A critical perspective on private prisons in England and Wales

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A CRITICAL PERSPECTIVE ON PRIVATE PRISONS IN ENGLAND AND WALES

Zusammenfassung
Kritische Betrachtungen zu den privaten Gefängnissen in England und Wales
Dieser Beitrag gibt einen Überblick über den aktuellen Einsatz von Privatgefängnissen in England und Wales. Obwohl nur 11 der insgesamt 137 Gefängnisse von privaten Unternehmen geführt werden, befinden sich 10% der Insassen in einer dieser, in der Regel grossen, Institutionen. Der erste Teil dieses Beitrages beschreibt den aktuellen Stand und versucht zu erklären, warum in den vergangenen 13 Jahren nicht nur die Anzahl der Privatgefängnisse zugenommen hat, sondern der Einsatz von Privatunternehmen im Kriminaljustizsystem überhaupt. Die Erklärungen können unter drei Aspekten zusammengefasst werden: dem finanziellen, dem ideologischen und dem praktischen. Der zweite Teil umschreibt die aktuellen Formen der Verantwortungszurechnung (die «gegenseitigen Kontrollen») in beiden Gefängnissystemen, im öffentlichen wie im privaten. Der letzte Teil ist dem Versuch gewidmet, die Privatisierung zu bewerten. Dabei ist die Informationsbeschaffung ebenso schwierig wie die Evaluation der Effektivität. Die wahrgenommenen Vorteile der Privatisierung müssen kontinuierlich aufs Neue überprüft, die Gefahren ungebremster Privatisierung in Erinnerung gerufen werden. Das ist besonders wichtig, in der heutigen Zeit, in der Konkurrenzfähigkeit, also die Fähigkeit im Wettbewerb zu bestehen, eine so zentrale Rolle in der regierungspolitischen Agenda zur Kriminaljustiz spielt.

Résumé
Regards critiques sur les prisons privées en Angleterre et au Pays de Galles
Cette contribution examine l'utilisation actuelle des prisons privées en Angleterre et au Pays de Galles. Bien que seulement 11 prisons sur les 137 existantes soient actuellement gérées par des entreprises privées, environ 10% des détenus sont logés dans une de ces institutions, qui sont en général de taille importante. La première partie décrit la situation actuelle et tente d'expliquer l'augmentation non seulement de l'utilisation des prisons privées dans les 13 dernières années, mais aussi du recours aux entreprises privées dans le système de justice pénale en général. Les explications peuvent être résumées sous trois titres: financier, idéologique et pratique. La deuxième partie décrit les formes actuelles de contrôle («checks and balances») dans le système carcéral aussi bien public que privé. La partie finale constitue une

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tentative d'évaluation de la privatisation. Elle met en évidence les difficultés non seulement en ce qui concerne la récolte des données, mais aussi en ce qui concerne l'évaluation de l'efficacité. Les avantages perçus de la privatisation doivent être constamment réexaminés, et les dangers d'une privatisation effrénée doivent être rappelés. Ceci est d'une importance particulière à l'époque actuelle, où la «contestability», ou l'aptitude à être concurrentiel, joue un rôle central dans la politique gouvernementale.

Although only 11 of the 139 prisons in England and Wales are currently run by private companies, about 10% of the current prison population are housed in one of these, generally large, institutions[2]. This conference usefully invites a review of the impact that the private sector has had in England and Wales, but, of course, it is notoriously difficult when reviewing recent changes to identify cause and effect. There can be little doubt that prison privatisation in England has encouraged the building of more modern prisons and perhaps encouraged a culture of greater respect shown to prisoners by staff. But whether these improvements could have been achieved without privatisation, and whether privatisation brings with it unnecessary and inappropriate limitations on the legitimacy of punishment needs to be explored. The paper falls into three parts. The first part describes the current position in England and Wales, and seeks to explain the growth not only in the use of private prisons in the last 13 years, but also in the use of private companies throughout the criminal justice system. The second part describes the forms of accountability (the checks and balances) built into the system (both public and private) to promote a lawful and legitimate prison administration. The final part, more tentatively, seeks to assess the advantages and disadvantages of these developments, noting not only the difficulties in gaining information, but also the difficulties in evaluating effectiveness.The perceived benefits of privatisation need to be constantly re-assessed and the dangers of unbridled privatisation remembered. This is particularly important at a time when "contesta-

2 For detailed statistics, see the Prison Service website: www.hmprisonservice.gov.uk, which includes a small section on contracted out prisons, and the prison statistics, www.homeoffice.gov.uk/rds/prisons1.html.

bility", or competition, plays such a central role in the Government's criminal justice agenda.

1 Prison Privatisation in England and Wales

The Criminal Justice Act 1991 first gave the Home Secretary the power to "contract out" the running of prisons. Before that some custodial services (immigration and deportation facilities) had already been privatised. And many services (education, maintenance, food, clothing, laundry, for example) were provided to prisons by the private sector. But the 1991 Act was a landmark, creating the legal framework for private companies to provide court security officers (sections 76–79), prison escorts between courts and prisons (sections 80–83) as well as private (or "contracted out") prisons themselves (sections 84–88). In 1986 the House of Commons' HOME AFFAIRS SELECT COMMITTEE had recommended an experiment with the contracting out of prison building, largely in order to save money and to accelerate the prison building programme[3]. This message found favour with a Government which was also determined to curb the power of trade unions and to extend the "free market" into public services[4].

