

**Western Australian Prison Officers' Union
Submission to the Economic Regulation
Authority**

**Inquiry into the Efficiency and Performance of
Western Australian Prisons**

'In the early days of privatisation, the vision of proponents was that public-sector prisons would import the most positive attributes of the private sector: innovative practices, more efficient staffing and so on. In a period of hyper-efficiency, it may be the flaws of private prisons that are duplicated and the strengths of the public sector that are stripped out: safe levels of staffing, with mature and experienced officers, who use their power professionally.'

Crewe, Liebling and Hulley 2015:334

Overview

The WA Prison Officers' Union (WAPOU) has eagerly participated in all opportunities to take part in the ERA's Inquiry into the Efficiency and Performance of Western Australian Prisons; and will continue to do so to whatever extent is made possible by the ERA. We reiterate our agreement with the majority of other stakeholders contributing to this Inquiry, that further and wider consultation is required to ensure an outcome with a level of rigour and legitimacy. The following submissions from WAPOU and Dr Phil Toner are to be read in conjunction with those previously made to this Inquiry by both parties. We also endorse the previous submissions by Jane Andrew on behalf of the CPSU/CSA.

WAPOU supports reform and positive change. The Inquiry has undertaken an enormous task in an inadequate timeframe and acknowledged the existence of many significant issues. Yet unfortunately, an opportunity to improve a system that could benefit greatly from reforms based on genuine consultation and rigorous analysis, appears to have been missed.

The ERA's doggedly myopic advocacy of following the spectacular self-destruction of the UK system, can only be accounted for by the privileging of ideology over evidence. The introduction of the failed twin policies of specification benchmarking and commissioning, is a recommendation that has not been justified and remains a bizarre move in the face of the crisis in which the UK prison system is now mired. Even a cursory look at the damning conclusions of Her Majesty's Chief Inspector of Prisons Annual Report 2014-15, is enough to make the argument against such a move.

Despite a mandate to look at options to improve the prison system in general, the ERA has not looked at best domestic and international practice – and has not in fact appeared to look further than the UK and NZ. In a recent report from the UK House of Commons Justice Committee (HoC), commentary is made on increasing prison populations and a comparison drawn with Texas, where this is viewed as an unjustifiable burden on taxpayers, which improved community sentencing options and diversionary programmes are being employed to avoid (HoC 2015:64). The ERA may not have wished to look at any of the more progressive strategies being adopted in the USA, given these are largely a response to the horror-show failures that have resulted from privatisation and contracting-out, which the ERA inexplicably favours.

On WAPOU's position against privatisation and contracting out – some may cynically argue our stance relates to the organisation's membership numbers. On that score we reiterate that we cover Officers in private prisons, and more significantly – WAPOU supports justice reinvestment, increased use of community sentences, and reforms that addresses the over-representation of minorities and move away from mandatory sentencing.

The Justice Committee report to the House of Commons has stated that: 'unless there are significant changes in both policy and rhetoric on sentencing, there is a continuing risk of unmanageable growth in the prison population' (HoC 2015:66).

The same could be said of the West Australian system, failure to consider this amounts to irresponsible use of taxpayers' money by this conservative Government. The burgeoning costs of the prison system are more broadly attributable to the growth in the prison population

than a lack of efficiency (though as with all systems there will be opportunities to improve). The ERA has acknowledged it has not conducted analysis to ascertain what degree of inefficiency there is within the system, but surmises there must be some; and takes a punt that there is enough to warrant this costly Inquiry, and an expensive overhaul of the entire Department of Corrective Services. Furthermore, if the Government wants the public to have faith in its intentions and motivations with regard to the prison system, it should follow the move of some US jurisdictions by prohibiting private prison operators and affiliated companies from making political contributions (Aman 2005).

In the current climate of austerity and severe public sector cuts, there is little doubt this Inquiry was always directed towards savings over quality. Not only is the prospect of commissioning a false economy, for all the reasons argued in these submissions and previous ones by WAPOU and Dr Toner, but the implications run contrary to the objective of rehabilitation. Again, in parallel to the UK Justice Committee's assessment:

‘Given the size of the prison population, and the likely need to continue to make financial savings in the medium term, there is a real danger that savings and rehabilitation could become two contradictory policy agendas. The question of the sustainability of the system cannot be ignored.’ (HoC 2015:66).

We go further, to argue the substance of the ERA's Inquiry and recommendations already suggest savings and rehabilitation are mutually exclusive objectives. The introduction of commissioning and benchmarking in the UK has been disastrous, and purely directed towards savings. As discussed by Dr Toner, there is no certainty of real savings having been achieved yet in the UK, and those that have are likely the result of top-down cuts rather than genuine efficiencies.

The violent, understaffed and unsafe prison system in the UK cannot be put down to the mishandling of private prison contractors alone. We have argued that privatization, contracting-out, or the preferred term ‘commissioning’, is a dangerous strategy because of the weight of evidence against private provision of prison services – and the lack of conclusive evidence in favour of it. We maintain the public sector is best placed to provide what is a core public service, and should not be run for profit. However, it is not simply private companies that have decimated the UK system. The turmoil exists across both public and private prisons. The real perpetrator responsible for the systemic and human damage, is competition itself.

The political greed for public sector savings in the UK, forced the public prison system to destroy itself through staffing cuts and reductions in pay and conditions (that worsened the cuts by impeding attraction and retention of staff). By using commissioning and competition to threaten the public sector into submitting to these measures, the Government effectively destroyed the service, which is now in ruins. The dangerous, violent and chaotic nature of the UK prison service has been the result of a foolish misperception that imposing competition of this kind on the public service will deliver some kind of perfect balance in response to ‘market forces’, which do not exist in this sector in the way the ERA claims.

Section 1

**Prepared for the
Western Australian Prison Officers' Union**

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‘Decisions will only be as good as the evidence on which they are based’

(Economic Regulation Authority 2015: 121).

1. Introduction

The central proposition of the third volume of the Economic Regulation Authority’s inquiry into the efficiency and performance of the Western Australian prison system is its advocacy of ‘benchmarking’ individual prisons and the system as a whole against prescribed ‘performance standards’; expanding ‘competition’ for the operation of prisons through ‘commissioning’ and imposing a contractual form of governance on all prisons. ERA asserts these four practices will improve quality of service and impose cost discipline on prisons.¹ This proposition, in turn, is based on three assumptions. First, current private operators of prisons in Western Australia perform better than public providers- ‘we have formed the view that public prisons in the Western Australian prison system are not performing as well as they could’ (ERA 2015: 1). A similar claim is made regarding the UK prison system, an early adopter of the model proposed by ERA. Second, this better performance is attributed to ‘shortcomings in governance arrangements and in management systems and processes’ within the public prison system (ERA 2015: 1).² *Ergo* the public prison system will perform better if it is subject to similar governance and management systems obtaining in private prisons.

The purpose of this study is to critically assess the central proposition of the third ERA report and its four key assumptions that underpin this proposition. The main critical points are that the ERA report:

- provides no robust evidence as to the relative performance of public and private prisons in WA
- ignores evidence that does not support its advocacy of benchmarking, competition and commissioning

¹ ERAs fourth and final recommendation ‘encouraging more effective planning, decision-making and use of information’ is a subsidiary proposition dependent mostly on implementing the above three practices. This fourth recommendation is not examined in this study as, in general, improved information and planning is unobjectionable. (Though again, no cost-benefit analysis of the likely gains from its implementation is provided by ERA). It is worth noting however, that ERA’s somewhat quixotic advocacy of the WA Treasury’s ‘micro-simulation model’ over DoCS simpler regression model, for predicting demand for prison services, is consistent with ERAs approach to evidence based policy. Recommendation 11 is that the ‘Department of Corrective Services adopts the micro-simulation model as the primary prisoner population projection model for the Western Australian Government, after an appropriate trial period agreed with the Department of Treasury’ (ERA 2015: 120). ERA informs us that the Treasury model is still under construction and has, apparently not been tested, as there is no presentation of results or, more importantly, a comparison of performance of the two models. ERA’s advocacy of the Treasury model is simply based on the *a priori* assumption that the more complex model being developed by Treasury will perform better than the DoCS model (ERA 2015: 1117).

² To emphasise the point regarding the centrality of governance arrangements in determining relative performance ERA (2015:1) notes its analysis does not support the claim ‘that the private sector is inherently better at delivering prison services than the public sector’.

- provides no evidence that the contractual form of governance it advocates is either appropriate or optimal for prisons and ignores the extensive research on this issue
- ignores alternative solutions to improve the performance of public and private prisons
- contradicts its advocacy of benchmarking and performance standards by not only repeatedly observing that the tasks and performance of the WA Department of Corrective Services (DoCS), and the prison system more generally, is subject to external influences that the Department cannot control. Moreover, these external influences are largely unpredictable and exert a major influence on the performance and cost of the prison system. A prerequisite ERA imposes on the introduction of benchmarking and performance standards is that institutions and people subject to these must be both responsible for and able to exercise significant control over their implementation and outcome. ERA provides no solution to this dilemma
- contradicts its own advocacy of benchmarking as the report concedes it is not possible to devise rigorous, objective, quantitative metrics that perform a benchmarking function. Benchmarking presumes metrics that standardise all of the following: the definition of prison services; inputs to and outcomes of prison services; the cost and quality of these services; the contribution of each of these services to achieving the objectives set for individual prisons and the wider prison system *and* control for differences in prison characteristics that determine the current large divergence across prisons in the type of services, their costs and achievement of the objectives set for individual prisons and the wider prison system
- proposes a significant and potentially radical and risky change to the management of prisons in WA which, it also acknowledges, imposes significant costs on public and private operators. It does this without providing a cost-benefit analysis of its recommendations. The absence of a cost-benefit analysis is caused, in large part, by the fact that ERA concedes there is no sound method to develop robust metrics of quality adjusted prison services and costs across institutions that are fundamentally different in their characteristics. Without a robust cost-benefit analysis there is no basis for either ERA proposing its recommendations or for the WA government to adopt these recommendations. This is a profoundly unsound basis for public policy.

The remainder of this study details why the assumptions in the ERA report are invalid and the recommendations based upon these assumptions are unsound. First, however, we turn to a brief exposition of the ERA argument.

2. ERA's Analysis of Deficiencies in the Public WA Prison System

'The ERA has observed that the governance arrangements applying to public prisons in Western Australia are not robust' (ERA 2015: 44). Five major deficiencies in governance arrangements hinder the performance of the publicly administered WA prison system:

2.1 A lack of clarity about roles and responsibilities

There is a significant level of uncertainty in the public prison system about roles and responsibilities between the head office of the Department and prison Superintendents. A key effect of this is that ERA has observed a degree of informality in decision-making that permits changes without appropriate analysis and reallocation of resources.

2.2 A lack of accountability

The uncertainty around roles and responsibilities makes it difficult to establish accountability for specific outcomes because it is not clear who is responsible for the outcome. This lack of clarity serves to diminish accountability between various parties in the prison system.

ERA provides the example of prison Superintendents who 'are not responsible for everything that happens within the confines of a prison. For example, Superintendents are not responsible for procuring or ensuring the efficient delivery of education or health services.

This may not lead to optimal education and health service outcomes because Superintendents are in control of resources (that is, prison officers) required for the efficient delivery of health and education services' (ERA 2015: 71). These services are delivered by specialist agencies within WA DoCS.

2.3 A lack of transparency

The Department does not publish data that allows all stakeholders to make a robust, independent assessment of the performance of public prisons. In addition, the Department does not publish information that would allow service providers working with the prison system to assess how well they are performing and improve their service offering.

In particular ERA 'has observed that there is a particular lack of transparency when it comes to the performance and operations of Western Australia's public prisons, especially when

compared to the information and documents released in relation to private prisons' (ERA 2015: 64).³

2.4 General inadequacies in information system, planning and controls

The Department and individual prisons lack robust and reliable information systems and have limited capacity to analyse information and plan appropriately for the future. These inadequacies result in adverse effects such as inadequate investment in prison capacity leading to 'over-crowding...[which] can result in occupational health and safety issues for prison officers and prisoners and limit the access of prisoners to programs and services. This reduces prisoner rehabilitation opportunities and is therefore likely to increase recidivism rates (ERA 2015: 54).

³ It was noted in the previous response to the ERA Discussion Paper (Toner 2014: 15) that despite strongly advocating the merits of performance benchmarks for public agencies the ERA's own efficiency and effectiveness performance reporting framework is strictly circumscribed. Section 23 of the Economic Regulation Authority Act 2003 states that: 'any requirement under the Treasurer's Instructions (issued under section 78 of the Financial Management Act 2006) that the Authority prepare performance indicators is to be limited to the Authority's management functions (including financial management), is not to apply to the performance of any other function of the Authority ERA and need only be complied with to the extent practicable' (ERA 2014: 84). (ERA 2014: 26). Given the difficulty of devising credible quantitative and/or qualitative measures of ERAs performance as a regulator of monopolies in WA, and the need to balance the conflicting needs of business, consumers and government in setting regulated prices, ERAs performance metrics are limited to measures of the quality, quantity, timeliness and cost of submissions to ERA's Governing Body (ERA 2014b: 84). As noted previously these are not measures of efficiency or effectiveness. This reinforces the observations in this current study prepared for WAPOU regarding the difficulty of establishing valid and reliable metrics of performance in organisations delivering complex service.

It should also be noted that ERA applies strict limits to its own acceptance of accountability. For example, the following disclaimer applies to certain ERA reports. 'This document has been compiled in good faith by the Economic Regulation Authority (Authority). The document contains information supplied to the Authority from third parties. The Authority makes no representation or warranty, express or implied, as to the accuracy, completeness, reasonableness or reliability of the information supplied by those third parties. This document is not a substitute for legal or technical advice. No person or organisation should act on the basis of any matter contained in this document without obtaining appropriate professional advice. The Authority and its staff members make no representation or warranty, expressed or implied, as to the accuracy, completeness, reasonableness or reliability of the information contained in this document, and accept no liability, jointly or severally, for any loss or expense of any nature whatsoever (including consequential loss) arising directly or indirectly from any making available of this document, or the inclusion in it or omission from it of any material, or anything done or not done in reliance on it, including in all cases, without limitation, loss due in whole or part to the negligence of the Authority and its employees' (ERA 2014, *2015 Energy Price Limits Decision*). It is unclear why this disclaimer does not hold for the current Inquiry into prisons given the extensive use of third party data in these reports. A similar disclaimer applies to the ERAs website. (<https://www.erawa.com.au/disclaimer>).

2.5 Resistance to Change and Union Involvement in Decision-making

The ERA has observed that there are some issues with the culture of segments of the workforce in the Department and individual public prisons. In particular, the ERA has observed that there is some resistance to change and a reliance on entitlements among some staff. This creates a barrier to reform and the introduction of more effective working arrangements.

The primary source of this resistance to change is that the ‘power to make decisions critical to the performance of individual prisons are [sic] divided between the Department, the Superintendent and WAPOU...WAPOU derives the majority of its power from the State industrial relations agreement that applies to the operation of public prisons...This role is formalised in the Enterprise Agreement. Section 173 of the Enterprise Agreement requires the Department to notify prison officers and their Union of any changes that are likely to have “significant effects” on officers, including changes to: the size and composition of the workforce; skill requirements; job or promotion opportunities; tenure; hours of work; transfers of officers; and restructuring of jobs...This creates a situation where Superintendents have to share their management role with WAPOU and negotiate operational changes’ (ERA 2015: 46).

‘The ERA also notes that there is no accountability placed on WAPOU for its influence on the prison system. WAPOU has a *de facto* management role in the prison system, allowing it to have a significant influence on the cost of the public prison system. However, WAPOU is only accountable to its members, not to the Minister or the Commissioner. Reflecting this, the role of WAPOU would ideally be limited to representing the interests of its members and not extend to making decisions on the management of the prison system’ (ERA 2015: 48).

