

17 April 2019

Dear Sir/Madam

Re: QPC Inquiry into Imprisonment and Recidivism Draft Report

I am writing on behalf of the Institute of Public Affairs (IPA), regarding the Draft Report of the Inquiry into Imprisonment and Recidivism. This letter supplements our previous submission to the Inquiry. The purpose of this letter is to provide some information from forthcoming IPA research that is relevant to two of the specific requests for information contained in the Draft Report: first, the request accompanying the report's Draft Recommendations 9, 10, and 11, regarding the governance arrangements of the prison system; and secondly, the request accompanying the report's Draft Recommendation 18 regarding the measurement of recidivism and its relationship to governance of the prison system. The research from which the following remarks are drawn has not yet been published and made publicly available. I would be pleased to provide the Commission with a copy once it has been published.

Draft Recommendations 9,10 and 11

These Draft Recommendations pertain to methods for improving the performance of Queensland prisons with respect to the rehabilitation and reintegration of prisoners. Draft Recommendation 9 proposes that the Queensland Government "modify legislation, policy and operational procedures to include a clear and specific objective of rehabilitation and reintegration of prisoners". Draft Recommendation 10 proposes "an effective throughcare model" for the adult criminal justice system, including "a focus on individual rehabilitation needs of prisoners" and "incentives to reduce reoffending". Draft Recommendation 11 proposes that in the development or modification of corrections centres, consideration be given to "cost-effective options to improve rehabilitation of prisoners". The accompanying information request seeks information on "incentives for... prison managers" and "changes to governance arrangements that would improve rehabilitation and reduce recidivism".

The IPA supports these recommendations. In response, we would like to draw the Commission's attention to recent innovations in the governance of private prison contracts which suggest a

potential role for prison privatisation in their implementation. The following remarks should be read in the context of the recent decision by the Queensland Government to take back control of the state's two privately-operated prisons following an investigation into their mismanagement. Notwithstanding the problems seen at those two prisons, this decision by the Government is nonetheless regrettable, as it was made without submitting the operation of the facilities to a competitive process. The Government estimates that its decision will cost Queensland taxpayers \$111 million over four years. The Government should not peremptorily rule out the private operation of prisons without considering different contractual arrangements that might contribute to cost-effective rehabilitation.

Private prisons have operated in Australia since 1990. Indeed, Borallon Correctional Centre in Queensland was the first privately-operated prison in the country. Including the two Queensland facilities that will now return to state control this year, there are 10 private prisons in Australia, housing more than 18 percent of the national prison population. A new private prison will open at Grafton in New South Wales next year, while Victoria's Ravenhall opened last year and is also operation privately. It is clear then that private prisons will continue to play a role in the criminal justice system in other states and that Queensland's recent decision is an outlier.

The standard operating model for private prisons has been that they provide the punishment, incapacitation, and deterrence functions of prison at a lower cost than public prisons, usually through reduced overheads, including staff numbers and wages. Two recent independent reviews of private prisons in Victoria and Queensland found that private prisons do generate savings for taxpayers in those states, estimated at up to 20 percent in Victoria and \$55 million between 2008 and 2014 in Queensland.¹ There is a dispute as to how these savings are calculated. University of Sydney researchers Jane Andrew, Max Baker, and Phillip Roberts suggest that the general lack of transparency around private prison contracts and the unjustified exclusion of government overheads from the calculation make the savings dubious.² By contrast, United Kingdom expert Julian Le Vay points out that it is not reasonable to hold private prison operators responsible for government

¹ Victorian Auditor-General's Office, Safety and cost effectiveness of private prisons, March 2018. Available here: <https://www.audit.vic.gov.au/sites/default/files/2018-03/20180328-Private-Prisons.pdf> pp. 83-9
Queensland Audit Office, Management of privately operated prisons, Report 11: 2015-16. Available here: <https://www.qao.qld.gov.au/reports-parliament-report-11-2015-16-management-privately-operated-prisons> pp. 1-6

² and Phillip Roberts. Prison privatisation in Australia: the state of the nation, The University of Sydney Business School, 2016. Available here: https://business.sydney.edu.au/__data/assets/pdf_file/0008/269972/Prison_Privatisation_in_Australia-The_State_of_the_Nation_June_2016.pdf [last accessed 12 February 2019] pp. 15-16 and p. 25

spending decisions.³ Le Vay estimates that private prisons may operate more cheaply in that country by as much as 30 percent.⁴ In the United States, Alexander Volokh argues that while evidence for private prisons' record on costs is mixed, the best available studies do show a saving.⁵ While there have been some documented failures within private prisons in Australia, especially in Queensland, it has also been argued that the introduction of private prisons into a prison system improves performance across the board.⁶ Given that the most recent independent reviews did show a saving for taxpayers, the question is, or should be, whether and how private prisons can also be directed towards the rehabilitation of prisoners in order to stimulate improvement across the whole prison system.

