Privatising Justice Support and Prison Administration Functions: A WA Exemplar of Effective Regulation and Accountability

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A prominent feature of recent public administration has been the propensity of governments to contract out, or privatise, functions that hitherto had been performed by the state directly. In Australia, this has been the case with prisons for the last decade. The trend has not been so marked with related law enforcement or justice support functions, such as court security, prisoner transportation and management of police lock-ups.

Between 1997, when planning commenced, and 2000, when contracts were signed, the Western Australian government was involved in procurements in relation to each of these main functions. The problem with some earlier exercises in privatisation had been that governments had neither asserted their regulatory functions nor enforced the contractor's responsibilities with sufficient rigour. This article describes the Western Australian approach to these matters, which in many ways seems exemplary.

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[Note: This article was written and accepted for publication several months prior to Professor Harding's appointment as Inspector of Custodial Services for Western Australia. – Ed.]

PRISON privatisation has over the last decade become an established aspect of the Australian penal scene. The first private prison opened at Borallon, in Queensland, in 1990. Since then the other private prisons which have opened have been: Arthur Gorrie (Qld) in 1992; Junee (NSW) in 1993; Mount Gambier (SA) in 1995; the Metropolitan Women's Correctional Centre (Vic) in 1996; Fulham (Vic) in 1997; and Port Phillip (Vic) in 1997. A total of about 3 100 prisoners are currently held in those prisons — about 15 per cent of the 1999 prison population.

Western Australia has had a chronic need for new prison accommodation for the last few years. This is partly because of poor quality stock, partly because of lack of 'fit' between security levels and prisoner classifications, partly because of over-provision in some geographic areas and under-provision in others; and above all because of a significant increase in prisoner numbers. As of 31 December 1997 the population had been 2 234, whilst on 31 December 1999 it reached 2 876 — an increase of almost 29 per cent. The adoption of a new operational philosophy — which seeks a balance between custody, care, rehabilitation and reparation — also placed new demands on the existing penal system.

Analysis of population trends in the light of the above factors indicated that the greatest single need was for a medium security adult male institution in the near-Metropolitan area. For a variety of reasons — including construction costs, asset delivery time, recurrent costs and regime quality — the government decided to seek bids from the private sector. This process commenced in April 1998 and a preferred respondent (Corrections Corporation of Australia) was selected in March 1999.

Almost simultaneously, indeed a little before this, the question of privatising a bundle of related law enforcement activities was being explored — court security, prisoner custody within the court precinct, transportation of prisoners and custodial responsibility for police lock-ups. Some of these matters had become police responsibilities largely as a consequence of historical accident and administrative convenience; others were becoming outmoded as justice functions came to be re-analysed in the light of changing societal needs and values. An internal review of the Western Australian Police Service (the Delta Project), which sought to re-focus police activities on core services, had identified these matters as suitable for contracting out.

The precedents for these matters were nowhere near as well established as those for prison privatisation. There were two prisoner transportation contracts in existence: South Australia (since 1996) and Victoria (since 1997). Otherwise, there is one police lock-up — the Melbourne Custody Centre — under private management in Australia, though as it is of such recent origin (1999) it did not offer a strong lead to the Western Australian project, which was being planned from 1997 onwards. The Western Australian procurement process was to a large extent breaking new ground, therefore, both conceptually and in terms of the scale

contemplated. Corrections Corporation of Australia was the successful bidder for this contract also.

However, neither contract could really be finalised in the absence of enabling legislation. Indeed, in the case of the core functions project, it would have been quite literally impossible to have proceeded, for the contract workers would need to be vested with statutory powers akin to those of police officers and/or the sheriff for some of their key functions. In the case of prison privatisation, although (as discussed below) some thought was given to the possibility of going ahead without enabling legislation, it was clear from the outset that the enterprise would best be carried out within a new statutory framework.

Thus it was that the passage in December 1999 of two statutes — the Court Security and Custodial Services Act 1999 (WA)[1] and the Prisons Act Amendment Act 1999 (WA) — finally cleared the way for the extensive contracting out of various law enforcement functions. These statutes had been stalled in the Legislative Council, where the government lacks an outright majority. The Labor Party was implacably opposed to privatisation in any shape or form, as were the Greens and the small number of Independents. If the laws were to be passed, support would therefore have to come from the Australian Democrats. The latter, in turn, were concerned to ensure that regulatory and accountability processes were put in place which adequately protected the public interest, and only when negotiations had been satisfactorily completed were the statutes passed. In the meantime the government had been finalising the relevant contracts, which could thus be signed shortly after the statutes were proclaimed.

The new arrangements represent a radical departure from traditional processes. This short article attempts to describe the purposes of the legislation, the administrative processes involved in contracting out, the substantive aims of the contracts, and the safeguards by way of regulation and accountability mechanisms that have been adopted.