ERA concludes that these five inter-related ‘deficiencies in the governance arrangements of the prison system necessarily have an adverse effect on its performance, including in terms of rehabilitation outcomes for prisoners, the cost of providing prison services and utilisation rates of prisons (ERA 2015: 44).

3. ERA's Recommendations to Redress These Deficiencies in the Public Prison System

ERAs recommendations to address these deficiencies do not align exactly with the five governance problems identified in the WA prison system. This is because to a large extent each recommendation addresses a number of deficiencies.

3.1 Ensuring consistent standards across the prison system

To address the problem of transparency and accountability ERA proposes three solutions. First, specify in detail the services provided by prisons that contribute to the achievement of the core objectives of the prison system. Second, identify the cost of these services. Finally, the Department use this data to establish Service Level Agreements (SLAs) with public providers that specify minimum standards of inputs, costs and outcomes expected of prisons in WA and to establish incentives and punishments for managers to encourage achievement of the Agreement. These SLAs are intended to mirror as closely as possible contracts in current use with private prison providers in WA.

ERA draws inspiration for this model primarily from the UK where, over the last decade, 'the National Offender Management Service introduced its specification, benchmarking and costing program. The purpose of the program was to:

- define what should be delivered (the outcomes and outputs for services) – so consistent services could be delivered across all areas of the business
- to know exactly what it costs to deliver each service
- understand how a service can be delivered efficiently and the cost of delivering that service' (ERA 2015:70).⁴

ERA also notes that such information 'allows the Department to compare the cost of individual prisons and better compare the cost of operating the more expensive (and presumably older) prisons with the cost of replacing them with new facilities that have lower operating costs (ERA 2015:70).

⁴ It is worth observing at this point that ERA describes this specification and costing process as focussed on outputs or outcomes that are desired from the prison system. However, examination of its own suggested standardised services for the WA prison system, and those in other jurisdictions cited as exemplars by ERA, reveals these benchmarks are mostly focussed on specifying and costing inputs into these services. For example, ERA (2015:70) gives considerable space to describe the specified standards in the UK for the provision of 'services for visitors' to prison which 'is broken down into fourteen service elements, the first of which states that there must be decent, indoor facilities with toilets, seating and baby changing facilities that visitors may access when visiting. This is applicable to all prisoner types'. The significance of the fact that services and, as will be shown later, benchmarks, are predominately specified in terms of inputs points to the difficulty of establishing a precise quantitative relationship between prison services and prison outcomes. Without such a precise relationship ERAs fundamental goal of establishing an 'efficient price' for a prison service is unachievable. This issue is taken up in section 4.

A key argument of ERA is that ‘contracts between the Department and Serco establish high levels of accountability and transparency’. However, ‘there is no such document formalising the relationship between the Department and public prisons’ and, consequently, ‘there is less clarity about respective roles and responsibilities and less accountability and transparency about the performance of public prisons’ (ERA 2015: 60).

Achieving parity in accountability and transparency between public and private prisons ‘can primarily be achieved through Service Level Agreements...to establish clearer roles and responsibilities and performance management frameworks (including benchmarks)’. In addition, SLAs would establish the objective of each prison in relation to the wider prison system, something ERA claims ‘is not clearly defined’ (ERA 2015: 60).

The Service Level Agreements will set out:

- Expectations- the manner in which both parties to the Agreement will behave and interact with each other, how each party will respond to unexpected events and the specifications of the prison
- Financial agreement- the level of funding available to the Superintendent for operating the prison and arrangements for adjusting funding when circumstances change
- Performance framework-- the service standards required from the prison and the performance monitoring framework applied to the prison. Service standards set out the minimum standards that an organisation must meet in delivering its operations.

SLAs also have a number of attributes, but the key ones of interest to this study are that SLAs simultaneously allow for precision in terms of specifying services and costs but also they must ‘be sufficiently flexible to cope with changing circumstances... Service Level Agreements should establish clear, good-faith processes for adjusting funding levels for prisons when circumstances change’ (ERA 2015: 60). The incompatibility of the principles of standardisation and flexibility in contractual relations will be brought out later.

Establishing clarity of objectives and responsibility between the Department and each prison is a necessary, but not sufficient, condition to improve performance of the public prison system. However, ERA notes further ‘reforms’ are required to ensure SLAs are sufficient instruments to improve performance. These include ‘financial penalties for poor performance or financial incentives for good performance’ (ERA 2015: 62). The ERA recommends that contracts with Superintendents (and potentially other senior prison managers) contain a clause that provides them with a financial bonus based on the successful delivery of the terms of their Service Level Agreement under the specified budget’(ERA 2015: 72). Penalties could include non-receipt of a bonus and also potential job loss as ‘ERA is of the view that Superintendents should be placed on fixed term contracts that align with the term of the Service Level Agreement of the prison for which they are responsible’ (ERA 2015: 72).

This study finds that ERA has not given sufficient consideration to perverse incentives engendered by these incentives nor has it apparently given any consideration to the extensive international literature on economic incentives for employees and managers in complex service organisations.

3.2 Performance benchmarks

The application and publication of performance benchmarks will help to ensure greater accountability and transparency. The ERA has sought to design a set of benchmarks that focuses on the core areas of prison performance that Superintendents can and should be expected to influence. However, ERA has recognised that Superintendents cannot influence all aspects of prison performance. Hence, benchmarks will also apply to the prison system as a whole. The Department will use the benchmarks to assess and compare the performance of individual prisons in Western Australia, the prison system as a whole and identify areas for improvement.

Four areas of prison performance will be measured:

- *Safety and security* – Prison operators are effective in preventing escapes that can pose a threat to community safety, and prison staff and prisoners are safe from harm.
- *Rehabilitation* – Prison operators make a positive contribution to the rehabilitation of prisoners in their care to decrease the likelihood that they reoffend upon release. Effective rehabilitation of prisoners leads to improved community safety, and savings for the Government in providing prison and other public services (such as law and order, health and welfare).
- *Quality of life for prisoners* – Prison operators treat prisoners humanely and decently, reflecting that this leads to better outcomes in prisoner rehabilitation and safety and security, and recognising that prisoners are held against their will.
- *Prison management* – Prison operators deliver prison services as efficiently as possible to ensure that public funds are not wasted.

These areas of prison performance are consistent with the mission of the Department, which focuses on Security, Safety of Staff, Safety of Prisoners and Rehabilitation.

The benchmarks for each of the four categories are intended to meet the following principles of good benchmarking:

- The prison operator must be able to influence the metric used
- It must be possible to accurately and reliably measure the benchmark
- The metric must not encourage perverse behaviour.

‘ERA considers that it is not possible to *directly* compare the performance of different prisons because of fundamental differences in their characteristics and the role that they play in the prison system. However, it is possible to provide a *high-level* comparison by giving prisons a weighted grade or score for their performance. This approach is taken in other jurisdictions, most notably in New Zealand and the United Kingdom’ (ERA 2015: 75).

This study finds first that ERA exaggerates the extent to which current contracts with private providers facilitate transparency and accountability; second the proposed method for collecting and analysing the performance data is methodologically unsound and third, as a

consequence the ‘principles of good benchmarking’ do not apply to the proposed benchmarks.

3.3 Encouraging more effective planning, decision-making and use of information

ERA recommends a variety of improvements to data collection, analysis and programme evaluation and more frequent and comprehensive dissemination of operational performance and financial data.

3.4 Encouraging competition in the prison system

ERA argues that intensifying ‘competition in the delivery of services will encourage better overall performance of the prison system through a wider choice, better quality service offerings, higher levels of innovation and potentially lower cost’ (ERA 2015: 138). It recommends the introduction of a ‘commissioning model’ and envisages that prisons and prison services can be delivered by a mix of public, private and not-for-profit providers.

ERA (2105: 71) argues that, unlike public prisons, ‘private prisons in Western Australia are subject to clear incentives to perform to a high standard. These incentives arise from the contracting process and the contracts themselves’. The specific incentives arising from ‘coemptive tension’ are specified in the following example: ‘Serco is subject to fixed term contracts and knows that if it does not meet the required standards, its contract will not be renewed. This would not only result in the immediate loss of business, but also affect its reputation and potentially its chances of winning business in other jurisdictions ERA (2105: 64).

ERA devotes considerable time to identifying the characteristics of ‘commissioning’; the bureaucratic apparatus to implement it within DoCS and to insisting that it is not ‘privatisation’ as competition does not exclude public providers. This study does not comment in detail on these specific issues but does observe that it is unclear why ERA is so keen on the nomenclature of ‘commissioning’ when the competitive process it describes is more commonly known as non-discriminatory open tendering or contracting-out of services. It would be an unusual contracting-out arrangement indeed that does not contain a detailed specification of service activities; performance criteria for assessing these activities and incentives for performance.

However, this study does critically assess ERAs understanding of competition in a market characterised by a monopsony on the demand-side and monopoly/oligopoly on the supply-side. It also questions ERAs simple portrayal of contractual relations.

3.5 Reducing the role of unions

It was noted earlier that a number of ‘reforms’ are necessary to efficiently implement SLAs. ERA argues that to make prison Superintendents accountable they must also have control over those aspects of the prison that determine achieving SLA performance benchmarks. ERA argues that unions exercise power over issues such as staffing and wages and this constrains Superintendents exercise of managerial authority and this, in turn constrains their accountability. ERAs ‘ideal’ solution is enhanced managerial control of each prison.

‘Ideally (albeit simplistically), the Commissioner of the Department and individual Superintendents would reach an agreement on:

- the type, quality and amount of services that the prison is expected to deliver
- the funding and staffing required to efficiently deliver those services
- a process for varying funding and staffing should service level requirements change.

It would then be the responsibility of the Superintendent to manage funding and staffing to achieve the agreed service levels. The Superintendent would be accountable if they were unable to meet the agreed service levels on budget. Superintendents would consult with local representatives of WAPOU on matters affecting the rights and safety of prison officers, but WAPOU would not have a decision-making role’ (ERA 2015: 46).

In section 4 it is noted that even on orthodox economic grounds ERAs proposal is unsound as it does not confront the fact that the market for prisons is in effect a monopoly and ‘capital and labour relations’ in the prison industry constitutes a bilateral monopoly. Further, ERA has a ‘simplistic’ understanding of the role of unions in the production process.

4. Criticisms of ERA Analysis and Recommendations

4.1 There is no ‘market for prison services’- the irrelevance of neoclassical economics

The Terms of Reference (ToR) for this Inquiry require the ERA to provide advice ‘based upon economic, market and regulatory principles and to provide advice on the design of appropriate performance standards, incentives and monitoring processes for the prison system’ (ERA 2015: 155). ERA applies the toolkit of neoclassical economics to the job of analysing the function and performance of the WA prison system. However, it does this without reflecting on the relevance and efficacy of this toolkit to the task.

That the ‘mental model’ of neoclassical economics is applied to the task is evident from many of the core ideas that underpin its analysis. This leads ERA to frame improving the performance of the WA prison system as essentially a resource allocation issue taken directly from elementary neoclassical ‘theory of the firm’. This is a profoundly inappropriate model to apply to the WA prison system and is the source of many of the analytical and policy failings in the report. ERAs (mis)-application of this simple neoclassical economic model is evident in the following.

4.1.1 Bias to contractual forms of governance

ERA's discussion of ‘governance’ arrangements in WA is unbalanced and unsound. The recommended governance arrangements seek to reproduce in the public prison system what ERA claims to be the contractual relationship between DoCS and private prisons. It simply asserts that the contractual form of relationship in production is preferable to the current system of direct administrative guidance. ERA does not cite any authorities for its endorsement of these arrangements in the provision of publicly funded services. The ‘governance’ it asserts is preferable reflects an unstated but clear bias towards the production of goods and services based on ‘arms-length’ market, or ‘purchaser-provider’, type transactions as the most efficient and effective way of organising production. Thus Superintendents in public prisons are to have the same or similar powers as, for example, Serco to negotiate with DoCS over costs, inputs and outputs; parley to amend the scope of the contract in exchange for adjustment to the prison budget; exert enhanced control over the disposition of prison staff and receive financial incentive payments for meeting specified contractual obligations.

As noted in the previous submission to ERA (Toner 2014) there is a distinguished school of orthodox economic thought, Transaction Costs Economics (TCE), that examines the costs and benefits of organising production of goods and services using contractual versus direct administrative guidance forms of governance and the conditions for preferring one

governance system over another. Direct administrative guidance does not, of course, exclude the use of benchmarks and performance standards. Some of the major reasons for the existence of this form of governance and its superiority over contractual forms in certain circumstances are: the risk of contracting out the service is excessive; it is impossible to derive accurate benchmarks, standards and costs that cover the principal activities of the contractee or contractor; the cost of developing and monitoring these metrics is high and the organisation inherently requires flexibility in its operations which is either impossible and/or generates costly inefficiencies when incorporated into a contract (Toner 2014).⁵ It is most improbable ERA is unaware of this important school of economic thought, or that it could have served it well in its deliberations. It is more probable, for reasons to be taken up later, that it has chosen to ignore it, and other evidence, that does not fit a pre-determined policy outcome.⁶

⁵ An example of excessive risk and inefficiency in contracting out is where the contractee has to maintain large surplus production capacity to guarantee continuity of supply should the contractor fail to deliver according to the contract or enters bankruptcy.

⁶ The latest report by the OICS (2014) into Acacia prison provides an excellent description of the contractual disputes, conflicts of interest, risk and cost shifting between contractual parties predicted by TCE when prisons are subject to the type of 'governance arrangements' advocated by ERA. These conflicts contradict the claim that contracts ensure clarity and transparency.

'In the three months leading up to the inspection, this Office received numerous complaints from both prisoners and staff about the lack of heating and air flow throughout the accommodation and administration blocks. The Department confirmed that a new heating, ventilation and air-conditioning system was being installed under the maintenance contract. During installation, issues were discovered with the gas ignition and pressure, which led to the system being shut down for safety reasons. For the heating system to work again the gas farm required upgrading, however the development was significantly delayed due to disputes between Serco, Sodexo and the Department over who was responsible for taking on the required Dangerous Goods Licence. During this time, prisoners and staff were forced to live and work in cold temperatures, with prisoners going to the extreme measures of leaving gas cooktops on during the day in an attempt to warm their units. To alleviate the cold and discomfort, staff relied on portable electric heaters to warm their offices, while an additional 1,000 blankets, at a cost of approximately \$33,950, were distributed to prisoners' (OICS 2014: 10).

Acacia prison over several years has undergone an extensive multi-year expansion of capacity. Due to conflicting interests of private agents involved in the project risk and cost shifting by private agents occurred which adversely overall cost and security. 'During the inspection, however, it became clear that there was still tension between expansion representatives from the Department, Serco, the builders and Treasury. Although the governance framework gave Serco the final say on all security matters relating to the project, there have been situations where this was challenged, negotiated or ignored. Serco, being a private company, were seen to be incorporating an additional level of corporate risk into their security planning and both the Department and Treasury felt, at times, that this was causing unnecessary delays. The tension was compounded by the notification timeframe Serco required from contractors to conduct priority works. With the prison still operating to regular routine, Serco required at least four days' notice before scheduling work inside the perimeter. This could be difficult for the builders to achieve, because they regularly hired contractors who could not always confirm the exact date that they could be onsite. These disagreements created operational and relationship risks, undermined the authority of the project's governance systems, and limited the ability of the state to enforce its contractual arrangements with Serco' (OICS 2014: 15).

