

**THE RIGHT TO KNOW AND OBLIGATION TO PROVIDE:
PUBLIC PRIVATE PARTNERSHIPS, PUBLIC KNOWLEDGE,
PUBLIC ACCOUNTABILITY, PUBLIC DISENFRANCHISEMENT
AND PRISON CASES**

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I INTRODUCTION

The use of market-based reforms in the public sector has been widespread over recent decades. These reforms entail a shift in the established paradigm, with the public sector moving from direct delivery to buying goods, services and infrastructure from non-government sectors. These reforms aim to reduce the scope and influence of the public sector and to improve its management by introducing private sector management practices and incentives. These reforms take many shapes and include the introduction of alternative service delivery models, such as contracting out and privatisation. However, the more recent types of privatisation such as public private partnerships ('PPPs') can produce dysfunctional consequences. One effect addressed in this paper is the possible demise of the established social contract, which is effectively an agreement determining the authority and obligations between government and its citizens.

A problem undermining the social contract is the paucity of information available to citizens under these market-based methods of public service delivery. This was one of the concerns of the New South Wales ('NSW') Public Accounts Committee who conjectured that when 'PPP arrangements ... [are] seen as less than transparent ... a low level of trust about PPP projects and a poor understanding'¹ ensues.² In particular, the insertion of commercial confidentiality clauses into PPP contracts effectively limits citizens' access to publicly owned information, thereby jeopardising the chance of informed public debate and healthy public accountability outcomes.

This paper uses prison privatisation cases to illustrate the proposition that the public can be disenfranchised, and public knowledge can be endangered, under

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1 Public Accounts Committee, Parliament of New South Wales, *Inquiry into Public Private Partnerships* (2006) vii.

2 Ibid.

market-based public sector reforms such as PPPs. It proposes that the paucity of public knowledge is a threat to good governance and public accountability.

II SERVICE DELIVERY MODELS IN THE 21ST CENTURY PUBLIC SECTOR INCLUDING PPP MODELS

Government reforms of recent years have sought increased cost-efficiency and quality improvements. Governments around the globe have introduced competition by way of privatisation techniques – one of a number of options governments have in their management reform tool kit. Methods of privatisation include contracting out, private finance initiatives ('PFIs') and PPPs. These are all built on the assumption that private sector skills and practices enhance public management and the public sector. These privatisations are characterised by both divestiture of assets or programs, as well as the privatisation of services once seen as the government's domain. In the case of PPPs, for example, the contract might include design, planning, financing, construction or operation of projects. To be called a PPP all these features do not need to be present; one or two may be enough.

In Australia, privatisation and its heir, the PPP, are progressively becoming a central policy solution for governments: for example, PPP projects in Victoria include the Latrobe Hospital, Victoria County Court, Spencer Street Station and Victorian Correctional Facilities.³ Allen also names a number of NSW initiatives including the Sydney Harbour Tunnel, Westlink M7, Lane Cove Tunnel, Eastern Distributor Toll Road and M5 Toll Road. A specific example that illustrates the scope of privatisation models is the Victorian prison system, which has undergone extensive privatisation over the past decade. The first round of privatisations was originally called 'design, construct, finance and manage' ('DCFM') projects. These same projects were then re-labelled 'build, own, operate, transfer' ('BOOT') projects.⁴ The most recent prison privatisations have been designated PPPs under the auspices of the Government's Partnerships Victoria project.⁵

In attempts to achieve purported cost savings and quality outcomes, reform governments usually initiate privatisation programs, which frequently override the public's doubt and suspicion about their benefits. However, the implementation of these privatisation programs, including PPP models, comes with threats to levels of public knowledge and possible disenfranchisement of the public.

3 Lisa Allen, 'Report Calls for Relaxing of PPP Rules', *Australian Financial Review* (Sydney), 8 November 2005, 9.

4 Edward William Russell (Chairman), Ewen Waterman and Nicholas Seddon, *Audit Review of Government Contracts: Contracting, Privatisation Probity and Disclosure in Victoria 1992–1999, An Independent Report to Government* (2000) Audit Review of Government Contracts, Victoria <<http://www.dpc.vic.gov.au/auditreview/>> at 12 October 2006.