The Government wasted no time in using its new powers. The first private prison in England, the Wolds, opened in April 1992, run by Group 4 Remand Services. This was a newly constructed prison for 320 remand (unsentenced) male prisoners. This was originally intended to be a "pilot project", to be evaluated by a team led by Professor KEITH BOTTOMLEY of the University of Hull. However, tenders were invited for the second "contracted out" prison before the evaluation study was completed. HMP Blakenhurst was opened in 1993, operated by UKDS. Doncaster and Buckley Hall were also

3 Home Affairs Committee, 1987.
4 See LIEBLING, 2004, pages 25–29.

opened as private prisons during the last years of the 1979–1997 Conservative Government; they also agreed the contracts for the building of Parc and Altcourse prisons, which both opened after the Labour Government took office in 1997.

It might have been thought that the Labour Party would have reversed the privatisation project, having fiercely opposed the Conservative policy when they were in opposition. But the realities of office led to a swift change of policy: not only were existing contracts continued, but the Labour Government has, perhaps surprisingly, overseen a large expansion. The latest policy initiative, the Carter Report 2003, concluded that a new approach was needed to focus on the "management of offenders" and that effectiveness and value for money could be further improved through greater use of competition from private and voluntary providers. The Government's response was to announce a new National Offender Management Service[5] (NOMS) in part to "ensure greater value for money by encouraging the greater use of the private and 'not-for-profit' sectors in prisons and in the community wherever it can demonstrate its greater cost effectiveness". The Government's position can be summarised from their response to Carter's suggestions on "contestability":

> "CONTESTABILITY The Government are not interested in using the private sector for its own sake, whether in prisons or in the community. We want the most cost effective custodial and community sentences no matter who delivers them. The experience with the Prison Service's use of the private sector has been extremely positive. Four private companies successfully run nine prisons (shortly to grow to eleven). Many prisoners and visitors to these prisons speak positively about the way they are treated by staff. More significantly, the threat of contestability in running prisons has led to dramatic improve-

5 NOMS took effect from 1 June 2004, though the Bill which will amend the existing legal structure was only laid before Parliament on 12 January 2005.

> ments in regimes and reductions in cost at some of the most difficult public sector prisons. So effective has contestability been that the public sector have won two prison contracts back from private sector operators and in the last few weeks, responding to the threat of the private sector, Dartmoor and Liverpool Prisons have transformed their performance. We intend therefore to encourage the private and 'not for profit' sectors to compete to manage more prisons and private and voluntary sector organisations to compete to manage offenders in the community. We want to encourage partnerships between public and private sector providers and the voluntary and community sectors which harness their respective strengths. As a market develops, offender managers will be able to buy custodial places or community interventions from providers, from whatever sector, based only on their cost effectiveness in reducing re-offending."[6]

At the time of writing (March 2005) there are 11 "contracted out" prisons in England and Wales, managed by several different private companies: Group 4 Securicor; Premier Custodial Group; United Kingdom Detention Services (UKDS). It is difficult to understand who owns and controls the various private companies involved. Companies amalgamate, or get taken over and change their names and ownership: for example, Group 4 and Securicor merged in July 2004 to form "Group 4 Securicor". The contractual position is also deeply complex. Some "private prisons" are only management contracts; others include "design and build" contracts (built under the PFI, Private Finance Initiative), with much longer (25 year) contracts. As well as privately managed prisons and PFI prisons, other prisons have been 'semi-privatised'. Some tender bids for "private" prisons have been won by the public sector, which then operate the prison

6 Home Office, 2004, page 14.

7 In 2001 the Government sought to contract out the management of a busy London local prison, HMP Brixton, but none of the private companies submitted a bid.

under a Service Level Agreement[7] (SLA). Thus, HMP Strangeways, for example, was rebuilt after the notorious riots in 1990[8] and the running and management of the prison was put out to tender. The Prison Service won the contract and re-opened the prison in 1994, under a new name, HMP Manchester. Similarly, HMP Buckley Hall, the fourth "contracted out" prison in the UK, reverted to Prison Service control in 2000 and is managed under an SLA, monitored by a Compliance Monitor. In 2002 it was re-roled as a closed women's prison. Also in 2001, HMP Blackenhurst (a category B local prison, housing both convicted and remand male prisoners) was returned to public management. Frequent changes create obvious management problems, well recorded in the annual reports of the Boards of Visitors (known as Independent Monitoring Boards)[9]. As has already been noted, it would appear that the Government is currently committed to more competition: it may be that all public sector prisons come to be run under contract, or Service Level Agreements.

Privatisation and the wider criminal justice system

As well as the prisons listed above, there are now four Secure Training Centres for young offenders up to the age of 17 run by private companies (two by Group 4, one by PPS and one by Securicor) under contract with the Youth Justice Board, itself part of the Home Office. These STCs (Oakhill in Milton Keynes, Hassockfield in County Durham, Rainsbrook in Rugby and Medway in Kent) are not the focus of this paper, but the welfare of detained children should not be ignored. The reports of the statutory inspection bodies (brought together as the "Commission for Social Care inspection" in 2004) often make depressing reading. Thus, the reports on Hassockfield, opened in 1999, have regularly commented on its unsettled

8 See WOOLF, 1991.
9 For example, www.homeoffice.gov.uk/docs3/imbblakenhurst03.pdf.

start and high staff turnover, including two changes at director level "which caused major disruption to the establishment's progress"[10].