4.1.2 The dangerous pursuit of ‘false quantification’

Central to the neoclassical notion of optimal resource allocation is the ‘production function’. This precisely specifies the type, quantity and price of all inputs to production and precisely quantifies how each contributes to the firm’s output. The role of the ‘entrepreneur’ is simply to purchase and combine these inputs in a manner that solves the basic ‘economic problem’ confronting all firms: how to maximise output and profit and minimise cost. Solving this problem leads to a unique ‘optimal solution’ where resources are allocated to simultaneously achieve their highest returns and satisfy consumer wants. ERA uses the word ‘optimal’ or ‘optimise’ 16 times in its report to describe how the current system fails to achieve this nirvana and how adopting its method of resource allocation will lead to a unique ‘bliss point’.

This vision of the production of goods and services underpins ERAs ‘costing, performance and benchmarking’ model for reform of public prisons. This model is premised on DoCS and Superintendents being able to precisely specify first, the inputs into the prison production process, for example, what prison services lead to a reduction in recidivism; second, the quantity and cost of these services in terms of both average and marginal cost; third, the contribution of each service to achieving a given output, say a reduction in recidivism and finally to ensure an equitable comparison of the performance of each prison to adjust all of these inputs and outputs for characteristics of each prison that uniquely affect the achievement of its performance targets.⁷ This data is necessary for a Superintendent to contract with DoCS to achieve a prescribed set of outcomes for the prison with the exact quantity of inputs contributing to these outcomes at a given price or budget set for the prison.

ERA is clearly annoyed at DoCS’ inability to provide cost data at a sufficiently detailed level that can ‘optimise’ the prison production function. ‘The ERA was unable to undertake a robust analysis of the costs of prison services in Western Australia to determine the extent of any inefficiencies, because the Department has not provided sufficiently detailed cost data. There are two reasons for this. The Department has not provided the information that it does have and that the ERA has requested, and in some cases, the Department simply does not have the information that would be required to undertake a robust analysis’ (ERA 2015: 53). ERAs annoyance is however, clearly feigned- ‘The lady doth protest too much, methinks’. It will be shown later that not only is it impossible to derive this data in any rigorous, objective method, but that ERA knows this to be the case.

4.1.3 ‘High level’ analysis or ‘arm waving generalities’

A distinguishing feature of neoclassical economics is, ironically, its indifference to the production process. It treats what goes on inside a firm, or any other production entity, in an *a*

priori and abstract way. It is unconcerned with the empirical detail of particular firms and products, it is unconcerned for example with marketing, engineering, technological change and labour relations. Production is a 'black box'; exemplified by textbooks that examine not real-world products and services but instead the production of fictitious 'widgets' using fictitious data on their marginal costs and marginal productivity. The role of the entrepreneur is simply to find a mathematical solution to a constrained optimisation problem. This indifference to what actually goes on inside firms finds expression in ERAs description of its own role as limited to the provision of only a 'high level' analysis of the prison system's interaction with government agencies; a 'high-level description of the key issues affecting the efficiency and performance of the prison system' and defining its role as 'to make some high-level, direction-setting recommendations' (ERA 2015: 11, 14, 44). Thus there is also scant discussion in the report on what actually goes on in prisons or scant reference to the criminology and penology literature. This indifference is transparent in ERAs inability to deal with that most unusual 'factor of production', labour. In the neoclassical economists world-view labour is just another homogeneous input to production, along with capital. Anything constraining management prerogative to control the capital-labour ratio and direct labour in its duties is an inefficient 'market imperfection'. We know however, that labour is unlike any other input. It thinks for itself, it has a sense of fairness, requires 'managing' to give of its best and it reflects on the production process in which it is engaged, and can, given the right work organisation system, be an invaluable source of insight into how to improve products, services and the production process

4.1.4 A resource allocation problem or a resource problem?

This idealised mental model ERA economists have of the 'reformed' prison system is that of a large corporation with each of the prisons envisaged as a separate production unit in competition with each other to achieve performance targets. In a competitive market an increase in demand for a firm's services or a shift in demand to higher quality services leads the firm to raise prices for inputs of capital and labour and thereby attract additional resources to meet this excess demand. The analogy to the price mechanism ERA envisages to bring demand for prison services into equilibrium with the supply of prison services is a rational negotiation between 'the Commissioner of the Department and individual Superintendents [who] would reach an agreement on...the funding and staffing required to efficiently deliver those services; and a process for varying funding and staffing should service level requirements change. It would then be the responsibility of the Superintendent to manage funding and staffing to achieve the agreed service levels' (ERA 2015: 46). The obvious unstated assumption is that the funding being 'managed' is sufficient 'to achieve the agreed service levels'. Problems for example of double bunking and inadequate drug rehabilitation programmes are viewed as arising only from inefficient resource allocation, not an insufficiency of resources. For ERA, achieving agreed service levels requires 'stronger governance arrangements, a better allocation of existing resources within the system, a focus on evidence-based approaches, and greater collaboration with experts' (ERA 2015: 46). ERA never confronts the issue that the prison system is in effect supply constrained, that unlike a

firm confronting rising demand, it cannot autonomously increase its resources. It does not entertain the possibility that performance issues arise from insufficient resources.

What emerges from even a casual examination of the OICS archive of prison inspection reports is gross under-investment in prison capacity and facilities- leading to overcrowding, reactive maintenance and inadequate availability of programmes for prisoners. This is mostly a function of the average daily prison population increasing by 32.3 per cent between 2007-08 and 2013-14 (ERA 2015: 39), without a corresponding increase in real resources. To argue as ERA does that these problems can be solved by improved management is an untested assertion and ignores the scale of the resource need.

4.2 Key Conclusions of the ERA Report are Pre-determined

It is an obvious point to make but it is of such profound importance it warrants stating: ERAs advocacy of a complex system of performance metrics, costings and benchmarks is not the result of careful and considered collection and evaluation of evidence as to the merits of this system, it is a pre-determined conclusion. ERA's advocacy of this complex system is simply a contractual obligation imposed by the WA Treasurer on ERA. The Terms of Reference (ToR) explicitly state:

‘A key deliverable of the inquiry will be the development and calculation of a set of benchmarks to allow comparisons of the performance of individual prisons in WA. The DoCS would use the benchmarks to identify areas in which the performance of individual prisons could be improved’ (ERA 2015: 155).

As such the ERA report can be characterised as a conclusion in search of a rationale.

4.3 ERA’s report does not meet the minimum conditions for good public policy

The Australian National Audit Office (ANAO) performs the critical function of providing an ‘independent assessment of...public administration and assurance about public sector financial reporting, administration, and accountability’ (<http://www.anao.gov.au/about-us>). Put simply, it sets the standards for good public policy and assesses government agencies against these standards. Assessed against these standards ERA's report does not satisfy the minimum conditions for good public policy. The following briefly sets out a few of these deficiencies.

4.3.1 ERA provides no evidence to support its major arguments

In proposing new public policy measures ANAO (2001: 6-7) asks a policy maker to consider: ‘Have the problems with the status quo been identified? Does the minister have sufficient information to make a decision?’ Some of the data that need to be provided include, ‘budget information; staff and other resource requirements; legal implications; social, environmental and other impacts; technical data and consultation [and] its results’.

ERA is proposing a radical and, potentially risky, change to the management of WA prisons. As ANAO argues a fundamental principle of good public policy is that it be evidence-based. ERA provides no robust evidence to support its major arguments. For example there is no robust data showing that private provision and/or the governance arrangements it recommends is superior to public provision in terms of efficiency and effectiveness. Indeed, ERA provides no solution to the fundamental problem it identifies: how to compare the cost and performance of prisons?

‘The ERA considers that it is not possible to *directly* compare the performance of different prisons because of fundamental differences in their characteristics and the role that they play in the prison system. However, it is possible to provide a *high-level* comparison by giving prisons a weighted grade or score for their performance’ (ERA 2015: 155).

As will be shown below, the latter assertion that it is possible to control for all of the intervening variables that affect prison performance *and* have robust measures of cost and performance by identifying the precise contribution of each prison service to the objective of the prison system, is contradicted by ERA when it admits it has as yet no robust method to construct these benchmarks (this is taken up later in more detail).

Even if one accepts ERAs argument completely that it is possible to develop ‘high level’ comparisons, this still remains a profoundly unsound basis for public policy as ERA is proposing a radical and risky change to the prison system, but it cannot know until after the radical change has been implemented whether there is any evidence to support the change!

The most recent Office of the Inspector of Custodial Services (OICS 2014) report on Acacia Prison provides some insights into the difficulties in constructing even the broadest cost and quality comparisons across prisons. ‘Understandably, people often ask not only about the total cost of Acacia but about the relative costs of public and private sector prisons. This is a very difficult comparison to make. The figure of \$155 per prisoner per day for Acacia certainly sits well below the average cost per prisoner per day across the state, which was \$317 in 2012–2013. However, it is important not to make simplistic comparisons. First, all prisons are different and all serve different purposes. Acacia has some significant advantages

in terms of its location (relatively close to Perth), its size (which brings economies of scale), and the fact it is relatively new. Small regional prison will always be more expensive. Secondly, the real issue in terms of 'value for money' is not the dollar cost but the quality of services received. Thus, if a contractor provides a cheaper service than the state but does not provide adequate quality of service, the state is not getting value for money and the contract should be ended. Equally, if the contractor's services cost the same as the public sector but the contractor provides a higher quality service, the state is getting better value for money' (OICS 2014: 8) It should be noted that the OICS provide no solution to this quandary.

4.3.2 No cost-benefit analysis

ANAO (2001: 10) demands policy makers consider the key question: 'Is the proposal cost effective?'

ERA fails to provide even the most basic indication of the cost of implementing its recommendations nor the likely impact on efficiency and effectiveness. Just exactly what is the scope of improvements anticipated by ERA, either in dollar terms, quality of prison life or recidivism rates, and what is the cost of these improvements? We just do not know. This is ironic as ERA repeatedly criticises others for introducing change without a 'robust assessment of the costs and benefits of the change' (ERA 2015: 63).

This absence is all the more remarkable since ERA acknowledges that the proposal imposes significant costs on public and private operators. Not only has ERA stated that it 'has been told that it can cost over \$1 million to compile a tender document to bid to operate a prison,' it also finds that 'the cost of undertaking a commissioning process for the Department is considerable' (ERA 2015: 146-147). One indication of this is that 'the cost associated with the contract management of the Acacia Services Agreement was \$785,646 and includes wages and superannuation of the Contract Management Branch and Monitoring Officers' (DoCS 2014b: 9).

Moreover, ERA's report provides information which suggests the scope for significant short or long-run cost reductions and/or efficiency gains that may flow from competition and private operation of prisons is limited. The great bulk of prison costs are fixed, this includes wages, depreciation and services such as health and education. 'Around 85 per cent of a prison's budget allocation is composed of fixed costs over which Superintendents have no control. For example, the number of full-time employees at the prison is fixed in the short-term. The remainder of the budget is variable costs, which are within the control of the prison Superintendent' (ERA 2015: 33). However, even these so-called variables costs are limited in the degree to which they can change. 'The variable components of the budget comprise approximately 15 per cent of the total budget. For example, the Superintendent can control their food budget (that is, they can determine the menu that the prisoners receive within

guidelines). Delivering some variable costs, including food, to budget may not be possible in the event that the prison population increases markedly' (ERA 2015: 33).

The absence of a cost-benefit analysis is caused, in large part, by the fact that ERA concedes there is no sound method to develop robust metrics of quality adjusted prison services and costs across institutions that are fundamentally different in their characteristics. Without a robust cost-benefit analysis there is no basis for either ERA proposing its recommendations or for the WA government to adopt these recommendations. This is a profoundly unsound basis for public policy.

Other plausible reasons for this omission are offered. First, since the report's conclusion is prescribed, why bother? Second, as explained above the general approach of neoclassical economics is founded on *a priori* reasoning from premises which cannot be falsified. This approach underpins ERAs 'high level' analysis and recommendations and allows it to avoid the complexities of confounding and contrary facts. An argument based on inferences from premises does not require a cost-benefit analysis.

4.3.3 ERA explicitly ignores criticisms

ANAO (2001: 9) requires policy makers to ask: 'Has feedback from consultation been incorporated into policy advice? (ANAO 2001: 7)... Is the minister informed about contending opinion on the matter? Are clear, different options available and presented honestly to the minister? (ANAO 2001: 9).

ERA rejects this advice for sound public policy formation. The *Draft Report* divides submissions to previous ERA prison inquiries into three discrete categories; those critical of its analysis and recommendations; supportive submissions and those that are broadly supportive but suggest improvements to implementation. ERA explicitly states it has responded in its *Draft Report* only to the last category. 'The ERA suggested that a commissioning approach be adopted for the prison system in its March 2015 Discussion Paper. Feedback from stakeholders was mixed. Some expressed concern that the ERA had arrived at a conclusion without sufficient analysis and understanding of the problems. Others were supportive of the proposed approach, while others still were supportive in-principle, but were concerned that the structural reforms proposed by the ERA to address probity issues may be too cumbersome...The ERA has sought to address the concerns of the latter group of stakeholders by reconsidering the structural reforms required to support a commissioning approach' (ERA2015: 139).

4.3.4 ERA fails to consider alternative means of improving the prison system

ANAO requires policy makers be open-minded to substitute solutions that are better than the model they advocate: ‘Has the search for alternatives been thorough? Is there a superior alternative? Are clear, different options available and presented honestly to the minister? Are the consequences of each option provided to the minister?’ (ANAO 2001: 7-8).

Compounding the fundamental problem that the outcome of the Inquiry was prescribed in the ToR is that ERA did not properly fulfil all the requirements of its ToR. The first paragraph of the ToR expresses, in the most general terms, the task of ERA, which is to ‘undertake an inquiry into options to improve the efficiency and performance of public and private prisons’. This it did not do, there is no discussion of ‘options to improve the efficiency and performance of public and private prisons’, other than the prescribed solution.

Some of these alternative solutions include the following. First, the ERA compliments Serco for its record on prison innovation (ERA2015: 148). However importantly it does not disclose the specifics of how this innovation is sustained by DoCS. The innovation is supported by a specific Innovation Fund in the contract between Serco and DoCS. The Agreement provides for payments of up to \$250,000 per annum where Serco is able to propose an innovative system or procedure provided at Acacia that is also transferable to other prisons in WA. The contract specifies that the proposed innovation be over-sighted and approved by DoCS prior to implementation, with the contractor required to submit an Innovation Application Form to DoCS detailing the innovation, its costs and expected gains (State Of Western Australia and Serco Australia Pty Limited 2006: Cl. 15.2 Innovation Bonus).

Unlike normal innovation investment undertaken by private firms which, by definition, is technically and economically risky because the outcome is uncertain, innovation at Acacia is not only under-written by the taxpayer it is also managed by DoCS. ERA has not considered extending this same system to public prisons under current governance arrangements.

Second, ERA also notes but does not comment further on the reform programme recently initiated by DoCS to improve the performance of the WA prison system. DoCS uses a set of simple and therefore, relatively robust metrics to gauge performance of the system, such as rates of escape, recidivism, prisoner engagement in education and training, hours out of cells and it plans to progressively impose tighter performance targets on these metrics. ‘Currently, performance targets for each prison are set in two ways:

- Some performance indicators are based on a target that is acceptable to the Departments executive. For example, the acceptable target for escapes or unlawful releases is zero.

- Other performance targets are based on the performance of individual prisons over time. The average result over 18 months is determined for each indicator and an improvement factor of 10 per cent is applied. That is, the prison's target is to be 10 per cent better than their performance over the past 18 months.

Performance targets are recalculated every 12 months to adjust for changes in the prison's performance and the requirements of the Department's executive' (ERA 2015: 83)

If ERA had adopted a balanced approach to public policy it would have reflected on these actions by DoCS and considered to what extent they are capable of meeting the type and rate of improvement it wants from the system. This it did not do.

