

Marketising Criminal Justice

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Abstract

Provision through government bureaucracy has been replaced widely by 'delivery' through 'service providers' who compete against each other in markets for public sector business. Marketisation promises to enable governments to provide lower cost, higher quality and better managed public services. This chapter describes and explores the substance and detail of how market mechanisms are being used in the commissioning of criminal justice services in England and Wales, focusing especially upon prisons. A nuanced account of marketisation is articulated, which positions market mechanisms as malleable, instrumental rather than mechanical, and more varied, both in their design and in their impacts than the new penology thesis might suggest. The implications of changes in marketisation policy and practice are explored, reflecting especially upon consequences for future market making, service quality, and the professional and moral identities and practices of criminal justice practitioners. It is argued that the current use of marketisation to pursue a model of 'bigger and cheaper' criminal justice is disabling, rather than enabling, legitimate penal order.

Key words: commissioning; privatisation; markets; new penology; prison cost and quality

Exam questions

- To what extent are the promises of marketisation achieved in practice?
- To what extent does Feeley and Simon's new penology thesis account for prison marketisation policy and practice in England and Wales?
- What are the effects of marketisation processes upon prisoners, prison staff and the future application of market mechanisms in the sector?

'Government is clearly failing to manage performance across the board, and to achieve the best for citizens out of the contracts into which they have entered.' (House of Commons Public Accounts Committee 2014)

'Narey describes the moment his views changed, at a contracted prison, watching new prisoners arriving "being called 'Mr Brown', and being offered a cup of tea and being treated with dignity which I knew was beyond the public sector... It wasn't about efficiency... it was just about humanity.'" (personal communication with Martin Narey, former Chief Executive of the National Offender Management Service, quoted in Le Vay 2016: 26)

1. Marketising criminal justice

A now considerable body of work describes the political, economic and sociological circumstances in which many governments have, since the 1960s, reimagined and reconfigured how their citizens access public services (e.g. Sennett 2006; Sandel 2013; Stuckler and Basu 2013). This includes criminal justice. Provision through government bureaucracy has been replaced widely by 'delivery' through 'service providers' who compete against each other in markets for public sector business. Manifestations of market thinking include privatised ownership and management, private sector design, finance, construction and management of whole institutions, outsourcing or contracting out

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of core or ancillary functions, and competition or market testing processes in which public and private service providers are compared and Service Level Agreements introduced to govern provision. The language with which these varied processes of marketisation are described is often imprecise and ideologically charged (Harding 1997: 1; Johnston 1992: 214-220).

Marketisation promises to 'liberate' governments from public sector monopoly and enable them to provide lower cost, higher quality and better managed public services; they can do more, and better, for less (Le Grand 2007). The market is said to offer an 'all-purpose key to better provision of public services': a means to solve 'management ills' in many different contexts and an 'apolitical framework within which many different values could be pursued effectively' (Hood 1991: 8; Pollitt and Bouckaert 2011). Yet evidence about the efficiency and effectiveness of marketised public services is limited, and outcomes between sectors vary. Contracting out has been found to work best in 'simpler, more transactional services like waste management'. The impact of competition in complex services, like health or education, is less clear (Institute for Government 2013: 4). Crouch has described the unshaken, yet mostly empirically unsubstantiated, faith in free markets to deliver economic and social prosperity as 'the strange non-death of neo-liberalism' (Crouch 2011).

Private actors have long been involved in the delivery of law enforcement and public order (D'Amico 2010; Nemeth 1989). However, many contemporary governments moved away from this and chose to deliver criminal justice services directly, through state employees. Direct state delivery was linked to the search for consistency and improved standards, through centralisation and nationalisation. Where the private sector was involved in delivering criminal justice, as was the case for example in labour leasing arrangements in the USA in the late nineteenth and early twentieth century, activities became notorious for their exploitation and brutality (Ryan and Ward 1989; Hallett 2006).

Since the late twentieth century, many governments have returned, at least in part, to non-direct provision of criminal justice services, including through private companies. Though the 'deep structures' of political decision-making vary between countries (Jones and Newburn 2005), problems of prison overcrowding, and desires to reduce cost and improve standards have been common motivators in favour of (re-)diversified provision (Harding 2001: 269). Internationally, the USA led the way from the 1960s onwards; Australia soon followed. Private delivery of criminal justice has since expanded exponentially in the USA, encompassing probation (especially in many southern States) and policing (Pastor 2003). Serious concerns have been raised about the private sector's involvement in US probation (Human Rights Watch 2014; Georgia Department of Audits and Accounts Performance 2014).² Although the USA has more privately managed prisons, internationally, Australia imprisons the highest proportion of its prisoners in privately managed facilities (18.5% overall in 2016: Australian Productivity Commission 2016, Table 8A.2). In August 2016, US Deputy Attorney General Sally Yates announced a goal of 'reducing – and ultimately ending – our use of privately operated prisons' on the grounds that private sector providers offer poorer services and do not save substantially on costs.³ The announcement signals an important change in policy direction, but its practical impacts are yet to be seen and are, in any case, limited to federal US prisons.

Within Europe, the UK has been at the forefront of marketising criminal justice. The key private players are: Global Solutions Limited (GSL); Premier Detention Services (PDS), which is owned by Serco; UK Detention Services (UKDS), which is owned by Sodexo; and Group 4 Securicor. Between them, these companies operate seven out of the UK's ten main immigration removal centres. They manage a small,

² In 2012, an Alabama County judge shut down a private probation company that he described in his Order as 'a judicially sanctioned extortion racket':

<http://media.al.com/spotnews/other/Judge%20Hub%20Harrington%20order%20to%20Harpersville.pdf>.

³ <http://apps.washingtonpost.com/g/documents/national/justice-department-memo-announcing-announcing-the-end-of-its-use-of-private-prisons/2127/>.

but culturally significant, proportion of prisons (14 out of a total of 123), housing men and women. Private companies operate prisons of all levels of security save for the most secure. They also run prisoner and immigration detainee escorting and court services. Management of Lincolnshire Police's custody suite is fully privatised, though privatisation and marketisation in policing have generally been more limited than in other criminal justice sectors (White 2015). Following the Government's Transforming Rehabilitation reform agenda of September 2013, probation services for low- and medium-risk offenders have been largely privatised, operated by complex consortia that raise serious challenges for transparency and good governance (Padfield 2016).