COURT SECURITY AND CUSTODIAL SERVICES

As this development preceded prison privatisation, it will be considered first. The shorthand term used to describe the activities covered by this legislation was 'core functions'. This encapsulated the notion that police officers and various categories of Ministry of Justice officials were being diverted from their essential functions by the need to carry out low-level and relatively unskilled tasks which in principle could equally well be carried out by less highly trained (and thus less

1. See also the Court Security and Custodial Services (Consequential Provisions) Act 1999 (WA).

expensive) personnel. In particular, court security (in the courtroom itself and at entry points to the buildings) did not necessarily need to be carried out by police personnel; court custody (of offenders being held within the court precinct and taken in and out of the courtroom during the day's hearing) likewise did not necessarily seem to require police involvement; prisoner movement and transportation (from lock-up to court, from lock-up to prison, from prison to court, from prison to prison, from prison to a hospital or mental hospital, to or from juvenile detention centres, etc) did not necessarily require police, prison officers, juvenile justice officers and so on; and finally police lock-ups were not necessarily the domain of the police themselves.

About 300 effective full-time staff ('EFTS') positions were tied up in these functions, some 200 of them being police and the remainder mostly Ministry of Justice personnel.[2] As the matter progressed, it also became apparent that some parts of these functions had been taking place in a legal hiatus, carrying major political and legal risk for government and the relevant services. For example, there was no legal authority to carry out a full search of a person wishing to enter the courtroom as a spectator.

Because of the overlap of the first three of these functions across departments, it was also apparent that there was poor coordination and no sense of organisational 'ownership', with the result that the service was sub-standard. This was both from the point of view of the main users (eg, the judiciary in terms of the punctual arrival of prisoners in court or the sheriff in terms of full authority over personnel carrying out functions in an area for which he or she remained primarily responsible in law) and from the point of view of the general public, as well as accused persons and convicted offenders.

It also was apparent that a notional saving of, say, 200 EFTS police positions could not be translated into a reduction in police resources and manpower. The same observation was true in relation to Ministry of Justice personnel. Accordingly, if the project were to receive the political and administrative support necessary for its success, the funding aspects had to be supplementary to existing outlays. Thus, because the project had multi-agency implications, it became an undertaking of the Department of Premier and Cabinet, with Treasury backing. Earlier governmental commitments to increase effective police manpower in response to community concerns over increasing crime rates could also be met.

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2. 300 EFTS positions involved more than 300 people. Although some personnel carried out these duties as their sole occupation, many more were involved in these activities as one aspect of their duties. The figure of 300 was reached by adding up the various proportions of time devoted to these activities. It thus denotes the human resource effort necessary to service the function rather than equating to the number of public service personnel previously involved.

This background brings out the following factors: first, that the primary aim was to develop existing services rather than to contract them out with a view to 'down-sizing' the previous service providers; secondly, that existing areas of legal risk were to be addressed; thirdly, that the mish-mash of arrangements relating to these functions was to be transformed into an integrated service; and fourthly, that, in the manner of achieving these things, the public interest in a well regulated and accountable set of processes was to be paramount. This was not to be the archetypal sort of privatisation that diminishes state resources and responsibilities. On the contrary, a new and more sharply focused service was to be created.

1. The Court Security and Custodial Services Act 1999

Recognising that an integrated new service model is required, the Court Security and Custodial Services Act 1999 begins by vesting all of the responsibilities and tasks in a single person — the CEO of the Ministry of Justice: sections 8-17. Section 18 then provides that the CEO 'for the purposes of providing any court or custodial services ... may, for and on behalf of the state, enter into a contract with a person....' A 'person' excludes a member of the 'public sector' and also the Commissioner of Police — though section 19 contemplates the possibility that the CEO may delegate *some* functions to the Commissioner of Police. This provision anticipates the point that, certainly in the short-run, it will simply not be economic to contract lock-up functions in most non-Metropolitan areas to the private sector.

Leaving that aside, the statutory scheme contemplates that both 'court security services' and 'custodial services' will be carried out by 'contract workers' employed by the successful private sector bidder for these contracts. That being so, these new categories of law enforcement officials require the appropriate statutory powers, such as the power to search, detain, seize property, and, in relation to custodial services, to restrain. The latter power is not as wide-ranging as that of police personnel.[3]

With the creation of a new class of law enforcement personnel comes the question: who will these people be? Anecdotal evidence strongly suggests that the operation of the Security Agents Act 1976 (WA) (as amended and re-enacted by the

3. See sch 2, para 12. It should be emphasised that existing service providers are not henceforth disentitled from carrying out these tasks. Under s 19, the CEO may make an arrangement with the Commissioner of Police to carry out any of the functions under the Act so that, for example, court security in relation to a dangerous offender or in a controversial case may still be handled by the police themselves. In this event, the police retain their full powers in addition to those created by the new Act. The CEO may also authorise 'justice officers' to carry out any such functions (s 25) and such persons are specifically authorised to use 'reasonable force' (s 26) in a wider range of situations than contract workers. To sum up: 'public officers' will continue to have greater powers than contract workers.