Third, ERA finds that the 'optimal' way 'to improve the efficiency and performance of public and private prisons' is to keep people out of prison in the first place. 'The ERA is aware of studies that suggest imprisonment is an expensive and ineffective response to crime. Research shows that imprisonment does not effectively deter criminal behaviour' (ERA 2015: 13). ERA notes this finding that should be critical to its Inquiry, but simply moves on without further comment or analysis. An obvious implication is that ERA should have examined both the causes of crime; the causes of fluctuations in the crime rate; approaches to reducing the crime rate and evidence-based policy on judicial, custodial and other alternatives to prison. Further ERA cites research from The Australian Institute of Criminology that 'the cost of crime in Australia totalled \$47.6 billion in 2011'. Let us assume the cost of crime in Australia is closely related to the size of the respective prison populations across the states, we find that WA accounts for around 15.5% of the total Australian prison population (ABS 2014: Table 13). This implies that in 2011 dollars the cost of crime in WA was around \$7.38bn. This compares to the total costs of running the WA prison system \$608m in 2013-14 (ERA 2015: 37). Even accepting that this rough estimate of the cost of crime in WA is 'out' by a factor of 8 it is still more potentially cost effective to invest in alternatives to prison. At a minimum ERA should have recommended more research on this issue.

Finally, there is ERAs strange obsession with Anglophone nations, or more accurately, a subset of them, as a source of policy advice to improve prisons. In the *Draft Report* only the UK and New Zealand are drawn upon as exemplars of good prison policy. As at 2015 there are 195 separate nations in the world (CIA 2015); limiting the potential sources of policy advice to just the most developed nations, comprising members of the Organisation for Economic Co-operation and Development, still leaves 33 other nations (excluding the UK and NZ) as potential sources of valuable ideas (OECD 2015). The notable Anglophone exclusion from the *Draft Paper* is the United States, whose prison system receives not one mention by ERA. This presumably is the prison system 'that dare not speak its name'. The appalling results of contracting out in the US were detailed in the previous submission to ERA (Toner 1014).

It is commendable that ERA gives considerable weight to reducing recidivism. It is however not commendable that ERA gives absolutely no weight to the prison policies of Norway, despite ERA finding it has a recidivism rate around half of WA, New Zealand and Ireland, jurisdictions that use the same method to calculate recidivism rates (ERA 2015: 42-43).

ERA (2015: 139) should have heeded the stern but sage advice it gave to DoCS: ‘The Department cannot be sure that resources are being spent efficiently if it does not consider all available options’.

4.4 Selective and unbalanced use of evidence

ANAO (2001: 9) requires policy makers ask: ‘Is the information provided to the minister balanced and accurate?’

The ERA report is selective and unbalanced in its use of evidence.

4.4.1 ERA dismisses inconvenient evidence

ERA (2015: 42-43) reports ‘that recidivism in Western Australia has declined in recent years, from above the national average in the years from 2008-09 to 2010-11 to below the national average in 2011-12 and 2012-13’. However, it dismisses this inconvenient trend as it ‘does not prove that Western Australian prisons have been effective at reducing recidivism, as there are a number of factors that affect the recidivism rate or limit its usefulness as a measure of a prison’s performance against rehabilitation objectives’ (ERA 2015: 42-43). ERA does not outline what the factors that affect recidivism rate are nor does it outline its limitation as a measure against ‘rehabilitation objectives’. Whilst it is important to maintain an objective view of prison trends the scepticism regarding the value of recidivism in prison evaluation is remarkable since ERA has lowering recidivism as a central goal of its benchmarking and commissioning model.

In support of its sceptical attitude to the recent WA trends in recidivism ERA (2015: 53) also quotes from a recent foreword the Commissioner of DoCS contributed to a recent DoCS report on recidivism: ‘There is no doubt that some of what we are doing is highly effective, but without reliable evidence to the contrary, I must assume that some of the measures we currently undertake in an effort to reduce recidivism do not work. To find out for certain will require a robust framework of reliable data collection and monitoring, along with independent evaluation’. Terminating the quote at this point creates the impression that DoCS, first, have no idea what is behind the trends and second, are not doing anything to find out.

Had ERA cited the full quote from the Commissioner a completely different impression would have been created with the setting of clear goals and an evidenced based strategy to achieve them. 'I have set an ambitious goal for the Department of Corrective Services, to reduce recidivism rates by six percent a year. To achieve this we must become a learning organisation. We must identify the characteristics of effective practice and use this knowledge to pursue a culture of continual improvement. In support of this goal I have embarked on an ambitious reform program that aims to radically change the way we do business. The Department is now working to build the evidence base needed to design and deliver programs that are tailored to, and proven to be effective for, different offender groups and offence types. This evidence has already told us the programs need to be delivered within an integrated, individualised, case management framework that extends beyond the structural confines of the Department and provides greater support for offenders upon release' (DoCS 2014c). Of course, how successful the Commissioner's plan will be cannot be reasonably known at this stage.

4.4.2 ERA ignores contrary evidence

Two particularly striking examples of ERA ignoring contrary evidence are first, its unqualified advocacy of an expansion of prison industries in public prison operating under commercial for profit principles found in Acacia and second it ignores the quite damning assessment of the performance of the UK prison system provided by the 2015 report of the House of Commons Justice Committee 2015. The UK prisons system is held up as an exemplar of the model for change ERA advocates.

'One area in which the ERA has observed that there is scope for considerable performance improvement is in prison industries. Prison industries are areas in which prisoners are employed to produce goods and services for consumption inside and outside of the prison. Industry types include laundries, textile and clothing production, timber and joinery, metal fabrication, baking, horticulture, and farming...There are significant differences in the manner that industries are managed in the private sector and the public sector. Acacia prison has a well-developed industries program and has incentives to ensure that it is efficient because Serco is allowed to retain 90 per cent of all Gross Prison Industry Revenue. By contrast, profits generated by industries in the public prison system are retained centrally by the Department.

The ERA observes that there may be scope for greater return from industries operated in the public prison system. However, Superintendents lack incentives to undertake the additional requisite work to achieve these efficiencies, because it does not support the budget position of their prison. The introduction of a revenue sharing arrangement in which a proportion of additional revenues are retained by the prison (which can only be used for specified

activities) would create incentives for Superintendents to operate its industries with greater efficiency' (ERA 2015: 73).⁸

It is concerning that ERA first equates the evaluation of prison industries purely on revenue raising grounds. This ignores the important rehabilitative role of prison industries which 'perform a range of functions including providing vocational training and work readiness opportunities for prisoners...[and] contribute significantly to the effective management of prisons by providing a structured routine with meaningful activities' (DoCS 2014a: 16). Second, ERA also fails to consider the perverse incentive effects if profit is the main motive in operating prison industries. This can result in 'adverse selection' as only more efficient prisoners are offered jobs; the selection of which commercial 'profitable' industries to operate may have no necessary connection to the labour market needs of regions into which prisoners will be released; the selection of industries to operate will be influenced by their relative profitability and less weight will be given to those industries which achieve a better rehabilitative effect; and related to this last point, there may be a reduced incentive to train prisoners if training is expensive and not directly linked to profit making activities. Finally, and most importantly, it fails to note that the push to enforce a more commercial orientation of prison industries, as occurred in the UK, has been a policy failure. A recent House of Commons Justice Committee report found that:

"Under its working prisons policy the Government's stated aim is to get prisoners working up to 40 hours a week in a daily routine focused around work and linking work activity with qualifications and employment opportunities...the majority of our witnesses were of the view that the working prisons initiative had stalled, if not failed. We encountered a very mixed picture of provision, which remains available only to a relatively small number of prisoners...The observations of our witnesses could be attributed in part to difficulties in developing regimes that allow prison work to be commercially viable" (House of Commons Justice Committee 2015: 22).

⁸ Contractual terms regarding prison industries in Acacia appear to be very favourable to Serco. DOCs (2013: 11) *Annual Review* of Acacia records that the private prison retains 90% of the gross revenue of its prison industries with the remainder remitted to DoCS. In 2012-13 DoCS received an annual payment of \$108, 274, implying that the gross prisons industries revenue was around \$1.08m., or that the gross revenue to Serco was around \$972,000 for the specific year. In addition, DoCS remits a significant share of its gross payment back to Acacia to fund additional capital investment in the prison industries. In 2012-13 DoCS remitted \$40,000 to Acacia, which 'was used for the refit of the mezzanine floor in the heavy industries block'. The DoCS (2013-14: 9) *Annual Review* of Acacia recorded that prison 'industries generated \$70,675 in revenue to the Department... and, in 2013/14, the Department approved the purchase of \$53,997 of industrial equipment for the industries workshops'. Neither the net profit of the prison industries nor DoCS share of total capital investment in Acacia prison industries is known. Nevertheless, it is an interesting business model whereby Serco gets to retain the bulk of prison industry income and capital investment for the prison industries is funded by DoCS. In addition, as noted above the cost and risk of innovation at Acacia is also apparently borne mostly by DoCS. Personal communication with DoCS reveals that the reason it undertakes this capital investment is that the assets of Acacia remains under public ownership.

The Commons report expanded on this by also nominating insufficient resources of equipment and staff as well as reiterating the problem of reconciling commissioning, employment and training.

‘The Government’s working prisons policy is a worthy aim and prison industries are becoming more common. Nevertheless, it remains the case that most prisons do not have the facilities for workshops on a scale that would enable the majority of prisoners to do work which will equip them for employment on release. Where there are such facilities, the aims of involving employers on a commercial basis and normalising a working week for prisoners are not achievable without sufficient staff to enable prisoners to be unlocked for a full working day. This appears to be much easier to achieve in prisons dedicated to that purpose.

The current commissioning arrangements for prison work and learning and skills do not appear to support the integration of these two vital aspects of rehabilitation. We recommend that the Ministry of Justice and the Department for Business, Innovation and Skills take steps to ensure that the next round of commissioning for learning and skills in prisons prioritises arrangements for embedding learning in the various forms of purposeful activity in which prisoners are engaged’ (House of Commons Justice Committee 2015: 23).

Bizarrely ERA (2015: 141) cites this latter quote but draws no conclusion other than that the Commons report ‘contains few references to commissioning and where it does, it implicitly supports the use of commissioning’. At a minimum ERA should have reflected more deeply on this experience and implications of its own Inquiry.

It is worth considering the findings of the Commons report in more detail as ERA (2015: 140) cites the UK experience approvingly as an exemplar of the benefits of its benchmarking, commissioning and competition model: ‘Between 2009 and 2011, the National Offender Management Service in the United Kingdom ran a competitive process for the right to operate four prisons, three established and one new build, with the public sector successfully tendering for one of the established prisons. The result of this competitive process is that the National Offender Management Service expects the combined operational costs of the three established prisons to fall by 16 per cent (£200 million, approximately AUD \$400 million) over the life of the contracts’.

Further efficiency cuts followed in the UK using ERA's preferred model. ‘In a Written Ministerial Statement on Prison Competition and Efficiency made on 8 November 2012, the Government announced its strategy for achieving efficiencies across the prison estate. This set out an intention to accelerate cost reduction to maximise savings, specifically through the public sector benchmarking programme and the use of competition. A separate benchmark is designated for each type of prison and for each prisoner type’ (House of Commons Justice Committee 2015: 6). ‘The intention of benchmarking is to streamline what prisons do while maintaining, and where possible raising, standards’ (House of Commons Justice Committee 2015: 28).

What ERA fails to record is that partially as a result of these ‘efficiency’ funding cuts: ‘All available indicators, including those recorded by HM Inspectorate of Prisons and NOMS

itself, are pointing towards a rapid deterioration in standards of safety and levels of performance over the last year or so. Most concerning to us is that since 2012 there has been a 38% rise in self-inflicted deaths, a 9% rise in self-harm, a 7% rise in assaults, and 100% rise in incidents of concerted indiscipline. Complaints to the Prisons and Probation Ombudsman and other sources have risen. There are fewer opportunities for rehabilitation, including diminished access to education, training, libraries, religious leaders, and offending behaviour courses' (House of Commons Justice Committee 2015: 70).

The report attributes this deterioration to a number of factors, many of which are inter-related. 'In our view it is not possible to avoid the conclusion that the confluence of estate modernisation and re-configuration, efficiency savings, staffing shortages, and changes in operational policy, including to the Incentives and Earned Privileges scheme, have made a significant contribution to the deterioration in safety' (House of Commons Justice Committee 2015: 70). A significant rise in the prison population is also a factor (House of Commons Justice Committee 2015: 33).⁹

Despite these radical changes designed to improve the performance of the UK prison system, on a critical measure namely the recidivism rate, there has been no long-run change to the adult rate, though there has been deterioration in the juvenile rate. The recidivism rate is measured in the UK as the 'proven re-offending rate within a year' of release. 'Since 2002, there has been little change in this rate... Over this time it has ranged from around 24% to 28% and since 2004 it has remained steady at around 25%... While the juvenile re-offending rate has seen an increase of 4.0 percentage points since 2002' (Ministry of Justice 2015: 9).

ERA is also silent on the glaring fact that, despite the implementation of an extensive and expensive system of benchmarking and performance standards, this did not prevent the marked deterioration in UK prison standards. Implicit in ERAs presentation of the merits of benchmarking, performance metrics and contracts is the somewhat naive view that these measures can somehow constrain governments from implementing either 'tough on crime' policies that result in a large increase in the prison population without a commensurate increase in prison resources or simply slashing prison spending. Legally binding contracts between private and/or public prisons and DoCS no doubt imparts greater inertia into the system. As the House of Commons Justice Committee (2015: 70) observed: 'Private sector prisons have not been immune from the imposition of efficiency savings but once their contracts have been agreed they are insulated to some extent'. But this inertia can be overcome with the implicit threat of not renewing contracts should private owners prove unwilling to re-negotiate the terms of their contract and, of course, contracts have a finite life.

⁹ The House of Commons Justice Committee (2015: 57) identifies benchmarking as a major factor in the deterioration of prison life. 'The main foundation of a safe prison is dynamic security, established through consistent personal contact between officers and prisoners, enabling staff to understand individual prisoners and therefore anticipate risky situations and prevent violence. Prison officers also have a pivotal role to play in prisoners' rehabilitation. Their involvement in sentencing, planning and resettlement, and enabling prisoners to take responsibility, should be enhanced. It would be counterproductive to reduce their role to one of basic oversight of safety and security. We are not convinced that the Ministry has considered sufficiently, or valued highly enough, the complicated and difficult nature of work undertaken by frontline prison staff under its benchmarking programme'.

4.4.3 ERA ignores positive evaluations of public prisons in WA

Even a cursory examination of reports by the Office of the Inspector of Custodial Services finds positive evaluations of public prisons in WA. For example, the OICS (2015: iii) report on West Kimberley Regional Prison in Derby (WGRP) which ‘opened in November 2012’ found that ‘like every prison, there is room for continuous improvement. However, during the first two years of operation it has achieved everything that could reasonably have been expected, and in some respects it has exceeded expectations... Good prisons are those which perform well in terms of security, safety, prisoner treatment and community safety, and the preconditions for this include a sense of direction, good values, and strong human relationships. Again, WGRP scores highly.

It has a philosophy that is relevant both to the region and to the Department’s corporate goals, and this is not just a paper policy but something that directly informs prison operations. The prison also enjoys good leadership and positive staff/prisoner relationships. Prisoners are busy and actively engaged in positive skill-building activities and, contrary to the predictions of some sceptics, they have proved able to cope with the demands of ‘self-care’. Staff at WGRP are more proactive and engaged than at most prisons, and local recruitment and training have significantly contributed to this. WGRP is a prison and there is no room for complacency.

