

DETENTION SERVICES CONTRACT REVIEW – SUMMARY

Introduction

A review of the current detention services contract with GSL was undertaken by Mr Mick Roche in response to recommendations 7.5, 7.6 and 7.7 in the Palmer Report on the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau.

These recommendations stated:

“Recommendation 7.5

The Inquiry recommends that DIMIA seek from the Australian National Audit Office a detailed briefing on the findings of the ANAO report on the detention services contract with GSL, to obtain the ANAO’s guidance on reviewing the Commonwealth’s current detention services contract with GSL and identify where and how changes can and should be made.

Recommendation 7.6

The Inquiry recommends that the Minister establish a Detention Contract Management Group made up of external experts to provide direction and guidance to DIMIA in relation to management of the detention services contract and report quarterly to the Minister. Group members should have expertise in the following areas:

- Project management in a high-risk government policy environment;
- Corrections management;
- Contracting strategy and management;
- Performance monitoring and management;
- Legal contracting and statutory reporting requirements;
- Management accounting and financial management.

The Detention Contract Management Group should have DIMIA representation at First Assistant Secretary’s level to advise on policy implications and ensure that the Group’s directions are implemented effectively through new departmental arrangements.

Recommendation 7.7

The Inquiry recommends that, as a priority task, the Detention Contract Management Group review the current contract for detention services and advise DIMIA, in consultation with GSL, in order to identify and agree changes in arrangements that would:

- Facilitate delivery of the detention services outcomes required by the Government;
- Provide the basis for an effective, responsible business partnership that values and encourages innovation by GSL;

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- Encourage GSL to carry out internal audits of its own performance and arrangements in order to maintain high-quality service delivery;
- Develop, in consultation with GSL, a new regime of performance measures and arrangements for their continued monitoring and management that are meaningful and add value to the delivery of high-quality services and outcomes;
- Agree with GSL arrangements for independent, external assessment and review as required;
- Provide for renegotiating arrangements for the provision of health care when the Immigration Detention Health Review Commission and the Health Advisory Panel have been established and have provided advice on new requirements;
- Foster a shared partnership interest in achieving effective policy outcomes to ensure that the Government's objectives and the high standards of behaviour expected by the Government are met.
- In his report (the Palmer Report) on the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau, Mr Mick Palmer noted that "The current detention services contract with GSL is flawed and does not allow for delivery of the immigration detention policy outcomes that are expected by the Government".

Terms of Reference

"The review is to provide advice to the Department in accordance with Recommendations 7.5, 7.6 and 7.7 of the Palmer Report (*see above*).

The review will include, but not be limited to, the following issues:

- The extent to which the services covered by the Contract should be insourced or outsourced;
- The structure of the Contract in terms of the prime/sub-contractor arrangements;
- Changes needed to the Contract in the light of the Palmer and ANAO reports;
- Changes needed to the Contract and/or DIMA contract management processes in the light of the above reports and experience to date with the GSL Contract, and
- Arrangements for monitoring performance under the Contract, including Performance Indicators and the monitoring processes.

The review is to provide an outline strategy and expectations for implementation of the recommendations in terms of variations to the current Contract or a new contract.

The consultant is to consult with a wide range of parties including departmental officers, ANAO, GSL, members of the Immigration Detention Advisory Group and relevant external authorities.

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Background

Under Section 189(1) of the *Migration ACT 1958* (the Act) an officer is required to detain any person they know or reasonably suspect to be an unlawful non-citizen. Section 196(1) of the Act provides that a person detained under s 189 must be kept in immigration detention until removed from Australia, deported or granted a visa.

Detention under section 189 is administrative detention, the purpose of which is not to deter or punish but to prevent the detainee entering the Australian community other than lawfully and/or to ensure that the detainee is available to be removed from Australia if necessary. The administrative detention concept has important implications for the operation of the detention facilities.

Prior to February 1998, detention facilities were operated by the then Department of Immigration and Multicultural Affairs. Security at the centres was provided by the Australian Protective Service while other services such as food, health, education and welfare were provided either directly by the department or by individual sub-contractors.