Security and Related Activities (Control) Act 1996 (WA)) has allowed entry of many unsuitable people into the ordinary private security industry. This kind of failure could not be tolerated in relation to the public responsibilities involved in court services and custodial services. The statutory framework tackles this issue by identifying 'high level security work' which contract workers will carry out[4] and by providing that they will require permits to perform this work.[5] In practice the overwhelming majority of contract workers will be engaged in high level security work and thus will require the relevant permits.

The procedures and criteria for granting permits are governed by sections 51 to 57 of the Act. The overall effect of these provisions is that the CEO can vet all contract workers before entry and also remove them subsequently. A wide range of information can be required relevant to determining the suitability of a contract worker; this includes criminal record checks, disciplinary proceedings in previous employment, and general assessment of the honesty and integrity of the contract worker's known associates. A criminal record is defined extraordinarily widely[6] to cover any offence for which the contract worker has been convicted in any part of the world, including even the payment of a penalty under a traffic infringement notice. Of course, these matters do not automatically exclude the granting of a permit, but it is evident that risk management is being taken very seriously indeed. This is particularly the case when it is observed that 'the rules of natural justice (including any duty of procedural fairness) do not apply to or in relation to the issue, or refusal to issue, a permit'.[7] This is certainly indicative of a determination to ensure that the State agency possesses the fullest regulatory powers in relation to this activity.

In parallel, a permit may be suspended or revoked either because of changed circumstances (eg, a new conviction) or because on further reflection the CEO considers that it should not have been issued in the first place.[8] This provision also excludes the rules of natural justice. As a further regulatory tool all permit details must be gazetted, a provision that is presumably designed to facilitate public scrutiny of the persons who acquire such permits.

The CEO's responsibilities extend to the question of minimum matters to be included in contracts. Section 38 spells these out,[9] and they are all aimed at

4. S 48.
5. S 50.
6. S 47.
7. S 54(2).
8. S 56.
9. 'A contract must provide for –
   (a) compliance by the contractor with this Act, and any other written law and the CEO rules;
   (b) objectives and performance standards in relation to the provision of services under the contract;

achieving both contract compliance and acceptable standards in the discharge of what remain ultimately State responsibilities. Section 4 covers such matters as compliance with CEO rules, meeting the objectives and performance standards of the contract, compliance with minimum standards, reporting and notification obligations, the contractor's code of ethics, the establishment of complaints procedures and grievance settlement mechanisms and an indemnity in favour of the State.

It should be noted that the minimum standards[10] are to be laid before each House of Parliament within 10 sitting days following the establishment or amendment of those standards. Even more significantly, the contract itself must be laid before each House within 30 days of its execution or amendment.[11] In actual fact, the Attorney-General has had it placed, unexpurgated, on the Ministry of Justice website.[12] In addition, the CEO is to prepare an annual report on the administration of the contract that is also to be laid before Parliament; this is so that 'an informed assessment can be made of the operations of each contractor and the extent to which there has been compliance with the relevant contract'.[13] These provisions bring into this area of law enforcement a transparency unique to Western Australia.

The continuing responsibility of the State and accountability of the contractor is seen in Part 3, Division 3 — 'Intervention in, and Termination of, Contracts'.

(c) fees, costs and charges to be paid to and by the contractor;
(d) compliance by the contractor with the minimum standards established under s 39 in relation to the provision of services under the contract;
(e) the submission of reports in relation to the contractor's obligations under the contract;
(f) notification by the contractor of any change in the control, management or ownership of – (i) the contractor; or (ii) a subcontractor, or a member of a class of subcontractors, specified for the purposes of this paragraph by the CEO in the contract;
(g) the financial and other consequences of intervening in a contract under s 59, terminating or suspending a contract under s 60 and of requisitioning property under s 65;
(h) codes of ethics and conduct, as approved by the CEO, to apply to the contractor, any subcontractor, their employees and agents;
(i) reporting procedures to notify the CEO of escapes, deaths of persons in custody or intoxicated detainees and other emergencies or serious irregularities;
(j) investigation procedures and dispute resolution mechanisms for complaints about the provision of services under the contract;
(k) an indemnity by the contractor in favour of the State of Western Australia;
(l) the office the holder of which is to be the principal officer of the contractor for the purposes of the Anti-Corruption Commission Act 1988, the Freedom of Information Act 1992 and the Parliamentary Commissioner Act 1971 respectively; and
(m) any other matter prescribed by regulation.'