Overall, however, it exudes a sense of stability, calm, respect and relevance. Physical and procedural security is generally sound and relational (or dynamic) security is very good. As the prisoners are ‘in country’ they are far more confident and settled than they are in southern prisons. ‘Out of country’ Aboriginal prisoners, whether from the Kimberley or other parts of the state, tend to be sad, to stand to one side and to look at the ground rather than engaging. At WGRP these very same prisoners are proud, engaged, and better connected to culture (see below). This creates a strong sense of ‘cultural security’.”

The same report is also very critical of the performance of Broome prison ‘reflecting continuing uncertainty about its future, low prisoner numbers, declining services, and staff frustration/low morale’ OICS (2015: iii).

4.4.4 ERA ignores adverse evaluations of private prisons in WA

A more balanced assessment of the merits of private prisons and of the likely gains from commissioning would have regard to less flattering official appraisals of private WA prisons than that preferred by ERA. For example, the OICS (2014: v) annual review of Acacia, conducted in 2013, recorded that: ‘Every prison, like every social or business organisation, goes through periods when performance will be better than it is at other times. Acacia is no

exception and sometimes our assessments of the prison have been positive and sometimes they have been more critical...it was always going to be difficult for Acacia to maintain the levels of performance found in 2010 and we did find slippage.

This certainly does not make it a 'failing prison'; it is still performing to a good standard in most areas, but it does mean that there is work to be done to lift performance again.

Some of the slippage was occurring because the risks associated with the expansion project were stretching the management team and diverting their energy and time away from current prison operations. Relationships between management and staff had declined. So had the levels of positive prisoner/staff interaction that had previously contributed to strong dynamic security. And several areas had dropped from their very high 2011 levels. For example, health and re-entry services were struggling to meet demand, and some easily remedied problems, such as the need for more computers in the education area, had not been actioned...Like almost every other prison, Acacia was also struggling to find sufficient meaningful and constructive activities for prisoners. This was not helped by regular custodial staff shortages, some generated by the need to conduct external prisoner escorts. This resulted in staff being cross-deployed from areas such as the gym to cover other areas and to the closure of the gym and some other activities'.

It is worth citing more of the OICS (2014: 21-35) assessment: 'Dynamic security is the linchpin of stable prisons and relies on the interface between staff and prisoners. Positive relationships between these two parties will lead to safer prisons due to increased respect and better intelligence gathering. Prisons that do not have good dynamic security will be more unstable.

Unfortunately, during the inspection only a few officers were observed spending time out of the unit offices and interacting with prisoners. An excessive amount of interaction between officers and prisoners was conducted through the unit office glass window, and some of this was observed to be rather abrupt and disrespectful'. Some of this may be driven by the introduction of 'Enquiry Time' and self-serve CMS kiosks'.¹⁰

''Enquiry Time' was introduced to restrict prisoner enquiries and to allow unit officers time throughout the day to work uninterrupted. Prisoners document their enquiry on a form and place it in the enquiry box in their unit. The box is emptied each day and officers respond to prisoner enquiries during allocated times each day. Enquiries are not processed on weekends. Alternatively, the self-serve CMS kiosks are used as a substitute for responding to simple enquiries, such as a prisoner's account balance. Serco saw Enquiry Time and CMS as

¹⁰ Ironically, ERA (2015: 148) identify these same Serco 'Custodial Management System kiosks' an example 'of innovations that would improve the public system'. This goes to the point regarding the selective use of evidence by ERA.

presenting opportunities for efficiency and for freeing up staff for other interactions with prisoners. However, at the time of the inspection, the two processes seemed to be actually reducing the opportunities for positive interaction. Prisoners expressed particular frustration with the 'Enquiry Time' process. Not only did they feel that it created a divide between themselves and officers, the prisoners also felt that they were not able to approach unit staff with serious requests for information regarding sensitive topics such as funeral applications. Some 'Enquiry Times' also fell while prisoners were at work, recreation or education, leaving those prisoners with even further restricted access to unit staff.

Overall, however, the 2013 inspection found some slippage in positive pro-social interaction between staff and prisoners. The pre-inspection prisoner survey revealed that only 36 per cent of respondents would trust their unit officers to support them if they had a problem. This was down from 40 per cent in 2010 and compares poorly with the state average of 51 per cent. On the other hand, two-thirds of the respondents would trust other prisoners to support them. This indicates a distinct shift in relations between officers and prisoners, with prisoners increasingly turning to each other for support. It also demonstrates the negative impact resulting from staff remaining behind the glass in offices too much'.

Finally OICS (2014: 73) attributed many of these problems to staff shortages at Acacia. 'Acacia has always functioned with fewer staff than would be found in a publicly operated prison and even on its own staffing model, the prison appeared to be too short-staffed on too many occasions. As a result, officers were regularly being cross-deployed to other areas of work. This was creating some security issues, including low staffing levels in the detention unit. It was also leading to restrictions on activities for prisoners, including recreation. Access to recreation is a vital component of a stable prison, not an optional extra'.

5. The Pre-Conditions for Benchmarking and Performance Metrics are Absent

Benchmarking presumes metrics that standardise all of the following: the definition of prison services; inputs to and outcomes of prison services; the cost and quality of these services; the contribution of each of these services to achieving the objectives set for individual prisons and the wider prison system *and* control for differences in prison characteristics that determine the current large divergence across prisons in the type of services, their costs and achievement of the objectives set for individual prisons and the wider prison system. Moreover, ERA concedes it is not possible to devise rigorous, objective, quantitative metrics that perform all of these benchmarking functions.

Even if one accepts that it is possible to derive performance metrics, benchmarks and contracts in the rigorous, quantitative manner envisaged by ERA, the whole complex edifice is only warranted if either of two conditions is met. First control over all the inputs and outputs to the prison system are fully under the control of DoCS. Control over the variables is 'endogenous' to the system. Inputs include not just budgets but variables such as prison population, duration of sentencing and the type of prisoner, all of which affect capacity utilisation, investment and other costs. DoCS must also fully control expected outputs, such as improvement rates in recidivism and rates of efficiency improvement. If these variables are exogenous, or largely exogenous, and controlled by the state government excluding DoCS, then DoCS will be fully compensated by the government for the effect of these external changes on the cost of the WA prison system.

Neither of these conditions apply. As a result DoCS will be *responsible* for a system it cannot *control*. As ERA (2015: 63) argues 'organisations and individuals cannot reasonably be held accountable for decisions over which they have little control'. Under this circumstance benchmarks and performance standards act not to drive improvement but simply to quantify the gap between expectations and reality, as applies in the UK.

ERA admits that key aspects of the performance of the prison system are beyond the control of DoCS; it concedes it has no solution to this dilemma, but refuses to draw any implications about its lack of control for the complex system it wants to impose on DoCS. 'Decisions made by governments and various public sector agencies in the justice and human services systems influence the size and complexity of the task of the prison system, and hence its costs and performance' (2015: 18-19). 'It is beyond the scope of this Inquiry to address of the external factors that affect the prison system (such as the high rate of indigenous incarceration and growth in the prison population)...Instead, the role of this Inquiry has been to conduct an independent examination of the prison system and to make some high-level, direction-setting recommendations'

It hardly needs stating that performance targets and benchmarks are important for individuals and any organisation. The point is that the setting of these targets and the data collection be

both feasible and useful. The sheer complexity and unrealistic ambition of ERA's proposal means they are neither feasible nor useful.

5.1 Methodological Impossibility of ERAs Costings and Benchmarks

The task of constructing costings, performance metrics and benchmarks to achieve the goals set for them by ERA is a methodological impossibility. The failure of ERA to construct these three measures in the *Draft Report* is not due, as it suggests, to the failure of DoCS to provide detailed costs of prison activities. This impossibility is in part due to problems ERA itself identifies but other factors are also at play.

The first problem ERA identifies is the high variability in the simplest measure of prison performance 'cost per prisoner' and the multiplicity of factors that affects these costs. The least expensive prison cost \$183 per prisoner per day, while the most expensive was nearly eight times that amount at \$1,446 per prisoner per day (ERA 2015: 38).

Second, ERA identifies a number of factors that account for this variability. These include:

- A prison's population (including security level, age and size, among other factors) is likely to affect the safety and security of the prison and the extent to which the prisoners can be rehabilitated. For example, Casuarina Prison contains the highest security prisoners in the State and therefore may be less able to offer education and rehabilitation programs to its prisoners.
- Prison design and age affects the cost of delivering services in that prison. For example, an old prison will have greater maintenance requirements, which may increase cost and cause disruptions. A prison that is better designed may also require less prison officers to supervise prisoners safely.
- A prison's location (whether it is located regionally or in the metropolitan area) is likely to affect costs and the ability of the prison to attract quality staff. (ERA 2015: 79-80)

Third, as a result, 'it is not possible to directly compare prison performance without adjusting for these factors. However, it is possible to provide a high-level means of comparison by giving prisons a weighted grade or score for their performance' ERA 2015: 80). It is crucial to note that ERA suggests any rigorous method to identify the factors that differential affect prison cost or performance or a rigorous method for weighting prison performance. (This latter proposition is examined below).

Four, there are additional complications identified by ERA, chief among these is the problem of quality. 'There is a trade-off between cost and quality in the delivery of prison services (as there is with all goods and services)' (ERA 2015: 53). ERA identifies the problem but the

insuperable difficulties of constructing, for example, quality-adjusted indexes of prison inputs and outputs results in the issue being quickly abandoned by ERA.

Five, ERA identifies another issue in measuring cost and performance. Following neoclassical economics an efficient allocation of resources requires a knowledge of total, average and marginal cost of production. Another reason that 'Cost per prisoner per day' is found analytically wanting is because it 'could be measured in marginal or total cost' (ERA 2015: 98). However, this raises a whole series of problems, how to define fixed and variable costs (ERA identifies labour as a quasi-fixed cost of production); how to allocate fixed costs across various levels of output and to identify if a given prison is subject to increasing, decreasing or constant returns to scale. To give a concrete example, how should a 'prison efficiency expert' treat indivisibilities like a large capital expenditure undertaken to expand capacity of a prison in advance of the rise in the prison's population? Let's say a large investment occurs in new capacity like the building of a new wing with planned capacity of 300 over the existing population of 600 prisoners. This would result in a 33% increase in the capital cost per prisoner and would greatly affect average or marginal cost. Are these costs ignored until the planned population increase occurs?

Six, to be of any analytical use the ERA performance metrics and benchmarks have to rigorously solve three quantitative problems. First, it has to precisely define what are the prison services that contribute to achieving the 4 key objectives set for the prison system. This assumes that it is possible to define either a standardised service input and assign a cost to this that is valid for all prisons or develop standardised service inputs, outcomes and costs for different prisons. This will not be straightforward, for example to what extent is 'peer to peer prisoner support' important in achieving prison goals. This type of 'service' is not contracted in any meaningful sense. Second, it needs to rigorously establish the relationship between the quantity and price of each prison service and the extent to which it contributes to achieving prison objectives. If this is not established what is the point of assiduously seeking to price all prison inputs? Some services may contribute to achieving multiple objectives. Moreover, the model needs to be able to calculate the efficiency with which an increase in prison services translates into a change in attaining prison objectives. Is there a decreasing, constant or increasing relationship between an increase in the quantity of a given service and the attaining of a given prison objective? This data is essential to be able to calculate not only marginal cost but also marginal benefit. Third, these tasks will have to be done for all 16 prisons in WA. Solving these quantitative problems is the only way for DoCS management to know for example, whether a decision by a given Superintendent to adjust the quantity and, therefore, cost of a specific service, contributes to a change in attaining prison objectives.

Finally, ERA proposes two 'solutions' to the problem of comparing prison efficiency and performance, but concedes neither of these are satisfactory.

To solve the problem of the non-commensurability of prisons, especially in terms of the role each prison plays in the system and the effect of this in creating differences in services and

costs ERA proposes to assign weights to prison metrics to control for these differences. For example, there are large differences across high and minimum security prisons in their objectives and the type and cost of services.

‘The ERA considers a model where prisons are given a weighted grade for performance to be the best means of providing a high-level comparison of prison performance. Under such a model, a prison’s performance against benchmark metrics would be weighted to provide a grade for performance in safety and security, rehabilitation, prisoner quality of life and management. Scores under each category would then be weighted to provide an overall performance grade for the prison... To implement this approach, calculations will need to be made to determine:

- a weight for each category reflecting its importance to the prison’s overall performance;
- a weight for each metric reflecting its importance to its category; and
- each prison’s target level of performance for each metric’ (ERA 2015: 84).

‘These weights may largely be determined by the Department given that they are a reflection of their priorities’ (ERA 2015: 83).

However, these weights do not control for differences in the ability of prisons to achieve these weighted metrics and thus do not control for the efficiency with which different prisons can achieve their objectives. These weights only control for the importance DoCS places on achieving these metrics. For example, DoCS would place more weight on a high security prison preventing escapes than say a prison farm. A prison farm would have a higher weight to achieving rehabilitation than a high security prison. It is not possible given the ERA weighting model to compare how efficiently each different type of prison achieves its objectives.

To control for these differences in the characteristics of prisons such as size, composition of prisoners and location, age of prison etc that affect the achievement of performance targets the ERA proposes this solution.

‘The second option is determining a benchmark target for each performance metric and then scaling that target to adjust for the different characteristics of individual prisons. In the event that the performance of a prison is, at least partly, the result of factors outside the control of Superintendents, it is advisable to make statistical adjustments to reflect these factors.¹⁴² Statistical adjustments are made based on the relationship between the performance indicator and selected external factors. For example, Casuarina may have a higher allowance for assaults because assaults are more common in maximum-security prisoners.

Scaling the targets for each prison, if it can be completed accurately, controls for the many factors that affect the performance of different prisons, allowing for a fair comparison of performance. There are a number of difficulties in attempting to perform a statistical analysis to scale benchmark targets. The most significant is the requirement for a large enough data set to conduct the analysis. Given the small prison population in Western Australia, the dataset is likely to be insufficient to conduct such an analysis.

ERA thus reverts to its fall-back position, ‘that it is possible to set targets for different prisons to inform a *high-level* comparison of prison performance, notwithstanding the challenges outlined in this section’ (ERA 2015: 84). This is illicit since it ignores the multiplicity of methodological problems that have been identified.

This is a critical point; it is not good enough for ERA to propose a ‘near enough is good enough’ approach. Unless these issues are addressed ERAs proposed metrics will suffer.

Section 2

Additional Submissions

by the

West Australian Prison Officers Union

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1. Benchmarking:

Dr Toner has articulated many of our key concerns in relation to benchmarking. We here provide some additional comments on the flaws of this recommendation by the ERA.

Kevin Lockyer, former Regional Director for the National Offender Management Service, UK, stated to the House of Commons Justice Select Committee :

‘...if you have a prison estate with structural inefficiencies built in...you are still left with those structural inefficiencies, and fewer staff. Putting all of your eggs in the benchmarking basket, therefore, is not necessarily a long-term solution to an estate that has those kinds of structural inefficiencies built in’ (HoC 2014:65).

Mr Lockyer’s comments reinforce the argument benchmarking is not a magic bullet, that structural issues and concerns such as inappropriate retro-fitting need to be considered, but also acknowledges that benchmarking can result in unworkable cuts to staffing levels that do not adequately account for all factors.

One of the shortcomings of applying benchmarking in the way proposed by the ERA, is that WA’s prisons are very diverse, and the proposals for how to accommodate for that are insufficient. Our concerns echo those expressed by the House of Commons Justice Select Committee in the UK, where commissioning and benchmarking have already been implemented:

‘A key question is whether making savings in the prison estate inevitably results in a one-size-fits-all approach to prisons policy’ (HoC 2015:68).

There is not enough scope within the proposals of the ERA to accommodate for the divergences between prisons themselves, and diverse prison populations. The ERA has acknowledged that complexity and diversity, but not offered any sound remedy for that challenge. Standardisation has its merits, but not at the cost of ignoring real differences that prevent accurate assessments and good systems from being applied.

