

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

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Submission to
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by
The Serco Institute

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Preface

This submission is made by the Serco Institute, a research institution wholly funded by Serco Group plc, the global public service company, but with no direct connection to the commercial operations of the business. The Institute first studied prison contracting in 2003, whilst preparing a report for the Confederation of British Industry. Since that date, we have also published a comparative analysis of different corrections markets around the world, and a survey of the published studies on value-for-money benefits from competition and contracting for prison management. At present we are in the final stages of a report on the origins and development of prison contracting in the United Kingdom.

Throughout this submission we use the term 'contracting' rather than 'privatisation'. Outside of the United States, the term 'privatisation' is generally confined to situations where governments divest themselves of the ownership of assets and the associated services, and exercise control through arms-length regulation (such as automobile plants, airlines and utilities). The operation of custodial services is a core function of government, for which it cannot divest responsibility. Private providers are engaged through contractual mechanisms over which government should exercise ongoing control.

This submission draws heavily on the UK market for custodial services. In part, this is because of the quantity and quality of information available, and in part because, in our view, the British market is the best designed and managed of prison markets around the world. Outside of the United States, it is also the deepest such market, and in cultural terms, it is also closest to the Australian political and governmental environment.

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Executive Summary

Comparative Cost (Term of Reference 2)

The available evidence suggests that, for the most part, it is competition rather than privatisation that delivers value-for-money benefits in prison contracting. Unfortunately, most of the studies of prison contracting have sought to compare private versus public, rather than competitive versus non-competitive.

Nevertheless, there is sufficient evidence from the United States, the United Kingdom and Australia to provide us with a high level of confidence that, if they are done well, competition and contracting can deliver significant financial savings. Research in the United Kingdom suggests that over a succession of procurements over a number of years, savings may have been as high as 20-30 percent.

According to UK studies, these savings are drawn overwhelmingly from reductions in personnel costs, for the simple reason that they account for two-thirds to three-quarters of all costs associated with operating a prison. Around half of these savings come from lower unit costs and half from lower staffing levels. As long as quality is not compromised, reductions in staffing levels reflect productivity improvements, and contract prisons have delivered significant innovation in this regard. In the UK at least, lower unit costs reflect a variety of factors – productivity improvements (such as better management of sick leave), a younger and more mobile workforce, and lower labour costs in regional markets.

Comparative Performance (Term of Reference 1)

In the United Kingdom, prison contracting has been associated with a notable improvement in the quality of life of prisoners, such as allowing prisoners more hours out of cell. Indeed, competition and contracting have been given credit for helping the government to deliver its 'decency agenda'.

Contract prisons in the UK report marginally higher assault rates, however, this may reflect differences in reporting protocols since one prisoner survey showed that in spite of a high level of reported assaults, the inmates of a contract prison had much lower levels of concern about their safety. There are no significant differences in escape rates.

No attempt has been made to incorporate lower recidivism rates into contractual performance measures, and at present, there is no understanding of how these risks might be managed. However, some innovation has occurred in Australia and the UK in rehabilitation and resettlement, and some prison management companies believe that this should be the new frontier of innovation in performance contracting.

Contract prisons in the UK are more humane, partly because government demanded a higher standard when writing the original contracts, partly because price was not allowed to dominate the procurement process, and partly because the political and policy environment at the time when the market was first established was focused on the quality of prison life.

Drivers of Change (Terms of Reference 7)

We believe that it is important for government to understand the drivers of successful prison contracting if it wishes to achieve the same outcomes as in the UK. The principal drivers are competition, contracting and commercialisation and while they are obviously related, all make somewhat different contributions to the improvement of outcomes.

System Effects (Term of Reference 2)

Whilst it has proven difficult to measure in quantitative terms, there is strong anecdotal evidence that competition and contracting have delivered benefits for the prison system as a whole. This occurs through imitation, through the adoption of new tools that have been developed in the process of competition and contracting, and through the incentivising effects of competition and benchmarking.

Accountability Effects (Term of Reference 3)

In the UK and Australia, prison contracting has been built on a strong separation of commissioner and provider, and a system of performance management that leads to better accountability. Just as important, however, is the fact that under performance contracting, accountability has direct and demonstrable consequences.

Market Design (Term of Reference 7)

In order to get the best out of competition and contracting, government needs to look beyond the individual procurement to the management of the wider market. Important lessons can be learned from the design and management of the prisons market in the UK.

1. Comparative Cost of Public and Private Prisons (Term of Reference 2)

1.1 Competition or Privatisation?

In our submission, this Term of Reference asks the wrong question. For the most part, it is competition that delivers value-for-money benefits, not privatisation. As Professor John Donahue of Harvard's Kennedy School summarised the evidence some years ago: 'Public versus private matters, but competitive versus non-competitive usually matters more. Without a credible prospect of replacement, it is hard to harness private capabilities to public purposes.'¹

Unfortunately, most of the academic and governmental studies of the relative efficiency of contract prisons have approached it as a question of public versus private. However, where an in-house team wins a competitive tender, the public provider is (by definition) more cost effective than the private alternatives (assuming that it delivers its commitments), and where a private provider is awarded a contract without competition, then there will be little incentive to seek out more cost-effective management.

Moreover, as the 'Way Forward' prisons in New South Wales demonstrate, even where a public provider is faced with a credible threat of competition (known in economic literature as 'contestability'), then significant efficiencies may follow.² The challenge with contestability lies in keeping the threat credible in the absence of actual competition.

1.2 The Published Evidence

In 2007, the Serco Institute undertook a survey of 43 academic and governmental studies of prison contracting from four countries covering a period of 25 years. The vast majority of these were case studies, benchmarking one or two privately-managed facilities with several public sector comparators, actual or hypothetical.

One of the great challenges in comparing competed and non-competed prisons (or private and public ones) lies in the difficulty of finding a suitable comparator. Even if two prisons with the same security classification were constructed at around the same time, using a similar design, it is probable that their roles and their populations would differ. The same difficulties arise with before and after comparisons – where the management of the same prison

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passes from one provider to another. Moreover, studies that take a snapshot of comparative performance in a single year may be unrepresentative of the situation overall.

Another challenge lies in the quality of financial data. It is unusual for public sector prisons to have a comprehensive chart of accounts for each facility that represents the full cost of operation. And in many studies, the costing methodology is flawed, with major cost elements, such as public sector pension liabilities or private sector tax payments, simply overlooked.

United States

For the aforementioned reasons, we were not entirely satisfied with any of the 34 case studies from the United States, although we selected ten that we felt were sufficiently robust to warrant closer consideration. All but one of these reported value-for-money benefits in the range of 5-15 percent.³

No matter how large the sample or how elegant the model, comparability also creates difficulties with statistical analysis. One of the better studies, which drew on consistent and high quality data from 111 juvenile facilities in Florida over three years, was weakened by the indifferent quality of financial information, the absence of competition and the fact that different kinds of provider – public, private and voluntary – were operating very different kinds of institutions.⁴

In several studies, there was evidence that public-managed prisons improved their performance once they were benchmarked against contract facilities.⁵ And a group of sceptics at the Federal Bureau of Prisons who have challenged the evidence that private prisons are more efficient, have acknowledged 'the disciplinary power of the market in the long-run' and that 'actual or threatened privatization and the corresponding competition it generates. . . provide public managers with additional leverage over public workers and unions'.⁶

United Kingdom

The most robust of the comparative studies of prison management was conducted in the United Kingdom in the late 1990s, contrasting four privately-managed prisons, each with its own public sector comparators (which were changed as the roles of the prisons changed). These comparisons were made over four years, using a consistent methodology.

Cost per prisoner and cost per place were both tracked, however because of changes in overcrowding levels, cost per prisoner was the most reliable. On this measure, the contract prisons were, on average 11-15% less costly than their public sector benchmarks. However, this underestimates the cost

differential since it failed to take into account taxes paid by the private providers and the full cost of public sector pensions.⁷

In 1995, when the Home Office decided to contract for a generation of prisons under the Private Finance Initiative (or PFI, similar to PPPs in the Australian context), the public sector comparators assumed that any new public prisons would be managed by the private sector under contract. In this way, the 11-15% in savings already secured through earlier competitions were banked prior to the new competition.

The quality of the public sector comparators used in assessing the PFI prisons was high, since the Prison Service had only recently completed a major programme of prison construction, which had been closely studied by the National Audit Office.