The marketisation agenda, and the dominance of competition and economic rationality paradigms, have attracted considerable criticism in criminal justice. Particular concerns include democratic accountability, neglect of the expressive moral functions of state penal power, legitimacy and social equity in the distribution of security as a social good (e.g. Loader and Walker 2006; Padfield 2006; Zedner 2006). Feeley and Simon (1992) theorised the application of new public management to criminal justice as the emergence of a 'new penology': a conception and practice of criminal justice that is actuarial, 'aggregate, risk-focused, distant, quantitative, rational, [and] control-oriented', and that treats offenders 'as units to be managed rather than moral agents with futures' (Liebling and Crewe 2013: 284). The new penology is said to have converted the central task of imprisonment from social or personal transformation to human containment and risk management 'at reasonable fiscal, political and legal costs' (Simon 2007: 153; Sparks 2003). This has brought with it instrumental, rather than normative, ordering practices. Hierarchical and state-driven governance has been displaced in favour of a plural, polycentric and network model of governance. The new penology has prioritised 'practices and values of efficiency, targets and comparison, along with the vague new concept of performance'. 'Old concerns with justice and individuality' are said to be displaced, and the moral life of criminal justice institutions corroded (Liebling 2004: 4; see also Garland 2002; Young 2007).

While the new penology literature provides a persuasive lens through which to understand contemporary penal policy and practice, Feeley and Simon's thesis has been criticised. Coleman and Sim provide a useful overview of some key criticisms (2005: 102-105). Building upon this literature, Liebling and Crewe have argued that the new penology overstates the degree to which the old penology 'was ever as humane and rehabilitative as its advocates may have wanted to claim, while overlooking the institutional chaos and abuse that help explain the shift towards a more managerialist era' (Liebling and Crewe 2013: 284). They also highlight how new penology thinking has been applied in different ways within institutions in ways that lead to sociologically and morally significant variations. They argue that these variations can be disguised (and are therefore unrecognised) by the blanket approach taken in the new penology literature, which defines several decades of penalty using one term.

This chapter builds upon the second aspect of Liebling and Crewe's critique, arguing that there are subtle, but significant, differences between mechanisms and processes of marketisation, which are not always attended to in analyses of the re-emergence of privatisation and competition policies in criminal justice. Research has focused upon the public/private distinction rather than considered the effects of ownership and service management transfers between sectors, and less still has explored criminal justice in the context of many, varied and hyper-mobile service providers that are now operating within and across criminal justice services and institutions. Departing from this tendency to consider marketisation at an abstract and general level, this chapter describes and explores the substance and detail of how market mechanisms are used in the commissioning of criminal justice services in England and Wales, focusing especially upon the prison sector. By tracing how marketisation processes have been mobilised over time, including within the current context of fiscal restraint, a more nuanced account of marketisation is articulated, which positions market mechanisms as malleable, instrumental rather than mechanical, and varied, both in their design and impacts. The

implications of these changes in marketisation policy and practice are explored, reflecting especially upon consequences for strategic direction within the sector, service quality, and the professional and moral identities and practices of criminal justice practitioners. A central argument is that there has been too little reflection upon the penological significance, or moral sustainability, of the 'bigger and cheaper' model of criminal justice that is currently being pursued. In the current context, marketisation processes are being used in ways that are disabling, rather than enabling, legitimate penal order. They are contributing to deteriorations in staff and prisoner safety and wellbeing and further eroding organisational hopes that imprisonment might do more good than damage to peoples' ambitions to live law-abiding lives (Liebling and Crewe this volume; Liebling and Ludlow 2016).

2. Marketising prisons in England and Wales – new landscapes

(a) Transitions in prison commissioning

The private sector established itself within the UK criminal justice system in the operation of immigration removal centres (Bacon 2005). The depth and breadth of the private sector's penetration into immigration detention has not, until recently, attracted the attention it deserves (though see e.g. Bosworth 2014; Uglevik 2014). Most academic and public debate has focused instead upon the involvement of the private sector in prisons. In the 1980s, aged buildings, overcrowding, hostile industrial relations and poor management were said to be holding back much needed improvement (King and McDermott 1989). This prompted a recommendation from the House of Commons Home Affairs Committee in 1987 to use the private sector 'as an experiment' to construct and manage new prisons (House of Commons Home Affairs Committee 1987a; House of Commons Home Affairs Committee 1987b). Seven years later, in 1994, the first privately managed prison opened (HMP Wolds). The experimental involvement of the private sector in prisons quickly developed to include longer contracts (of 15 years and more), and to incorporate the private financing and construction of prisons, as well as their management (Ludlow 2012). In the years that followed, 11 new-build prisons were opened under private management. Scotland and Northern Ireland did not follow suit.

In time, the experiment developed a stage further, moving away from pure private management of new build prisons, towards the construction of a market in which the public sector became both commissioner and bidder in competitions for the management of existing operational prisons. Inspired by Lord Carter's 2003 report, the National Offender Management Service (NOMS) was created, hurriedly and imperfectly, to provide a new organisational framework to support these new ways of operating (Ludlow 2015: 67; Padfield 2006). Some suspected that the amalgamation of probation and prison services through NOMS was 'simply a Trojan horse for smuggling in "contestability" to yet another public sector body' (Stelman 2007). The Transforming Rehabilitation agenda has proved this to be an accurate prediction.

In the first round of competition the public sector retained one contested prison (HMP Manchester), and won one back from the private sector (HMP Buckley Hall). During this period, competition and marketisation were predominantly motivated by improvement. Debate continued about how much 'better' privately managed prisons were performing compared to their publicly managed counterparts, and concerns began to be raised about some of the negative consequences of 'robust' private sector management models but, as Liebling and Crewe have argued, the marketisation agenda during this period was tied explicitly and strenuously to 'moral ends': this was an era of 'managerialism-plus' (Liebling and Crewe 2013: 292) or 'neo-liberalism with a guilty conscience' (Liebling 2004: 4).

July 2008 signalled a new era in prison marketisation policy, with a more far-reaching and routine commitment to competition in the sector. This coincided with the onset of the financial crisis and the

need for the Prison Service to make challenging budget cuts. Ministerial approval was given for a Prison Competition Strategy, consisting of three strands: (a) the re-competition of all contracted (public and private) prisons; (b) new build prisons in which only the private and third sectors could participate; and (c) continued performance management and benchmarking to identify 'poor' performance against private sector costings. By 2010, the Ministry of Justice was subject to a 23 per cent budget cut to be achieved by 2014-15 (HM Treasury 2010: 55-56). In this context, in 2011, Justice Secretary Ken Clarke re-committed to competition as a mechanism by which to achieve general improvement, rather than merely to manage poor performance. He said:

'For offender services, I intend to employ the principle that competition will apply at some stage to all those services not currently bound to public sector delivery by statute. This will mean the benefits of competition can be felt much more widely, contrasting with the previous approach of only using competition when procuring new services or as a way of managing poor performance.' (HC Written Ministerial Statements 13 July 2011, vol 531, cols 31-33WS)