In February 1998, the operation of the immigration detention facilities was contracted to Australian Correctional Services Pty Ltd (ACS) as a prime contractor responsible for the delivery of all detention services, including support services at the facilities.

Following a tender process, a new detention services contract was let to Group 4 Falck Global Solutions Pty Ltd (now GSL Pty Ltd) on 27 August 2003. The new Contractor took over the services between 1 December 2003 and 29 February 2004.

Since then, the Australian National Audit Office (ANAO) has undertaken two performance audits of the Contracts with ACS and GSL and a third is in preparation.

Approach

While the existing contract with GSL may limit options for contractual change in the short term, the review was conducted on the basis of a 'clean sheet of paper' to identify best practice. The extent to which contractual change should be pursued with the current contractor or used as a basis for a subsequent tender can be considered in the light of value for money considerations and the Commonwealth Purchasing Guidelines after decisions have been made on the review's recommendations.

Consistent with the Terms of Reference, the report provides an outline strategy which will need to be developed in further detail.

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Overall Conclusions

The review concluded that the general structure of the current detention services contract was sound (the ANAO acknowledged that it represented a significant improvement over the previous contract), but that changes were needed to:

- Improve performance management arrangements;
- Provide for input or process measures in relation to some functions;
- Adjust the payment mechanisms to reflect changes in detention arrangements, and
- Meet the drafting and risk allocation issues identified by the ANAO.

Importantly, the review also concluded that changes were also required to DIMA's contract management and monitoring processes.

While the review focussed on change that was under DIMA's control, it is important to recognise that change is also required on the part of the contractor. This will largely be driven by changes to the performance management system which will become more strategic and focussed on systemic improvement on the part of the contractor.

The Detention Services Contract

The Detention Services Contract (the Contract) between the Commonwealth of Australia represented by DIMA and Group 4 Falck Global Solutions Pty Ltd (now GSL Pty Ltd) was signed on 27 August 2003. The Contract commenced on 1 September 2003 (the implementation date) and expires 4 years after that date unless extended by DIMA before then. The Commonwealth has an option to extend the Contract, on essentially the same terms and conditions, for an additional period or periods amounting to not more than 3 years.

The Contract is outcome oriented and structured around a prime contractor responsible for delivering all the services. It provides for GSL to deliver detention services in all detention facilities to the relevant Immigration Detention Standards.

GSL's performance in delivering the services is managed by the 148 Immigration Detention Standards with their associated 243 Performance Measures and the Performance Linked Fee Matrix. Each performance measure is allocated performance points depending on the seriousness of a failure to meet the relevant standard. Points are tallied quarterly and allocated a dollar value. 5% of the service fee is 'at risk' under this system.

Contracting Options

Consistent with the Terms of Reference, the review considered the extent to which the services covered by the contract should be in-sourced or out-sourced. The conclusion was that DIMA (and the Commonwealth) lacked hands-on experience in operating detention facilities and that it would be very difficult to take significant components of the service back into the Commonwealth. At the same time, the benefits of doing so were not clear.

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However, it was noted that the experience in outsourced prisons in Australia and the UK has been largely positive.

Consideration was also given to different prime/subcontractor arrangements with, for example, DIMA managing sub-contracts directly. But such an approach would not relieve DIMA of the need to specify requirements and monitor performance – two issues which have proved challenging under the current contract. The difficulty with such an approach is the pervasive nature of security across each centre and the integral role of most sub-contractors, arguably with the exception of the health care sub-contractors, in establishing a dynamic security environment.

Provision of health care within the centres is however, particularly sensitive and a more hands-on approach by DIMA is called for together with arrangements to ensure that there are no contractual obstacles to meeting appropriate health care standards.

Similarly, consideration has been given to using more than one prime contractor. State prison systems have benefited from having both public and private service providers, and in the case of Victoria and Queensland, two private sector contractors. This has enabled the states to set performance benchmarks and to undertake comparative performance measurement in a competitive environment.