Dangerously reduced staffing levels is one of the key elements of the crisis in the UK prison system. WAPOU urges the ERA, the Department, and Government, to be mindful of the dangers of attempting to derive savings through cuts to staffing levels, and pay and conditions – which may impact the quality of staff who can be recruited and retained. The Justice Select Committee’s (JSC) report to the House of Commons (HoC) again has words of warning to heed:

‘A quarter of the staff who have left the Prison Service in the year to September 2014 resigned. NOMS ought to have foreseen that major reductions in staffing, less favourable pay and conditions of employment, and significant changes to prison regimes, would lead to a rise in people opting to leave the Prison Service, regardless of the buoyancy of the external labour market. This underlines the importance of retention as well as recruitment. As NOMS is highly dependent on its staff to run well-functioning prisons, and it is important the Service acts rapidly on the evidence of recent surveys to ensure that staff feel valued and are given appropriate support to work in circumstances which are challenging at the best of times, but

currently particularly pressured. Given the importance of relationships between prisoners and prison staff we do not believe that making further detrimental changes to terms and conditions of staff is sustainable as a means of controlling costs.’ (HoC:2015:70).

Given the WA prison system already faces staffing shortages in some areas, exacerbated by the punitive budget cuts that have periodically limited the capacity to meet safe staffing levels, we do not believe the further staffing cuts implied in the ERA’s recommendations are safe.

The HoC Justice Select Committee stated on short staffing in the UK system:

‘interim measures such as restricted regimes...have been adopted as a necessary means of minimising the risks of operating with insufficient staff, but these measures themselves have an adverse impact on the ability of the prison system to achieve rehabilitation and reduce reoffending.’ (HoC 2015:71).

To be clear, contracting out to private providers almost invariably results in lowered staffing levels as this is the key place that (unsustainable) savings can be made, and benchmarking is evidently another means to cut staffing levels – as has been established by the UK experience. WA prisons are already regularly running restricted regimes which consequently impacts rehabilitation prospects, further cuts can only exacerbate this.

Given the current government is set upon further decreasing public sector budgets, and the Department is duly seeking savings out of staffing costs, it appears very likely that were the ERA’s proposals to go ahead then the objective of ‘efficiency’ and dollar savings will be privileged over the objectives of safety and rehabilitation. Weighting scorecards and structuring SLA’s would naturally be influenced by that preferencing. The proposed system is not capable of enshrining the objectivity that is implied.

Similarly, throughout the research WAPOU conducted in the UK, we heard repeatedly that the staffing level benchmarks applied to each prison did not reflect a neutral and scientific assessment process. Instead they were weighted towards a preference for high security prisons (anecdotally a result of NOMS senior officials all hailing from that background themselves); and prisons with very active local staff succeeded in negotiating higher staffing levels, through leverage as opposed to a real difference in need. This strikes at the heart of the assumption that benchmarking is in essence as ‘fair’ and even handed system.

The Justice Committee expressed criticism of benchmarking in the following statement:

‘We are not convinced that the Ministry has considered sufficiently, or valued highly enough, the complicated and difficult nature of the work undertaken by frontline prison staff under its benchmarking programme.’ (HoC Justice Committee 2015:72-73).

It is clear where efficiency and savings are the primary goal, the value of Officers’ work may easily be over-simplified to justify staffing reductions. This is an obvious concern in the current climate.

1.1 Transparency

The ERA has argued greater transparency is enabled through the contracting out or privatisation of services. However, as Aman has noted, the privatisation of a service means the Freedom of Information Act does not apply, and ‘More important, market incentives and the profit motive may too easily be substituted for the public interest as well as form primary markers of programmatic success’ (Aman 2005:514).

Legislative changes can further limit transparency, such as in the *Freedom of Information (Amendment) Act 1993 (VIC)*, which was partly crafted to limit public access to information about public-private partnerships, and was specifically amended to include private prison providers (Sands 2006).

Aman (2005:516) argues the transfer of public sector services to the private sector, can create a ‘democracy deficit’ precluding transparency and public engagement; with the delegation of public functions to private bodies, in such sectors as the prison industry, also potentially removing protections against human rights violations. Aman states shifts from the state to the international arena can retain a role for the domestic public sector – but often primarily in a ‘rubber stamp’ capacity. The commissioning of prison services to multinational corporations represents such a move. As we have argued before, this leads to the public being excluded from information and meaningful participation in questions about what is ultimately a core public service.

We have noted before that the direction of the Inquiry towards commissioning appears predetermined and ideological. That interpretation is echoed by Aman’s comments on this trend (Aman 2005:518):

‘Markets and market approaches can cut costs in ways that politically accountable officials usually wish to avoid. Privatisation of some governmental services may make it easier to cut budgets or eliminate unions. Moreover, a preference for markets by politicians can signal not only an ideological preference, but a kind of toughness as well. Markets can imply a degree of harshness that appears to be neutral and simply the logical consequence of processes over which we really have no individual control. For example, the idea of bringing market processes to bear not only in the management of prisons or welfare eligibility but, by implication, on prisoners and welfare recipients as well, may resonate with a political goal of ensuring that certain individuals in society do not benefit unduly at the public’s expense.’

In a privatised context the public is ‘usually excluded from regular information about the treatment of inmates in prison. Publicly-available information about cost and the contractual provisions is likely to replace a broader, political discourse in a privatised setting’ (Aman 2005:531). The claim that having a private provider’s contract publicly available can compensate for that level of openness and debate, accountability and access to the Freedom of Information Act, in the face of ‘commercial in confidence’ barriers, is exceedingly thin.

If genuine transparency is really sought, then the Government should follow Kentucky’s lead in stipulating that private providers such as Serco, must develop a strategy for dissemination of info to government, the public and the media, with **all** documents and records (other than financial ones) being deemed public records (Aman 2005:538).

1.2 Departmental Culture

The ERA raises a concern about the culture within the Department of Corrective Services, it identifies “...some resistance to change and a sense of entitlement amongst some staff” (ERA:2015:4). The ERA puts forward that it believes its concerns are supported by their own observations, information received from stakeholders and quantitative sources such as statistics relating to overtime and workers’ compensation.

The ERA states a belief the use of employee entitlements is very high.

The ERA claims the amount of overtime paid to Prison Officers is high; and further, that the fact 30% of this overtime is to cover for personal leave, and a further 10% is for workers’ compensation, suggests an issue with the performance of the prison system. The ERA further compares the rate of workers’ compensation claims in the public sector, with Acacia private prison.

There is considerable reason to question the approach of the ERA. The statistics provided in relation to the use of overtime identifies that 60% of the overtime budget or \$16.8 million was expended for reasons *other than* personal leave and workers’ compensation. However, there is no consideration whatsoever of what the causes or drivers for the large majority of overtime are.

There also appears little understanding as to the various purpose or uses for personal leave. Personal leave covers a number of sub categories of leave:

- (a) Illness/Injury Leave – If the Officer is unable to work because the Officer is ill or injured.
- (b) Primary Carer Leave – If the Officer is unable to work because the Officer is the Primary Care Giver of a person:
 - (i) who is a person who is related to the Officer by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on or is a member of the household of the Officer and
 - (ii) who is ill or injured and in need of immediate care and attention.
- (c) Unanticipated matters of a compassionate or pressing nature - If the Officer is unable to work because the Officer must attend to unanticipated matters of a compassionate or pressing nature which have arisen without notice and require immediate attention.
- (d) Planned Personal Leave – If the Officer is unable to work because the Officer must attend to planned matters where arrangements cannot be organised outside of normal working hours or be accommodated by the utilisation of flexible working hours or other leave.(West Australian Industrial Relations Commissions 2013:43)

In practical terms the two most used components are what historically were called Sick Leave and Carers leave. There is no breakdown of these components in the ERA's analysis. To make comment on the potential reasons for the volume of leave taken, there must surely be some consideration of the various purposes for the leave and reasons for its use.

The question must be asked as to whether Prison Officers are more likely than other employees to access either personal leave for the purposes of ill health, or indeed workers' compensation. Again there appears little consideration of what may be the causes of employees taking either form of leave other than the suggested culture issues.

We believe being a Prison Officer is a harsh, tough and stressful role. The role of a prison officer '...comes with demanding requirements such as the necessity of staff to maintain a heightened vigilance while they are at work and to adhere to security protocols. In addition, corrections staff must perform their duties within harsh physical environments and with repeated exposure to violence, injury and death threats' (Denhorf, Spinaria and Morton 2012:1). Prison Officers deal with a range of physically exacting and stressful activities such as assaults and aggressive behaviour amongst prisoners, handling deaths in custody, violence and threats to themselves and colleagues.

This is not the sort of working environment many people face.

The complex and challenging nature of the role of Prison Officers has been highlighted in a number of studies looking at the effects the work has on people as individuals.

In the 2012 Study by Denhorf, Spinaria and Morton referred to above, it was argued that "Given that corrections professionals are routinely exposed to multiple types of stressors concurrently in corrections settings – such as organizational operational and traumatic - the more narrowly defined and context-specific conceptualisations like Compassion Fatigue, Secondary Traumatic Stress or Vicarious Trauma by themselves only capture a small portion of the broader spectrum of exposure and stressor types. For this reason, an umbrella term- *Corrections fatigue*-has been proposed to more fully capture the range of stressors and types of exposure that can and do operate in corrections settings. The term Corrections Fatigue also addresses how different types of stressors tend to manifest in the form of a cumulative toll on staff health and functioning..." (Denhorf, Spinaria and Morton:2012:5).

The effects of the role have been identified in the United Kingdom as leading to increased incidence of sick leave due to stress related ill-health.

"A comparatively high level of sickness absence has also been documented in the sector that has been linked to stress-related illness. For the twelve-month period to March 2014, staff sickness was found to account for more than 40,000 lost working days in prisons in England and Wales. Over a quarter of this absence was due to mental health problems such as job - related stress, anxiety and depression." (Kinman, Clements & Hart 2014:4).

Indeed in the Safe Work Australia Report in 2013 on The Incidence of Accepted Workers' Compensation Claims for mental Stress in Australia, the fourth highest sub category after

Train Drivers, Police and Ambulance drivers was Prison Officers (the situation worsened amongst women, where Prison Officers had the second largest incidence of accepted claims).

A study in 2012 by Bigboy Ngwenya of Edith Cowan University looked at this question of the 'Causes and effects of physical injuries in a high risk and high need offender management environment in Western Australia (ECU: 2012).

The study found high levels of physical injuries being sustained by Officers in WA's public prisons.

'The major causes of physical injuries were from slips, trips and falls, and hitting objects with part of the body or against objects during the process of managing non-compliant prisoners. Variables such as physical fitness, job demands, lack of recognition by society, and fear of blood borne infections were significant predictors of injuries amongst POs' (Ngwenya 2012:iv).

The injury rates were impacted on by age and the officer's rank. The effect of rank appeared to relate to the likelihood of direct contact with prisoners (Ngwenya:2012).

The pattern for workers' compensation claims being made by officers was again impacted upon by age with over 70% of claims being made by officers over 45 years of age. At the time of the study in 2012, over 53% of officers were over 45 years of age (Ngwenya:2012).

The ERA drew reference to the variations between Acacia Prison and the rest of the Public Prison system. There are many reasons why this should not be done without consideration of a whole range of other factors. For example, the age of the workforce, staff turnover, or indeed the design of the facility - all of which are relevant, as indeed may be the prisoner cohort. It is our members' observation that the risks of injury are greatest in high security and remand facilities. Often in newly unionised workplaces with shorter institutional understandings of employee rights, there will be issues in the way employers perceive staff exercising those rights. Under-reporting of incidents and reduced safety can occur as a result. From conversations with members we understand this to be the case at Acacia.

The ERA implies high levels of utilisation of personal leave and high instances of workers' compensation claims, is symptomatic of an "entitlement" culture. What is clear is that Prison Officers generally, and in Western Australia specifically, are performing a very difficult role which will often lead to high levels of sick leave and workers' compensations claims.

What is undeniable is that Prison Officers incur physical injuries and mental health problems at a higher rate than most other workers.

The ERA suggests there is a "resistance to change" (ERA:2015:51) within the Department. It claims "staff display some reluctance to move away from practices they have long applied, even when it is clearly demonstrated that existing practices are ineffective, and more appropriate alternatives are available." (ERA:2015:51).

On this point as with many others, the ERA Draft Report is at least consistent in proffering very little evidence to support its claims. The ERA draws reference to two specific examples. The ERA identified a case where the Department advised they wanted to make better use of some infrastructure, and the staff did not want to change rosters to effect the change. So little information is provided in relation to this example as to make it almost impossible to comment or respond in any meaningful way. There is no detail of what the change proposed was, or indeed what the effects on the roster of staff involved would be. It is unclear how much benefit would have been derived from the change or whether, as is often the case with Departmental proposals, the so called “efficiency improvement” would offer any improvement at all.

The second example given is of staff working strictly to their hours and job requirements. As could have been identified quite easily, the CPSU/CSA members involved were working strictly to their hours in response to the effects of Departmental cuts. This was campaigning by union members against negative impacts such as undue workload pressures, and cannot be fairly quoted without providing the context of the specific issues at hand.

Our experience is that Prison Officers are very committed to the role they carry out. They believe they can make a difference to the lives of the prisoners they manage. Therefore they have been, and are supportive of changes they can see will provide a positive outcome.

1.3 Incentives

The ERA has touted incentives as a means to achieving greater efficiency, and specifically recommended the possibility of prisons retaining a portion of profits from industries. There are numerous potential problems with such strategies, already borne out in the experience of private prisons that continue to open industries no matter how low staffing levels are, as a result of financial carrots and sticks. McElligott also explains how this perverse incentive decreased safety in one Canadian private prison:

‘Because searches (for weapons and contraband) are time intensive and labor intensive, they tend to interfere with work programs and other prison activities. Any manager might be annoyed with such disruptions, but the operator of this privately run jail was paid extra for every hour of programming it ran, and so there was a material incentive to minimize searches. Persistent understaffing made searches still more disruptive, so the private managers had some powerful inducements to ignore “problems and complaints” – but this would involve trampling on practices traditionally used by CO’s (corrections officers) to ensure their own safety.

Even after guards at the private jail won union rights, they faced an uphill battle to introduce the kind of safety-based struggles that had transformed CO unions in the public sector. Conditions in the privately run jail produced very high turnover rates and undermined the solidarity, confidence, and experience necessary to refuse unsafe work.’ (McElligott 2007-8:86).

1.4 Lean staffing and resulting safety breaches

McElligott has argued understaffing leads to incidents of compromised safety when prisoners do not receive adequate services and hours of unlock; providing the following example from a private Canadian prison with a lean staffing model:

‘In the jail’s first year of operation, food complaints sparked a major riot in which a five-foot long concrete ledge was pried loose and used to batter through windows and doors. By the time the riot was contained, about 100 inmates were within reach of the central control bubble and the grounds outside the pod.’ (McElligott 2007-8:92).

The failures of the UK prison reforms – primarily commissioning, benchmarking, and resultant staffing reductions, have been writ large in numerous reports. One tangible example that encapsulated the issues was the event of the ‘Mackerel Mutiny’, in not dissimilar circumstances to those in the Canadian private prison described by McElligott. Eleven inmates in Highdown Prison barricaded themselves in a cell and refused to come out in protest of their dismal conditions, resulting from government cuts and reductions to staffing levels through benchmarking and reduced pay and conditions for officers. The prisoners explained they were not getting enough food, exercise, showers, and time for association – later stating they would come out for mackerel and dumplings.

