

Submission
No 4

**INQUIRY INTO THE PRIVATISATION OF PRISONS AND
PRISON-RELATED SERVICES**

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The Director
General Purpose Standing Committee No. 3
Parliament House
Macquarie St
Sydney NSW 2000
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Dear Director

Inquiry into prison privatisation

I write with respect to your Committee's inquiry into the possible effects of prison privatisation and of the privatisation of prison services. I will keep my submission brief, but extra material can be found in two contributions to a collection of essays in L Pearson, C Harlow and M Taggart (eds), *Administrative Law in a Changing State* (Hart Publishing, Oxford, 2008). They are Alfred C Aman Jr, "Politics, Policy and Outsourcing in the United States: the Role of Administrative Law" (pp 205-221); and Richard Rawlings, "Poetic Justice: Public Contracting and the Case of the London Tube" (pp 223-246).

Governments can have a number of reasons for considering the privatisation of prison assets or prison services, but I strongly suspect that the present government's primary concerns revolve around cost savings and debt stabilisation, if not debt reduction. I will not address those economic issues. Rather, in what follows, I shall assume that the government is minded to pursue privatisation options to some extent, and I will confine myself to issues that need to be addressed to make those options work well.

A number of factors affect whether privatisation works well. I will address these very briefly:

1. Some of the relatively recent privatisation projects have drawn huge political criticism, but not until the government has found itself locked in to the relevant contractual regimes. Governments seeking to alter unwise but binding contractual obligations face significant additional costs to pay for variations, or even worse, might have to pick up the pieces after the failure of the principal private sector contractor.

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It has sometimes been the case that the problems which do emerge were either predicted by those in opposition to the whole project, or could have been predicted if the public had had more of a say in the requirements of any contracting regime. Hindsight is a wonderful thing, but we should be able to learn from our mistakes the next time around. I suggest that if the government goes ahead with prison privatisation, then it should engage in a reasonably open debate with all stakeholders as to the terms or possible terms of the contracting regime to be adopted. Not all of the terms, of course, but terms relating to overall objectives, key performance indicators, securities against financial failure, and other risk factors.

For example, without in any way contradicting the government's policy of being tough on crime, it would be an advantage to require prison management to adopt strategies (so far as possible) that seek to minimise recidivism. The social and economic benefits of that are obvious.

2. The principal contracting regime should require regular independent reviews to measure performance against the contractual performance standards.
3. Treasury forecasts of the costs and savings to be achieved should be open, and information should be collected and made publicly available at regular intervals, so that the public can assess the forecasts' accuracy.
4. Most large privatisation and outsourcing regimes involve a series of cascading contracts, sub-contracts and so on. One of the lessons to be learned from the failure of the contractual regime governing the London Tube modernisation program is that the head contractor should provide securities against the possible failures not only of its own performance, but the performance of those beneath it in the contractual chain. The latter would be unnecessary if all parties remained solvent, but that wasn't the case for the London Tube. There, the head contractor went into liquidation, and its subcontractors were able without any penalty to enter new contracts with the government (which came in to rescue the project), even though in some cases they had been closely related to the head contractor.
5. Legislation needs to make clear that prisoners' civil rights and their existing rights of appeal and judicial review should remain unaffected by any move to privatisation of prison services. For the purposes of appeal and judicial review rights (eg, in relation to disciplinary proceedings), this would mean that legislation would deem actions or decisions taken by private sector staff as having been taken by the Department or prison governor. For the purposes of civil rights, the government should remain the defendant of last resort if the employer of the private sector staff should fail financially.
6. As has already happened with the legislation governing the Commonwealth Ombudsman, the State Ombudsman's legislation should be extended to take in prison contractors.
7. Finally, it is in the public interest to ensure a certain measure of transparency as to the government's contractual requirements and costs. The FOI legislation has in the past been difficult to use in this context, because contractors have understandably sought to include confidentiality clauses in their contracts. There are two ways of getting around that. The

first option is to modify the *FOI* legislation itself, along the lines already achieved in the ACT. The second option is probably easier to achieve, but open to abuse by governments seeking to minimise transparency. It is to insist on the insertion into all relevant contracts of a clause that ensures that certain information and clauses (such as price, and key performance indicators) are to remain open to *FOI* access despite that Act's *prima facie* protection of confidential documents.

I do hope that this submission is of some assistance.

Yours faithfully

A handwritten signature in black ink, appearing to read 'M. I. Aronson', with a horizontal line underneath the name.

M I Aronson.