On this basis, the present value of the first of the PFI prisons was a further 17% below its public sector comparator (although this included construction costs as well as operating costs). By the time the contract for the fifth PFI prison had been negotiated three years later, the cost per place for a prison of comparable scale had fallen by 38% from the public sector comparator for the first PFI prison.

Not all of this cost differential can be attributed to operating efficiencies, although since 60-70% of the present value of a PFI prison is attributable to operating costs, we might conclude that they made a significant contribution. While it is difficult to estimate what the total financial benefits might have been, it seems reasonable to conclude that, over a succession of procurements under two different models, competition reduced operating costs by more than 20% and perhaps by as much as 30%.⁸

Australia

There has been very little research into this question in Australia. There were three studies of Borallon, in Queensland, in the early 1990s, which were methodologically flawed in various ways. The NSW Auditor General has published the operating costs at Junee since 1998, benchmarking these against other minimum security facilities. Whilst it has been recognised that the public estate is considerably older, on average, than Junee, by 2002-03 the differential was so great (around 46%) that it is deserving of closer attention.

The 2005 report of the NSW Public Accounts Committee on the 'Way Forward' prisons is perhaps the most interesting, since it demonstrates the significant gains that can be made through contestability alone. The differences in overtime and sick leave, in particular, were striking.⁹

More recently, the Inspector of Custodial Services in West Australia has provided some indicative numbers of the relative efficiency of the one contract prison in that state (Acacia Prison, currently managed by Serco):

Our best estimate. . . is that Acacia's total costs – for both Serco and the Department – are probably no more than 55 percent of the public sector average.

In making comparison between Acacia and the public sector, it is important to recognise that Acacia does enjoy some advantages. These include economies of scale due to its size, its modern buildings and security arrangements, and its location. By comparison, some of the public sector's most expensive prisons are the smaller and older regional prisons. As previously noted, there is also room for debate about the most accurate way to calculate total costs.

However, none of these differences or arguments can detract from the conclusion that the cost of taking Acacia into the public sector would be very substantial. Conservative estimates, based on public sector costs being around one third more, would be \$12.5 million per year, but the real figure could be closer to \$20 million. This was, of course, one of the main reasons that the Labor Government chose to retest the market [in 2006] rather than 'nationalising' the prison.¹⁰

1.3 Sources of Savings

This question was not raised in the terms of reference, although we believe that it is important to understand the sources of savings if the government is to have confidence in the use of competition and contracting in prison management. To some extent these issues are raised in term of reference 1(g).

Personnel Costs

Those studies that have addressed this question have concluded that most of the savings come through a reduction in personnel costs. This is unsurprising since personnel costs account for two-thirds to three-quarters of all the costs associated with operating a prison.¹¹

There are two elements to this: unit costs (the cost of salaries and benefits per staff member) and staffing levels (usually measured as staff-to-inmate ratios). One of the few studies to provide insight into the relative contributions of these two elements was undertaken by HM Prison Service in the late 1990s. In a series of comparisons conducted over three years, the authors found that around half of the cost reductions came from having fewer staff per prisoner, with the other half coming from lower average unit costs.¹²

A 1996 study by the Legislative Budget Committee of the state of Washington looked at the experience with prison contracting in Louisiana and Tennessee, concluding 'that the number of staff ranged from 88 to 97 percent of state facilities' staffing, and that the average salaries for those personnel range from 69 to 93 percent of state salaries'. The committee recognised the significance of these differentials when they were combined:

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If a private facility can operate at 90 percent of state staffing, and at 85 percent of average state salaries, this translates into a personnel savings of 24 percent. Since personnel costs comprise about 70 percent of all operating costs, this results in a saving to the total budget of approximately 16 percent.¹³

Unit costs: It is usual, though not universal, for contested facilities to have lower unit costs.¹⁴ In a few cases, this is because the contract prisons pay lower salaries; in others, it is because of significantly less generous pensions and fringe benefits. Even if it were the case that public sector employees working for an uncontested monopoly were overpaid (as determined by market benchmarks), it would not amount to a productivity improvement to pay the same group of workers less, or to require them to work longer hours for the same pay.

However, some unit cost savings clearly do amount to productivity enhancements. The most obvious examples are the management of sick leave and overtime. Studies undertaken by HM Prison Service in the 1990s found that the cost of sick leave (per prisoner) was 53% lower in the contract prisons than in their public sector counterparts. And it would appear that these differences have persisted over time: while recent sickness absence rates for the privately managed prisons are not available, the rates for the Prison Service are exceptionally high – 14 days per year in 2005, compared with an average of 10.3 days for the public sector as a whole and 8.4 days for the wider economy.¹⁵

Contestability was successfully used by the NSW government to manage sick leave and overtime problems in its 'Way Forward' prisons.¹⁶ And the operations manager of a public sector comparator prison in Queensland referred, perhaps with some poetic licence, to problems that had existed in a recently-closed old-generation public facility:

They were taking sickies without pay, to create overtime for people who were having sickies without pay, who were creating overtime for them. . . Knowing night shifts were going to be short, they would work right through – on public holidays and things like that you can actually get quadrupled rates.¹⁷

The management inefficiencies associated with excessive sick leave have also been noted in relation to US federal prisons, although it has not surfaced as a significant issue in the comparisons of privately and publicly managed facilities in that country.¹⁸

It would also appear that privately managed prisons have reduced their unit costs by structuring their workforce in different ways. (It should be noted that all of the contract prisons in the UK have involved a new start, so that no existing staff were transferred.)

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An annual survey undertaken by the Prison Service Pay Review Body in the UK compares the terms and conditions in publicly and privately managed custodial services. The 2006 survey found that the average basic pay for prison officers (in the public system) was 39% higher than for prison custody officers (in the privately managed facilities). But the authors identified a number of structural differences between the two systems, which appeared to contribute to better value for money:

- private companies set their terms and conditions with reference to conditions in local markets, while (for the most part) the Prison Service negotiated national pay scales;
- prison officers (in the public system) had much longer terms of service and many were near the top of their pay scale;
- the privately managed prisons had an average turnover rate of 24%, compared with 3% in the Prison Service – the former was higher than the average in the private sector in general (15%) and the latter was lower than the public sector in general (8%);
- the workforce in the privately managed prisons had a much younger age profile; and
- prison officers in the public sector had a much steeper pay progression in their early years of service.¹⁹

Staffing levels: As long as service quality is not affected, significantly lower staff-to-inmate ratios are evidence of increased productivity. If, through better physical design, service design or use of technology, prison managers are able to significantly reduce the number of staff required to supervise the prison population, then they are able to have a major impact on costs.

This relationship is widely understood among prison managers: in a study of state prison expenditure in 2001, the US Bureau of Justice Statistics reported:

High inmate-to-staff ratios were most common in states reporting low average costs per inmate, and low inmate-to-staff ratios predominated in states with high average annual costs per inmate.²⁰

One of the most significant impacts of introducing competition into custodial services has been to force prison managers to explore new service designs and management regimes that will permit lower staffing ratios. A national survey of 65 private correctional institutions across the United States, conducted in 1997, found that, on average, staffing levels were 15% lower in the privately managed facilities.²¹ Moreover, where public prison operators were exposed to competition, this was one of the most common ways in which they strove to bring down their costs.²²

* The privately managed prisons in North America and in the UK have generally maintained higher turnover rates than the public sector, and while contract managers recognise that these have sometimes been too high, it is generally thought that the exceptionally low turnover rates in the publicly managed prisons are also inefficient.

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Contract prisons have been able to operate successfully with lower staff-prisoner ratios for almost two decades, partly because of technological innovations, such as CCTV cameras and electronic keys, and partly because of regime innovations such as direct supervision and the recruitment of a much higher proportion of female prison officers.

However the trend has by no means been uniform. At the Taft Correctional Institution, a federal prison managed under contract in California, staffing ratios were higher than the public sector benchmarks, in part because of the steep penalties associated with understaffing, and in part because the comparator prisons had reduced their staffing levels. In some cases, differences are evident among the custodial staff, while in others they emerge mostly among support staff.

Other Costs

Almost no attention has been paid to other sources of cost differentials. There is some evidence to suggest that private prison operators have been able to purchase commodities and manage their stores more effectively, but this has not been considered in sufficient depth to offer significant insight.²³

2. The Impact of Contracting Prison Management (Term of Reference 1)

2.1 Comparative Performance

Measurement of the qualitative performance of competed and non-competed (or public and private) prisons is even more problematic than comparisons of financial performance.