In England and Wales, many prisoners are released early on curfew[11], and the monitoring of these curfew orders is done by private companies. Thus, Securicor and Premier currently hold five-year contracts for the electronic monitoring of offenders in the community. Electronic monitoring ("tagging") can be imposed by a court as part of a community sentence, or by a prison as part of the licence conditions imposed on an offender when they are released early from prison on Home Detention Curfew (HDC). It can also be a condition of pretrial bail. Although largely used to monitor an offender's compliance with a curfew requirement, it is also used to monitor attendance at programmes[12]. The Government is committed to greater use of electronic monitoring and is also piloting satellite tracking in three areas[13]. Although beyond the scope of this paper, it is appropriate to note the widespread use of private companies in this area. It is clearly arguable that Home Detention is the ultimate form of privatised imprisonment, whereby the prisoner (or perhaps his wife or mother) is responsible for his own imprisonment.

Until the reforms of the Criminal Justice Act 1991, the Prison Service was responsible for escorting prisoners from prison to court, and from court to prison. Whilst this may have been an effective example of "joined up" criminal justice and even a useful education for prison officers, it was perceived as wasteful of resources. Now the 1.2 million journeys that prisoners make every year, moving between prisons and the 140 Crown Courts and 450 magistrates' courts are under

10 Commission for Social Care (2004) Report on Hassockfield Secure Training Centre (HMSO), p 1.

11 English early release rules are complex, subject to significant change when the powers of the Criminal Justice Act 2003 are introduced later in 2005: these will strengthen the powers of executive release from, and executive recall to, prison. At the end of June 2004, there were 3,663 offenders on HDC: See population in Custody, Quarterly Brief, April-June 2004, on www.homeoffice.gov.uk/rds/index.htm/.

12 See Home Office press release 15 Oct. 2004: www.probation.homeoffice.gov.uk/output/page255.asp.

13 See Home Office press release 2 Sept. 2004: www.probation.homeoffice.gov.uk/output/page244.asp.

contracts which cost over £108 mill p.a.[14]. From the Government's perspective the key factor has been cost cutting, the need to reduce the number of prisoners who escape whilst under escort and the timeliness of deliveries. However, there are other concerns: for many prisoners, the journey to and from court takes far too long, is deeply undignified, often cold and distressing. In 2004, Serco signed a 7 year £300 million contract to provide prisoner escort and custody services to HM Prison Service for the London and South East region of England. The company's website announced that this gave Serco approximately 25% of the market in England and Wales. This is another area which should be examined in more detail. For example, the Criminal Justice Act 1991 allowed for the setting up of Lay Visitors, responsible for visiting courts and checking the standards in which prisoners are held in court cells. Certainly they exist, but I am unaware of any review of their effectiveness.

The same firms are also involved in the building of new court houses, new police headquarters and new police custody suites[15]. They provide civilian detention officers in police stations as well as private security services. Private companies now carry out many core policing functions. Private security firms routinely guard private spaces. But these private spaces include vast quantities of what would previously have been thought of as public spaces: shopping malls and residential areas, for example. In an important review of policing in England and Wales, NEWBURN and REINER (2004) suggest that: "Arguably, the most profound shift in the past 50 years in policing has been the ending of the idea of a police 'monopoly' in policing as a broadening array of private, municipal and civilian guards, officers and wardens become ever more visible."[16]

14 See PA Consulting at www.paconsulting.com/NR/rdonlyres/346FB259-58B4-415E-9CC6-BE6B588DDFB8/0/cs_prison_service_pecs.pdf.
15 See Centre for Public Services, 2003, for detailed examples.
16 Page 614.

They point out that private security personnel far outstrip police in numerical terms, and that even within the police, civilian employees have become an accepted part. Another huge growth area for the private sector has been created by the proliferation of security hardware, in particular CCTV.

Explaining the use and growth of private prisons

For the purposes of this article, it is time to try and explain the growth in the use of private prisons in England and Wales. It is clear that one of the main attractions of privatisation for the Government has been, and remains, financial savings. One obvious factor is cheaper staff costs, since staff costs are said to amount for perhaps 80% of total costs in running a prison. Another huge cost, which the Government has been happy to escape, has been the cost of building new prisons which explains the attraction of the Public Finance Initiative[17].

For the Conservative Government in 1991 there was also an ideological attraction in privatisation. Mrs Thatcher's Government was keen to develop "free market" thinking into public services. Much has been written about "new public management"[18], and about how this managerialist perspective fitted with the dogma of the Conservative Government. A particularly interesting account has been written by an "insider", LORD WINDLESHAM, a former Minister and Parole Board Chairman, who gives a detailed account of how Conservative Party political and commercial interests overlapped at this time[19].

17 But the savings may be exaggerated: 25 year contracts do not come cheap. Of particular concern to critics of the privatization of prisons are the "windfall" profits which arise from refinancing. Once a PFI project is up and running, financial institutions are willing to offer finance at lower rates, whereas the amount paid by the Government remains as per the contract (see Prison Reform Trust, 2005).