10. Ss 38(d) and 39.
11. S 45(4).
12. <http://www.moj.wa.gov.au/offmngt/private.htm>.
13. Ss 45(1) and (2).

'Intervention' seems to contemplate some major failure by the contractor that is or could well be ephemeral — for example, an emergency or a failure to effectively provide a service. In such a case an administrator may be appointed to give directions about the issue in question. 'Termination or suspension' seems to contemplate a longer running or more profound failure by the contractor — for example, insolvency, unauthorised change in ownership of the contractor company, or commission of a material breach of the contract which is not capable of being remedied.[14] Once more, an administrator may be appointed to take over the running of the contracted services.

It is important to note that both 'intervention' and 'termination or suspension' of the contract require the approval of the Minister. In accountability terms, this parallels and reinforces the transparency provisions by ensuring full political responsibility for key contract matters.

The last of the major innovations in statutory accountability is found in Part 5, relating to the Inspector of Custodial Services. This independent office holder is a new position created by the Prisons Act Amendment Act 1999, and the position and its responsibilities will be discussed more fully below. Suffice to say for now that the operations of the contractor will be liable to regular inspection, and inspection reports must be tabled in both Houses of Parliament. Even those lock-ups that are not at the relevant time within the contractual provisions but are still being administered by the police service as a delegate of the CEO, will also progressively be brought within the inspection power.

The foregoing is an extremely strong regulatory and accountability structure. Because of the paucity of precedents in this area of law enforcement operations, it has had in effect to be created from scratch for Western Australian purposes.[15] If it works in the way it is intended no one can duck for cover: neither the personnel carrying out the contractual obligations, nor the contractor, nor the CEO, nor the Minister. Moreover, the notion of an 'informed assessment' being made on the basis of transparent and regular information flow contemplates not only Parliamentary debate but, just as crucially, media discussion and the involvement of special interest and lobby groups who are concerned with the quality of these justice system services.

2. The contract

Accountability lies not only in statutory arrangements but also in how the contract is made, what terms it contains and how it is administered. As to the

14. S 60.
15. It goes much further than the arrangements for the privatisation of the Melbourne Custody Centre, dealt with by s 9AA of the Corrections Act 1986 (Vic), introduced by the 1994 amendments to the principal Act.

contract making process, this involved the full panoply of government procurement. Thus, expressions of interest were sought, the parties shortlisted, a Request for Proposals developed, bids received and evaluated, and the preferred respondent selected for negotiation with the government team.[16] A special team was assembled which included not only Ministry, police and judicial representatives (the Sheriff), but also well qualified independent consultants. Most notably, however, an independent probity auditor was involved throughout the process, attending every meeting of any significance and finally signing off that probity had been maintained.

As mentioned, the successful tenderer was Corrections Corporation of Australia ('CCA'), a Queensland company that is a wholly-owned subsidiary of Corrections Corporation of America. CCA has been awarded Australian contracts to operate two prisons (in Victoria and Queensland)[17] and one prisoner transportation service (in Victoria).

Negotiations in relation to such a novel area of contracting out were long and complex. From the government's point of view it was carried out very much from the perspective of minimising risk in the delivery of service as well as maximising value for money. A unique provision is that the contractor's accounts must be made available 'on line' to the Ministry as purchaser so that there is an opportunity to check precisely what tasks have been carried out and what expenditure has been incurred. The contract provides that any 'savings' — that is, under-expenditure in relation to projected costs arising from innovation — will be shared between the parties.[18]

Another matter of great importance is the provision for contract compliance monitors employed by the Ministry to have access to the actual work sites to check standards and procedures.

A third matter designed to minimise risk relates to the decision to bring these services on stream in a graduated way. The first aspects to be implemented will be those relating to court security and prisoner custody within the court precincts,[19] as well as some, but not all, prisoner transport services. These commenced on 31 July 2000. At this time the transport of juvenile detainees in regional areas and of arrested persons to their first court appearance had not been taken up. However, the Ministry has an option, according to an already agreed pricing formula, to require

16. Because of the uniqueness of the procurement, a model development paper was prepared to inform government of the key steps and to test the progress of the initiative.
17. And now, of course, in Western Australia.
18. Under-expenditure as a consequence of volume reduction will be kept by the Ministry of Justice as purchaser.
19. This includes 'custody centres', that is, places where prisoners are held pending or following court appearances. These custody centres are located within police precincts and can thus be confused with police lock-ups. However, the distinction is that they are not used for overnight stays.

CCA to take up the remainder of the prisoner transport and police lock-up services; that option must be exercised to take effect no later than 18 months after the commencement of the first part of the contract. Once more, risk management is seen to be paramount; if there are problems in the first two areas (which could be said to be at the blunt end of these general law enforcement services), then the government has an opportunity to re-think whether to contract out the services which exist at the sharp end.