5 Department of Treasury and Finance, Victoria, *Partnerships Victoria* (2000) Partnerships Victoria <[http://www.partnerships.vic.gov.au/CA25708500035EB6/WebObj/Policy/\\$File/Policy.pdf](http://www.partnerships.vic.gov.au/CA25708500035EB6/WebObj/Policy/$File/Policy.pdf)> at 12 October 2006.

III THE SOCIAL CONTRACT: THE RIGHT TO KNOW AND THE OBLIGATION TO PROVIDE

In liberal democratic societies, there is an implicit agreement establishing authority and obligations between the government and its citizens. This ‘conception of society ... recognises the rights and liberties of individual citizens, within an overall social order to which individual citizens consent’.⁶ Under this arrangement there is implied consent that citizens will forgo certain rights and freedoms for the right of the government to undertake certain obligations and create a central authoritative structure. This agreement is commonly called the social contract. Creyke and McMillan alert us to the notion that public services delivered via an explicit legal contract may be problematic for public accountability as

powers are conferred upon government not for a private end but for the public good and should not be fettered by individual agreements. This contest – between private law and public law considerations – is likely to be increasingly important in the modern age of contracting out the delivery of government services. It is a problem that also arises commonly when governments enter into large-scale development contracts that purport to free the developer from the obligation to obtain planning consents and regulatory approvals that would otherwise apply to the project.⁷

Under the social contract, citizens have the right to expect governments to ensure all aspects of public accountability are met by the government and its agents. However, this responsibility to the public is not contracted out when a private partner is engaged to design, plan, finance, construct or operate a public service or infrastructure. Public accountability remains with the government despite the blurring of public-private boundaries and attempts to hide behind legal contracts.

Blanchard, Hinnant and Wong identify that ‘[o]ne of the most important factors in our conceptualisation of the social contract relationship is the presence of appropriate accountability and control mechanisms’.⁸ These developments raise a number of questions, including what impacts PPPs have made on the ability to police accountability on the boundaries between the public and private sectors.

IV PPPS AND PROBLEMS FOR PUBLIC KNOWLEDGE

Extensive theory and experience point to a number of areas where care should be taken when implementing PPPs. A large slice of the pie is taken up by those areas related to public knowledge. First, commercial confidentiality clauses reduce transparency and negatively impact on public accountability. A second area relates to potential problems associated with reduced scrutiny, which creates

6 Andrew Parkin, ‘Liberal Democracy’ in John Summers, Dennis Woodward and Andrew Parkin (eds), *Government, Politics, Power and Policy in Australia* (7th ed, 2002) 297, 298.

7 Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (2005) 657.

8 Lloyd Blanchard, Charles Hinnant and Wilson Wong, ‘Market-Based Reforms in Government: Toward a Social Subcontract’ (1998) 30 *Administration & Society* 483, 488.

opportunities for corruption and patronage. Third, part of the 'standard' package of public sector reforms often includes legislative changes, including changes to freedom of information legislation that limit citizens' access to public information. The final area is the asymmetric information held by private partners as they may accumulate better knowledge than the public contract manager, which can lead to public interest challenges. Each of these problems is addressed below.

A Commercial Confidentiality Clauses and Reduced Transparency

First, as Hodge notes, the overuse of 'commercial-in-confidence' clauses in privatisation projects has impacted on public accountability and transparency.⁹ Limiting or making secret the information previously available to public stakeholders of government decisions creates a major risk for governments. This can occur when contracts with commercial confidentiality clauses restrict citizens' access to public information, thereby thwarting transparency. Therefore, striking a balance between the confidentiality clause and the public's right to know creates tensions for public accountability: too much transparency and the private sector partner will be disadvantaged, too little transparency and the citizens' right to public information might be severed.

Additionally, if we accept that good communication is at the core of trust building, commercial confidentiality regimes alienate public stakeholders and their potential to identify problems and help develop solutions. In short, commercial confidentiality needs to be minimised to ensure transparency and ensure citizens retain their rights to public information.

B Reduced Scrutiny and Associations with Corruption and Patronage Allegations

Second, a fundamental part of accountability requires that the terms of contracts are met. Therefore, irrespective of whether a probity concern is based on perception or fact, it is imperative that independent checks of the privatised system are possible. The lack of scrutiny provided under a commercially confidential clause leaves the door open for temptations or allegations of corruption or 'kick backs' and patronage or 'cronyism', which at the very least can undermine administrative processes. For example, in some PPPs there may be substantial money to be made, which calls for robust oversight, an important component of public accountability.