These political commitments were implemented by two phases of market testing, known as 'Prison Competitions Programme' phases 1 and 2 (PCP1 and PCP2). PCP1 began in 2009: five prisons were put out to tender, including a new-build prison (Featherstone II, now HMP Oakwood), the re-competition of two contracted prisons (one public sector, HMP Buckley Hall, and one private sector, HMP and YOI Doncaster), and two non-contracted 'poor performing' public sector prisons (HMPs Birmingham and Wellingborough). The inclusion of HMPs Birmingham and Wellingborough raised, for the first time, the prospect of a management transfer of an operational public sector prison to the private sector (aside from a failed attempt at HMP Brixton in 2001, which stalled for want of interest from the private sector). PCP2 began in 2013: nine prisons were put out to tender, including eight public prisons (HMPs Acklington and Castington [merged to form HMP Northumberland], Durham, Hatfield, Lindholme, Moorland, Onley and Coldingley) and the re-competition of one private prison, HMP Wolds (the first privately managed prison to be opened in 1994).⁴ The prospect of an operational public sector prison transferring to private sector management was realised in PCP1 and PCP2: first in October 2011, when management of HMP Birmingham was transferred to G4S, and secondly in December 2013, with the transfer of HMP Northumberland to Sodexo. The competition for Wellingborough was aborted because the prison was judged to require too much capital investment to make its future viable.

PCP2 did not result in any further transfers beyond HMP Northumberland. This was because the public sector bid for HMP Durham was considered to provide best value for money and a decision was taken to use the Durham model as a 'benchmark' to be implemented in all Category B local and Category C training prisons from October 2013 (NOMS 2013: 11). This was intended to speed up cost-saving (rather than service improvement) across the estate by importing private sector cost and staffing models without the time, cost and political and legal risks of competitive tendering exercises (Secretary of State for Justice Q 12, HC [Session 2012-13] 741-i.). Further benchmarks have been developed for the high security and women's estates, and young offender institutions as part of what is now NOMS' Prison Unit Cost programme. Implementation of these further benchmarks began in March 2014. The new benchmarks have demanded 'new ways of working'; reduced staffing levels, delayed staffing structures, and more flexible staff deployment to deliver reduced daily prison regimes. Implementation of benchmarking has led to a 30 per cent reduction in the public sector prison workforce (Prison Reform Trust 2016: 5).

Liebling and Crewe describe the period from 2007 onwards as 'managerialism-minus' coupled with 'punitive austerity': 'economy and efficiency are prioritized above any moral mission'. "Old penology" values of decency and relationships are transformed into "new penology" language of cost-savings

⁴ <http://ted.europa.eu/udl?uri=TED:NOTICE:336076-2011:TEXT:EN:HTML>.

and effectiveness' (Liebling and Crewe 2013: 294-295). Yet marketisation policy and practice during this period are not as uniform or unidirectional as the new penology account might suggest. Julian Le Vay accurately characterises marketisation policy in prisons as 'stop/start' (Le Vay 2006: 33). Alongside the withdrawal of HMP Wellingborough from PCP1 and the demise of PCP2 in favour of internally generated efficiencies through benchmarking, competitions for clusters of prisons were cancelled, including in Kent and South Yorkshire. Plans for three new-build 2500 bed 'titan' prisons and new-for-old replacement prisons did not come to fruition, with one exception, eventually, in Wrexham (HMP Berwyn) which is presently under construction, and for which no private sector bids were invited. Ken Clarke's 2011 competition strategy, which subjected prisons that were not poorly performing to competition, was cancelled by incoming Secretary of State, Chris Grayling, in favour of benchmarking and, under Michael Gove, in 2016, in favour of the creation of six 'reform prisons' (HMPs Wandsworth, Holme House, Kirklevington Grange, Coldingley, High Down and Ranby). Reform prisons are a central pillar of what the Government has described as the 'biggest shakeup of prisons since Victorian times'. Governors at these prisons have been given increased legal and financial freedoms. Former Secretary of State for Justice, Michael Gove, promised to legislate to extend these freedoms 'much further - enabling prisons to be established as independent legal entities with the power to enter into contracts; generate and retain income; and establish their own boards with external expertise.'⁵ The legal form in which these reforms will be embodied is unclear, as is ongoing political commitment to them under incoming Secretary of State for Justice, Liz Truss.

What further emerges from this account of prison marketisation is that the commissioning of prison services in England and Wales has moved away from the contracting out of whole, new-build prisons to private companies, in return for a simple operating fee, towards a more complex and hybrid position in which the private sector occupies a more limited and contingent position. Through benchmarking, private sector models of efficiency have been distilled and applied across the prison estate without the need for competition or transfer of prisons from public to private sector management. Internal reorganisation has also been prioritised over outsourcing through restructuring exercises, such as the merger of HMPs Everthorpe and Wolds, which were previously separately publicly and privately managed respectively, to form HMP Humber in 2015, and through the introduction of reform prisons.

Where contracting out is pursued, it is being used in a more targeted way, for specific services, with greater focus on outcomes, through results based payment mechanisms. Greater use is being made of horizontal commissioning whereby services that span multiple prisons are contracted out as a package. These contract packages are managed centrally by NOMS, outside of an individual establishment's control. The hope is that contracting in this way will enable economies of scale to be harnessed. An important example of this is the contracting out of facilities management at 50 prisons to Carillion, which happened in 2014. Some evidence suggests that the horizontal contracting out of facilities management has led to a deterioration rather than an improvement in the upkeep of prison infrastructure (e.g. HMP Ford Independent Monitoring Board 2015: 5). Rather than simple operating fees, NOMS has also increased its use of results based payment mechanisms, tying payment to reduced reconviction rates. Key examples are the Social Impact Bond that has been piloted at HMP Peterborough and the payment by results mechanism used at HMP Doncaster. A mixed picture has emerged from re-conviction data (Ministry of Justice 2014) and evaluations of these initiatives, with some reported successes at HMP Peterborough (RAND Europe 2014; 2015), but fewer at HMP Doncaster (GVA 2012; GVA and Carney Green 2015). Fox and Albertson have argued that payment by results brings with it high levels of uncertainty, and 'the associated risk to investors will lead to a sub-optimal provision of interventions in the criminal justice sector' (2011: 410). In May 2012, the Ministry of Justice tendered contracts for a pilot rehabilitation programme at HMP Leeds using payment by

⁵ <https://www.gov.uk/government/news/biggest-shake-up-of-prison-system-announced-as-part-of-queens-speech>.

results. The National Audit Office reported that the competition closed ‘without a successful bid after all but 1 of the 6 potential providers decided not to compete. The firms reported that the model for the pilot was unworkable.’ (National Audit Office 2015: 24).