The Justice Secretary Chris Grayling’s (appearing) decision to have the Crown Prosecution charge the 11 men with the very rare and serious charge of mutiny, is an indication of the desperation the administration felt towards gagging similar complaints - that could draw further attention to the dramatic failings of its brutally austere prison policies. Yet the men were acquitted, as the trial made clear how much staffing cuts had eroded the decency of their treatment. As one headline read ‘Grayling’s prison regime goes on trial – and is found guilty’. One of the barristers stated: ‘This not guilty verdict was not only a victory for the defendants but a resounding demonstration of the danger caused by the cuts to the safe and humane running of the prison service.’

With respect to the importance of purposeful activity and hours of unlock, this example of the consequences of lean staffing models brings home the salient point that any move to reduce the hours of unlock in the prison regime should be fiercely resisted.

1.5 Prison Utilisation rates

At 43.6.7 in the Draft Report the ERA indicates stakeholders have expressed concern the Western Australian prison system is over-crowded.

The ERA notes the extent of crowding or overcrowding of a prison can be assessed by considering the utilization rate of individual prisons. However, it notes that this process is complicated by DoCs having changed the way of measuring prison capacity three times, from Design Capacity to Operational Capacity and finally to Total Capacity.

For many years the yardstick used by the Department to determine capacity was Design Capacity. Design Capacity relates to the number of prisoners the facilities were originally constructed to house, whether intended for single occupancy, shared cells or dormitories.

As the prison population started to rise dramatically in early 2009, a new definition of capacity to measure utilization rates was introduced by the Department. This new definition, Operational Capacity, was publicly reported on in parallel to the Design Capacity.

It was defined on the Department's website at the time as follows: "Operational Capacity refers to the design capacity plus additional cells within a centre which are not intended as long term accommodation e.g. Temporary beds/bunks."(DoCS Albany Regional Prison: 2012:1).

The population continued to soar and by late 2012 the Department stopped reporting on Design Capacity, and solely reported on Operational Capacity.

The growth of permanent double-bunking as a response to the growing population, led to a need to find a politically acceptable way to describe utilisation rates and prison capacity. As considerable amounts of Government money was spent on doubling-up single cells, having a capacity measure which continued to show growing levels of overcrowding was simply unacceptable.

However, the change in the definition has also indicated the Department no longer appears to be concerned about the standards appropriate in relation to many aspects of prison cell design - such as space, ventilation, access to showers, toilets, and fire safety engineering.

There are a series of National and International standards which should apply to the provision of prisons in Western Australia.

One of these standards is The United Nations Standard Minimum Rules for the Treatment of Prisoners, which provides some general rules on the appropriateness of accommodation for housing prisoners:

- '9. Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.'(United Nations 1987:2)

This clearly identifies that single cells should be the norm for prisoners. The United Nations Standard Minimum Rules also deal with the issue of the proper provision of sanitation for prisoners:

- '12. The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.'
(United Nations 1987:2)

A set of guidelines for the Design and Construction of new Prisons in Australia and New Zealand outlines a range of expected standards:

‘6.7 Each cell shall provide a prisoner with the functions of sheltering, sleeping, grooming, sanitation, studying and relaxing. These should occur without the interference of other prisoners.’(Victoria Office of Corrections 2012).

This means that in relation to sanitation there should always be discretion partitions to allow for privacy when using a toilet.

The Guidelines also identify that a single person cell should be 7.5m² in a Minimum Security Prison and 8.75sqm² in a secure prison. A cell for two people 11.5m² at a minimum in a Minimum Security Prison and 12.75sqm² in a secure prison.

It is therefore the case that the vast majority of cells that have been double-bunked under the recent program, which were never designed for more than one person, fail to meet the BCA and engineering standards. The Department is not, in relation to these cells, compliant with the Standard Guidelines for Corrections as set out previously, or indeed the United Nations Standard Minimum rules for the Treatment of Prisoners.

Simply put, the cells are too small, do not have appropriate discretion for ablutions, and there are questions in many about ventilation and air flow. Therefore, the utilization of these cells for double-bunking should only be temporary as was plainly intended under the initial definition of Operational Capacity.

This very issue was considered in the recent Inspection of Bunbury Regional Prison by the Office of the Inspector of Corrections (OICS 15:98:16).

The Inspector found that the cells in Unit One did not meet international standards, indeed he stated:

“The Unit 1 cells at 5.98 sqm², were too small for ‘single occupancy’ by these guidelines, yet were frequently used to house two.”(OICS:15:15)

The Inspector then pointed out that there are factors other than floor space that affect the acceptability of a cell.

He identified that when a range of other failings were considered in relation to the cells that: ‘...even the standard minimal cell space in Unit 1 would have been insufficient for humane treatment’ (OICS:15:16).

It is our strong view that the only way to determine utilisation rates is to base it upon the Design Capacity, which sets out the capacity of the facility in compliance with national and international standards.

If the Government does not provide enough capacity to allow for the management of all prisoners within the Design Capacity, we believe the long term consequences for the community, staff and prisoner security could be severe.

It is our concern that the overcrowding currently experienced within most facilities results in heightened tension, greater risk of assaults, potentially increased self-harm and property damage.

The negative effects of overcrowding are set out in many studies over the last 25 years. Craig Haney in a 2006 article wrote: ‘Not surprisingly, a large literature on overcrowding has

documented a range of adverse effects that occur when prisons have been filled to capacity and beyond....Although some of the studies are dated, nothing has changed to alter their troubling implications. Thus a group of prison researchers summarized in the 1980's, as the trend was just beginning to gather momentum: "crowding in prisons is a major source of administrative problems and adversely affects inmates health, behaviour and morale."²¹Two other early commentators concluded their review of the literature in much the same way, stating "[w]ith few exceptions, the empirical studies indicate that prison overcrowding has a number of serious [,] negative consequences' (Haney 2006:270).

And continued:

"In addition, overcrowding has been associated with higher rates of disciplinary infractions. For example, one study concluded that in prisons "where crowded conditions are chronic rather than temporary...there is a clear association between restrictions on space and the occurrence of disciplinary violations" (Haney 2006:271).

Our members are clear that working in overcrowded prison facilities significantly increases workplace stress and pressure. We therefore believe this will lead directly to higher levels of personal leave and workers' compensation claims.

It is also our experience that overcrowding leads inevitably to prisoners not receiving education, training or therapeutic programs. This negatively effects release on parole and leads potentially to increased re-offending, both of which have an adverse effect on prisoner numbers.

When the problem of overcrowding is combined with the shortfalls in staff currently being experienced, it is potentially a toxic brew.

It is therefore our strong view that the count of the Department's capacity must not allow it to hide overcrowding for political purposes. Either a cell was built to house one person in line with United Nations and Australian Standards or it was not. Simply changing terminology does not change the fact nearly all of Western Australia's 14 prisons have musters well in advance of their Design Capacity, with all the stresses and pressures this brings.

1.6 Weightings and value judgments

The suggestion performance benchmarks can be weighted to create comparability is flawed for numerous reasons, as Dr Toner has explained. Additionally, it is clearly problematic to suggest these weightings can be fairly and reasonably determined by the Department without bias or value judgments. The financial pressure on the Department, which is plagued by budget cuts, is enormous. The threat of further privatization of services through commissioning or contracting-out, is a powerful blackmailing tool to ensure the maximum costs are cut – whether sustainable or not. The UK has shown how this story ends. If the Department is to weight each performance category then 'prison management' ie cost cutting, will surely be given primacy in the current climate. This is particularly so, given the purpose of this Inquiry was clearly to find ways to cut costs above all else. The token

acknowledgement the ERA gives to the need to avoid this, is no safeguard against its practical occurrence.

Questions of safety and quality are implicitly accorded a lower value by the ERA. Under the ‘safety and security’ category the ERA refers to measuring escapes, absconds, assaults, self-harm and similar, for prisoners. To indicate the relative importance, measurement of assaults is ‘extended to include prisoner assaults on staff’. This may not have been intended to read like an afterthought, but when accompanied by the comments in the ‘management’ category it paints a different picture.

Benchmarks under the management category, the ERA states, can be designed to measure ‘poor staff culture’ – which it relates back to the prevalence of workers’ compensation claims, personal leave use and overtime (ERA Draft Report :79). It is made clear that this is viewed as an attitudinal problem on behalf of staff, rather than a reflection of a dangerous and stressful workplace - under increasing pressure as a result of overcrowding and government cuts. It is also made clear this is a problem not because staff welfare is obviously at issue, but because of the financial cost and loss of productivity.

The lower priority accorded to the ‘quality of prisoner life’ category is also evident. The ERA acknowledges the legitimacy, value, and support for MQPL as a measurement, but backs away from its regular use on the basis that it is ‘resource intensive’. In other words, ensuring quality of life just costs too much. A fairly overt declaration that costs are more important than quality – and indeed, human rights. Given that prisoner quality of life is unarguably linked to the prospects of rehabilitation (which the ERA has said is important but very difficult to measure) it is extremely disappointing this is not given greater priority.

This gives weight to the concern Liebling has expressed, regarding cost-cutting and rehabilitation being contradictory objectives, and Aman’s statements on the propensity for cost-cutting to come at the potential detriment of human rights.

2. Commissioning

The ERA has made much of how the apparent benefits of competition can allegedly be reaped through commissioning. As Dr Toner has already identified, the degree of competitiveness in the private prison industry is highly debatable. In the United States the industry is very concentrated, in 1998 over 76% of the private prison business was controlled by two companies, Wackenhut Corrections Corporation (WCC) and CCA, which is a former subsidiary of WCC . It’s necessary for decision makers to understand that the market-like effects they hope to achieve will be concentrated in the period before a contract is struck, not substantially afterwards as: “the distinctive feature of contracting out is the element of *ex ante* competition – competition *for* the market as opposed to competition *in it*” (Domberger & Jensen in Aman 2005:536).

The House of Commons Justice Committee has also commented on the lack of a level playing field under commissioning:

‘they (private companies) also benefit from greater ability to make capital investments in the hope of recouping the benefit over the lifetime of the contract, while public sector processes restrain such investment.’ (HoC 2015:70).

The Justice Committee goes on to report to the House of Commons some further concerns about the impacts of commissioning:

‘Prison governors in public sector prisons and some private sector prisons are no longer responsible for the sum total of everything that happens within their prison walls. As well as effectively becoming contract managers for provision of services for which they used to be directly responsible, they are constrained in their operational decisions when dirigiste decisions are taken from the centre on such matters as the Incentives and earned privileges scheme, the ‘lights out’ policy and release on temporary license. We conclude that relegating governors to an oversight and partnership management role with much reduced discretion undermines their control over the performance and safety of the establishment and their ability to govern their prisons using their professional judgment, as they are trained at public expense to do.’ (HoC 2015:72).

The Committee goes on to discuss an additional issue:

‘There is a risk that the proliferation of partner organisations providing services to prisons could distract prison management teams from their core role. This potential effect is all the more important when resources are such that reduced staffing levels are impinging on the safety of prisoners and staff for which governors have ultimate responsibility’.

With respect to delegations to the market via privatisation (or commissioning of public services to private companies if preferred) Aman raises the following concern about the result of competitive pressure:

‘This encourages such delegations on the part of the state and it raises concerns over whether the cost savings that result from such public delegations to private entities occur at the expense of democratic processes, legitimacy, and individual justice.

...privatisation, in this global context, tends to reduce the democratic public sphere in favour of other arrangements that are likely to be less transparent and accountable to the public, and less exposed to competing value regimes.’ (Aman 2005:524)

On the topic of commissioning and the need for the state to retain the knowledge and capacity to intervene where needed, Aman makes the following point:

‘The ability of a state to step-in can be ensured, at least in part, through a “contestability” process where public providers are able to bid against private providers for contracts. Such a procedure, however, risks the removal of a governmental check on the dominance of economic concerns over human rights issues, insofar as the public providers are subjected to the same dominance of economic issues over noneconomic values in the provision of services.’ (Aman 2005:535).

This is a key danger of commissioning. As we have argued, in their current form the ERA’s recommendations are set to design a system that values cost cutting over quality and rehabilitation.

2.1 Human Rights

As WAPOU continues to object to the ERA's privileging of cost savings over rehabilitation and safety imperatives, we restate the case for keeping profit out of punishment. As Aman has pointed out:

'While it can be argued that there would be little point in privatising if some savings were not anticipated, as the cost-savings requirement gets larger, there is an increasing danger that private prisons would need to sacrifice prisoners' rights to meet the standard.' (Aman 2005:529)

In the United States there is great variance from one state to another in terms of the statutes on privatisation. The Colorado statute (and many others) require that 'privatisation of government services not result in diminished quality in order to save money', however, that quality can be hard to measure and monitor (Aman 2005:530).

Where quality is not protected then human rights may not be either. Aman explains that the potential for human rights abuses in private prisons (or prisons that are contracting-out key prison services) is that the 'relatively strong relationship between democratic forms of government and the protection of human rights' breaks down in the prison context' (Aman 2005:531).

2.2 Voluntary Sector

As noted elsewhere, the notion robust competition will partly be enacted by involvement from the voluntary sector, is misguided. Not only are the costs prohibitive for all but the largest, but evidence from the commissioning experience of the UK shows they are more likely to be forced out of the sector altogether. The UK Centre for Crime and Justice Studies reported the prospect of participating in a 'market for punishment' through commissioning, was thought too morally objectionable by some organisations, and amounted to services being privatised 'by the back door' (Silvestri 2009). One of the other major themes The Centre goes to is the question of eliminating diversity, independent advocacy, and competition through commissioning. As smaller players are forced out, and those advocates drawn in lose their independence and capacity to criticise the system, the pool shrinks and the sector concentrates and homogenizes – rather than strengthening through competition.

2.3 The Risks of Further Contracting-out to the Private Sector through Commissioning

The most respected academics writing in the field of corrective services, have acknowledged the risks of further contracting-out to the private sector as commissioning proposes; and

indeed – warn against the reality that commissioning may force the public sector to drop its standards to unacceptable levels, as in the UK experience:

‘...despite the high quality of some private-sector prisons and persisting cultural problems in the public sector, there are serious risks in the private-sector staffing model of low pay and thin levels of officer deployment – a model that is increasingly being emulated by the public sector and that may characterise privatised areas of public service more widely.’ (Crewe, Liebling & Hulley 2015:314).

Commissioning and the threat of privatisation was used in the UK to force public sector workers to accept cuts to pay and conditions along with staffing levels. This aligns with the statement on the poor staffing model of the private sector operators being mirrored by the public sector, with disastrous results. The imposition of this model upon the public prison system in the UK, on pain of death, accounts for the degradation of safety and service delivery documented in recent authoritative reports from the UK including the Harris Review (2015), The House of Commons Justice Committee report Prisons: planning and policies (2015), and HM Chief Inspector of Prisons for England and Wales Annual Report 2014-15.

According to a highly regarded study of the difference between public and private prisons by Crewe, Liebling & Hulley:

‘...the domains of security and policing were areas where the high-performing private-sector prisons were least impressive in relative terms compared to the public establishments. Thus, even in private prisons with relatively experienced staff, the thin staffing levels that characterise profit-making institutions, a relative absence of jailcraft, and a workforce that is less bonded to its occupation, seem to limit quality levels in certain areas.’

‘A lack of experience, capability, and expertise among staff, thin staffing levels, and high turnover typically lead to weaknesses in private prisons in areas such as policing and control, organisation and consistency, and staff professionalism. These weaknesses, even when relative, are identifiable even in the best private-sector prisons. Thus, while our study shows that there is considerable variation in quality within the private sector, it also suggests that there are some general and significant risks in contracting out prisons based on a model in which staffing is lean and staff are relatively expendable.

‘...Given the current financial climate and a political culture of economic rationalism, this is a worrying observation. Cost was the primary consideration in the recent award of two new private prisons in the United Kingdom and, as Harding (2001, 299) notes, evaluations of cost have “played a disproportionate role” in both debates and research about prison privatisation or, we could argue, prison life. A “race to the bottom” (Gaes 2005, 86) on cost is risky for both sectors. Likewise, there are considerable dangers in emulating the private-sector model in the public sector.’ (Crewe, Liebling & Hulley 2015: pp332-333).