C Freedom of Information Legislation Changes

Third, legislative changes can often impact on citizen access to public information. This occurred during Victoria's public sector reforms. Changes included the *Freedom of Information (Amendment) Act 1993* (Vic), which severely decreased public access to government documents, for example, by broadening confidentiality exemptions to more Cabinet documents and also

9 Graeme Hodge, 'Privatisation: Lessons from the War' (2002) 27 *Alternative Law Journal* 177.

adding a considerable application fee. This legislation has a particularly strong bearing on PPP projects and was expressly extended to include private prison providers.

D Asymmetric Information by the Private Partner

Fourth, complications can arise if the private partner in a PPP accumulates better knowledge about (say) operations than the public organisation on whose behalf they are acting. This means that the private partner is in a position to act in their own interest instead of in the public interest. For example, the private partner might ‘cherry-pick’ clients leaving the public sector to deal with the less profitable clients or activities. Private companies are required to meet their legal obligations to their shareholders first and foremost, which may conflict with the public interest. In extreme situations, the asymmetric information might enable a private partner to know much more about the business than the government does, thereby constituting another problem for public knowledge.

V WHAT HAS BEEN DONE? ... PRISONS

In today’s globalised, competitive world it is inevitable that public goods, services or infrastructure are tested against the efficiency and innovation of the market. Furthermore, it is vital that the social contract which underpins the authority and obligations between government and citizens is upheld. The challenge is to ensure that, in the process, the accountability required of good governance is preserved. One component of this transparency is citizen access to public information. The NSW Public Accounts Committee examined ways in which knowledge sharing about the development and operation of PPPs could be improved.¹⁰ One of their recommendations ‘supports accounting treatment that promotes public knowledge about the Government’s liability for ... projects. There should certainly be efforts to clarify public understanding of the issue of off balance sheet accounting’.¹¹ This should be extended to include opportunities for stakeholder scrutiny of all contract clauses and conditions as well as performance specifications and financial data.

So what happens in Australian PPP prisons?

Roth found that whilst the Victorian, Queensland and Western Australian jurisdictions made contracts available to the public, NSW did not make contracts available to the public due to commercial confidentiality restrictions.¹² However, other research questions the extent of the scrutiny available. For example in the case of Victorian prisons, the Victorian Auditor-General, after receiving legal advice, omitted financial payment data from his Special Report on Victoria’s

10 Public Accounts Committee, above n 1, 36.

11 Ibid 52.

12 Lenny Roth, ‘Privatisation of Prisons’ (Background Paper No 3, NSW Parliamentary Library Research Service, 2004).

partly privatised prison system.¹³ This report also revealed that a number of minimum standards were not being met, demonstrating the way in which PPP arrangements avert the public eye. In response to these findings, one recommendation was that 'the Department [of Justice, Victoria] should move to incorporate in future annual reports more extensive information ... as a key means of discharging the Government's accountability to the Parliament and community for the operations of such a significant State industry'.¹⁴

Apart from the lack of information, the Special Report found that there were onerous restrictions placed on the public release of the prison contracts as well as on performance and financial data, creating major problems for citizens wanting to access information about the service being delivered in their 'name'.¹⁵ However, around the same time as the Auditor-General's Report, a committed group of activists banded together (through the Coburg Brunswick Community Legal and Financial Counselling Centre)¹⁶ and successfully obtained the release of much information that had originally been withheld by the Department of Justice on the grounds of commercial confidentiality. This was a win for public knowledge. On the other hand, Moyle found that the management of the privatised Borallon Prison in Queensland was excessively secretive. This meant access to information was difficult, and commercial considerations took precedence over public accountability.¹⁷

The impact asymmetry of information has on public knowledge is also evident in prison PPPs. For example, in the case of the recently privatised Metropolitan Women's Correctional Centre in Victoria, the private company had a better understanding of the privatised prison business than the Victorian Correctional Regulator did. This affected the ability of the Regulator to effectively carry out its regulatory functions, especially during the first years of the privatisation program. That is, the private operator of the Centre had more extensive financial resources and better organisational capacity and experience when compared to the Regulator. These circumstances opened up opportunities which the private company could exploit, including withholding information. This impacted on the capacity of the Regulator to properly exercise its power, leading to a situation where the private operator acted in its own interest rather than in the public interest. It took over a year for the Regulator to understand the rules of the new privatisation game and serve a number of default notices on the private operator. This episode concluded when the Government took back control of the Centre by removing management and ownership from the private operators and placing it with the public sector again.