To our knowledge, the only attempt to measure the performance of public and private facilities systematically is the 'Weighted Scorecard' used by HM Prison Service in the United Kingdom. This system of key performance indicators (KPIs) and key performance targets (KPTs) was introduced in 1992 following the successful use of contractual performance measurement in the privately-managed prisons. From 2003, the Prison Service began to publish performance against these KPIs and KPTs in internal league tables.

Unfortunately, the Weighted Scorecard does not allow for comparison of publicly and privately managed prisons. HM Prison Service acknowledges that the current KPTs and their weightings have been refined 'to reflect the current working arrangements and the objectives of the Prison Service', and that the contract prisons have different objectives, different working arrangements and different KPTs. Among other things, this means that the privately managed prisons are not measured on around half of the targets, resulting in scores of zero. The Ministry of Justice has commissioned research with a view to establishing a more comparable system of measure, although this appears to be some way from completion.

2.2 Impact on Prisoners

Quality of life

While this outcome was not raised in the terms of reference, we believe that it should be central in any assessment of the merits of competition and contracting in the management of custodial services.

In the UK, prison contracting was used by government to bring about a revolution in staff-prisoner relationships. Martin Narey, who was at one time the Director General of HM Prison Service, has stated on a number of occasions that contracting had been central to the delivery of the

government's decency agenda'. Gerry Sutcliffe, the Parliamentary Under Secretary for the Home Office, told the House of Commons in 2007:

The companies that provide those services have developed a strong track record of delivery and are driving forward the decency agenda, as well as introducing innovation and increasing value for money in public sector prisons. Martin Narey, the former director general of the Prison Service, has said that if had not been for the private sector, the decency agenda would not have moved at the pace that it has.²⁴

It should be noted that the period of intense innovation in the early 1990s was stimulated by a group of public officials who saw contracting as an opportunity to introduce ground-breaking reforms from the United States.

Innovation in Prison Management in the UK

In the 1970s, the US Federal Bureau of Prisons had introduced unit management – a more decentralised form of managing prisoners in housing clusters – and direct supervision – which introduced non-institutional, normalised environments and took prison officers out of control rooms and placed them in living areas where they would interact directly with inmates. In part, this was a revolution in prison design, with smaller units, softer furnishings, brighter colours and open association areas. These innovations were quickly adopted in public prisons across a number of state and local jurisdictions in the United States.

In the UK, the Home Office was able to replicate these designs in a new generation of prisons that were planned and constructed throughout the 1980s. However, the Home Office faced strong resistance to the introduction of the associated regime changes that would have required prison officers to work and eat among the prisoners, and interact with them on a more personal basis. The prison unions adopted a conservative position, refusing to cooperate in these reforms, even after the major changes recommended by the Woolf Report into riots at Strangeways Prison in 1990.

The decision to contract several of these new generation prisons provided commissioners with an opportunity to introduce direct supervision in these facilities overnight. The early prison contractors relied on North American expertise in developing their solutions, either through joint ventures, or by involving architects and prison managers in their teams, and adapted to local conditions in the UK.

As a result, the first privately-managed prison in the UK, HMP Wolds, drew heavily on these North American innovations in regime. As a condition of the contract, prisoners were out of their cells for around 14 hours a day (compared with much lower levels in public prisons). Prison officers spent their working day amongst prisoners in large association spaces, even eating their meals with prisoners. They wore softer, non-military uniforms, and name tags. They called prisoners by their first names. And, as a result of a non-discriminatory recruitment policy, when the prison opened, around one third of the prison officers were female (compared with an average of around three percent across the rest of the prison estate).

The difference in regime was immediately noticed amongst prisoners themselves, with a number of them writing to newspapers condemning the armchair critics. It was also favourably written up by the Chief Inspector of Prisons and a detailed academic study.²⁵ In his second report on the prison in 1998, the Chief Inspector wrote:

... the undoubted success of Wolds represents a threat not so much to the employment of individuals within the Prison Service but to what many refer to as the Prison Service' culture' regarding the treatment and conditions of prisoners. Many prisoners, with long experience of time served in many public sector prisons over many years, described to me and my team the cultural shock that they had experienced, stepping out of the usual escort van bringing them from court, into a spotlessly clean reception area, where they were treated as human beings by firm, fair and friendly staff.

'This staff style was evident not just in reception but throughout the whole prison, and I believe that it is a major contributor to the remarkable absence of tension that one experiences walking around, the low level of drugs, and the general feeling that rehabilitation really is an achievable aim for all except for the most intransigent.'²⁶

This outcome was all the more remarkable, given that operating costs for The Wolds were around five percent below those of comparator prisons.²⁷

It should be noted that direct supervision was not a significant element of the management regimes introduced by the private prison companies in the United States. This was unique to the United Kingdom, and it arose out of the political conditions that existed in the country at that time (in the wake of the Woolf Report) and the willingness of senior civil servants to employ contracting in this way.

Professor Alison Liebling[†] has studied the qualitative aspects of prison contracting over some years. She was part of an academic team that studied the UK's first contract prison, The Wolds, in 1993, where 53 prisoners were interviewed, 45 of them with previous experience of prison life.

- Nearly 80% of prisoners said that Wolds was better than other prisons they had experienced and supported what Group 4 was trying to achieve;
- 72% praised the living conditions at Wolds for the amount of freedom it gave, the quality of relationships with staff and the facilities available;
- 63% rated their relationships with staff as good or very good;
- 74% thought staff were better than at other prisons, attributing this to the respect they were shown and the time that staff took to talk to prisoners;
- 53% were in favour of a private company running the prison, with very few opposed.²⁸

A 2002 study undertaken by Liebling and Arnold on behalf of the Home Office sought to measure the quality of prison life, comparing four public prisons and one contract prison (Doncaster). Doncaster strongly outperformed the public sector facilities on all five 'relationship' measures (respect, humanity, support, relationships and trust), and matched or outperformed the others on 'regime'

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measures (fairness, order, safety, wellbeing, prison development, family development and decency).²⁹ Liebling and her colleagues are presently in the midst of a more comprehensive study of 'moral performance', comparing several public and contract prisons in the UK, which seems to broadly confirm these results.

The National Audit Office conducted a survey of 1,834 randomly selected prisoners from public and contract prisons in 2003. They also found much higher levels of perceived respect in the privately-managed prisons.³⁰

A study undertaken by Liebling of Acacia Prison, the only privately-managed prison in West Australia, made similar findings to her UK reports, with significantly higher results on the quality of life measures and several of the safety and security ratings (though not on several others) than a public sector comparator.³¹ (Acacia Prison is listed by the West Australian Inspector of Custodial Services as one of only two high-performing prisons in that state – facilities that are meeting or exceeding their performance goals.³²)

Prisoner safety

On average, reported assault rates are marginally higher in contract prisons in the UK. However, the comparison is not 'apples-for-apples'. In the contract prisons, inmates spend much longer out of cell, so that there is more time for prisoners to interact with staff and other prisoners. At the same time, reporting protocols differ between the two groups of facilities – the contract prisons face stiff financial penalties for failure to declare even minor altercations, whereas the public prisons have no such incentives.

There is some evidence to support the view that differences in reported assault rates may be partly a function of reporting protocols rather than reflecting the true level of prisoner safety. In 2004, Liebling compared four public prisons with Doncaster, one of the early contract prisons. As reported in the key performance target data, Doncaster had the second highest level of assaults among the five prisons.³³

However, when prisoners were asked whether they felt safe, Doncaster ranked equal with the best. Less than nine percent of respondents agreed that they generally feared for their physical safety, the second lowest score. More than half agreed that this prison was good at delivering personal safety, which was the highest score. Three quarters reported that they felt safe from being injured, bullied or threatened by staff, which was well above any of the comparator group. In short, there did not appear to be a strong correlation between what the statistical reports and what the prisoners were saying.³⁴

Overcrowding

Under the kind of contracts established by the Australian state governments, the extent to which prisons are overcrowded is entirely a matter of government policy. It has been suggested that prisons designed for direct supervision may be better equipped to handle overcrowding, although there are also reasons why privately-managed prisons might be less willing to accept high overcrowding levels.³⁵

The contract prisons in the UK have developed a model of prison management that delivers a more humane regime for prisoners with fewer staff. How this model works has been little studied (certainly the results of any such research have not been released into the public domain), however it is possible that these staffing ratios work because the regime is perceived by prisoners to be more decent. As Liebling has observed: 'It is harder to develop a "them and us" culture when here are not many of "us".'³⁶ In these circumstances, a significant increase in overcrowding might have a different impact in a contract prison than a comparable increase in a public establishment.

