation three: Our third recommendation would therefore be for Tier 1s to be required to establish minimum levels of referrals for their subcontractors, and thus a basic fee; referrals above this level would then be paid for separately.

Intellectual Property

Also included in the risk section of the market stewardship principles is the issue of intellectual property rights (IPR). This is a particular concern for the VCSE sector, and one which our members have already begun to raise with us. The current ISPA requires the subcontractor to licence NOMS to use its intellectual property "to the extent necessary to receive and use the services" (Clause 19.5). Clause 19.6(c) goes on to state that Tier 1s may continue to use the subcontractor's IPR even if the agreement is terminated.

This appears to open up the possibility that Tier 1s could therefore pass the IPR on to other subcontractors, who would then be able to replicate the services designed by the VCSE provider. Clinks is aware that this is a complex area of law, and that this may be an extreme example. However, we do believe it is essential for the success of TR that it takes fully into account the distinctiveness and specialism of the VCSE sector's offer to providers, and ensures that steps are taken to protect these key assets.

The Secretary of State for Justice, Chris Grayling, has himself noted that:

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[6] Ministry of Justice (2013: 7), 'Principles of Competition', Online: http://www.justice.gov.uk/downloads/rehab-prog/competition/moj-principles-of-competition.pdf, (last accessed 20/02/2014)

"I'm very clear there is a level of expertise to be found in the voluntary sector that cannot be found elsewhere... I want efficiency, I want a system that is not bureaucratic, but I do not want the private sector to come and own all of this. They haven't got the expertise to do it."[7]

The Centre for Social Justice have also pointed out that the sector has specific qualities that are not replicated elsewhere:

"We have seen some excellent examples of the ways in which these organisations can deliver the transformational services that will be critical if we are to successfully reduce reoffending. These voluntary organisations often bring something unique to the areas they work in, such as a strong connection with communities and an acute responsiveness to the distinct needs of individuals."[8]

This is particularly true of those "additional rehabilitative activities" which are not core to the new services, but which providers may wish to include in pursuance of further reductions in reoffending, such as mentoring. [9] By definition, these are likely to be innovative and original services, most often pioneered by the VCSE sector as a result of its specific commitment to the needs of communities and services users. In our view, it would then be a poor return to the sector for this pioneering and imaginative work if its ability to continue to deliver these services in future were in any way undermined by taking part.

An obvious example is arts interventions: though not originally designed with the specific purpose of reducing reoffending, these have nevertheless been linked to intermediate outcomes on the path to desistance from crime, as well as to improved willingness to engage with prison regimes[10], and are therefore a valuable option for Tier 1s to consider in their offer.

Recommendation four: Clinks would recommend further engagement with the sector in order to address its concerns, and to ensure that the market stewardship principle of reward and recognition are also respected in relation to intellectual property rights.

Contract Period

Clinks welcomes the clarification provided by the ISPA over the length of the contracts that subcontractors can expect to sign. In our view, minimum three-year contracts are in line with best practice for VCSE organisations, for whom shorter-term funding is often a significant challenge, but for whom very long contracts are also often unrealistic given the insecurity of other funding. Three-year contracts are also short enough to ensure that VCSE providers who may wish to consider joining supply chains further down the line, but are not able to do so immediately, will have the option to do so; this in turn minimises the risk that VCSE organisations will rush to sign contracts for which they are not yet ready, out of fear that they will otherwise be shut out of the market for the foreseeable future.

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[7] Justice Secretary's Speech at Centre for Social Justice, 23rd July 2013, 'The new probation landscape: why the voluntary sector matters if we are going to reduce reoffending' Online: http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/landscape.pdf (last accessed 20/02/2014).

[8] ibid p.5.

[9] Ministry of Justice (2014:29) 'Target Operating Model- Version 2' Online: http://www.justice.gov.uk/downloads/rehab-prog/competition/target-operating-model-2.pdf (last accessed 20/02/2014).

[10] National Offender Management Service (2013) 'Intermediate outcomes of arts projects: a rapid evidence assessment' Online, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254450/Intermediate-outcomes-of-arts-projects.pdf (last accessed 20/02/2014).

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Dependencies and NOMS

Additionally, subcontractors will depend directly on some actions by NOMS or the MoJ themselves, such as access to prisons to carry out services. There is currently no provision in the event that statutory bodies do not carry out their obligations in this respect, and no requirement for the Tier 1 to undertake a brokering role to help prevent this, even though these could potentially leave subcontractors in breach of the ISPA.

Recommendation five: Clinks therefore recommends that the need to identify these additional dependencies should also be added to the ISPA, along with the provision of Relief Events where this is the case, and Tier 1s given a duty to work with NOMS and the MoJ to ensure that these dependencies are carried out.

Impact on Tier 3

Finally, Clinks would observe that, although the ISPA is primarily intended to govern relationships between Tier 1 and Tier 2 of supply chains, it will also be significant in setting the expectations of Tier 3 organisations. NOMS and the MOJ should bear in mind that many of the concerns we highlight in the foregoing response are particularly acute in respect of small and very localised providers, whose interests must also be considered when the final ISPA is drafted.

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