In summary, a new service has been created. Seeking such a service, the government was obliged to examine regulatory and accountability issues with great rigour, the catalyst for this being the insistence of the Australian Democrats. On the drawing board, the structure appears to be very robust. The key question is how it will work in practice. Not only the Western Australian government but also other governments and all students of public administration will be keenly interested in the outcome.

PRISON PRIVATISATION

Once the decision had been made in 1998 for the construction and operation of a private prison,[20] the question of an appropriate statutory framework became paramount. In the light of the anticipated opposition to the passage of enabling legislation, however, an 'administrative solution' was, as mentioned above, worked on simultaneously with a statutory solution. In other words, the question was explored whether the private sector could operate the new prison under the authorisation of the already existing Prisons Act 1981 (WA).

In toying with this possibility, Western Australian authorities would have been aware of the South Australian precedent. In that State the government also lacked a majority in the upper House of Parliament. The draft legislation having been blocked, the South Australian government took the view that, as nothing in the Correctional Services Act 1982 (SA) positively prohibited the delegation of custodial functions, reliance could be placed upon the general power of the

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20. Formally, the possibility of public sector operation of the prison remained open until the closure of the procurement process. Para 11 of the Request for Proposals stated:

> Four options may result from the RFP process: 1. The private sector will be awarded a contract to design, construct, maintain, finance and operate the prison. 2. The private sector will be awarded a contract to design, construct, maintain and operate the prison, while the public sector will finance the facility. 3. The private sector will be awarded a contract to design, construct, maintain and finance the prison, while the public sector will operate the prison. 4. The private sector will be awarded a contract to design and construct the prison, while the public sector will finance, operate and maintain the prison.

In the event the second alternative is the one that was adopted.

executive arm of government to delegate or contract out its functions. This was done in relation to the Group 4-operated private prison at Mount Gambier. However, this arrangement has not been administratively straightforward and several significant functions (eg, transfers, special leave orders and releases) must be done in the name of, and with the authority of, the public sector. Consequently, the general manager of the Mobilong Prison, which is directly managed by the Correctional Services Department, has to take formal responsibility for various decisions and functions that arise within Mount Gambier. Although no major problem has arisen at this stage, it is clearly a weak model in terms of both risk management and accountability.

The dangers of contracting out prison management services in circuitous legal ways have recently been cogently illustrated by events at Lea County and Guadalupe County Correctional Facilities in New Mexico, USA. In that State, although there was clear statutory authority for privatisation of county jails, there was a hiatus with regard to State prisons, at least as far as full tax benefits and procurement advantages were concerned. In a context where prisons bring employment to areas, the authorities of these two counties were anxious to facilitate the construction and operation of prisons by Wackenhut Corrections Corporation ('WCC'). Accordingly, they contracted with WCC to design, construct, finance and manage the two prisons, and then contracted with the New Mexico Department of Corrections to house State prisoners in institutions which, by definition, had to be designated as county jails. In other words, they purported to achieve by two linked contracts an outcome that could not be achieved directly.

For a variety of reasons — including the egregious error of mixing isolation category maximum-security prisoners with medium-security ones — each prison experienced serious trouble. At the Guadalupe County prison, this included a major riot. The ensuing inquiry stated:

> The circumvention of the procurement code was the most damaging aspect of the approach taken with these two facilities.... [I]t cannot be determined who is responsible for many of the inappropriate, confusing, incomplete and costly provisions of the contracts. In the end, the complex contractual arrangements, the unclear facility missions, the need for prison beds, and the involvement of too many agencies and individuals in negotiations, resulted in contracts which fell well short of industry standards and created significant security, programmatic and fiscal implications for the State.[21]

Whilst the difficulties that might have flowed from an administrative arrangement in Western Australia would, perhaps, not have been as acute as those

21. J Austin, R Crane, B Griego, J O'Brien, & G A Vose 'The Consultants' Report on Prison Operations in New Mexico Correctional Institutions' (14 Jan 2000) <http://www.legis.state.nm.us/corrections.html> Executive Summary.

encountered in New Mexico, it soon became apparent to government officers that there would be considerable risk in going down this path. Accordingly, as with the Court Security and Custodial Services Act 1999, it was preferable for the government to take account of the concerns of the Australian Democrats, without whose support no legislation would have been passed. The outcome has been the creation of a strong regulatory and accountability structure that, through its partial applicability to the public sector, has the capacity to act as the lever for widespread prison reform in Western Australia.