Rehabilitation

The difficulties of tracking the impact of different regimes on recidivism, and the challenges associated with allocating re-offending risk to contractors are dealt with below.

However, it should be possible to measure the contribution that a prison operator has made to resettlement and rehabilitation, for example, whether an offender has been released into a full-time job or training programme, or whether upon release, they were moved to settled accommodation.

To date, none of the contracts in Australia or the United Kingdom has attempted to establish performance measures of this kind, although some work is being done in the UK to work with offenders to improve success rates in resettlement. Some private prison companies see this as the next area for significant innovation in prison contracting.

2.3 Impact on Staff

Staff Safety

In the UK, there is very little specific information on assault rates on staff.

Staffing Levels and Employee Conditions

As mentioned in Section 1.3, staffing levels in contract prisons tend to be significantly lower than in non-contested establishments. This is what we would expect if competition were delivering productivity improvements. While professional prison managers have remained concerned about these staffing levels, the fact that the oldest of the contract prisons in the UK has operated with these staffing levels for 17 years without a major incident, suggests that they are sustainable.

In the case of terms and conditions, the contract prisons in the UK pay significantly less on average, although as discussed in Section 1.3, much of this can be explained by the fact that prison contractors recruit in regional labour markets, and by the fact that they have structured their workforce in very different ways.

It should be noted, however, that all contract prisons in the UK and Australia were Greenfield sites, so that in no case was an existing workforce transferred from public to private employment. Under UK law, if this had happened, then terms and conditions, and union coverage, would have been protected. In this regard, the proposal now proposed by the NSW government is unique.

However, there are examples of the staff in privately-managed prisons in Australia transferring from one to employer to another when a contract was lost by the incumbent on rebid.

Case Study: Borallon Correctional Centre

As a public service company, Serco takes the view that its principal assets are the intellectual and human capital of its people. Serco's employees embody the company's know-how, deliver its services and carry its reputation. Their expertise, their capacity to adapt and develop are fundamental to the company's commercial success.

To ensure a smooth transition into new contracts and businesses Serco seeks to collaborate with employees, employee workplace representatives or unions. In tendering for contracts, it is Serco's practice to engage at the earliest practicable stage with the relevant union or unions. In recent years, this has been at the Expression of Interest stage and relationships develop as the bidding process proceeds. This approach is critical in minimising misunderstandings and in laying the groundwork for a seamless transition of employment arrangements when a contract is awarded.

In Australia, the greater part of Serco's direct operative workforce is subject to union collective agreements. There have been no strikes or other serious industrial action in Serco owned or managed businesses during the last five years. Disputes are dealt with through consultation and collaboration and resolved as expeditiously as practicable.

Serco took responsibility for the operation of Borallon Correctional Centre in Queensland, in January 2008. It is a 490 bed male, medium and high security prison located near Ipswich that had previously been operated by another private company. Serco engaged early in its dealings with the Liquor, Hospitality and Miscellaneous Union (LHMU). This approach, combined with an overall understanding of their philosophy, resulted in the negotiation and lodgment of a satisfactory Union Greenfields Agreement (s.329 Agreement) for all custodial officers prior to Serco taking up management of the Centre. The terms and conditions of the Agreement provided the foundation for offers of employment to Custodial Officers and other support employees, quickly giving employees certainty about their jobs going forward.

The change program involved extensive consultation and communication and was not without some disagreement. It was Serco's goal to deliver certainty to employees by ensuring they understood the process, the terms and conditions of the Agreement and had the opportunity to ask questions. Regular contact was maintained with the union. A combination of written communication and off-site briefings during transition helped to achieve Serco's goal.

To date, major changes to employees' working routines, rosters, hours of work and multi-tasking, have been implemented at Borallon Correctional Centre and in some functions there are fewer employees than before by using the right people to do the right jobs. The areas of difficulty and disputation with employees and the LHMU were managed using open and professional communication, collaboration and negotiation. There has been no lost time nor any industrial action in the course of implementing these reforms.

2.4 Impact on the Public

Public Safety

The available evidence from the UK suggests that rates of escape in the contract prisons are comparable to those in the public estate.³⁷

Recidivism

Recidivism rates are not just of concern in measuring qualitative outcomes – if contract prisons were delivering a comparable standard of care at a lower cost, but their recidivism rates were markedly higher (for a given population of prisoners), they would not be providing better value for money.

Unfortunately, in the vast majority of jurisdictions, there are not sufficient data to enable recidivism rates to be studied. The only exception to this appears to be the American state of Florida, which maintains high quality information on recidivism. A series of studies of recidivism amongst adult and young male and female offenders in Florida from 1999 to 2005 concluded that there were no significant differences between publicly and privately managed facilities.³⁸

In the United Kingdom, one of the greatest difficulties in studying the impact of the management regime lies in the short time which prisoners typically spend in a contract facility, either because they are incarcerated for only short periods, or because they are frequently moved between public and private establishments.

At this point in time, contractors are reluctant to assume recidivism risk, in large part because there is still little agreement among professionals about which interventions work in reducing the likelihood of reoffending. Nevertheless, in Australia and in the UK, trials are being conducted in contract prisons around the delivery of high level outputs – such as successful completion of a training programme, or retention of a job for a period of time. This raises the prospect that public sector commissioners might be able to use contracting to transfer the risk of delivering outputs for a defined population of prisoners.

2.5 Sources of Benefits

Little work has been done in the UK on the reasons for these differences between public and privately managed prisons. One part of the explanation is simple – the Home Office used the opportunity to demand higher standards in the contract prisons, particularly in relation to hours out of cell and hours of purposeful activity. The quality of the officials in the Home Office and the Prison Service responsible for managing these early procurements appears to have been high, with several of the key figures having extensive operational experience in managing a prison, and at least one of them having a background in supply chain management in the private sector.

At the same time, the early procurements were not driven exclusively by price. As the National Audit Office later explained: 'The Home Office had not expected to make financial savings from the private sector operation of Wolds; the main objective was the injection of competition and new ideas'. The fact that the winning solution was substantially less than the Prison Service benchmark was a 'pleasant surprise'.³⁹ In these circumstances, it is unsurprising that the competitive process threw up innovative new approaches to managing a prison.

The political and policy environment within which the initial contracts were being let was also conducive to a focus on respect and decency. The tender was held, and the contractors' solutions were designed in the immediate aftermath of the Strangeways' riot and the subsequent Woolf Report, which placed renewed emphasis on the quality of prison life. One of the consequences of this appears to have been that the so-called 'decency agenda' was coded into the hardware of the UK custodial market.

From the providers' perspective, there was a vast pool of untapped resources from which they were able to draw – a wealth of experience with direct

supervision in North America that had not yet been transferred to the UK environment, and a number of experienced and high quality prison governors who had spent many years reflecting on how prison management might be reformed, but had been previously denied an opportunity to implement their ideas.⁴⁰

It is probable that some of the benefits came through the adoption of direct supervision. The North American evidence on the effectiveness of this approach is mixed, although studies have been consistent in their finding that the quality of life has improved for prisoners.⁴¹

3. Drivers of Change (Term of Reference 7)

If the NSW government is to take full advantage of competition and contracting in its prison services, then it will be important to understand how these instruments work and the conditions under which they work best. Given the diversity in outcomes from different contracting models around the world, it is evident that those involved in commissioning private provision require some insight into the operation of the system.

The Serco Institute has done a considerable amount of research on the drivers of change and our conclusion is that competition, contracting and commercialisation, whilst obviously related, each do different work.

3.1 Contracting

Clarification of purpose: Exposing a service to competition and writing a contract demands a detailed statement of requirement and this has the effect of focusing the commissioners' attention on the desired outcomes, as well as the desired scale and scope of the service in question.

In 2004, the Serco Institute conducted a survey and a series of interviews with former public sector managers who had transferred to Serco, and were now managing very similar public services under contract. A number of those interviews were Prison Directors. One striking difference was 'a clearer focus on results'. As one of them said:

It does give a clearer focus on results because the contract is based on outcomes. It is based on us achieving certain targets, and it gives a greater clarity and focus to those. This is quite a stark difference from [public sector organisations] because even though they would say they were focused on outcomes, actually they are not. [In the public sector], lots of other things get in the way – like short-term politics which tends to dominate and get in the way of that focus on delivering outcomes.⁴²

It has also been suggested that contracting with private providers resulted in a separation of the management of prisoners from their punishment. Under the contracting model originally established in the UK, responsibility for the adjudication of prisoner misconduct and the assignment of additional punishment rested with a state official, the Controller, who was located on-site and also served as the contact monitor. This meant that the responsibility of the prison contractor was confined solely to questions of management, and it is possible that this contributed to a more constructive relationship with prisoners.