18 See FERLIE et al., 1996.

19 See WINDLESHAM, 1993, around page 288; WINDLESHAM, 2003.

The explanation for the growth does not lie only in the financial and ideological attractions of privatisation, but in the faults which were, and remain, easy to identify in many public sector prisons. One of the most obvious in 1990 was the powerful trade union, the Prison Officers Association, which was reluctant to change. Another was the large public service bureaucracy, which was both uncertain in its objectives and lacking in management expertise[20]. At the same time, many prisons were old, decaying and squalid[21]. A useful catalogue of the failings in the prison system of that time is to be found in the report by LORD WOOLF, now Lord Chief Justice, into the prison disturbances which took place in 1990[22]. Thus one can conclude that private prisons were first introduced, and now house perhaps 10% of prisoners, for three main reasons: financial; ideological and practical.

2 Accountability

Are adequate checks and balances built into the prison system to ensure that they are properly monitored, and indeed function within the law? Let us explore the accountability mechanisms which currently apply to both public and private sector prisons. First, there are constitutional and statutory controls. But in England these are weak. The UK has no formal written constitution, though the incorporation of the European Convention on Human Rights into domestic law by the Human Rights Act 1998 has had an important impact on the culture of public decision-making, which is now more openly harnessed to the standards of the European Convention[23]. Although many have long recognized the need to update and modernize the Prison Act 1952, not least in order to give prisoners clearly enforceable rights, the power of the executive is great. Legislative change and prisoners' rights have not been Government priority.

20 See LIEBLING, 2004.
21 See STERN, 1989.
22 WOOLF, 1991.
23 See IRVINE, 2003.

Secondly, there is Parliament's wider role. Whilst Parliament has not legislated in detail on private prisons since the 1991 reforms which permitted their introduction[24], much of what we know about private prisons comes from individual MPs asking questions of Ministers in the House of Commons[25]. Questions are not always answered, of course, either because the information is not collected or because the costs of collecting it would be disproportionate. However, in recent times, ministerial statements have provided more information than would be available, particularly due to the tenacity of individual MPs. Much of the real work of the House does not happen on "the floor of the House" (i.e. in the debating chamber), but rather in committees which have the time to explore topics in a little more detail. Thus, the influence of the HOME AFFAIRS COMMITTEE in 1986/7 has already been noted. As important in this area has been the Public Accounts Committee, whose recent reports, for example, on the operational performance of PFI prisons hold much useful information[26].

Thirdly, there is the role of the judiciary. The judges in England have in the last forty years developed the law on prisoners' rights through decisions in individual cases.Important recent examples include *R v Secretary of State for the Home Department, ex parte Simms and O'Brien; Same, ex parte Main* [1999] 3 WLR 328; 3 All ER 400 where the House of Lords allowed the prisoners' appeals against the banning of oral interviews in prisons with journalists and *R v SSHD, ex parte Daly* [2001] UKHL 26 where the House held that a policy requiring that prisoners be absent when privileged legal correspondence held by them in their cells was examined by prison officers was unlawful. There is of course no ground for complacency here: it is to be hoped that the English courts would not follow the dangerous precedent of the US Supreme Court, when it decided by 5 votes to 4 not to grant a prisoner the right to sue a private prison for infringing

24 But see now the Management of Offenders and Sentencing Bill 2005.

25 Much valuable information on performance can only be gained from searching Written Answers either in Hansard, or nowadays on Parliament's website: www.parliament.uk.

26 See the 49th report, Session 2002-3, HC 904.

his constitutional rights (see *Correctional Services Corporation v Malesko* (2001) 534 US 61). But there have been no reported cases involving private prisons in England yet: perhaps because minor claims have been settled to avoid the adverse publicity? It would useful to know more.

Fourthly, we have what might be called the administrative forms of accountability, the checks and balances which have been built into the prison administration. Each prison has a Board of Visitors[27] who have a duty to "satisfy themselves as to the state of the prison premises, the administration of the prison and the treatment of the prisoners[28]" and to "hear any complaint or request which a prisoner wishes to make to them or him", to "inspect prisoners" food and to "inquire into any report made to them ... that a prisoner's health, mental or physical, is likely to be injuriously affected by any conditions of his imprisonment"[29]. Until 1993, these Boards also had a disciplinary function, but the WOOLF Report (1990) rightly recommended that these powers should be removed from them[30]. The effectiveness and degree of involvement of Boards varies from prison to prison[31]. More influential are the reports of the Chief Inspector of Prisons. This Inspectorate has existed since 1960. Under the amended s. 5A of the Prison Act 1952, "it shall be the duty of the Chief Inspector to inspect or arrange for the inspection of prison in England and Wales and to report to the Secretary of State on them ... The Chief Inspector shall in particular report to the Secretary of State on the treatment of prisoners and conditions in prisons". Carrying out regular announced and unannounced visits to prisons, the Chief Inspector

27 Known as Independent Monitoring Boards since 2002, but the legal framework is only now to be updated in the Management of Offenders and Sentencing Bill 2005.

28 Rule 77 of the Prison Rules.

29 Rule 78 of the Prison Rules.

30 We will return to this issue. Disciplinary powers were instead handed to the Governor of a public prison and the Controller in a private prison. The European Court of Human Rights decided in *Ezeh and Connors v UK,* 30 October 2003, that disciplinary proceedings constituted criminal proceedings for the purposes of Art 6, given the power to award extra days onto the custodial parts of sentences. Therefore, prisoners had a right to legal representation and governor was not an "independent and impartial tribunal".