(b) How commissioning landscapes shape prison policy and practice

These new ways of doing business have important implications for the public and private sectors, as well as for theoretical understandings about the nature and role of marketisation in criminal justice. First, decisions about how to deliver criminal justice services and by whom are now taking place in a more mature and fluid market, with increased interaction and cross-fertilisation between public and private sector providers. We know, especially from the work of Crewe, Liebling and Hulley (2014; 2011) that there is no straightforward relationship between which sector manages a prison and its staff culture and quality of life. As the market has matured, some of the cultural challenges in public sector prisons have emerged in longer-term privately managed establishments. The culture of public sector prisons is also changing as many have been forced, through benchmarking, to adapt to significantly leaner staffing models, which previously have characterised private sector management. Greater fluidity between sectors, and ‘the revolving door of knowledge’ (Podmore 2015), increasingly pose questions about fair play and competitive advantage among the small group of competitors within the market. One example that gave rise to such questions was former NOMS Director General, Phil Wheatley’s, move to work for G4S in January 2011. His move to G4S came shortly before the announcement that G4S had succeeded in the competition to manage HMP Birmingham, displacing the incumbent public sector.

Secondly, though commissioning lessons have been learned, learning has been incremental, and old decisions and ‘start/stop’ misfires linger in ways that make marketisation policy and practice more partial, unwieldy and limited than a new penological theoretical account might suggest. Some contracts, for example, are too long to reap the refresher benefits of competition, and some have too great a focus on process measures at the expense of outcome delivery. As Le Vay recounts, prisons financed under the Private Finance Initiative ‘were spared closure, even though some appeared high cost and not very well performing, because the contracts were unfeasibly costly to end’ (Le Vay 2016: 37). The result is a cumbersome and, at times, prohibitive contractual legacy, which requires sophisticated management and can be difficult to alter quickly in response to changing political ambitions. It seems likely that the manpower and resource implications of the complex task of market and contract management have some restraining influence upon the nature and scale of further marketisation processes. This is partly because major failings in the design and management of some criminal justice contracts, such as the electronic monitoring contracts between the Ministry of Justice and G4S and Serco, have increased political pressure to ensure that sufficient expertise is invested in the commissioning cycle as a whole. This includes planning, procuring, monitoring, managing and reviewing, rather than merely delivering (HM Government 2013; National Audit Office 2013; National Audit Office 2014a and 2014b).

The use and scale of marketisation may also be inhibited by uncertainty generated by start/stop misfires, such as the decision not to take forward the South Yorkshire prison cluster competition. Decisions of this sort can erode confidence among private sector providers about the State’s competence and the viability of future business in the sector. They can also lead to negative operational consequences, including at prisons that are managed by the private sector. For example, in HMP Doncaster, which is operated by Serco, staff vacancies were left deliberately unfilled in order to absorb staff from other prisons in the South Yorkshire cluster who otherwise would have been made redundant. The decision not to continue with the cluster competition led, in part, to serious staffing difficulties at HMP Doncaster, which have contributed to the prison receiving negative reports from HM Inspectorate of Prisons and the Committee for the Prevention of Torture. Doncaster has

been given until November 2016 to improve under threat of the contract being terminated. Serco may feel deterred from participating in future competitive processes because of the reputational and financial risks of the current situation at HMP Doncaster and the contributory role that NOMS played in this.

Thirdly, management transfers within and between sectors have given rise to new challenges about mobilisation, transition and transformation. Transfers in prison management, such as that which occurred at HMP Birmingham in October 2011, have proven to be highly complex processes that have exposed shortcomings in expertise and capacity and wide gaps and conflicts between policy aspirations and what can be achieved in practice. Competitive tendering processes, which have been imagined as tools to bring about rapid and dramatic cultural improvement, have proved to be less straightforwardly or immediately revolutionary. Significantly, employment regulation in this field, which means that, as a starting point, all existing staff transfer over to the employ of the new operator on their existing terms and conditions of employment, results in management transfers being less of a 'big bang' and more of a subtle and gradual signalling and processing of cultural continuities and discontinuities, working with broadly the same group of managers and staff as was previously employed (Ludlow 2015; Robinson, Burke and Millings 2015). These experiences may partially account for NOMS' current preference for reform through internal reorganisation rather than through competitive tendering exercises.

Finally, benchmarking has narrowed the cost differential between publicly and privately managed prisons in ways that ostensibly radically alter the marketisation landscape. Le Vay argues that benchmarking is the death knell of prison competition as we have known it: 'there is so little difference private and public sector costs that competition is now pretty much an irrelevancy, at most a theoretical sanction against some future failure by the public sector.' (Le Vay 2016: 42). One potentially positive effect of this may be to shift the focus of future commissioning attention onto quality improvement, rather than predominantly cost saving. However, a less positive effect for those who have argued in favour of a mixed prison provide economy is that benchmarking, coupled with pressures to 'play contracts by the letter' since the electronic monitoring contract scandal (Le Vay 2016: 68), cast doubt on the likelihood of sufficiently profitable and certain future business for private providers. This may mean that there will be no feasible competitive market in the future. There are already concerns that the dominance of Serco and G4S means that, in practice, one (public sector) monopoly is merely being swapped for another sort of (private sector) monopoly.

The new approach of disaggregating and horizontally commissioning non-core custodial services (e.g. facilities management, healthcare, resettlement, industries and resettlement) may further disincentivise private sector participation in the market. If private sector prison directors do not have control over many of the services that are provided in their prisons, it becomes difficult to maintain high quality regimes, and thereby safeguard corporate reputation. The pre-existing contracting out of education and healthcare in prisons has not been altogether successful. In the context of prison education, Gerry Czerniawski has argued that 'neo-liberal logic that alleges that competitive tendering and performance outcomes are the best drivers to improve prison education has culminated in a race-to-the-bottom in the standards of educational provision for prisoners.' (Czerniawski 2016: 208). The extension of horizontal commissioning to other prison services gives rise to further broader questions about accountability and effective management. In evidence before the House of Commons Justice Select Committee, the former Chief Inspector of Prisons, Nick Hardwick, former Director of NOMS, Phil Wheatley, and some private prison contractors raised concerns that 'having too many separate contracts operating in prisons could fragment and therefore compromise the integration of the system.' (House of Commons Justice Committee 2015: 53). One effect of horizontal commissioning is to open up a gap between people who interact with services on a daily basis, and so understand their shortcomings and have incentives to improve them, and people who are responsible for managing the

contracts, who are located remotely within NOMS and whose abilities to contract manage have been criticised (Ministry of Justice 2013; National Audit Office 2014b).

(c) Marketisation experiences and outcomes: quality, identity and culture

In the second quote that introduced this chapter, former Chief Executive of the Prison Service, Martin Narey, placed humanity at the heart of his motivations for opening up prisons to competitive tendering processes: 'It wasn't about efficiency [...] it was just about humanity.' In 2001, when Martin Narey addressed prison governors at a conference shortly before the first private prison was due to open, he highlighted the many well-documented failings of the public sector, describing them as a 'litany of failure and moral neglect' (Narey 2001: 3).