1. The Prisons Act Amendment Act 1999

The basic scheme follows that of the Court Security and Custodial Services Act 1999. Thus, the CEO of the Ministry is empowered to enter into a contract with a person to provide prison services for the State.[22] It should be noted that although the proposal related to only one prison — the 750 bed male medium-security prison to be known as Acacia — the statute is expressed in general terms, so that future prison privatisation is also authorised. Section 15C is virtually identical to section 38 of the Court Security and Custodial Services Act 1999,[23] summarised above. Section 15D, requiring minimum standards to be established, is likewise identical to section 39 of the other Act. The contracts themselves must be tabled, and, similarly, annual reports of the CEO's account of the operator's performance must be tabled to enable 'informed assessment.[24] Again, this parallels the other Act, as does the Attorney-General's decision to put the contract on the Ministry's website.

With regard to personnel, the structure is once more similar. 'Contract workers' involved in 'high level security work' must hold a permit issued by the CEO, and the Act specifically requires that this provision extends to a person exercising the function of a supervisor. This is a particularly important provision in the context of prison administration. Cultural factors are particularly important in running prisons; they are not simply generic institutions that are the same the world over. There has been a demonstrated trend for US-based corporations not sufficiently to appreciate the fact that the American style of doing things can create considerable disruption in a different environment. State control over such appointments is therefore a key issue of risk management.[25] Apart from this specific provision, the general scheme for vetting contract workers and subsequently revoking their permits mirrors that in the other Act.

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22. S 15B.
23. See supra n 9 for the full text.
24. S 15G.
25. RW Harding *Private Prisons and Public Accountability* (Milton Keynes: Open University Press, 1997) 82-88.

So also do the step-in rights — that is, intervention, suspension and termination of the contract. A minor difference here is that intervention does not require the Minister's approval, though suspension and termination do.

Prisons being closed systems, external oversight is of course particularly important. In this regard, the Ombudsman, the Freedom of Information Commissioner and the Anti-Corruption Commission each have exactly the same powers in relation to a contracted prison as in relation to a directly managed prison.[26] The big breakthrough, however, is the appointment of an autonomous statutory office-holder to be known as the Inspector of Custodial Services.[27] As mentioned, the jurisdiction of the Inspector also extends to court security and custodial services.[28]

Just as the personnel vetting provisions have explicitly drawn upon the Criminal Justice Act 1991 (UK), so too does the Inspectorate draw upon the model of the HM Chief Inspector of Prisons.[29] That model provides for not only announced and unannounced inspections of designated prisons, but also for 'thematic inspections'. The present UK incumbent, Sir David Ramsbotham, has developed this side of the Inspector's functions quite notably. There have, for example, been thematic inspections of prisons from the point of view of across-the-board management of life-sentenced prisoners[30] and, more recently, suicide prevention.[31]

The Western Australian Inspector is required to inspect each prison at least once every three years.[32] This may be with or without notice.[33] Also the Inspector 'may review a prison service at any time, including any aspect of a prison service' — in other words, conduct a thematic review.[34] As would be expected, in carrying out these and other functions the Inspector's powers are comprehensive, involving access to prisons, persons, vehicles and documents as he or she thinks fit.[35]

Transparency is again paramount, and section 109N provides for reporting to Parliament in ways that precisely mirror the other Act. The Western Australian

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26. Sch 5.
27. See new ss 109A to 109U, inserted as part XA of the Act.
28. Cabinet has agreed that the Inspector's jurisdiction will soon be extended to juvenile detention centres and to a wide range of community corrections functions. The necessary amending legislation is expected to be introduced in the second half of 2000.
29. R Morgan 'Her Majesty's Inspectorate of Prisons' in M Maguire, J Vagg & R Morgan (eds) *Accountability and Prisons: Opening Up a Closed World.* (London: Tavistock Publications, 1985).
30. As at 30 June 1998 there were 3 934 'lifers' in the British prison system, so their management is an extremely significant issue: Home Office *Development and Statistics Directorate – Research Findings No 94* (London, 1999).
31. See Home Office *Suicide is Everyone's Concern: A Thematic Review by Her Majesty's Chief Inspector of Prisons* (London, 1999).
32. S 109I(1).
33. Ss 109I(3)(a) and 109J(1)-(2).
34. S 109I(3).
35. S 109K.

model is, in this respect, more robust than the UK one, where the reports of the Inspector are technically to the Home Secretary who is not obliged to table them (though the Annual Report must be tabled).[36] However, reflected specifically in the Act[37] is the prevailing UK administrative practice whereby the department (in WA, the Ministry of Justice) is given the opportunity to view in advance and make representations to the Inspector in relation to the opinions expressed in his or her report.[38]

One of the problems of external accountability can, paradoxically, be that multiple external agencies diminish rather than increase accountability. This can obviously arise if the overlapping agencies are diffident in their assertion of jurisdiction, but it can equally arise when 'turf wars' erupt inasmuch as it is possible for the responsible agency to play one off against the other. Accordingly, the Act[39] requires that the Inspector consult with the Anti-Corruption Commission, the Director of Public Prosecutions, and, most importantly, the Ombudsman concerning the performance of a function of the Inspector under the Act. Some working protocols need to be agreed in advance.