Management space: Another significant difference between managing public services such as prisons under a formal agreement lies in the 'contractual shield' that is created, leaving creates space within which managers are free to manage.⁴³

The heavy cost of bureaucratic intervention in operational management in the Prison Service has long been recognised in England and Wales. Lord Woolf criticised 'the confetti of instructions descending from Headquarters' in 1991; Sir John Learmont, the 'blizzard of paperwork' in 1995; and Lord Laming, 'the deluge of paperwork' in 2000. The Chief Inspector of Prisons turned to this same issue in his 1998-99 annual report:

Sitting in the office of a Head of Management Services, as I have done in a number of prisons, and observing the amount of and content of the paperwork that descends from Headquarters every day, is a sobering experience. Numerous requests for information, from many different branches, asking for the same facts to be presented in a slightly different form, on a different day. Many requests for instant information, or views on proposals, carrying the comment that they involve 'nil' resource requirements. That may be so in terms of money, but it ignores the fact that time is a resource, and time spent in an office, or distracted from normal routine duties, is time spent away from prisoners. Any operational leader knows that time spent in the front line is crucial if command is to be properly exercised. I am absolutely certain that one of the main reasons for some of the unsuitable or unacceptable attitude of some staff, to the treatment of and conditions for prisoners, on which we have reported, is due to the absence of senior management from the wings. . .⁴⁴

Lord Laming was concerned not only with the distraction of senior staff from day-to-day management but also with the blurring of accountability lines. More disturbing was Laming's observation that little had changed since the publication of the reports in 1991 and 1995.⁴⁵

One of the contributions that contracting makes to the efficiency of prison administration is that it regulates the manner in which head office intervenes in the management of individual institutions, and it increases the autonomy of Prison Directors. In October 2007, the Confederation of British Industry's *Business Voice* magazine interviewed Vicki O'Dea, the director of HMP Ashfield, a prison and young offender institution managed by Serco. O'Dea had had an outstanding career in the Prison Service prior to joining Serco, and yet she was struck by the differences in the management cultures.

Betraying scant nostalgia for her 19 years in the Prison Service, she says that she finds working for a private company 'liberating'. 'Don't get me wrong, there is a lot that's good about the public service: staff training and development, race relations, offending behaviour programmes. And it does teach you to use your resources well, human or otherwise. But everything is made so difficult. If you need something, you spend time writing a business plan, persuading the area manager, and so on. Now, I just go and buy it.'

At first, such spontaneity seemed odd. O'Dea recalls a seminal moment soon after her arrival when she was showing around a Serco board member and mentioned how she'd love to soften the staff uniform. 'Why don't you?' he asked. 'Only then did it sink

in that I no longer had to consult the Prison Service,' says O'Dea, whose hands-on senior managers also now wear the uniform.⁴⁶

Increased accountability: A third consequence of commissioning a public service under contract is heightened accountability. In the survey of contract managers conducted by the Serco Institute, a number of respondents commented that accountability was more personal than it had been when they managed similar services through the traditional model.

Respondents recognised that this was the natural consequence of increased freedom to manage: 'I have much greater managerial autonomy, but the consequences are that I can't blame anyone else.' One of the contract managers compared accountability in the public sector to a layer cake – 'in the [public sector], you're just one of many layers and its very easy to blame the layer above you or the layer below'. By the contrast, a contract was a bubble – relatively self-contained with only one way in or out – through the contract manager: 'Here the focus is entirely on the contract director and you are responsible for every part of contract delivery, whether it goes well or badly.'

Of course, the existence of an explicit performance regime, with explicit financial consequences helped to explain this heightened sense of accountability: 'If you don't achieve your KPIs in the public sector, you can trot out a load of excuses. . . Here you get heavily fined. So it does focus the mind.'⁴⁷

Commenting on the first of the PFI prisons in England in 1999, the Chief Inspector of Prisons made very similar observations:

HMP Altcourse, being a contract prison, has a number of advantages over public sector prisons in terms of its direction. Its contract lays down what is expected of it, and how much that costs. To monitor that contract, there is a contract compliance monitor, or Controller, in the prison, monitoring what is being done, 365 days a year. Being a commercial operation, management response to appeals from the Director for help, or support, is instant, not subject to labyrinthine public sector, bureaucratic procedures, and it tells.⁴⁸

3.2 Competition

Competitive tendering performs the same role in public service markets that competition does in consumer markets – an open tender demands that alternative providers develop innovative solutions in a competitive environment, where each bid team knows that other highly experienced teams are at the same moment in time developing alternative solutions to the very same set of requirements. The tendering process is thus a period of intense research and development, as bid teams bring together existing technologies, processes and capabilities in new and innovative ways.

Moreover, as discussed at greater length in Section 3.4, the fact of having won a competition against alternative providers gives the management team a powerful mandate to introduce change throughout the organisation.

It may not be necessary for the contract to be won by an independent provider (private or voluntary sector) for competition to make a significant contribution to public service improvement. As noted above, the evidence seems to suggest that many of the benefits are delivered through competition rather than privatisation. And at least some of the benefits of competition can be secured through contestability, that is, the credible threat of competition. The productivity improvements secured by the NSW government with the three 'Way Forward' prisons is evidence of that. However, emphasis must be placed on the word 'credible' – repeated threats without periodic competition will not remain credible.

3.3 Commercialisation

There are several additional benefits that may come from engaging private firms. International public service companies may have a greater capacity to transfer best practice from one country to another. As already noted, in the early history of the prisons market in Australia and the UK, North American firms played a significant role – both prison management corporations and smaller firms specialising in innovative design. In more recent years, British prison management companies have played an important role in the dissemination of best practice from the UK to Japan, Germany, South Africa and Australia, and more recently, from Australia back to the UK.

Corporations also offer economies of scale, with competition and contracting assisting in the search for the most efficient level of organisation. Organisational economists have described the process of acquisition and divestment that takes place in capital markets, and the contracting out and in-sourcing that occurs within organisations, as part of an ongoing search for the most efficient scale and scope. In the private sector, a great deal is invested in this search, and contracting is one of the few tools available to the public sector that imitates this process. Corporations are fundamental in this search for 'efficient boundaries'.⁴⁹

Companies also offer government the ability to scale up innovations without assuming the risk of introducing a new innovation at the same time across the system as a whole. A number of writers have commented on the difficulty that the public sector has in scaling up effective innovations.

The history of efforts to replicate, sustain, and scale up from effective programs is dismal. . . Scaling up effective services requires conditions that are still exceedingly rare.

That is why effective programs have flourished only under some sort of protective bubble, outside or at the margins of large public systems. Protective bubbles can be

created by foundation funding, by a powerful political figure, by a leader who is a wizard, by promises that the effort will be limited in scale and time, or by some combination of all of these. The problems arise when the successful pilot program is to expand and thereby threatens the basic political and bureaucratic arrangements that have held sway over decades.⁵⁰

In our submission, the existence of two or more providers (public or private) within a system of public administration, means that there is an intermediate structure that can assume the responsibility for scaling up without compromising or challenging the system overall.

Finally, there are benefits associated with employing an organisation with a brand name, and possessing stakeholders with a commercial stake in the reputation of that brand. In the UK, prison contractors are held to account both through their profit and loss statement (that is, through financial penalties for non-performance) and through the share price (as the Chief Inspector of Prisons delivers public reports on the performance of individual establishments). It is difficult to replicate this particular discipline in organisations that are wholly government-owned.

3.4 A Fresh Start

At least some of the benefits of competition and contracting seem to come from the opportunity that they provide for an organisation to press the reset button and make a 'fresh start' with a service that is performing poorly or just coasting. In this sense, competition and contracting appears to be a successful example of 'zero-base budgeting' which was pursued, largely unsuccessfully, in the 1980s.

One study suggested that in prisons, which tend to be extremely conservative institutions, change is faster 'when sufficient numbers of new staff are transferred en masse from the training college or from another establishment'.⁵¹ This may be one of the reasons why competition and contracting seem to deliver transformation in organisational performance and culture.