Competition policy in prisons has been criticised for its 'curious imprecision about what competition was for – why it was a good idea' (Le Vay 2016:10; Ludlow 2015). Few, however, would argue against improved (or sustained) quality being important among its ambitions. The experiences of staff and prisoners, caught within the net of marketisation processes, must be central to any enquiry about the effects and significance of market-making in the prison sector. Alongside understanding how marketisation policy and practice shape high level strategy and governance, we ought to explore, and empirically probe, their effects on daily prison life, and consider what this might tell us about the nature of the contemporary penal state (Garland 2013; Liebling and Ludlow forthcoming).

There is good evidence to suggest that the introduction of private sector management to a small number of prisons in the early 1990s in England and Wales acted as a catalyst for some improvements to public sector prisons that have made meaningful differences to the quality of life of people in prison. These included standardised improvements to daily prison regimes, increasing time out of cell and access to a wider range of purposeful activities. The private sector has also been at the forefront of using technology in prisons, including CCTV, biometric technology, on-wing kiosks through which prisoners can order canteen and book appointments and in-cell telephones. Some of this technology can increase transparency, and enable prisoners to exercise greater personal autonomy and keep in better contact with family and friends. More significantly, perhaps, it reduces operating costs by decreasing the involvement of prison staff in routine prison processes. According to evidence presented to the House of Commons Justice Committee, for every prison custody officer saved, an estimated £750,000 is saved over the lifetime of a 25-year contract (House of Commons Justice Committee 2015: 9). Some public sector prisons have introduced kiosks to reap similar cost savings. The use of technology to replace staff is not without its risks. Legitimate order, safety and well-being are largely relationally and dynamically produced, through interactions and relationships between staff and prisoners (Liebling, Price and Shefer 2011). A kiosk with which prisoners transact is no substitute for skilled staff who are able to deliver safe and purposeful regimes through their relational use of power, experience and skills. As Liebling and Crewe have noted, improvements in conditions have not ameliorated prisoner complaints about 'the administration of punishment, the lack of empathy for their predicament, and limited opportunities for growth and development' (Liebling and Crewe 2013: 301).

The introduction of privately managed prisons also generated leverage to push through broader changes to how all public sector prison staff are remunerated and deployed; flattening management structures, reducing staffing levels and increasing levels of flexibility for managers within the contracts of employment of uniformed staff. Some of the Government's difficulties in implementing prison reforms had arisen from the intransigence of the Prison Officers' Association (POA), the trade union that represents most prison officers in the UK. In 1997, former Director General of the Prison Service, Derek Lewis, described the POA as the 'principal obstacle to progress' (Lewis 1997: 137) and in 2004 Alison Liebling described the union as 'placing constraints on modernisation' (Liebling with Arnold

2004: 402). In a study of UK prison governors' views and experiences of privatisation, Crewe and Liebling found that even those governors who objected ideologically to the introduction of private prison management, accepted that public sector prisons had improved 'enormously' because of competition, which had rebalanced industrial power away from staff and in favour of management. As governors put it 'the inside story of prison privatisation in the UK was principally the story of finally controlling or cubing union power.' Directors of privately managed prisons 'talked with enthusiasm about the relief of managing cooperative staff, and the benefits this brought' (Liebling and Crewe 2013: 293; Crewe and Liebling 2012). Government policy has been accused of lacking honesty about the extent to which reforming employment and industrial relationships with prison staff have been central concerns of those driving prison privatisation (Taylor and Cooper 2008: 4), but the practically limiting effects of marketisation upon public sector terms and conditions of employment are undeniable. Benchmarking has taken maximum advantage of leverage generated by public/private staffing model comparisons and applied it in a systematic way across the estate (see further below).

The presence of a private sector prison employment model has challenged public sector staffing culture more broadly, beyond terms and conditions of employment, by highlighting (positive and negative) differences in working practices between and within sectors. There are important differences between how staff in public and private prisons exercise their authority and these differences cause variation in prisoner quality of life between prisons. Public sector prisons tend to be 'heavier', infused with authority which, when exercised poorly, feels oppressive, unfair and uncaring. Private sector prisons tend to be 'light', in ways that can feel less inhibiting, more caring, but also less safe, because prison staff are sometimes 'absent' or insufficiently active in managing trouble (Crewe, Liebling and Hullely 2011; 2014; and Liebling and Crewe this volume). Better quality of life experiences in prison are related to better outcomes post release (Auty and Liebling, submitted). The emergence of private sector 'lightness' has helped the public sector's 'heaviness' to be articulated and challenged. With regained power, through privatisation, it became possible to manage out some of the abusive ways in which some public sector prison staff exercised power in their relationships with prisoners, and to demand more decent and progressive staff-prisoner interactions. There was an operational vision of better (more humane but also leaner and cheaper) practice to which managers could refer, both as a source of inspiration for improvement but also as a threat for what might happen to staff that were impervious or obstructive to reform. The private sector's 'lightness' has also highlighted, albeit perhaps inadequately, the public sector's strengths in the confident and 'present' use of authority, by a stable and experienced group of loyal and vocationally-oriented staff. These strengths are under considerable pressure because of the importation of leaner and cheaper staffing models from the private sector into the public sector, through benchmarking. There are significant obstacles to comparing cost alongside quality between the sectors (Le Vay 2016: 159-196; Rynne and Harding 2016: 155-157).

Although the presence of the private sector has brought with it some direct and referred benefits, private prison management has not been a guarantee of high or improved performance. Just as with the public sector, some of the 'best' and 'worst' performing prisons are privately managed (Rynne and Harding 2016: 158-159). Evidence of children being physically and emotionally abused by staff in G4S operated Medway Secure Training Centre (a prison for 12-17 year olds) provides a high profile recent example of some of the poorest private sector practice. Following the broadcast of evidence of abuse obtained through undercover journalists working at Medway, the Justice Secretary formed an Independent Improvement Board, which reported in March 2016. The Board's wide-ranging review highlighted deficiencies in the commissioning, contracting, management and monitoring of Medway. In the Board's view, these deficiencies had contributed to Medway's poor culture and the abusive practices of some of its staff. The Board reported that it 'felt that G4S had a much better understanding of the terms of the contract than the Youth Justice Board, and that they may be using this knowledge to interpret the contract in terms more favourable to them'; that 'there was a risk that G4S would

deliver “what is in the contract” rather than deliver what was in the wider interests of young people’; that G4S was ‘penalised for incidents that do not necessarily improve safeguarding or rehabilitation and that avoiding contractual penalties has become more important than considering what purpose the provisions behind the penalty serves for the young people’; that ‘the Youth Justice Board has not articulated the contract in terms that enables effective and nurturing care and rehabilitation of young people’; and that ‘there is an over-reliance in the Youth Justice Board on the views and opinions of other organisations rather than developing contract management and monitoring arrangements that are robust enough’ (Medway Improvement Board 2016: 52-53). Medway is a long way from Martin Narey’s aspiration of increasing humanity through privatisation. G4S has decided to leave the Secure Training Centre market.