The difficulty for the Commonwealth is that while having more than one prime contractor would provide a more competitive environment and act as a spur to innovation, it would significantly increase DIMA's management overheads and reduce the economies of scale available to a single contractor. It could also make the provision of surge capacity more difficult.

The Palmer Report suggested that consideration be given to some form of alliance contracting or strategic partnership. But as Mr Palmer also acknowledged such contracts need "tight and astute" management. Such a contracting model can offer significant benefits but the risks are high and the successful models few in services based contracts. The early Australian experience is largely based around civil engineering contracts where there is considerably more experience in risk management and the contracts are based around projects with milestones and known timeframes. The process of developing, negotiating and agreeing such a contract would not be a quick one and to attempt one now would divert resources from the immediate task of improving performance under the current contract.

However, an alliance or partnership model could be considered for the next detention services contract provided that this would allow sufficient time for the necessary research and development of an appropriate model without diverting resources from current priorities.

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Contract Change – Performance Management

The major area where the detention services contract needs work is in performance management. This was the area singled out by both the ANAO and the Palmer Report.

As noted above, the detention services contract is an outcome-oriented contract with the intention that the Service Provider's performance be managed externally through the 148 Immigration Detention Standards and the associated 243 Performance Measures, and internally through the contractor's own performance and compliance mechanisms.

The ANAO summed up its issues with the standards and measures as follows:

- The large number of standards and related measures makes it difficult to manage and interpret the information in a systemic and cost effective way;
- Terms used in the standards and/or measures are not defined to allow their assessment;
- The standards contain conditions and provisos that would make it difficult to prove that the standard should have been met in a particular instance;
- Many standards could only be assessed by experts rather than by general administrators; and
- Evidence to substantiate whether standards had been met or not would be difficult to collect and /or prove.

It is clear that the current contract includes a large number of standards and measures by comparison with performance management systems in similar service oriented environments such as aged care, the Job Network and prison systems.

The key difficulty with such a large number of Standards and Measures in the Detention Services Contract is that, as the ANAO observed, it makes it difficult to deal with the measures, and performance, in a systemic way. As a consequence, the performance information provided to the contractor does not lend itself to identifying the systemic issues to be tackled. Experience to date with the performance management system indicates that some 20 or so measures account for the vast majority of sanctions included in the quarterly performance reports.

On the other hand, the Immigration Detention Standards are the result of considerable consultation with detention stakeholders and they have value as an agreed expression of the way in which detention facilities should be run. They provide guidance to both DIMA and the contractor as well as to detainees and detainee advocates, NGOs and government bodies such as the Ombudsman's Office and the Human Rights and Equal Opportunity Commission.

The review has examined a number of performance management systems in analogous environments. These examples suggest that in contracting for

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services, precision quantitative measurement of all outcomes is a difficult, perhaps unobtainable, goal and that successful contract management outcomes depend on a structured approach using a mix of input, process and output indicators, supported by a system-based monitoring system.

Notwithstanding the above comments, there are a number of cases in which the existing standards, performance indicators or measures can be tightened, particularly where experience shows that there have been difficulties in interpretation, for example in relation to access to sporting, leisure and recreational activities.

A significant difficulty with the current performance management system is that the measures and the associated system are largely incident-based. This is not the best way to drive quality improvement because it deals with symptoms rather than the causes of poor performance. The ANAO makes the point that such a system is reactive rather than proactive.

This suggests that the role of the standards should change and that they not be used directly to drive performance, but rather that they guide and inform that operation of the detention system as a set of overarching principles – but without the associated measures except for a small number of critical measures. Performance could then be driven by a much condensed and more focussed system, drawing on the experience to date. Briefly such a system could involve a limited number of key result areas derived from the standards, and from experience to date, with each result area comprising no more than, say, 8 to 10 expected outcomes.

The basic principle of any new performance management system should be that monitoring focus on identifying systemic reasons for poor performance (and for exceptional performance) rather than counting infractions against the Standards. There should then be an approach agreed with the contractor to rectifying the underlying cause of poor performance with sanctions only being applied for failure to undertake the agreed rectification plan in the specified time. The time allowed for corrective action and the application of any penalty would be driven by the risk management matrix, the level of sanctions increasing with the level of risk.