To this end, governments in Australia and overseas have begun to experiment with the terms of private prison contracts to incentivise improved rehabilitation results. With reoffending a major driver of the growth in incarceration, these experiments have the potential to be important contributions to improved criminal justice outcomes.

So far, two Australian private prisons are governed by contracts that include incentives for reduced reoffending, with two more such contract due to commence this year and next. The contract for Victoria's Ravenhall, signed in 2015, provides for a performance payment if the prison outperforms other prisons in reducing reoffending.⁷ The operators of the Melaleuca Remand and Reintegration Facility in Western Australia will reportedly receive a \$15,000 bonus for each release prisoner who does not offend within two years of release.⁸ In addition, the new contract for Parklea prison in New South Wales, which commences this year, includes a complex performance payment system that include key performance indicators for a reduction in reincarceration, measured against a

³ Le Vay, Julian. *Competition for prisons: public or private?*, Bristol University Press, Policy Press, 2016 p. 160

⁴ *ibid* p. 255

⁵ Volokh, Alexander. "Prison accountability and performance measures," *Emory Law Journal* Vol. 63 2013 pp. 339-416, pp. 357-360

⁶ Economic Regulation Authority, *Inquiry into the efficiency and performance of Western Australian prisons: final report, 2015*. Available here: <https://www.erawa.com.au/inquiries/completed-inquiries/2014-inquiry-to-consider-the-efficiency-and-performance-of-wa-prisons> p. 235 and p. 242

Harding, Richard. "Private prisons," *Crime and Justice* 28, 2001 pp. 265-346 pp. 331-6

⁷ Bucci, Nino. "Victoria's Ravenhall prison operators to be paid up to \$2 million bonus if reoffending reduced," *Sydney Morning Herald*, 12 February 2015, accessed 11 February 2019.

<https://www.smh.com.au/national/victorias-ravenhall-prison-operators-to-be-paid-up-to-2-million-bonus-if-reoffending-reduced-20150212-13d8gb.html>

⁸ Bembridge, Courtney. "New Perth women's prison opens with cash incentives for successful rehab," *ABC News*, 18 December 2016, accessed 22 January 2019. <https://www.abc.net.au/news/2016-12-18/new-womens-prison-opens-in-perth-with-operator-offered-incentive/8130394>

benchmark year.⁹ Finally, the operators of the new prison at Grafton, New South Wales, will be able to earn annual incentive payments for reduced reoffending among its male and female cohorts, and Indigenous and non-Indigenous cohorts.¹⁰

These new contracts following an emerging trend from overseas. Notably, the Auckland South Correctional Facility, also known as Wiri for the suburb in which it is located, is governed by a contract that includes reduced reoffending incentives.¹¹ This goal was incorporated into the design of the prison.¹² The United Kingdom government ran two reoffending reduction pilot programs in prisons as Peterborough and Doncaster. The Peterborough trial tested a social impact bond model that delivered a return to investors upon targets being met. The trial had promising results, leading to a reconviction rate 8.4 percent less than a matched national control group (though this was less than the government's 10 percent target). The results of the Doncaster trial were less promising, with a reconviction reduction of 5.7 percent for one trial cohort against the 2009 baseline that was used, and reduction of just 3.3 percent for a second cohort.¹³

Importantly, the Doncaster model was based on penalties for the operator, rather than bonus payments. This is relevant to the design of incentives. As Volokh points out, in accounting terms there is no difference between bonuses and penalties. Whether a contract offers a bonus or imposes a penalty will not affect the behaviour of prison operators, because it is their own assessment of their expected performance that dictates how attractive they find a performance-based contract, and this does not change based on the incentive design.¹⁴ However, as Volokh notes, this argument does not account for insights from behavioural economics. Prospect theory, as described by Daniel Kahneman and Amos Tversky, argues that actors will be more aggressive in trying to avoid losses