Competitive tendering exercises, in which the public sector is permitted to compete against private sector bidders, have raised the enticing possibility that they might, at best, combine the strengths of public and private prison cultures and simultaneously challenge and counteract both sectors’ weaknesses. As outlined above, this possibility was raised in two competitive tendering exercises for prisons in England and Wales, PCP1 in 2009 and PCP2 in 2013. Both processes resulted in the transfer of operational public sector prisons into private sector management: HMP Birmingham to G4S in 2011, and HMP Northumberland to Sodexo in 2013. The inclusion of HMP Birmingham in PCP1 was motivated principally by poor performance and obstructive local industrial relations which were thought to have held back much needed improvement (Ludlow 2015: 27). Internationally, the leading example of a similar transfer was of Parklea Correctional Centre, near Sydney, from public sector management to GEO in 2009. In the UK, there have been some private to public transfers, such as G4S managed HMP Wolds to the public sector in 2012, but fluidity between sectors is generally low. Within the broader criminal justice system there have been transfers between different private sector providers, but there are no examples of whole prisons transfers. Private to private transfers generally do not raise prospects for cultural change of the same magnitude as public to private or private to public transfers. The transfer of Acacia prison, in Western Australia, is among the few international examples where a whole prison has been transferred from one private operator (AIMS) to another (Serco). The decision to transfer Acacia in 2006 was motivated by AIMS’ failure ‘to make significant improvements’. ‘The first contract period [under AIMS] was affected by a number of issues due to inaccurate staffing level estimates, poor accountability structures within the contracting company, and poorly defined corporate decision-making structures.’ Acacia experienced problems with staff retention post-transfer, but the prison’s overall performance has since improved (Andrew, Baker and Roberts, 2016: 50).

Just as with outsourced private sector delivery without competition, private sector management following a competitive tendering exercise has not proved to be a straightforward, cost free, or panacea solution to resolve all of the ills of public sector prisons. This is contrary to its presentation in government policy, which has generally positioned markets in public life as natural and the private sector as a self-evident source of improvement. Empirical evidence about the nature and effects of these competitive tendering processes points towards a more nuanced and limited account of the improvement outcomes that marketisation processes can deliver. In practice, competitive tendering exercises have proven complex, with questions about whether the public sector has adequate expertise. They have proven time-consuming and expensive and can risk order and safety for both staff and prisoners.⁶ They have lacked clarity of vision and purpose, and arguably they have been driven by procurement processes that are more readily focused on cost reduction than quality improvement. The competitive process for HMP Birmingham has been described thus: ‘Following a process that cost £5.84 million, the Birmingham competition produced a contract between the Government and G4S with a value of £316.5 million that is impenetrable to all but lawyers in its length

⁶ The military were involved in contingency planning following the decision to privatise HMP Birmingham: <http://www.bbc.co.uk/news/uk-politics-12920843>.

and language, which is more focused upon NOMS' needs than prisoner needs, and which lacks vision and ambition for future service improvement and the important role of the workforce in delivering it.' (Ludlow 2015: 194).

The competition for HMP Birmingham provides a useful case study for reflecting upon the nature, effects and significance of competitive tendering exercises as processes of marketisation, particularly in light of the new penology thesis. Ethnographic research during the competitive tendering exercise and mixed method studies during the three years following Birmingham's privatisation, document a two-year competitive tendering process at Birmingham (originally forecast to take only nine months) that was experienced by staff as demoralising and disempowering (Ludlow 2015; Liebling et al 2015; 2013; 2012). During the competition, staff reported that nobody communicated with them in a language that they could understand and NOMS' responsibilities as an employer were broadly neglected. There were six self-inflicted deaths in HMP Birmingham during the height of the competition in 2010 compared with none in 2009, two in 2007 and 2008, and one in 2005 and 2006. Some staff attributed these deaths to the destabilization and uncertainty created by the competition process (Ludlow 2015: 172). The procurement process was approached as a transactional task, administered from afar, with apparently little understanding of Birmingham's enduring problems and how competition (and the particular form of competition that was used) would address those problems. A traumatised institution and staff group transferred to G4S in October 2011.

Rather than enabling reform, the early principal effect of competition was to create negativity, hostility and anxiety among staff, which constrained improvement at Birmingham, especially in the early days after G4S had taken over the prison's management. Staff and managers felt devalued, alienated, and 'tarred' by working for a 'failing' public sector institution. This added to the commercial challenges of an already high risk commercial venture. As Le Vay has argued, the use of competition to 'punish' the public sector carries with it risks that the commercial perspective (the interests and perspectives of the private sector) will not be properly understood, with inadequately considered consequences for the future of the market (Le Vay 2016: 26). Staff were preoccupied by their own 'private troubles'. They retreated from wings and the confident and professional use of authority, with consequent adverse impacts upon safety and order for prisoners (Liebling et al 2012; Liebling et al 2014; Zacka 2014; Lipsky 1980). Anxiety paralysed progress. Staff lacked the security that they needed to adapt to the future and sought security in trying to preserve the past. Staff described facing a crisis of self-legitimacy, many having linked 'wearing the Crown on their shoulder', which had now been removed, to their sense of 'rightful authority' and moral and professional purpose (Tankebe 2014). In policing, a greater sense of self-legitimacy has been shown to be linked to greater commitment to democratic modes of criminal justice practice (Bradford and Quinton 2014).

Since privatisation, quality of life for prisoners at HMP Birmingham has improved, significantly and across almost all dimension measures (e.g. decency, humanity, and fairness), albeit against a low quality baseline. In a survey conducted by NOMS' Audit and Corporate Assurance team in May 2009, 83.8% of prisoners at Birmingham scored their overall quality of life negatively. By 2013, two years after privatisation, 'prisoners and staff rated their quality of life and treatment significantly better than in 2011 and 2012, and were feeling as though their prison 'was finally settling down'. Staff views of senior management were positive, and feelings of safety, control and security were positive, for the first time. Professional orientations towards prisoners were improved. Prisoners noticed and appreciated these changes.' (Liebling et al 2014). Ironically, since benchmarking, operational staff at HMP Birmingham are among the best paid prison officers in the country.

Notwithstanding these improvements, evidence about the experience and impacts of the competitive process at Birmingham begs questions about the costs, losses and risks entailed by these processes, as much as their potential gains. Some of the damaging consequences and experiences of competition

at Birmingham were avoidable and might have set the prison on a more positive course for improvement with fewer 'casualties'. It is possible to imagine a less brutalizing process, based on greater transparency and information sharing, careful advance planning, clearer vision and, perhaps above all, an explicit articulation of, and therefore preservation of, the strengths of the public sector, in order to combine these strengths with those of the private sector. As Liebling and Ludlow have argued, 'To construct a process from an unstated but powerful set of assumptions about how the "public sector has failed", and the "private sector has the answers" omits to carry with it the significant strengths visible in public sector prison work (pride, loyalty, public service, experience and the competent use of authority). It underestimates some of the weaknesses inherent in private sector operations (cheap staff, high turnover, lack of loyalty, inexperience, and a drift into criminal justice work rather than a vocation).' (Liebling and Ludlow, forthcoming).