31 Some of their annual reports may be read on the web.

may make recommendations to the Home Secretary. The Inspectorate also carries out thematic reviews, though not yet of the private sector. Finally, there is the Prisons and Probation Ombudsman[32], an independent prisoners' complaints adjudicator, whose reports are influential but who has no specific powers, for example to award compensation. He cannot consider complaints made by prisoners' friends or families.

Finally, as far as private prisons are concerned, there is also the contract, monitored both centrally and on site. As we have seen, some "public" prisons are now also monitored under a Service Level Agreement. Centrally, responsibility was moved during 2003 away from the Prison Service to a new part of the Home Office named "Correctional Services". Then, in January 2004, the Government announced the creation of the National Offender Management System (NOMS), within the Home Office, though legislation to update the Prison Act 1952 was not published until January 2005. In NOMS, it is the Office for Contracted Prisons which monitors these contracts. Each private prison also has a Controller on site. This post was initially set up, not only to deal with contract compliance, but with the concerns expressed about the privatisation of punishment, in particular, concerns about employees of "private" companies using force on prisoners and imposing disciplinary punishments. Thus, a director of a private prison has the same duties and functions as the governor of a public prison, except in certain key areas. Rule 82 of the Prison Rules 1999[33] states that

"(1) Where the Secretary of State has entered into a contract for the running of a prison under section 84 of the Criminal Justice Act 1991 ("the 1991 Act") these Rules shall have effect in relation to that prison with the following modifications –

32 To be replaced by a Commissioner for Offender Management and Prisons by the 2005 Bill.
33 Delegated legislation passed under the authority of the Prison Act 1952.

(a) references to an officer in the Rules shall include references to a prisoner custody officer certified as such under section 89(1) of the 1991 Act and performing custodial duties;
(b) references to a governor in the Rules shall include references to a director approved by the Secretary of State for the purposes of section 85(1)(a) of the 1991 Act except –
  (i) in rules 45, 48, 49, 53, 54, 55, 61 and 81 where references to a governor shall include references to a controller appointed by the Secretary of State under section 85(1)(b) of the 1991 Act, and
  (ii) in rules 62(1), 66 and 77 where references to a governor shall include references to the director and the controller;
(c) rule 68 shall not apply in relation to a prisoner custody officer certified as such under section 89(1) of the 1991 Act and performing custodial duties.

(2) Where a director exercises the powers set out in section 85(3)(b) of the 1991 Act (removal from association, temporary confinement and restraints) in cases of urgency, he shall notify the controller of that fact forthwith."

This unclear provision illustrates some of the difficulties: "prison officers" in private prisons are known as "prison custody officers", the "governor" of a private prison is a "director", but there is little clarity about how their roles differ from those employed in the public sector. The Rules specifically give the Controller a role where the governor of a public prison has the right to remove a prisoner from association (rule 45), to impose temporary confinement on a prisoner (rule 48), to impose restraints on a prisoner (rule 49), and to hear disciplinary charges and impose penalties (rules 53, 54, 55, and 61). The Management of Offenders and Management Bill 2005, clause 7, will transfer to the Director disciplinary functions, supposedly freeing up the Controller to focus on contract monitoring. This is a serious concern. The Controller is the "face" of the state in the private prison. Already there has been concern that some Controllers have become

too close to the contractor[34], and this shifting in powers is dangerous. Even more dangerous is giving to the private contractor "punishment" responsibilities. We will return to this at the end of the paper.

3 Weighing Up the Privatisation Business

Hurdles in the evaluation process

One difficulty in assessing the impact of private prisons is gaining information on them. Commercial contracts are secret. How do we know what we know about private prisons? Because contracted prisons are now managed by the Office for Contracted Prisons rather than the Prison Service details of their performance are not included in the Prison Service's annual report. Thus, when the latest Prison Service performance ratings were published with much publicity, there was simply a postscript which announced that MARTIN NAREY, the Chief Executive of the National Offender Management Service, "has responsibility for the performance of the contracted sector establishments and he makes an assessment of the contracted establishments on the same basis"[35]. Much information is available via Parliamentary questions, and active pressure groups such as the Prison Reform Trust or the Prison Privatisation Report International, which is published six times a year by the Public Services International Research Unit of the Business School at the University of Greenwich. The editor of this clearly trawls both company and government reports for information. But this is no alternative to full and frank official disclosure.

Another difficulty in measuring effectiveness is agreeing what it is a prison is meant to effect. A key aim of the Home Office is the reduc-

34 See House of Commons' Public Accounts Committee 49th report, Session 2002-03, HC 904, published 2 December 2003.

35 www.hmprisonservice.gov.uk/ news/index.asp?id=2129,22,6,22,0,0 - 25k – 27 Jan 2005. Performance data on private prisons is now put in the House of Commons library. But it is not available in the same detail nor is it subject to the same level of scrutiny as public sector data.

tion of crime. Can private prisons reduce crime? It seems a curious question but it is one which has been asked in Parliament. On 8 June 2004, an MP asked the prisons minister how much the reconviction rate has changed since the introduction of the private sector to the prison service. The prisons minister replied that "figures for the number and percentage of prisoners reconvicted within two years of discharge from prison are given in Prison Statistics England and Wales, 2002"[36]. However, the reconviction rate is a poor measure of re-offending. And during their sentence, prisoners may be moved (even a number of times) between different private and public prisons. Oddly, one new private prison, Dovegate, has the operator's performance fee related to reducing reoffending rates but only for the 200 of the prison's 800 prisoners who are based in the therapeutic community[37].