With the establishment of new prisons in Australia and the UK, prison management companies elected to recruit their custodial staff in the local community, rather than drawing on professional prison guards from the public sector. This enabled them to introduce a radically different culture into the contract prisons from the outset, one that was immediately identified by prison inmates. Prisoners in privately-managed prisons referred to the public facilities as 'POA prisons', an allusion to the prison officers' union which had strongly opposed managerial and cultural reform. Indeed, one prisoner spoke of the 'humanistic change' that accompanied the introduction of prison contracting as 'Maggie Thatcher's fresh start'.⁵²

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Some of the benefits may also come from introducing heterogeneity into the system. Some organisational theorists have argued that a modest level of personnel turnover in a system, involving the introduction of participants who are not as deeply socialised with prevailing norms, has the effect of increasing exploration and improving aggregate knowledge. From this perspective, it may matter less that the new entrants are experts in the field than that they bring a different perspective. The gains to the system come from their diversity.⁵³

There is some evidence that such a process may have been at work in the UK prison sector in the late 1980s and early 1990s. Experienced (i.e. well-socialised) prison administrators took the view that it was unwise to encourage close association between prisoners and prison officers, opposing suggestions that prison officers wear name tags and call prisoners by their first names. It was widely believed that it would be unwise to introduce significant numbers of female prison officers into male prisons. Prison management companies introduced each of these reforms from the beginning, contributing to a radical transformation in prison culture, many of which have since been adopted more broadly by the Prison Service.⁵⁴

A mandate for change: Under market-testing, even where the in-house provider wins the contract, the fact that the management team has secured (or refreshed) its right to manage following a competitive process, bestows upon it a mandate for change. This may give managers the authority to renegotiate the implicit terms and conditions that tend to accumulate over time in mature organisations through a process of accretion.

Organizational theorists speak of 'psychological contracts' in employment relationships, defined as 'a series of mutual expectations of which the parties to the relationship may not themselves be even dimly aware but which nonetheless govern their relationship to each other'. These expectations are largely implicit and usually develop outside the formal employment relationship.⁵⁵

Psychological contracts are essential to the effective working of a complex organisation – the written contract of employment is simply too cumbersome to allow management and staff to adapt to changing circumstances day to day. However, if they are not periodically reviewed, they can also result in organisational sclerosis, and management may find itself incapable of refreshing the organisational structure and culture over time.

Requirement Redesign: Competitive tendering requires the commissioning agency to prepare a detailed statement of requirement, which has the effect of focussing attention on the purpose, and the scale and scope of the service in question. In some cases, this is associated with a shift from process to a performance culture. In its 2001 report on Public Private Partnerships, the British centre-left think-tank, the Institute for Public Policy Research wrote:

A major potential benefit of PPPs is that they can help government to focus more clearly on the services people want, rather than simply managing existing forms of service delivery. . . Public managers often comment that attempting to specify the nature of a planned service formally is a challenging experience – forcing out in the open issues which would otherwise remain hidden. This is an indication that the commissioning process can prove a highly effective way of concentrating minds on how to shape services to improve outcomes.⁵⁶

4. System Effects (Term of Reference 2)

It is generally accepted that the introduction of competition and contracting into a prison system contributes to improvements across the system as a whole, although attempts to quantify this effect have so far failed. In the United States, three studies sought to compare overall spending on corrections across a number of states, with the proportion of prisoners held in privately-managed facilities. All three found a negative correlation, so that there seems to be some kind of relationship between broader use of prison contracting and lower spending on corrections. However, these studies did not establish that the relationship was causal – it is possible that governments that are in financial crisis and thus needing to constrain expenditure, use competition and contracting along with many other tools, or that governments that had already adopted a fiscally conservative policy were also more inclined to use competition and contracting.

There is, however, strong anecdotal evidence of the effect. The Australian criminologist (and until recently, West Australian Inspector of Custodial Services), Richard Harding, documented a number of examples where the public sector embraced reforms that had been initiated by the private sector, through a process he described as 'cross-fertilisation':

In the United States, the state of Louisiana required ACA accreditation by its private prison but not for its own public sector prisons. This requirement soon worked its way into the fabric of the public sector system. . .

In the United Kingdom, an example related to the standards required of the private operators of a new remand prison, The Wolds. The mandated minimum standards far exceeded in every component those expected of comparable public prisons: for example, out-of-cell hours, visits, access to showers, out-of-doors time, telephone usage, and so on. While The Wolds was starting up, the Prison Service was developing its new Model Regime for Local Prisons and Remand Centres. The standards approximated those earlier required of the private prison operator – a quantum leap. Commenting on this, Bottomley et al state that 'the threat of market testing [i.e., opening up more remand prisons to private sector operation]. . . acted as a powerful spur to innovation.'

In Queensland (Australia) current research being carried out by Harding and Rynne has identified clear cross-fertilization effects with regard to health care, where the standards the public sector required of the private sector were initially far higher than it required of itself. Within a few years the public sector found it necessary to equal those standards. . .

The same research project has also identified substantial cross-fertilization in the area of prisoner programs. Borallon Prison avowedly set out to integrate programs into the daily lives of inmates through a unit management approach. The cognitive programs directed at addressing offending behavior were different from anything else

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found in the public system. . . These fresh approaches were picked up by the public sector quite quickly.⁵⁷

In the United Kingdom, the 2001 report into the prison system by Patrick Carter (now Lord Carter), concluded:

It is widely accepted by management and unions alike, that the competition offered by the new private prisons and the market testing of existing establishments has made the prison system more efficient and effective as the public sector has sought ways to improve its working practices and become more competitive.⁵⁸

Mike Newell, then president of the Prison Governors' Association, acknowledged in 2002 that 'despite my moral objections to placing prisons in private hands, I have to admit that the shock to the Service of privatisation did start it on a path to recovery'.⁵⁹

The process by which cross-fertilisation occurs has been little studied. In some cases, those responsible for managing an individual facility or the prison system as a whole use the prospect of competition as a lever to introduce changes that were previously not possible.

- In the case of the new generation prisons in New South Wales, the changes were introduced as part of departmental negotiations with public sector unions, resulting in a new industrial award. It was only once the new award had been agreed that the government agreed that the public sector would operate these facilities without the need for actual competition.⁶⁰
- It appears that the Governor of Woodhill Prison, a public facility opened at roughly the same time as The Wolds (which was the first contract prison in the UK), used the threat of competition as a way of introducing a performance culture into his prison.⁶¹

In some cases, senior managers use the new establishments as exemplars, demonstrating that desired reforms are capable of being implemented without risk to prisoners or staff. The introduction of significant numbers of female prison officers into the contract prisons may provide an example of this. Prior to The Wolds, the first privately managed prison in the UK, the ratio of female custody officers throughout the Prison Service was around three percent. When The Wolds opened, around 30 percent of its prison officers were female, and later contract prisons have maintained this gender ratio. Once it had been established that a prison could be safely managed with such high levels of female staff, the public sector followed, although as of 2003, the proportion was still only 21 percent.⁶²

In some cases, the systemic changes necessary to introduce competition and contracting provide policymakers with the tools that they had previously lacked to introduce reform. The obvious examples in the UK system is the

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'Weighted Scorecard', a performance management tool introduced across the prison system after the performance measurement regime for the contract prisons had been established, and Service Level Agreements for prisons being managed by in-house teams following successful competition against the private sector.

5. Accountability Effects (Term of Reference 3)

In most parts of the world, contracting of public services has been built on a model of performance management, with the contractual documentation specifying key performance indicators, accompanied by financial penalties for underperformance (and in some cases, financial rewards for superior performance).

And in some parts of the world, the introduction of contractual performance measurement has brought with it a revolution in the management of performance in prisons. In the UK (and a number of other countries), the establishment of performance regimes for contract prisons was the first time that output targets had been introduced into the corrections system.

The association between prison contracting and performance accountability is an old one and it is by no means coincidental that modern doctrines on public accountability are often traced back to Jeremy Bentham, the late 18th century philosopher, who constructed his theory whilst developing and promoting a proposal to design, construct and operate a large contract prison on the banks of the Thames.⁶³

5.1 Accountability

Performance Measurement

Performance targets are essential when government contracts for the management of a prison, since it is no longer possible for policymakers and senior managers of the system to direct the facility through command and control. Typically, performance targets focus on a relatively small number of key inputs, processes or outputs, using a point system to calculate success or failure, with financial penalties imposed at specified intervals throughout the year based on the accumulated points.