⁹ Corrective Services NSW, "Class 3 contract documents awarded tenders," accessed 22 January 2019. https://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/related-links/doing-business-with-csnw/class_3_contract_documents.aspx

¹⁰ 5 NSW Treasury, Project Summary: New Grafton Correctional Centre, accessed 12 February 2019. <https://www.treasury.nsw.gov.au/sites/default/files/2017-09/New%20Grafton%20Correctional%20Centre%20-%20Project%20Summary.pdf>

¹¹ The complex formulas for the incentives payments are outlined in Schedule 16 of the governing contract. Department of Corrections, "The contract," accessed 12 February 2019. https://www.corrections.govt.nz/about_us/getting_in_touch/our_locations/auckland_south_corrections_facility/contract.html

¹² 7 Rikha Sharma Rani, "New Zealand tries a different kind of prison," Citylab, 1 September 2017, accessed 12 February 2019. <https://www.citylab.com/equity/2017/08/new-zealand-tries-a-different-kind-of-privateprison/538506/>

¹³ The final results of the trials can be found here: Ministry of Justice, "Final results for cohorts 1 payment-by-results prison pilots," accessed 12 February 2019. <https://www.gov.uk/government/statistics/final-results-for-cohorts-1-payment-by-results-prison-pilots>

¹⁴ Volokh, as above, p. 377

than in trying to maximise gains; where actors have hit their targets, they will be risk averse, but where they have not yet hit their targets, they will be risk-seeking. What this suggests is that if the goal of prison privatisation is to create incentives for experimentation towards better rehabilitation results, contracts should be structured so that, absent improved performance with respect to rehabilitation, operators do not make a profit. This insight finds support in the different results of the Peterborough and Doncaster trials. It also makes intuitive sense: in a normal business, entrepreneurs first invest their capital and then produce something of value to recoup their costs and turn a profit, meaning that they start from a position of loss and assume the risk of failure. Private prison operators can, and should, be made to face the same pressure.

Our forthcoming report describes in more detail how private prison contracts can be improved. But for current purposes, I note the following implications of the above summary of available research. First, properly-structured private prison contracts have the potential to contribute to the solution of the reoffending problem. Any future privatisation of prisons in Queensland should include such incentives. And secondly, the incentives need to be large enough that they determine the profitability of the contract for operators. This is necessary for stimulating the kind of experimentation that will yield improved results. It also affects an appropriate transfer of risk from taxpayers to the entity that stands to profit. I make some additional comments regarding incentive design in relation to Draft Recommendation 18 below.

There are some caveats on the above. The goal of prison privatisation should be to create market pressure within the prison system. Properly speaking, the goal should be marketisation rather than privatisation per se. However, there are systemic restrictions on how much incarceration can be made into a market as traditionally understood.

There are two kinds of competition that might exist in the prison system. The first is competition among bidders for the right to operate prisons. The second is competition between prisons in their performance. In respect to the former, the most important reform to the governance of the prison system that the government might make is to introduce a competitive tendering process. This may not lead to privatisation: in 2016, for example, the New South Wales Government undertook “market testing” for the John Morony Correctional Centre. Bids were received from three private

providers and from Corrections New South Wales. The in-house bid was successful.¹⁵ In its review of that state's prison system, Western Australia's Economic Regulation Authority recommended that such a commissioning model be implemented.¹⁶ Queensland did briefly have a commissioning model, with a state-owned corporation created to bid for prison contracts, but this was discontinued in 1999.¹⁷ However, critics have noted that the general lack of transparency and data-tracking within the prison system makes competition in procurement less straightforward than it might seem.¹⁸ As such, transparency emerges a key consideration in the potential marketisation of prisons and the pursuit of greater efficiency within the system. This insight is generally applicable across the entire throughcare process; the involvement of private providers in in-prison or in-community program delivery will also require clear terms on which competition is undertaken and assessed.