Although NOMS has not initiated further competitive tendering exercises for whole prisons since PCP2, there is evidence that some of the processual and conceptual errors that were observed at HMP Birmingham are being repeated elsewhere (Ludlow 2014; see also Liebling 2006). There are significant parallels between findings from HMP Birmingham's privatisation and the Transforming Rehabilitation probation reform process in which supervision for all low- and medium-risk offenders has been contracted out to mixed consortia of private, quasi-public and third sector bodies (Community Rehabilitation Companies: CRCs). Robinson, Burke and Millings have described probation workers as deprived of information and opportunities for agency during the competitive process, and bereft of any rationale for why radical privatisation was thought to be necessary or beneficial and any consideration of what might be lost through such a process. They describe probation staff, who now find themselves working within newly privatised Community Rehabilitation Companies, as inhabiting liminal spaces 'betwixt and between' socially constructed identities, which has generated feelings of anxiety, disempowerment and deprofessionalisation. Further themes include separation, grief and loss, powerlessness, status anxiety, new challenges to loyalty and trust and processes of dis-identification and re-identification (Robinson, Burke and Millings 2015; see also Deering and Feilzer 2015).

The effects that these transformations in probation will have upon service quality and the experiences of people under supervision are still unfolding. Early indications are mostly inconclusive or somewhat negative (National Audit Office 2016; HM Inspectorate of Probation 2016; Burke and Collett 2016). The National Audit Office has praised the Ministry of Justice's success in sustaining services throughout a period of major change but has highlighted shortcomings in how new services were procured (in five of 21 CRCs only one compliant bid was received) and has raised concerns about the increased workloads of all probation staff following the reforms, and the adverse impacts that this is having upon staff supervision and training and service provision to offenders (see also Dominey 2016). NOMS has invested significantly in the contract management of CRCs, reporting that 151 full-time equivalent staff have been employed at a cost of 2.1% of the total contract value. The National Audit Office has raised concerns about deficiencies in monitoring the National Probation Service and 'the extent and trajectory of contract management and operational assurance activity' as CRC contracts mature (National Audit Office 2016: 7).

The same critiques of competitive tendering processes, of underestimating the weaknesses inherent in the private sector operating model, and of avoiding more fundamental questions about the right cost/quality/prison population size thresholds, can be levelled at the benchmarking processes in prisons. Imposing private sector cost models upon all public sector prisons has imposed efficiencies across the estate in a systematic way, without the cost and risk of running individual competitive processes. However, the effects of benchmarking are deeply contested. As Le Vay puts it, 'The Cost and Benchmarking Programme, completed across the public prison system by April 2015, has driven down staffing levels across the prison system much further than previously thought possible – or safe.'

(Le Vay 2016: 37). The House of Commons Justice Select Committee described the situation as: '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: 33). The Committee also received evidence of 'low staff morale and higher sickness rates, partially explained by work-related stress' since benchmarking (House of Commons Justice Committee 2015: 37). In 2015, more prison staff resigned from their posts than were made redundant. The Committee felt that 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: 43; see also Liebling and Ludlow 2016).

Crewe and Liebling (in this volume) have described how benchmarking is reconfiguring penal power with three main outcomes: (1) producing environmental conditions that are reshaping prisoner behaviour in ways that are mainly undesirable; (2) increasing power-sharing between staff and prisoners in ways that can be compatible with legitimate penal order when authority is 'actively and carefully delegated to trusted prisoners', but can also be problematic when power is 'handed over in more informal, collusive and unaccountable ways'; and (3) causing some staff to feel so overwhelmed that they retreat and, though they are 'physically present', they are 'un-engaged relationally' - 'present in person but absent in practice'. Getting through the day has come to mean 'fire-fighting' and 'survival'; a poor foundation 'for prisoners to "work on themselves", their lives and their futures' (see also Maguire and Raynor 2016). These important penological and sociological changes do not appear to have been considered in the political decision-making processes that have led to the pursuit of a cheaper and bigger prison system. Some of the negative effects of benchmarking might have been predicted from evidence about the experience of imprisonment and models of order in US prisons from which the turn to larger, cheaper prisons appears to have been inspired (see e.g. Petersilia 2008). This form of marketisation in prisons – the universal and uncritical adoption of private sector staffing and operating practices – does not appear to be achieving Martin Narey's original aspirations for maximising humanity. It is not clear that the maximisation of humanity is now even part of the political discourse that is shaping decisions about whether and how to apply market mechanisms to prisons. Perhaps this should not come as a surprise. As Simon and Feeley put it, the new penology 'has trouble with the concept of humanity' (Simon and Feeley 1995: 173).

3. Conclusions and a look to the future

This chapter has sought to demonstrate how processes of marketisation vary significantly over time, between jurisdiction, and within criminal justice services. Different forms of marketisation and differences in how marketisation processes are operated meaningfully affect the sorts of service that result and the quality of life for people who live and work within criminal justice institutions. As David Faulkner put it, in *Servant of the Crown*:

'The mechanisms of "contestability" [...] can be used in different ways, with different underlying objectives. [...] They can be used competitively, to save costs, impose standardisation and uniformity, and punish or threaten punishment for failure. Or they can be used co-operatively to encourage innovative and experiment. They can be rigid and 'top-down', requiring compliance with a centrally-imposed specification, or they can be flexible and help to promote local creativity. The process can be complex, time-consuming and

bureaucratic, encouraging artificial devices to gain favour or win contracts, or it can be open and accessible to new ideas from old or new sources. Commissioners can concentrate on getting best value from whatever competing sources are already available, or they can accept a public responsibility to use the process of commissioning in ways that will “grow” the skills and capacity, and the values and relationships, that will be needed for the future. [...] The outcomes of commissioning could be beneficial or disastrous, depending on the choices that are made.’ (Faulkner 2014: 194).