The consequences for failure to report (in terms of financial penalties) are so severe, that companies have a powerful incentive to report even minor incidents. One of the inherent difficulties with the Weighted Scorecard, the performance measurement system employed by public prisons in the UK is that prison managers do not face a similar discipline.

The success of prison contracting in Australia and the UK over a period of almost two decades confirms that in spite of the difficulties that academics had predicted might arise with the contracting of complex services,

performance management can be a powerful means of delivering greater transparency and better outcomes.

Prison Controllers

In British, Australian and some American prisons, accountability has been enhanced by the presence on-site, of at least one full-time contract monitor. This contributes to greater transparency than exists in the public system. As one of Serco prison directors explained when the Institute conducted its survey:

I've got three full-time contract monitors on this site – one has 30 years experience, one has 20 years and the other has 15 years – and they're permanently here monitoring what I do. There is no other Governor in [the system] who has that number of people sitting in and watching them permanently.⁶⁴

This level of scrutiny is unusual, but there is no doubt that in all contract prisons in Australia and Britain there is a much higher level of external supervision than in public facilities.

Prison Inspection

However, prison contracting in the UK has not depended entirely on quantitative measures. When the contract prisons were first established, the UK government had recently established a Prisons Inspectorate for England and Wales, and it was decided that privately managed facilities would also be subject to this scrutiny.

Inspections are qualitative rather than quantitative in nature (albeit based on a formal methodology), which permits the Chief Inspector to scrutinise aspects of prison management that are not (and could never be meaningfully) covered by quantitative targets. There are no financial penalties associated with a critical inspection, although reports of announced and unannounced inspections are released to the public, and management companies pay close attention to their findings because of the reputational impacts.

Over the seventeen years since the first contract prison was opened in the UK, the reports of the Chief Inspector of Prisons have been crucial in providing politicians, public servants and the public at large with confidence that these organisations were delivering safe and decent public services. Indeed, it was through these reports, that the private sector's contribution to the so-called 'decency agenda' was first brought to light.

Independent Monitoring Boards

The UK has long had a semi-formal system of civilian oversight of its prisons in the form of Independent Monitoring Boards (IMBs or Boards of Visitors as they used to be known). Boards monitor day-to-day life in local prisons to

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ensure that proper standards of care are delivered and report to the Governor and the Secretary of State as appropriate. Contract prisons also have IMBs and a number have issued public reports on the performance of their establishments.

Other Public Scrutiny

In the UK, the National Audit Office and the Public Accounts Committee have also reported from time to time on individual contract prisons, and on prison contracting more generally, exploring operational as well as financial performance.

Regulation and Legal Liability

Legislatures, regulators and courts are often willing to demand higher standards of private providers than they are of traditional public service providers, a pattern that has been evident in a variety of sectors over many years.

For example, in 1997, in a 5:4 decision, the US Supreme Court decided in *Richardson v McKnight* that prison guards employed by private contractors were not entitled to the same kind of qualified immunity enjoyed by state employees when sued by inmates under the Civil Rights Act.⁶⁵

The case involved two prison officers employed by Corrections Corporation of America in a Tennessee prison. An inmate sued, arguing that they had violated his Eighth Amendment right to be free from cruel and unusual punishment. The court concluded that there was nothing in the history of the common law, nor in the purposes of qualified immunity which justified the extension of the doctrine to private prison guards. While it was in the public interest for prison officers to take decisive action, this was of greater relevance to public employees than to the employees of private contractors where there was a competitive market.

The minority of the court applied a 'functional' analysis, considering the nature of the public function performed by the employee. On this basis, they concluded that private prison officers would be inhibited in the performance of their duties if not protected by qualified immunity. Legal scholars were inclined to support this position rather than the majority.

In 2001, in another narrow decision, the Supreme Court declined to extend this doctrine to include the prison officers' corporate employers. In *Correctional Service Corporation v Malesko*, an inmate of a half-way house managed under contract, sued the corporation when an officer refused Malesko, who had a heart condition, access to an elevator. Malesko had a heart attack and fell when he was forced to use the stairs to get to his room. Such actions could only be brought against individuals. Justice Rehnquist

commented that 'Whether it makes sense to impose asymmetrical liability costs on private prison facilities alone is a question for Congress, not us, to decide.'⁶⁶

It is not clear that it is in the public interest to expose private providers to separate liabilities or to hold them to more demanding legal standards than public providers, and it certainly results in an unlevel playing field. Nevertheless, the heightened concern that accompanies public service contracting may be seen as one of its inherent advantages. Jeremy Bentham recognised that this underlying suspicion of the private contractor was one of the system's great strengths:

Jealousy is the life and soul of government. Transparency of management is certainly of no avail without eyes to look at it. Other things being equal, that sort of man whose conduct is likely to be the most narrowly watched, is therefore the properest man to choose.⁶⁷

In the UK, the National Audit Office has recognised that there may be a link between the separation of purchaser and provider that is inherent in the contracting model may in itself contribute to increased accountability:

Contracting provides a strong separation of purchaser and provider, giving the purchaser a powerful incentive to demand high performance, good quality evidence of the true level of performance and firm action to improve performance. Contracting cannot occur without the specification of and monitoring of delivery against agreed performance outcomes. In short, contracting creates incentives for better accountability.⁶⁸

5.2 Consequences

The effectiveness of any accountability regime must be judged in large part by the changes that take place as a result of increased transparency and external scrutiny. This is one of the great strengths of prison contracting – there are serious consequences for underperformance, and strong incentives to rectify the problems.

The oft-repeated statement of the UK's National Audit Office in 2003, that 'the best PFI prisons are outperforming most public prisons but the lowest performing PFI prison is among the worst in the prison estate' overlooks the fact that by the time the NAO published its report, that prison, a young offender institution, had been turned around. Three months after that report was tabled in the House of Commons, the Chief Inspector of Prisons conducted a full inspection of the same facility and reported that 'it bore comparison with some of the best performing young offender institutions we have inspected'.⁶⁹

Financial Penalties

The published data on the financial penalties levied on contract prisons is evidence of the serious consequences for a failure to meet agreed performance targets. In the UK, one contractor has been penalised as much as £800,000 a year for a single prison, and several have experienced deductions of more than £100,000.⁷⁰ These penalties would be significantly greater than the narrow profit margins that are characteristic of this industry, so it is understandable that they amount to a powerful incentive to reform. As one of Serco's prison directors told us when we conducted our 2004 survey of former public servants: 'If you don't achieve your KPIs in the public sector, you can trot out a load of excuses. . . Here you get heavily fined, so it does focus the mind.'⁷¹

We would add that such severe financial penalties place a heavy burden on commissioners to ensure that they design a contractual performance regime that is both effective and fair.

Rectification Notices

One of government's earliest interventions lies in issuing a rectification notice to reform identified failings (such as a failure to meet contracted hours out of cell). Such an action is treated most seriously by prison contractors who are required to develop and implement a rectification plan within a defined time period. Failure to do so could result in contract termination.

In at least one example in the UK, the bank lenders appointed their own firm of monitors to scrutinise the changes being introduced by the operator to improve performance levels.

Temporary Takeover

In the case of serious and persistent underperformance, it is possible for public sector commissioners to intervene and suspend the management of a contract prison.

In 2002, the Director General of HM Prison Service made two announced visits to Ashfield, a young offender institution that had been struggling to meet its performance targets, and subsequently appointed a Prison Service team to take control of the prison. At the same time, a rectification notice was issued and the operator developed a rectification plan and recruited a new prison director. Management control was returned to the company after five months.

Apart from replacement of the entire senior management team, this intervention contributed to the termination of a joint venture between two large corporations, which provides some indication of the impact of accountability measures such as this.

Contract Termination

In extreme cases, the remedy of contract termination is open to public sector commissioners. This has been employed in some North American jurisdictions, and with one of the contract prisons in Victoria in 2000.

Failure to Win Future Business

The reputational impacts of negative reports by the Prisons Inspectorate, and from persistent underperformance, are taken very seriously by the senior executives of contract management companies. It is not unusual for procurement teams to make site visits to existing prisons before deciding whether or not to award a contract to a potential operator.