As mentioned, the Inspector's office is an independent one, not even subject to direction by the Minister.[40] The point has been grasped that it would be quite counterproductive for it to be a dependent limb of the Ministry of Justice, whose activities, after all, it is scrutinising. The reporting line is to the Parliament. As for the Inspector's qualifications, it is enough if the appointee is 'appropriately qualified'. Unlike South Africa, which recently set up an Inspectorate system,[41] Western Australia has avoided the trap of seeing this as a quasi-judicial office suitable for retired judges or career-end Queen's Counsels. In that respect also the UK model has been followed.

The notion of inspection is quite novel in the Western Australian prison context. Like most Australian jurisdictions, internal audit — that is, checking the performance of Ministry activities through Ministry personnel — has been the convention. Such audits are, at best, process-orientated. Moreover, whenever major crises or

36. In practice, all of the Chief Inspector's reports are available in print form or on various websites, including his own and the broad-ranging penal affairs website <www.penlex.org.uk>.
37. S 109N(7).
38. It is also contemplated that the Inspector may circulate draft reports for discussion. In other words, the processes allow scope for informality, interaction and negotiation between interested parties.
39. S 109O.
40. Although the Minister may not override the Inspector's decision to carry out an inspection, he may direct him positively to carry out some particular inspection. However, the Inspector may refuse to do so, and in this event must give his reasons for so doing to Parliament: s 109L.
41. Correctional Services Act 1998 (SA) ss 85-91 ('the Judicial Inspectorate').

disturbances have occurred within the system, there has been no ready-made machinery for conducting an investigation, determining facts and making recommendations. With the establishment of the Inspector's office, that is no longer the case; a standing body with expertise and familiarity with prison issues is available. This is certainly preferable to the ad hoc inquiries with uncertain or limited powers that characterised the last two major incidents.[42]

The Inspectorate model, then, is a strong one — applicable to all prisons, private or public, within the Western Australian system. It goes further than the UK model in that it is also intended to be applicable to juvenile detention centres, some community corrections activities,[43] and functions being carried out under the Court Security and Custodial Services Act 1999 — most importantly the running of lock-ups. At the time of writing,[44] the specification of the position had not yet been settled, nor the resources and staffing levels. The ultimate effectiveness of the office will depend upon these factors. The experience in the UK was that it took the best part of 10 years for the office to become dynamic and strong, but Western Australia probably cannot afford to wait that long.

Of course, the UK Inspector can only make recommendations. That is also the position in Western Australia.[45] Management has the responsibility of first evaluating, then contextualising those recommendations in the light of competing priorities and fiscal realities. In recent years the UK Chief Inspector has sometimes expressed frustration at the failure of the Prison Service management to implement his recommendations.[46] That is a structural problem that probably cannot ever be wholly overcome; if the Inspector could by executive action cause his recommendations to be implemented, he would in reality be managing the whole system. However, this does not diminish the value of the office from the perspective of accountability. In the particular context of the establishment of a new model of imprisonment in Western Australia — a privately managed prison — this is certain to be of great importance, as it was in the UK.[47]

The Ministry of Justice has taken the opportunity even before the appointment of an Inspector to trial an inspection mode of internal accountability, as opposed to

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42. J McGivern *Report of the Inquiry into the Causes of the Riot, Fire and Hostage-Taking at Fremantle Prison on 4-5 January 1988* (Perth: Department of Corrective Services, 1988); LE Smith, D Indermaur & S Boddis *Report of the Inquiry into the Incident at Casuarina Prison on 25 December 1998* (Perth: Ministry of Justice, 1999).
43. See supra n 28.
44. April 2000.
45. S 109I(2).
46. See eg the Annual Report for 1997/98, and the inspection reports relating to Wormwood Scrubs (1999) and Portland Young Offenders' Institution (2000) <www.penlex.org.uk>.
47. Harding supra n 25, 61-63. See also HM Chief Inspector's Reports relating to Doncaster prison (1996), Buckley Hall prison (1997) and Blakenhurst prison (1999).

the previous audit approach. Three prisons have already been inspected by in-house teams, the membership of which has been supplemented by an external independent member. The first of the resultant reports, relating to Bunbury prison, has been voluntarily tabled in Parliament. It is already evident that this kind of approach has had a greater impact within the system than any previous accountability mechanism. If the objective of the Australian Democrats in negotiating the package described above was to leverage prison reform, it is clear that this process has already commenced.