The Prison Service has for a number of years been measured against Key Performance Indicators (KPIs), developed, of course, to improve performance[38]. What the Prison Service calls a "full" list of estab-

36 www.publications.parliament.uk/ pa/cm200304/cmhansrd/vo040608/text/40608w16.htm.

37 See PPRI No. 56.

38 Thus the Annual Report states, in 2003-2004, the Prison Service met nine of its fourteen KPIs:

- There were 15 escapes from prisons and prison escorts compared with 17 in the previous financial year and no Category A escapes since 1995.
- There was only one escape from escort per 39,377 prisoners, compared with the target of one escape from escort per 20,000 prisoners.
- The average staff sickness rate was 13.3 days against a target of 13.5 days.
- The rate for timely delivery of prisoners to court was 82% against a target of 81%.
- 32,592 prisoners had a job, education or training outcome within a month of release, 12% more than the target of 29,044.
- 5.5% of staff were from a minority ethnic group, meeting the target of 5.5%.
- Education targets were significantly exceeded in most areas:
  - Prisoners achieved 103,583 Work Skills awards compared to the target of 52,672;
  - Prisoners achieved 43,731 Basic Skills awards compared to the target of 34,482;
  - Within this, the KPI for delivery of Basic Skills Level 2 qualifications was narrowly missed, with 13,338 completions against a target of 13,648.
- 9,169 offending behaviour programmes were completed. Within this, the target of 1168 sex offender treatment programme completions was not achieved, but the actual figure of 1046 is the highest ever figure for completions.

The Prison Service failed to meet five key performance targets:

- The rate of positive mandatory drug tests was 12.3% against the target of 10%.
- The rate of self-inflicted deaths was 135.9 per 100,000 prisoners against a target of 112.8. This represents a small improvement on the rate for 2002/3.

lishment performance against their respective individual KPI targets for 2003–04 is also published[39], but this list, as we have already noted, includes public sector establishments only. The PPRI Report No 64 (September, 2004) cites the *2003–04 Outturn and targets by Establishment, HM Prison Service Planning Group*[40], 15 July 2004 to say that six private prisons failed to meet their target on preventing serious assaults, that Parc, which had the seventh highest level of serious assaults compared to all prisons in England and Wales, had the highest rate in the private sector. The rate of serious assaults on prisoners or staff that resulted in a positive adjudication (disciplinary hearing) was three times higher than the target acceptable under Securicor's contract. The serious assault rates at Dovegate and Wolds were amongst the highest compared to all prisons in England and Wales. PPRI also state that both Dovegate and Parc were well below their targets for the average number of hours of purposeful activity that they are contractually required to provide per week and that Altcourse was the only private prison that met its targets. There were particularly high levels of drug use at Dovegate, Forest Bank and Parc. Altcourse also failed to meet its targets for the rate of positive drug tests, carried out randomly on a proportion of prisoners every month[41].

From the perspective of the private company, the bottom line must be profits. Here too information is difficult to access. As we have seen, these companies change their names and ownership. They are deeply involved in a variety of other commercial enterprises, including other "contracted out" or privatised criminal justice agencies.

- The provision of purposeful activity was an average 23.2 hours per week against a target of 24 hours, although this also represents an improvement on the previous year's performance.
- The average rate of doubling, or the number of prisoners held two to a cell designed for one, was 21.7% against a target of 18%.
- The rate of serious assaults was 1.54% against a target of 1.20%.

39 See http://staging.hmprisonservice.gov.uk/assets/documents/100004A1publicKPI_summary2003-04.pdf.

40 Data placed in the House of Commons library: cited also in Prison Reform Trust (2005).

41 Whether such "targets" are the appropriate measures is another question. See LIEBLING, 2004, for a detailed critique of performance measures and of her research developing new measures of the quality of prison life.

Companies publish annual reports, and these too are digested by PPRI, which explores in detail the web of companies and payments involved in the operation of PFI contracts.

As we have seen, one of the main advantages of private prisons is the financial savings. Here we run into a number of evaluative difficulties. There are of course many hidden costs with contracted out services. There are the costs of the public service monitoring the contracts, including the legal staff and accountants. NOMS estimate that they spend £2 mill a year monitoring contracted-out prisons. Then there are consultancy fees: the CENTRE FOR PUBLIC SERVICE (2003) report estimated that the total costs of PFI consultants had been about £145 mill by 2003. Nor are all savings necessarily wise or effective. For example, staff in private prisons are clearly cheaper. The average basic salary for prison officers in public prisons in England and Wales in April 2003 was £23,071. In the private sector it was £16,077, nearly a third less[42]. But cheaper staff are not necessarily better staff. SACHDEV (2003) points out some of the dangers that cheaper staffing creates: greater income inequality, poorer employment terms and conditions, poor pension provision. The Government's own Prison Service Pay Review Body stresses the importance of competitive pay levels to retain people of high calibre throughout the Prison Service. Their 2004 report also stresses the need for more reliable figures on which to base their recommendations. Nor are staff costs in private prisons necessarily cheaper if one includes staff turnover. This problem has been highlighted by the Chief Inspector of Prisons. Thus a report in 2004 on HMP Lowdham Grange described low staffing levels, inexperienced staff and a staff turnover of 30 per cent, making "meaningful personal contact [with prisoners] difficult"[43].