In one of his final reports as Inspector of Custodial Services in West Australia, Richard Harding commented: 'One of the attractions of private sector participation in prison management is that a poor performer can be replaced.' There are, of course, numerous examples where inadequate performance has resulted in a contractor being replaced upon re-competition with another provider. In the case of West Australia, the Inspector of Custodial Services played a leading role in the decision to open the contract to re-competition, in large part because of concerns over the performance of the incumbent.⁷²

5.3 Increased Accountability?

So do all of these measures actually result in increased accountability? According to contract managers who used to manage similar public services within under a traditional public sector regime, the answer is definitely yes. In an anonymous survey of such men and women conducted in 2006, the Serco Institute asked whether they agreed with the proposition 'Under contract, scrutiny is much closer and performance is much more visible than is experienced in similar public sector institutions'. Some 96 contract managers responded, with 38 percent strongly agreeing and a further 51 percent agreeing. Only two percent disagreed.⁷³

6. Market Design (Term of Reference 7)

When public sector commissioners seek to engage the private sector in the delivery of public services, they are, in effect, creating a market. It may be a thin market, with very little competition, but it is a market nevertheless. In our experience, if government wishes to get the best out of the private sector, it must think about these broader questions of market design.⁷⁴

This submission is not the appropriate vehicle for the exploration of such a complex question. However the following summary of the design elements in the UK prisons market in the early 1990s provides some insights into why prison contracting in that country fared so well.[‡]

Elements of Good Design in the UK Prisons Market in the Early 1990s

(i) Underlying conditions

Prison contracting was done for the right reasons. Cost savings were a factor, but not as significant as might have been expected. Officials were also concerned with improving management control, improving services and introducing innovation in design.

The absence of corruption. This is generally taken for granted, but it has been one of the great strengths of the British public services market.

The absence of political lobbying. The longstanding concern among the critics of prison contracting that the growth of a custodial industry would result in political pressure for more prisons never eventuated. One provider withdrew from the market, in part because they tried to import North American lobbying techniques which were rejected.

Political resolve – It was understood that the Prime Minister was firmly behind the introduction of contract prisons. However, Ministers were also actively involved in briefing the industry and encouraging companies to enter the market.

High quality prison managers – There was a ready pool of high quality prison managers who had been thinking for years about how to run better prisons, but had been frustrated in their attempts to do so within the system.

(ii) Market design

Contractors were asked to do it better and not just cheaper. Government decided to ask the contract prisons to deliver to a higher standard. Among other things, this meant that prisoners came out in support of the contract prisons.

Total service (not just facilities management). Companies were asked to make a difference at the front end of public service delivery. They were also able to pursue economics of scope, which may account for the level of savings in the UK.

[‡] This analysis is based on interviews with public officials and company executives involved in the creation of the British market, for a forthcoming publication by the Serco Institute.

Government built a market. It was clear from the outset that there would be a stream of opportunities, so companies were prepared to make a deep investment in the market. Considerable effort was put into attracting quality companies into the market.

The prospect of repeat business. The fact that there was a continuous stream of opportunities (not only in prisons but also in related custodial services) meant that companies had an interest in making deeper investments in capability, and in protecting their reputation.

Good market design. The government built a one-to-many market rather than a spot market.[§] This may have been largely accidental, but it resulted in greater control and better outcomes.

(iii) Good people

Professional advice on prison management. The Remand Contracts Unit drew on the skills of highly capable and innovative prison managers

Professional advice on managing procurement. The responsibility for designing the procurement wasn't just turned over to consultants. The Procurement Unit in the Home Office assigned the responsibility for this market to a young official who had worked in the automotive industry and had some understanding of how long-term partnership worked.

Transfer of managers from public to private. A pool of well-educated and highly motivated prison governors crossed over to the contract prisons and brought with them a public service ethos.

No transfer of prison officers from public to private. The fact that almost no existing prison officers were employed meant that the companies were able to create an entirely new culture overnight.

(iv) Contract management

Output rather input specification. Contractual performance measures were sufficiently high level to permit substantial innovation in the prison regime.

Understanding of contract management. There was an early appreciation that contractors had to be monitored and managed (without intruding too far into their management space).

Qualitative as well as quantitative assessment. An independent Inspectorate of Prisons was crucial to establishing public confidence in the new system. And having a more finely grained and qualitative system of performance assessment enabled the financial performance measures to focus on key outputs.

(v) Good companies

International experience. The companies drew on the best of experience from the US. While no one believed that the American prison system could be imported directly into the UK, important lessons were learned.

[§] In the United States, there are both one-to-many markets, where a state purchases from multiple public and private providers, and a national many-to-many (or 'spot') market, where states compete to purchase bed days from public and private providers in other states. Research has shown that under the conditions that have prevailed in recent decades, the spot market has resulted in smaller prisons and higher operating costs, and lower levels of monitoring and thus lower levels of performance. See Douglas McDonald and Carl Patten, Jr., 'Governments' Management of Private Prisons', Cambridge, MA: Abt Associates, Inc, 15 September 2003.

Local experience. On the other hand, the private companies drew on the practical experience of former UK prison governors.

Decision to do it well. Most of the early players in this market understood that if the first prisons were not done well, this experiment would be short-lived. Group 4 was an ideal company from that perspective to launch the UK market – they had a Scandinavian commitment to social responsibility; they were not concerned about working with unions; and they insisted on being paid on availability and not per capita, so that their risk profile was appropriate.

Willingness to innovate. The early prison companies (and Group 4 in particular) were willing to experiment with new approaches to prison management – introducing a form of direct supervision, employing large numbers of female prison officers, significantly altering staff ratios and removing batons.

7. Contracting Other Custodial Services (Term of Reference 4)

7.1 Court Escort

In Australia, Victoria, West Australia and South Australia have contracted prisoner transportation for some years. Court escorting was first contracted in the UK in the early 1990s, principally with a view to better coordination, the responsibility having been divided previously between policing, courts and correctional agencies.

In England and Wales, the contracting of court escorts was first studied by the Home Office in 1995, shortly after the policy was first implemented. Two thirds of court clerks reported that the service had improved, while almost 30 percent thought that it was equal to what had been provided before.⁷⁵ A survey of prisoners in 2000 reported that while there were improvements that could be made, overall, the contractors were delivering services well.⁷⁶ And a study for the Prison Service conducted by PA Consulting at the end of the first generation of contracts in 2002 found that costs had been reduced below that of the previous in-house service, although there was potential for further savings.⁷⁷

In Scotland, prior to reform, prisoner escorts were undertaken by 8 police forces and the Scottish Prison Service. Following a multi-agency review, these services were rationalised and contracted in 2002–2003. A study by the Scottish Prison Service in December 2006 concluded:

- Centralisation and contracting had released about 300 police officers and 200 prison officers to undertake core duties.
- Management information had improved in accuracy, consistency and quantity.
- There were 33 performance measures in the contract, with a minimum standard for each. The initial contractor matched or exceeded these standards in all but a few months.⁷⁸

Other benefits that have flowed from the contracting of prisoner transport in Australia include:

- Staff are recruited with skill sets aligned specifically to the transport needs.

- Training is focused on the specific tasks associated with the movement of prisoners.
- Specialist firms have designed purpose-built vehicles to meet short-haul and long-haul escort requirements. Design improvements have included:
 - Single cell modules to ensure prisoner safety;
 - CCTV coverage for better monitoring during the move;
 - Secure storage of property.
- New technologies such as global positioning are used to track vehicle locations for better safety and security.
- Close attention is paid to logistical support to allow greater efficiencies in the escorting operations.
- Increased efficiency has resulted in lower fuel consumption and a smaller carbon footprint.

7.2 Home Detention

In the UK, the private sector is involved not only in the supply and fitting of electronic monitoring devices for home detention, but also in monitoring compliance with curfew conditions. This scheme was introduced in 1999, following several years of pilots and its use is presently confined to juveniles and in the early release of adult offenders (who are typically under home curfew for 16 to 60 days).

While trials are being conducted on satellite tracking, at present the UK system is based on a more robust monitoring system that uses the telephone network. If the computer system detects a breach, the contractors first telephone the offender or make a home visit to confirm whether a violation has occurred. Once confirmed, the contractor can issue a warning, or if it is serious enough, contact the Public Protection Unit in the Ministry of Justice.

Recall rates are low – around 5 percent of the population on release. Most of these were for breach of curfew conditions and very few posed a risk of serious harm to the public.⁷⁹

Studies have confirmed that where home detention is appropriate, it is a cost-effective alternative to imprisonment. A recent report by the Public Accounts Committee found that home detention costs the taxpayer £70 less per day than keeping an offender in prison.⁸⁰

There are no comparative public sector costs against which to benchmark performance, since this service has been contracted from the outset. However, the latest round of competition, in 2005, reduced the cost of monitoring by 40 percent, with tougher financial penalties for poor performance.⁸¹

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