As to the second form of competition, between prisons in their performance, marketisation is limited by the needs of justice and the situation of private prisons within a state-controlled prison system. In a normal market, experimentation and innovation are limited only by resources. However, prison operators necessarily contend with restrictions on how they might pursue incentives on offer, simply because they are dealing with humans who have rights that do not disappear at the moment of incarceration. This means that private prison contracts will always have a level of prescriptiveness that other service contracts may not have. And to the extent that this limits operators' autonomy, then it also limits how reasonable it is to expect them to outperform state prisons. If competition and marketisation are to play a role in prison governance, it can only be to a level consistent with the amount of autonomy prison managers (private or public) can be given. For example, in a review of the contract for the Melaleuca facility in Western Australia, that state's Inspector for Custodial Services criticised the contract for being "overly aspirational and highly prescriptive" and this ultimately contributed to the mismanagement of that facility.¹⁹ Again, this insight is not limited to private prison operators but extends to private companies involved in service provision within the system.

¹⁵ Department of Justice, "CSNSW named as preferred bidder for John Morony Correctional Centre," Media release, 25 May 2017, accessed 12 February 2019. <https://www.justice.nsw.gov.au/Pages/media-news/mediareleases/2017/CSNSW-named-as-preferred-bidder-for-John-Morony-Correctional-Centre.aspx>

¹⁶ ERA, as above, p. 10

¹⁷ Harding, as above, p. 312

¹⁸ Jane Andrew, Max Baker, and Phillip Roberts, *The cost of commissioning: research report on the proposed reforms to Western Australian prisons sector*, The University of Sydney Business School, 2015. Available here: <https://www.erawa.com.au/cproot/13826/2/A%20Submission%20in%20Response%20to%20the%20ERA%20Draft%20Report%20-%20Andrew,%20Baker,%20Roberts.pdf>

¹⁹ 3 Office of the Inspector of Custodial Services, *Inspection of Melaleuca Remand and Reintegration Facility*, April 2018. Available here: <https://www.oics.wa.gov.au/wp-content/uploads/2018/06/Report-117.pdf>

The challenge, then, of how to, in the terms of the Draft Report, “foster markets and community involvement in services that support rehabilitation and reintegration” is that the product being bought and sold is a matter of negotiation, based on how the purchaser and seller assess what is feasible given irremovable constraints. Nonetheless, the track record of private prisons in reducing costs, the growing number of test cases here and abroad, and the extensively-documented non-viability of the status quo all suggest that prison privatisation on terms like those outlined above (and in our forthcoming research) should be part of the policy mix, if only to subject the state prison operator to competitive pressure. The ideological decision of the Queensland Government to resume control of the state’s private prisons without testing whether the market could provide the service desired to the required standard is therefore a retrograde step that is inconsistent with the need to find cost-effective ways to reduce incarceration and reoffending.

Draft Recommendation 18

In the above discussion, I observed that transparency and successful negotiation of incentives were key considerations in the possible marketisation of the prison system. Draft Recommendation 18 proposes that the Queensland Government develop “common performance objectives and indicators across the core criminal justice agencies” and “systems to provide accurate and timely data to support decision-making and improved transparency and accountability”. I would like here to make some general comments about the development of such targets, and how they relate to the problem of making the prison system more efficient.

The IPA joins other civil society groups in noting that the prison system, and especially the operation of private prisons and the provision of private services within the system, is very opaque.²⁰ I have suggested that private prisons can play a role in reducing reoffending if they are governed by contracts that include appropriate incentives. However, private prison contracts are not generally made publicly available in their entirety. Queensland, in fact, has never released the contracts that govern its private prisons. Any competition within the system, whether in the operation of prison or the involvement of private service providers, needs to be subject to public scrutiny. The IPA therefore welcomes the relevant parts of this recommendation.

²⁰ Andrew, Baker and Roberts 2015, as above

There remains though a question as to what exactly should be made transparent. The reason that private prison contracts are usually heavily redacted is that operators want to maintain a competitive advantage over their rivals. It is unreasonable to expect full disclosure of trade secrets, since the point of involving private companies is that they will pursue their advantage and profit in a way that leads to better results and greater efficiency. American historian and political scientist Jerry Z. Muller argues that transparency is more important in relation to outputs than inputs into decision-making processes. Too much transparency of the latter can inhibit the free flow of information within an institution.²¹ In practice, this means that we should be more concerned about public reporting of costs and results than of how contracts are agreed and internal operations decisions about how targets are pursued. The publication of costs and results should allow governments to rank prisons by performance. As noted in the Draft Report (p. 190), New Zealand and the United Kingdom publish 'league tables' comparing the results of their prisons. Corrective Services New South Wales told that state's Legislative Council that the new contracts for its Parklea and Grafton prisons are designed to enable the publication of a similar table.²²