2. The Acacia private prison contract

Seven consortia responded to calls for expressions of interest. Four were shortlisted and invited to respond to the Request for Proposals,[48] and CCA was again successful. The subsequent procurement and contract processes mirrored those already described.[49]

It should be emphasised once more that, with regard to the terms of the contract itself, on-site contract compliance monitoring will be continuous and the purchaser will also have 'on line' access to the records and books of the contractor. The pricing mechanisms are also a key aspect of accountability. In terms of delivering the promised services, the contract places great reliance on the notion of Performance Linked Fees ('PLF'). Each service requirement is specified and priced, and the performance level identified. A certain proportion of the PLF can be subtracted from the notional payment for each item if performance falls short. For example, in relation to recorded incidents of serious assaults by prisoners on staff or visitors, the standard required for payment of the PLF is eight such incidents or fewer per year, and the percentage of the PLF linked to compliance is six per cent. A sliding scale cuts in once this performance standard is breached. Similarly, each inmate must be provided with six hours per weekday of accredited vocational or educational training programs and the standard required for payment of the PLF is 100 per cent compliance. Once more the percentage of the overall PLF attributable to this item is six per cent.

In the Request for Proposals itself and the successful bid, each of which is incorporated by reference into the formal contract except where there is a conflict with the principal contractual document, these main components are broken down

48. Note that this document also was tabled in Parliament — an unprecedented move for prison privatisation procurements in Australia to date.
49. There was some, but not extensive, overlap between the personnel involved in the two procurements — sufficient to facilitate the exchange of ideas. Equally, the members of each team were quarantined from their normal Ministry of Justice line responsibilities — essential as a purchaser/provider model was being developed at the same time.

into much more detail. For example, 100 per cent compliance with the programs performance indicator involves developing and delivering culture-specific cognitive skills programs for Aboriginal prisoners. The precision of what is required and the accountability consequences of non-performance far exceed any comparable arrangement in the public prison system.

In addition, the contract introduces a concept quite unique in this area of public administration — financial penalties for serious failures. Three issues have been identified — non-natural deaths, escapes and riots or loss of control — and each such occurrence attracts a penalty of $100 000. There is no cap upon the cumulative amount of the penalties that may be imposed; this is in contrast, of course, to the loss of the PLF, which cannot exceed a fixed amount. In essence, if the contractor lost all of the PLF, the operation would be financially marginal; and if, in addition, three or four penalties were to be imposed, it would probably be a loss enterprise. This in itself sharpens the edge of the accountability mechanisms.

This point leads on to the financial criteria for awarding the contract in the first place. In many procurement systems, notably those prevailing in the United States, the expectation and often the legal requirement is that the cheapest conforming bid should win the contract. In the area of prisons, however, the automatic application of such a formula may well introduce an area of risk, and indeed some of the United States experience does demonstrate the unwisdom of cheap operations.[50] In the United Kingdom the concept of 'deliverability' allows the purchaser through the evaluation panel to make non-cost judgements as to quality.[51] In Western Australia the evaluation criteria set out in the Request for Proposals specifically stated that evaluation would be on the basis of 'value for money'. In the event, the successful bidder was far from being the cheapest conforming bid. The judgement was made that the total correctional regime offered was preferable to that of any other conforming bidder in that it seemed to be superior in its attempts to bring about rehabilitation and reparation, whilst also meeting the other cornerstone items of safe custody and care and wellbeing. From an accountability point of view, there should be less risk in a better quality regime than in a poorer quality regime, and the various mechanisms for ensuring that the public interest is met are likely to be applied more constructively.

However, from a regulatory point of view, there would be some real discomfort if the public sector standards do not measure up to those of the private sector. Although the legislation does not make any specific provision in this regard, the

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50. See RW Harding 'Private Prisons' (2000) 28 Crime and Justice: A Review of Research (forthcoming).
51. See National Audit Office *HM Prison Service: The Private Finance Initiative Contracts for Bridgend and Fazakerley Prisons* (London: HMSO, 1997).

strong expectation is that the public sector prisons will soon operate under 'service level agreements' — that is, public sector quasi-contracts within the Ministry of Justice. It would be intolerable to have a dual prison system — a fully accountable, high performance private sector and a less accountable public sector operating according to imprecise specifications. The standards must be comparable. One of the benefits of well-balanced privatisation is that it encourages cross-sectoral improvement.

SUMMARY

Western Australia has now completed two major procurements in the law enforcement field. The first of them — court security and custodial services — is significant in scope in that it takes in police lock-ups, and commendable in the regulatory and accountability model which it has adopted. Likewise, the private prison procurement is exemplary, and its approach and processes have already impacted directly on the systems and accountability of the public sector prisons. Most notably, this has revolved around the establishment of the autonomous statutory office of the Inspector of Custodial Services — an innovation that should turn out to be an Australian pacesetter and model. In addition, it has opened up the whole prison system to informed assessment and debate via the transparency mechanisms that have been adopted. That may, in the long run, be the greatest single contributor to the process of prison reform.