42 Hansard, 23 March 2004.

43 Report on An Unannounced Inspection of HMP Lowdham Grange, 1–3 March 2004, HM Chief Inspector of Prisons, published June 2004. www.homeoffice.gov.uk/justice/prisons/inspprisons/inspection.html.

Challenges for those who promote privatisation

Privatisation, or contestability, remains a central part of the Government's penal policy. We have already noted the difficulties which face both those who support and those who criticize the policy in collecting "hard data" on the effectiveness and costs of privatization. But there are many other issues which those who support the policy of privatization must recognise.

A penal system based on contracts, whether private commercial contracts or Service Level Agreements, may become too rigid. An initial contract may be out of step with changing priorities. Thus, currently there is an emphasis within the Home Office on the need to provide work, training and education opportunities in order to reduce reoffending. Contracts which were agreed some years ago (and PFI contracts last for 25 years) may need adapting. Anne Owers, the Chief Inspector of Prisons stated: "We urge, once again, that the contract be revised to ensure that a good prison can become an excellent one"[44]. More difficult to assess is whether commercial concerns skew performance. According to the Chief Inspector in another report, for example, "... there was a concern that in order to keep up the numbers on the Therapeutic Community required by the prison's contract – and because the Prison Service was slow in transferring prisoners in and out, prisoners from Dovegate's main prison were taking precedence over those from elsewhere on the waiting list. Many of those from the main prison were clearly unsuitable (77 prisoners had been returned since January 2002) ...". This meant that Therapeutic Community places were "not available for more difficult and personality disordered prisoners who might benefit from therapy."[45] The more cynical might add that since the company which runs

44 June 2003 HM Chief Inspector of Prisons Unannounced short inspection of HM Prisons and YOI Doncaster cited in Prison Privatization Report International, No 63, July 2004.

45 Report on an Announced Inspection of HMP Dovegate 29 March–2 April 2004 by HM Chief Inspector of Prisons, July 2004, published 14 September 2004, www.homeoffice.gov.uk/justice/prisons/inspprisons/inspectionreports/d.html.

Dovegate will be penalized if they do not achieve a certain target in reducing offending behavior amongst those in the therapeutic community, they have every interest in excluding those whose behavior is more difficult to change.

There are also concerns about legitimacy, or moral concerns, which will not go away. Let us look at what really counts, from the prisoner's perspective. There can be no doubt that many prisoners are relieved to find themselves in a modern prison, rather than a Victorian decaying building[46]. They also appreciate being treated with respect by staff, being shown "common courtesies". But should the decisions which really count for a prisoner in an English jail be taken by a private contractor? HARDING (1997) argues that properly regulated and fully accountable, private prisons can lead to improvements within the public sector. But he identifies what he calls ten "tenets of accountability", essential for productive cross-fertilization and success. They are worth listing as a checklist against which to evaluate privatisation:

(i) The distinction between the allocation and the administration of punishment must be strictly maintained, with the private sector's role being confined to administration.
(ii) Penal policy must not be driven by those who stand to make a profit out of it
(iii) The activities of the private sector and their relations with government must be open and publicly accessible
(iv) What is expected of the private sector must be clearly specified.
(v) A dual system must not be allowed to evolve in which there is a run-down and demoralized public sector and a vibrant private sector.
(vi) Independent research and evaluation, with untrammelled publication rights, must be built into private sector arrangements.

46 JAMES et al., 1997, wisely point out that prisoners may make their "moral" judgements according to different criteria from those employed by academic critics who oppose privatization. But both perspectives may be useful.

(vii) Custodial regimes, programmes and personnel must be culturally appropriate
(viii) There must be control over the probity of the private contractors
(ix) There must be financial accountability
(x) The state must in the last resort be able to reclaim private prisons

Why does he argue that the private sector's role be confined to the administration of punishment? As we have seen, this is not the case in England. Already the private contractor is empowered to take important decisions. An early decision is the decision on the prisoner's security categorisation and allocation. Once allocated, a key issue is the regime to which the prisoner is allocated: all prisons run an Incentives and Earned Privileges scheme. Every prisoner will be on Standard, Basic or Enhanced Privileges. There is already evidence on the unfair differences which may apply from one prison to another[47]. Release dates are increasingly fixed by those in authority in individual prisons: until 1998, prisoners sentenced to under four years in prison would be released automatically at the half-way point in their sentence. But the Crime and Disorder Act 1998 introduced Home Detention Curfew. Now a prisoner may be released up to 135 days early, in a public prison, by the decision of the Governor and his staff. Currently HDC decisions in private prisons are taken by the Controller, the 'state's representative and monitor in the prison, but the Director and his staff make decisions on categorisation and IEP etc. Now it is proposed that the Controller should become more detached from such decisions and focus on contract monitoring. But a person empowered to refuse 135 days early release is in effect imposing the equivalent of a sentence of 9 months of additional imprisonment. As HARDING says, "If privatization worked in such a way as to enable the private sector to allocate punishment, there would be a profound and irreparable fissure in the balance of the

47 See LIEBLING et al., 1997; BOTTOMS, 2003.

modern democratic state and the corresponding fealty which it could expect of its citizens"[48]. The Government wishes for smooth contract enforcement: it must not close its eyes to the rule of law. Sentence lengths should not be fixed by private contractors.