Muller makes one other observation that is relevant to the Commission's inquiry. He notes that the setting by government of performance targets mimics one of the features of command economies: when the government sets targets it takes upon itself the task of determining what the market should produce and in what quantities. In a proper market, this is not something that the government can determine, as supply and demand are product of individual decisions that it cannot anticipate. Premeditated targets distort production and lead to the misallocation of resources.²³ In developing performance targets for the criminal justice system, the Queensland Government should be mindful of the distortive effect that targets can have upon institutions. Metrics can be gamed, and the redirection of resources towards top-down goals can interfere with normal operations in unforeseeable ways. Therefore, performance targets should be developed in close consultation with managers and providers, who can provide important feedback about what is feasible and what sorts of targets will cohere with the efficient operation of the prisons and services in question. It ought to be noted well that the involvement of private operators and providers mitigates this concern somewhat, as private actors have a natural incentive to not accept targets that destroy value and

²¹ Jerry Z. Muller, *The tyranny of metrics*, Princeton University Press, 2018 p. 161

²² Portfolio Committee No. 4 – Legal Affairs, Parklea Correctional Centre and other operational issues, NSW Legislative Council, December 2018 p. 44 Available here:

[https://www.parliament.nsw.gov.au/lcdocs/inquiries/2470/ Report%20No%2038%20-%20Parklea%20Correctional%20Centre%20and%20other%20operational%20issues.pdf](https://www.parliament.nsw.gov.au/lcdocs/inquiries/2470/Report%20No%2038%20-%20Parklea%20Correctional%20Centre%20and%20other%20operational%20issues.pdf) pp. 44-48

²³ Muller, as above, pp. 61-3

efficiency elsewhere in their business. Moreover, in a negotiation with private actors, the government has a monopsony, meaning that it starts negotiations from a strong position.²⁴ This is not true of negotiations internal to an entirely state-run system.

In short, while the development of measures and targets is important for the pursuit of improved rehabilitation outcomes in the criminal justice system, it faces some unavoidable constraints. Top-down targets with insufficient relation to real-world conditions risk increasing inefficiency. The involvement of private companies within the system mitigates this risk, without removing it altogether.

Finally, this concern about measures and targets suggests that simplicity is a virtue. Earlier, I discussed performance incentives for private prisons. I return to this point now in relation to the request for information regarding “how recidivism indicators could be used to be better measure performance” and “how baseline performance should be established”. As noted above, a variety of recidivism measures have been used in recent private prison contracts, including measures of reoffending and reconviction, and the use of baseline years and matched groups for comparison. However, there is a good argument for holding that the simplest measure here is the best: how many individual prisoners return to prison within two years (or some other period) of their release, with bonuses being attached to each individual prisoner. While prisons will still themselves have to develop a baseline of their expected performance, public reporting is made much simpler if it takes the form of noting which prison released how many prisoners of which how many reoffended. Moreover, this accurately conveys where the risks of reoffending lie. Crime is committed by individuals, against individuals. As such, our assessment of crime should take place at the individual, rather than aggregate level, as much as possible. The per prisoner bonus offered to the operators of the Melaleuca facility in Western Australia is a model that deserves serious consideration. In a system that involves private operators and providers, this model also shifts the onus for developing baseline assessments to those providers; and since they stand to profit, they should also wear the risk of failure. Decisions would have to be made about how and when an individual prisoner’s results become attributable to a specific prison, and, like all incentive models, this one does include the risk of ‘creaming’ (devoting the most resources to the easiest case), but, in fact, these difficulties are made more transparent when the focus is on individuals, and would otherwise be hidden by aggregate measures.

²⁴ David Youngberg, “How to fix private prisons,” Foundation for Economic Education, 8 June 2017, accessed 12 February 2019. <https://fee.org/articles/how-to-fix-private-prisons/>

Thank you for the opportunity to make this submission. I regret that I am not able to provide the full research report on which these comments are based and hope to be able to provide it to the Commission in the future. If you would like any further comment from the IPA about this or about our criminal justice research, I can be contacted by email at abushnell@ipa.org.au.

Yours faithfully

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