The marketization of prison services and exposure to greater competition on cost can cause private interests and economic concerns to prevail over the public interest (Aman 2015). As numerous observers and theorists have asserted, preoccupation with cost has played too great a role – and this is only worsening in the West Australian context – as evidenced by the predetermined agenda of this Inquiry itself.

4. The Role of WAPOU

The ERA Draft Report states a perception that WAPOU has a ‘de-facto managerial role in relation to Public Prisons in Western Australia’ (ERA:1015:26). To support this it relies upon sections of the Department of Corrective Services Prison Officers’ Enterprise Agreement 2013 (“the Agreement”), which it claims provides the evidence to that effect.

The ERA argues through the consultative process set out in Clause 169 of the Agreement, Clause 173 the Introduction of Change Clause, and Clauses 174-177, the Dispute Resolution Procedures, WAPOU exercises a de-facto managerial role, for which it is claimed it has no proper accountability. On this basis the ERA claims WAPOU’s role should be curtailed.

WAPOU is a trade union registered under the Western Australian *Industrial Relations Act 1979*. As a Branch of the CPSU - State Public Services Federation it is registered with Fair Work Australia, under the *Fair Work Act 2009*.

Most of WAPOU’s members work within the public sector. Of Prison Officers in the public sector, WAPOU has over 95% of all potential members. Membership is at over 75% of the potential membership in the private sector. This has the obvious effect that it is highly representative of Prison Officers in WA, and indeed is strongly supported by its members, as was evidenced during the state wide industrial action taken in 2013.

WAPOU is also the professional voice for Prison Officers in relation to matters of professional practice. WAPOU speaks to matters of public policy as they might affect Prison Officers.

Prison Officers in the public sector are barred under Clause 22 of the Prisons Regulations 1982, from speaking about matters they become aware of in the course of their duties. WAPOU is able on their behalf to vocalise their concerns about all work related issues.

The suggestion there is a quasi-managerial role undertaken by WAPOU on the grounds set out by the ERA, shows a fundamental misunderstanding of trade unions and professional associations and their role in modern Australia.

WAPOU is party to an Industrial Agreement in the same way that the unions who represent Doctors (the AMA, Nurses (The ANF of WA), Teachers (The SSTU) or indeed Police (WAPU) are.

The Department of Corrective Services Prison Officers’ Enterprise Agreement 2013 sets out terms negotiated between the parties over many months, and represents considerable compromise on the part of both parties.

The specific referencing of some clauses by the ERA as previously stated shows little understanding of common practice in Enterprise Agreements, or indeed the legislative framework affecting the parties.

The ERA draws attention to Part H of the EBA which sets out the consultative mechanisms – stating that: ‘The de facto management role of WAPOU is formalised under Part H of the Enterprise Agreement, which relates to change, consultation and dispute resolution for significant changes to operations affecting Prison Officers...’ (ERA 2015:26).

The consultative processes set out in Clause 169 of the EBA are far from unusual. The clause allows consultation on a range of matters. It sets out two levels of consultation, those at a prison level and those at the Department level.

A non-exhaustive survey of public service agreements identified a number of other agreements which set up standing bodies between the employer and Trade Union to facilitate communication and consultation. For example:

- Corruption and Crime Commission Industrial Agreement 2013 (cl 63 Establishment of Consultative Mechanisms)
- Dental Officers’ industrial Agreement 2014 (cl 61 Joint Consultative Committee)
- School Education Employees’ (Teachers and Administrators) General Agreement 2014 (cl 40 The Employee Relations Executive Committee (EREC))
- Western Australia Police School Traffic Wardens Agreement 2011 (cl 35 Joint Consultative Committee)

Neither Clause 169 nor these agreements can compel either party to agree to proposals made during the utilisation of these procedures.

Issues such as workload management, safety, fixed term and casual employment usage, changes to work organisation and /or work practices in the workplace, turnover of staff, accident rates, incidents of workers’ compensation and EEO matters, are dealt with under the consultation process and are hardly exceptional matters for consideration in any consultation process.

The use of Department-wide consultative bodies is also part of the WA Public Service and Government Officers’ General Agreement 2014 (PSGOGA).

It should be noted this is a Multi-Agency Agreement and sets down Government-wide and Departmental consultation processes. WAPOU’s is a Single Industry Agreement covering very specific workplaces. The logic employed in having local prison-based as well as Departmental consultative processes, has in our view contributed to what are historically low levels of formal disputes between the parties. It is WAPOU’s view the consultative process in fact aids efficiency and effectiveness of managerial decision making.

It is worth noting the *WA Occupational Safety & Health Act 1984* under Division 2 of the Act, provides for local Occupational Safety and Health committees. In doing so it recognises it is more efficient to resolve matters at the workplace level.

The provision of Introduction of Change or Significant Change clauses in Awards or Agreements is extremely common. In fact WAPOU’s is little different to those in many other awards or EBA’s.

To allow for a comparison with other Industrial agreements we considered the key elements and effects of Clause 173 of the Agreement. The operative part of this provision is the

requirement that:

- (a) The employer has made a definite decision to introduce change;
- (b) the requirement to discuss the change with the affected employees and the Union;
- (c) the discussion to commence as early as practicable; and
- (d) the employer to provide information.

A non-exhaustive survey of other Public Sector Agreements identified Change provisions that replicate all the above requirements (a, b, c, d) in the following agreements:

- West Australian Police Industrial Agreement 2014 (cl 7. Introduction of Change)
- Public Transport Authority (Transperth Train Operations Rail Car Drivers) industrial Agreement 2013 (cl 7.1 Introduction of Change)
- Dental Officers' industrial Agreement 2014 (cl 62 Notification of Change)
- Corruption and Crime Commission Industrial Agreement 2013 (cl 60 Notification of Change)
- Western Australian TAFE Lecturers general Agreement 2014 (cl 14 Notification of Change)
- WA Health – HSUWA – Pacts Industrial Agreement 2014 (cl 51 Consultation/Introduction of Change)
- Western Australia Police School Traffic Wardens Agreement 2011 (cl 34 Notification of Change)

Indeed the Fair Work Ombudsman's "Best Practice Guide to Consultation and cooperation at the workplace" sets out that:

'Every modern award contains a standard consultation clause dealing with the requirement for employers to consult with employees and their representatives where the employer intends to implement significant changes at the workplace. The clause requires consultation where an employer has made a decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, or where an employer proposes to change an employee's regular roster or ordinary hours of work.

In these cases:

employers must notify employees and their representatives who may be affected by the proposed changes

employers must discuss the changes with the affected employees and their representatives, and provide information in writing to them, as soon as practicable after a definite decision has been made about:

the nature of the changes

effects the changes are likely to have on employees

measures to prevent or reduce the adverse effects of such changes on employees

employers must then give prompt consideration to matters raised by the employees and their representatives in relation to the changes.’(Fair Work Ombudsman: 2013:3)

It is clear there is nothing unusual or extreme about the nature of Clause 173 “Introduction of Change” in the Agreement.

The ERA claims the effect of the Dispute resolution clauses 174-177 and specifically the Status Quo provision is that it ‘effectively means that the Superintendent must reach agreement with WAPOU in order to make significant operational changes’(ERA:2015:27).

The operative part of the *status quo* provision provides that whilst a dispute remains unresolved and the prescribed dispute resolution procedure is being followed, work practices and conditions remain unchanged until the dispute is settled.

A non-exhaustive survey of other public sector agreements identified a number of agreements that contain *status quo* provisions that provide the same operative outcome as above:

- WA Health – Australian Nurses Federation – registered nurses, Midwives, Enrolled (Mental Health) and Enrolled (mothercraft) Nurses – Industrial Agreement 2013 (cl 60 Dispute Resolution Procedure)
- Western Australian Fire Service Enterprise Bargaining Agreement 2014 (cl 9 Dispute Resolution Procedure)
- School Education Employees’ (Teachers and Administrators) General Agreement 2014 (cl 42 Dispute Settlement Procedure)
- WA Health – HSUWA – Pacts Industrial Agreement 2014 (cl 56 Dispute Settlement Procedure)
- Western Australian TAFE Lecturers General Agreement 2014 (cl 12 Dispute and Grievance Resolution Procedure)

The purpose of such provisions is to stop industrial disputes becoming inflamed and more difficult to resolve. Moreover, Clause 174.3 provides for the WAIRC to be able to lift the status quo if they feel that this is warranted. This ensures that WAPOU cannot simply use the status quo as a mechanism to block change as there is an umpire to ensure fair behaviour.

The Staffing Agreements in place flow from the WAIRC conciliated resolution of industrial action in 2002, and the request of Government to include a process for the current Memorandum of Understanding in the 2010 Enterprise Agreement. The Agreements create benchmarks for workload and have again helped ensure much lower levels of disputation between the parties. The effects of the series of strikes in 2002 cannot be underestimated, and the parties’ ability to find resolution to some of the underlying causes such as safe staffing levels, shows maturity as industrial parties.

The Draft Report questions what the proper role is for a Trade Union.

According to the Oxford English Dictionary a Union is “an organised association of workers in a trade, group of trades or profession formed to protect and further their rights and interests”. This is not narrowed to simply pay and conditions, and neither should it be.

WAPOU is both the professional voice for Prison Officers in WA, much as the ANFWA is the professional voice of Nurses, WAPU the union and professional voice for Police Officers and the SSTU the Union and professional voice for Teachers.

We are proud to put forward the professional views of Prison Officers and it has been the publicly expressed view of both Commissioners Johnson and McMahon, that WAPOU has a significant role to play in expressing these views.

WAPOU is properly accountable as any union is to its members. As with action by any union, the effect or outcome of any dispute may impact on the management of resources, that is clear.

WAPOU is rightly accountable to its members, to argue it should be accountable to the Department would reduce it to little more than a house-union with no legitimacy. WAPOU's legitimacy must come from freely representing members. It does so within the boundaries of what is currently the law, as it relates to Industrial Relations. It is our submission that the suggestion WAPOU has some greater responsibility or role is frankly purely ideological.

5. Addressing Indigenous over-representation and other alternatives for improvement

The ERA considers recidivism rates and rehabilitation objectives to be within the purview of this Inquiry. However, the ERA states factors such as the high rate of indigenous incarceration and growth in the prison population are out of scope (ERA Draft Inquiry 2015:13). If recidivism is in scope, then it follows that indigenous over-representation in the system – and the growing prison population – should also be considered in scope.

The broad mandate for the Inquiry to look at ways to improve the efficiency and performance of the prison system, could not sensibly preclude two of its greatest problems. Given that WA imprisons Aboriginal people at nine times the rate of Apartheid South Africa (John Podmore 2015), it is in fact negligent not to even consider this crisis in any review of the prison system.

Furthermore, in association to the overrepresentation of Aboriginal people in the system, it is also a fact that the recidivism rate for young Aboriginal people is 25 percentage points higher than the non-Aboriginal recidivism rate. In 2014 only 26 percent of Aboriginal prisoners less than 24 years old were in prison for the first time, compared to 74 percent of non-Aboriginal prisoners in the same age group (OICS 2014:ii). The Inspector of Custodial Services states in his 2014 report:

‘This Office has noted numerous times that service provision in mainstream prisons does not meet the needs of young adults, particularly Aboriginal young adults. There are no specific strategies in place to target and engage this cohort.’

With further comments made:

‘Research has found that education and training programs are generally a cost-effective method to reduce recidivism’ (OICS 2014:12).

This reference to training programs is clearly only one element where consideration needs to be given on how best to respond to the crisis in Aboriginal over-representation and recidivism rates.

In submissions to the ACT Standing Committee on Justice and Community Safety’s, Inquiry into Sentencing – the ACT Human Rights and Discrimination Commissioner has stated that she has ‘continued to progress our recommendations regarding a Justice Reinvestment strategy’ in the ACT, which had been motivated by ‘the continued over-representation of Aboriginal and Torres Strait Islander young people and adults in the justice system and more specifically, in detention.’ (Standing Committee on Justice and Community Safety 2015:386).

The Inquiry into Sentencing looked at a wide range of progressive alternatives and undertook extensive expert and professional consultation. In addition to strategies such as justice reinvestment, Restorative Justice was also considered. The Attorney-General told the Committee that:

‘...restorative justice conferences are likely to reduce the frequency and costs of future crime. The review found that the average effect of restorative justice when compared with conventional justice procedures, usually through the court, is beneficial.’

And additionally that:

‘...restorative justice conferences are even more effective with repeat adult offenders rather than juveniles and for serious violent crime rather than less serious non-crimes against the person.’

Significantly, he also stated that:

‘...we know that in relation to offenders the evidence demonstrates they are less likely to offend again in that circumstance and it is cheaper than the conventional justice process. For all of those reasons, there is good evidence to highlight why these matters should be pursued further.’ (Standing Committee on Justice and Community Safety 2015:348-350).

Stakeholders involved in the ERA Inquiry have advocated for a coordinated ‘whole of government approach’ to addressing reform in the prison system – as it is evident that the performance of prisons cannot be understood or assessed in isolation from its context in connection with legislature, policy, and other government departments. We would argue any potential opportunities for improving the prison system are relevant for the ERA to at least acknowledge, and consider making recommendations for further investigation of. To do otherwise is to take a blinkered view that ignores the reality of interconnection, and to miss opportunities for advancement.

Even if the ERA refuses to look at approaches such as restorative justice on the basis that they involve change to a separate part of the justice system, it cannot be ignored that restorative justice (RJ) could be employed alongside (rather than in place of) traditional approaches and indeed prison sentences.

The Attorney-General stated:

‘What I want the justice reform strategy to look at is not just RJ as a stand-alone but in what circumstances an expanded RJ program should sit alongside the conventional sentencing process in court. For some crimes it would be appropriate still to face that as well as participate in RJ.’ (Standing Committee on Justice and Community Safety 2015:353).

The ERA has no real rationale to suggest indigenous overrepresentation, diversion strategies to combat overcrowding and better facilitate rehabilitation, or progressive approaches to reducing recidivism, are out of scope. Rather it appears to have simply cast these items into a brimming ‘too hard basket’. If there is any genuine intention of improving the system, beyond ham-fisted grabs at cost reduction, then best practice and innovation from other jurisdictions must be considered.

In the words of the Victims of Crime Commissioner (ACT) on restorative justice:

‘Our restorative justice scheme... also allows offenders to be referred to restorative justice while they are serving a sentence. I think our scheme is the broadest scheme I have encountered. I do not have an exhaustive knowledge of restorative justice but I see we are missing an opportunity. We are looking around for strategies to avoid people going to prison, and we have got one looking us right in the face, and we do not seem to be able to grasp the nettle and say, “This has got real potential”.’ (Standing Committee on Justice and Community Safety 2015:351).

Conclusion

The UK prison system cannot be looked to as an exemplar given its state of crisis, following the failure of commissioning and benchmarking. The absence of sustainable savings must also be squared against the profound human cost, in suicide, self-harm, assaults, and damage to the physical and mental health of inmates and officers alike.

As outlined in the 2014-15 Annual Report by Her Majesty’s Chief Inspector of Prisons for England and Wales, in an average week in the UK prison system four to five prisoners died, one or two of those deaths was self-inflicted, there were almost 500 self-harm incidents, there were over 300 assaults and more than 40 of them were serious, there were about 70 assaults on staff, and on average there was a homicide once every three months (HM Chief Inspector of Prisons Annual Report 2015:8).

More than just contrary to the goal of rehabilitation in general, it is in fact negligent to propose we ignore that cautionary tale. The canary has well and truly expired down that coal mine. There is an ethical question to consider in the creation of responsible and sound public policy, but there is also a question of social conscience at hand.

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