The picture of commissioning that emerges from the discussion above has most in common with the competitive, top-down approach that Faulkner describes. The driving aim, and principal effect, of marketisation in the prisons sector in England and Wales has been to save cost more than to improve quality. This is most apparent in the importation of standardised private sector cost models to all public prisons, through benchmarking, which has caused significant deterioration in quality of life for staff and prisoners in many prisons and is fundamentally reconfiguring penal power. As John Podmore has argued, ‘There is a real danger [...] that benchmarking not only generates a whole new bureaucracy of its own but that the costs of it do not feature in any financial analysis. There is a further danger that it develops and promotes the mediocre rather than develop the exceptional. There is certainly no evidence of the transfer of best practice in such an approach rather a culture of self-protection in the world of tick-box and league table comparisons.’ (Podmore 2015). Some prisons have been more successful than others at navigating these changes and maintaining forms of legitimate penal order that nurture personal development within new and challenging financial and institutional circumstances. From a new penology perspective, benchmarking provides an example, alongside others in this chapter, of where the experiences and outcomes of marketisation processes have not been as homogenous or universal as theory describes. It seems important to probe these empirical differences and account, theoretically, for their presence, causes and effects, not least to learn more about how we might nurture institutional resilience to some of the damage caused by reforms such as benchmarking.

Shortly after he took office as Secretary of State for Justice in 2012, Chris Grayling outlined to the House of Commons Justice Committee his desire to ‘develop a penal system that was cheaper, not smaller’ (House of Commons Justice Committee 2015: 9). This vision of penal policy has substantially persisted notwithstanding ministerial changes. Insights from comparative penology are a helpful reminder that this model is a policy choice, and is only one ‘proposition for change which, like any proposition, should be subject to rigorous critique’ (Sennett 2006: 10). We know that big prisons, that house men and women a long way away from their families and communities, are less safe and inflict more harm than smaller, local prisons (House of Commons Justice Committee 2015: 17). Big, cheap custody makes society less, rather than more, safe and does not bring with it the economic advantages that are claimed (Armstrong and Maruna 2016). As Alison Liebling has argued, drawing on David Garland’s work, many of the conditions that do most to support people to live law-abiding lives lie outside the prison. ‘[I]n opting for larger, cheaper prisons and more clusters we are privileging a certain economic kind of understanding of the problems faced. We risk forgetting that there are other shared aims (such as social justice, crime prevention and inclusion, or legitimate prison communities) and there is a moral language which has been excluded from this debate.’ (Liebling 2011: 11; Liebling 2008; Maguire and Raynor 2016: 16).

Following the competitions for HMPs Birmingham and Northumberland, prison commissioning in England and Wales had shown signs of moving away from bare competition that is about punishing or threatening punishment for failure. There were elements of the Transforming Rehabilitation probation restructuring programme that reflected a potentially more innovative, flexible, inclusive, and locally grounded vision of commissioning. Greater care than has been seen previously was given to thinking about how the design of the procurement process enabled or disabled the participation of

small and medium sized enterprises (SMEs). Collaborations with SMEs and third sector bidders were encouraged to promote greater market diversity and innovation. The extent to which this has translated into practical service improvements remains unclear and further research is needed to explore relationships between public, private and third sector partners, and their service users (Mills, Meek and Gojkovic 2012; Tomczak and Albertson 2016). Nevertheless, procuring services in these more ambitious ways is a complex task, demanding high levels of skill, vision, purpose, judgment, and joined-up-thinking, which may exceed existing public sector capabilities and resources. This difficult work must be conducted within a model of government that compartmentalises the state into arbitrary departments for the purposes of funding and service delivery. The best judgment of commissioning teams can be constrained and compromised by political mandates that impose unrealistic or imprudent demands about scale, pace and purpose.

The introduction of reform prisons, with increased freedoms for their Executive Governors, may pull prison commissioning practice in a more co-operative, localised, and improvement-driven direction; but these are uncharted waters. Unlike all previous forms of marketisation, Executive Governors do not have complete, newly designed visions for their prisons embodied in Service Level Agreements. The parameters of their powers and expectations about what they must deliver are undefined. They will require tenacity and new skills. As the House of Commons Justice Committee put it, 'the evolving nature of the role of governors has implications both for models of procurement and for models of leadership, with more emphasis required on influencing and relationship management skills' (House of Commons Justice Committee 2015: 54). The new Secretary of State's commitment to reform prisons is not clear. The language she has adopted to describe them has already softened; 'enabled prisons' seem less radical than how they were presented by their brainchild, former Secretary of State, Michael Gove. Leaders of enabled prisons will require courage, as much as skill. The dismissal of Derek Lewis in 1995, as former Director General of the Prison Service, by the then Home Secretary, is a reminder of the ease with which civil servants can become political scapegoats (Lewis 1997).

It is, of course, essential that taxpayers' money is spent wisely within the criminal justice system. What appears to be lacking, in thinking about how to deliver and commission criminal justice services, is how to strike the right balance between cost and quality and the role that marketisation policies can, or ought to, play in getting this balance right. The private sector does not have all of the 'answers' - 'surrendering' a public service to the market will not necessarily improve it. There is a tipping point beyond which order and decency are lost in favour of a system of mass warehousing that brutalises and ceases to aspire to play a positive role in supporting people towards better futures. At this point, imprisonment becomes a bare expression of state power; so lacking in legitimacy that it is unable to engage those who have breached the law in moral conversation. Disorder and violence often result (Carrabine 2005; Sparks and Bottoms 1995; Rynne, Harding and Wortley 2008). There has been too little reflection upon the penological significance or moral sustainability of this model of bigger, cheaper criminal justice.

Within this context it seems essential to recognise that commissioning and contracting processes do not play merely purposive, mechanical or technical functions. Perhaps the most important lesson to be learned is that privatisation is not an end in itself (Van der Hoeven and Sziraczki 1997: 16). Market mechanisms are not benign tools or tools of inherent improvement. To be used appropriately, in ways that maximise humanity, they need to be designed and operationalised with clear vision and moral values, rather than mere economic rationality. Just as economies that are more open to foreign trade have been found to have larger governments (Rodrik 1998), so more open markets in public services require greater proactive governance and regulation.

Market mechanisms have, embedded within them, a complexity that, without masterful management, can become self-fulfilling, divorced from what it was hoped the process would achieve.

Market mechanisms also have embedded within them what Philip Bobbitt has described as a 'market state' orientation; a drive to maximise individual opportunities through commercial means over the well-being of the nation as a whole (Bobbitt 2002). As David Faulkner reports, 'Commenting on Bobbit's book, while David Blunkett as Home Secretary welcomed the market state as being more democratic than a state dominated by a metropolitan elite; the former Archbishop of Canterbury, Dr Rowan Williams, criticised it as lacking a sense of moral values.' In Faulkner's view, the market state is 'an abdication of political leadership'. For Faulkner, the market state context makes 'it more than ever necessary to reaffirm and hold on to the values of fairness and justice, and of humanity and compassion, and to ensure that public services and the institutions of state are working together to protect them.' (Faulkner 2014: 179). It might prove beneficial to think more often about commissioning, contracting and marketisation processes through this lens. More important than polarising questions about which sector is 'better' (public or private), may be the question of whether or not processes and outcomes of marketisation, as they are unfolding in their variously nuanced forms, strengthen and protect, or undermine and erode, fairness, justice, compassion, and humanity.

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