13 Auditor-General of Victoria, *Victoria's Prison System: Community Protection and Prisoner Welfare* (1999) Victorian Auditor-General's Office <<http://www.audit.vic.gov.au/old/sr60/ags60cv.htm>> at 12 October 2006.

14 Ibid 7.

15 These restrictions were a function of the Government, not the private companies, as other contracts by these same private companies held with other governments overseas had their details publicly available.

16 *Coburg Brunswick Community Legal & Financial Counselling Centre Inc v Department of Justice* [1996] VCAT 49366 (Unreported, Deputy President Galvin, 14 August, 1998).

17 Paul Moyle, *Profiting from Punishment – Private Prisons in Australia: Reform or Regression* (2000).

IV WHAT CAN BE DONE? ... CONCLUSION AND RECOMMENDATIONS

Is it reasonable to expect the public sector to behave like entrepreneurs? Conversely, is it realistic to think the private sector will have the public interest as its default priority? In reality, these expectations are not easily met. I have explained that the realities of the new public sector have 'exposed an accountability gap between the accountability doctrine, conventions and reality. Practice has moved ahead of the doctrinal adjustments required of the traditional [public sector] model, creating vagueness, gaps and disagreements'.¹⁸ The change in how governments are now required to 'do business' highlights the requirement for superior accountability institutions, mechanisms, remedies, procedures and relationships which advocate on behalf of public stakeholders. These accountability tools need to ensure that public knowledge obligations are accommodated.

Private sector involvement in social infrastructure remains highly political and sensitive, with the debate about public versus private primarily focusing on costs or value for money. This is a narrow discussion and the real contemplations should also involve quality and public accountability considerations. As contended by Sturgess:

Public officials must understand the purposes of [public service] markets and insist service providers address key public policy objectives. They should be selective about the kind of providers allowed to participate ... [and] also understand how to attract quality providers with a diversity of business models to guarantee truly competitive markets. ... Governments are ... right to seek good employment practices ... [and] entitled to engender enhanced accountability.¹⁹

As the new forms of public service organisation become more common, there is a need for hybrid models of accountability. The public accountability framework governments currently use for PPPs arose from those designed to oversee simpler and more stable organisational structures and provide debatable public sector governance. It is now time to deal with the inadequate accountability mechanisms, remedies, procedures and relationships employed in today's complex and variegated public administrations.²⁰ The traditional accountability mechanisms served their purpose well under the traditional public governance models, but do not meet the needs of a public sector that uses PPPs to deliver government services and infrastructure.

Moreover, the social contract is undermined by the lack of transparency in PPP projects with commercial confidentiality clauses used excessively to prevent citizen access to public information. The Institute for Public Policy Research argues that 'a more robust and comprehensive framework for the release of information on PPP projects would help to foster confidence and thereby

18 Valarie Sands, 'Victoria's Partly-Privatised Prison System: An Accountability Report Card' (2004) 26 *The Asia Pacific Journal of Public Administration* 135, 137.

19 Gary Sturgess, 'Hey, Partner, Let's Regain a Leading Role', *Australian Financial Review* (Sydney), 30 March 2006, 63.

20 Valarie Sands, 'Prisons in Victoria: Accountability Mechanisms in the Part-Privatised Prison Service' (2004) 29 *Alternative Law Journal* 15.

encourage members of the public to get involved with what may potentially become new democratic arenas'.²¹

While PPPs are imperfect, they work well when certain conditions are present. PPPs may be appropriate when commercial confidentiality clauses are not too onerous to limit public access to important information; when the public accountability mechanisms used to scrutinise are sufficient to disallow opportunities for corruption and patronage; or when the private partner's information asymmetry is so minimal that the public interest is not affected. However, when one or more of these conditions do not hold; or when public accountability cannot be met under the PPP arrangements; when the social contract is undermined by the lack of transparency; or when the community would be disenfranchised because of lack of public access to public information, a PPP may not be the best public policy approach.

21 Institute for Public Policy Research, 'Opening It Up: Accountability and Partnerships' (2004) in Matthew Flinders, 'The Politics of Public-Private Partnerships' (2005) 7 *British Journal of Politics and International Relations* 215, 230.