Let us also consider the prison disciplinary system. It has already been noted, that European Court of Human Rights decided in 2002 that prison governors should not have the power to award additional days imprisonment. The Government chose not to abolish the power to award additional days, and indeed in the Criminal Justice Act 2003 specifically confirmed it. Since 2003, the Governor in a public prison and the Controller in a private prison has had to refer serious cases of prison discipline to a district judge who visits the prison when and if necessary. But the governor retains many other disciplinary sanctions: for example, forfeiture of facilities (maximum 42 days), stoppage of earnings (maximum 42 days), cellular confinement (maximum 14 days), or exclusion from work (maximum 21 days). Now, under the Management of Offenders and Sentencing Bill 2005 the Director of a private prison is to be given disciplinary powers. This is clearly a huge cause of concern: since categorisation and disciplinary adjudications all effect release dates, these decisions affecting individual prisoners should not be delegated to the contractor.

As greater power is given to those who manage private prisons, more emphasis must be given to questions of accountability[49]. The vital roles of the Chief Inspector of prisons, the Boards of Visitors (Independent Monitoring Boards) and the Ombudsman needs to be strengthened. The office of Chief Inspector of Prisons is particularly important: the current post-holder appears to remain fiercely independent, with little evidence of "capture". Will this remain the case? The Government now proposes to create a new inspectorate "for justice

48 Page 27.

49 A view echoed elsewhere in the Commonwealth: see for example, MOYLE, 2000.

and community safety with the responsibility and capacity to deliver end-to-end inspection of the criminal justice system", and is minded to move to single inspectorate to replace the five existing criminal justice inspectorates[50]. This writer is sceptical whether such a move will strengthen the independence of inspection bodies.

There has been surprisingly little academic work published in this country on privatisation, surprising given the enormous role the private sector now plays in the criminal justice system. Dr ALISON LIEBLING's work stands out. *In Prisons and their Moral Performance,* 2004, she looks at published official comparisons, unpublished results of competitions and academic research evaluations. The academic research evaluations include quantitative studies, largely US-based, and qualitative studies such as the evaluation of England's first private prison, the Wolds[51]. She concludes cautiously that "the fundamental problem with private sector management of prisons may be that private sector managers are inherently preoccupied with this basic instrumental (commercial) form of reasoning in a sphere of activity where this instrumental approach is particularly morally dangerous"[52], pointing out an apparent paradox: that both private and public sector have a distinct advantage over the other. On the one hand, the public sector has an ethos which emphasises integrity and transparency, with goals which include public reassurance, quality and social justice. But she identifies the many obstacles which prevent these high ideals from reaching life on the landings: protracted union activity; inadequate quality control; slippage of standards; bureaucratic inertia; fragmentation among headquarters groups; fragmentation between headquarters and the field; inadequate buildings; lack of management expertise; uncertainty of purpose; cost cutting. On the other hand, she argues, the private sector, although motivat-

50 See *Inspectorate Reform: Establishing an Inspectorate for Justice and Community Safety: Consultation* (published in March 2005 available on www. www.homeoffice.gov.uk).

51 JAMES et al., 1997, and Moyle's study of Australia's first privately managed prison, Borallon, in Queensland (MOYLE, 2000).

52 Page 121.

ed by profit and expansion, can achieve a new cultural ethos via instrumental means. But there are obstacles here too: lack of transparency; overriding commercial interests; excessive delegation of powers; the potential for abuse when systems of regulation fail.

LIEBLING notes the "absence of an established or enduring moral framework at senior management levels in the private sector"[53], but concludes that "it is over-simplistic to suggest that the public sector has the monopoly on 'public sector values' or, conversely, that only the private sector has the management expertise to make values real in practice"[54]. Currently, it appears that the Government and those who run English prisons think that this paradox, or the tension which exists between public and private prisons, is a healthy one, and that "contestability" allows the system to enjoy the best of both worlds. But this "wisdom" should not be accepted without much more exploration. Many questions remain unanswered such as the liability of private companies to prisoners for breach of their rights; the effective monitoring of sub-contracts and further delegations of responsibility; the political power of private companies, for example, their power (and right?) to lobby for more onerous sentencing laws simply to continue the growth in their industry. Nor has this paper explored the important role played by the voluntary, not for profit, sector in prisons. Charities have long played an important role in ameliorating the prisoner's welfare in prison and many fear that the "contract culture" will distort their values and goals and change the nature of their contribution[55].

Of course, the concept of privatisation is itself contestable. Does the distinction between private and public make sense? In England and Wales we are currently moving towards some more complex combinations of private and public organizations. JAMES et al.[56] suggest

53 Page 127.
54 Page 479.
55 See BRYANS et al., 2002.
56 1997, page 172.

that the private/public dichotomy may be, in some respects false, misleading and/or unhelpful. Today there seems much less resistance, even in the academic press, than there was ten years ago, and "contestability" has become a central part of the Government's criminal justice agenda. My concern is that the "contracts" culture should not be accepted without question. There remain significant practical and theoretical concerns about whether the state should contract out the "core business" of punishment. These fundamental questions have had too low a profile in the current political debate and I am grateful to the organisers of this conference for the opportunity to raise them here today.

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