The above discussion has focussed on DIMA's performance management of the Service Provider. But equally important is the Service Provider's internal Performance Management Plan incorporating its compliance and quality regime.

Other Contractual Issues

The ANAO report identified a number of issues in the insurance, liability and indemnity regime in the contract. In some cases a drafting technicality may have thwarted the obvious intent of the Contract while in other cases the intent may not be clear. The more difficult issues relate to indemnities granted by the Commonwealth. While some could be the subject of renegotiation, all of these issues can readily be dealt with as part of a fresh tender.

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Other contractual issues identified during the review reflect operational experience to date. These issues include the fixed fee component of the Detention Services Fee which is set by capacity bands and measured by actual detainee numbers. This approach has proved to be somewhat inflexible and detainee management would be enhanced by a payment system based on planned capacity.

Similarly, while it could be argued that the needs of detainees average out in the long run, a single rate of per capita payment for all detainees does not encourage the provision of resources tailored to the needs of individual detainees.

Again, experience with the current contract has seen significant reductions in the average length of stay so that turnover has increased with consequent pressure on resources for detainee induction. Consideration could be given to restructuring the fee base to recognise the costs, and importance of a thorough induction process.

As noted above, in some cases it may be desirable to include process or input measures in the contract to complement the output measures. Catering and cleaning are two areas which would benefit from the addition of process or input measures.

Consideration could also be given to including provision in a new contract for enhanced interaction between Detention Services staff and detainees including the recruitment of staff with enhanced skills relevant to detainee activity.

Contract Management

It became apparent during the review that contract management has as much, or more, impact on the quality of services as the Contract itself. Perhaps the most significant issue here is that DIMA's contract management of the Service Provider is not strategically focussed.

This is a product of a number of factors:

- The large number of standards and measures which do not lend themselves to a systemic or strategic approach to contract management;
- A performance management system based around incident reporting and not focussed on the underlying causes of poor performance;
- Mixed structures and reporting lines with some centres managed through the State Offices and some directly by National Office, with the roles and authority of on-site contract managers unclear, and
- A monitoring function which, notwithstanding improvements over the last 12 months, is not strategic in its approach.

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While the contractual changes to implement a new performance management system and to better reflect DIMA's requirements will be a major contributor to improving contract performance, they will need to be accompanied by improvements in DIMA's contract management regime.

Key amongst the improvements required are:

- Adoption of a more strategic approach to the management of the contract, with a focus on systemic issues;
- Development of DIMA contract management skills;
- Better management of the relationship and communications with the Service Provider, including governance arrangements, and
- Implementation of a more focussed national contract management organisational structure with clear lines of control, underpinned by an appropriate contract management plan.

Contract management responsibility for detention facilities is currently split between DIMA's state and national offices. Management of the detention services contract would be enhanced by applying a consistent management model and reporting lines across all detention centres.

Monitoring

An effective system of monitoring contractor performance is critical to overall contract management and accountability. While significant improvements have been made over the last twelve months, further development of the function is required. In particular, monitoring should be recognised as a specialist task, requiring expert assessors with relevant experience who are trained in audit and monitoring techniques. The monitoring program should be system focussed and risk management based. Separating the monitoring function from the contract management function would enhance its professionalism and increase overall accountability.

To complement performance monitoring improvements, it is suggested that GSL and DIMA review operational procedures to assess their continued relevance and ensure they are client-focused. The review should also determine whether on-site specific operational procedures are necessary and if there is merit in rewriting procedures to be more user friendly.

Legislation

A common theme emerging from the review was the need for legislation governing the operation of the detention facilities. Appropriate legislation would clarify roles and responsibilities, not only for the department and for the contractor, but also for detainees and others working in the centres.

Consideration could also be given to incorporating the Immigration Detention Standards in regulations.

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Infrastructure

The age, condition and location of the detention facilities do not assist in providing immigration detention services of an appropriate standard. At the same time, maintenance and repair costs are higher than industry benchmarks.

Consideration should be given to the need for further investment in detention facilities.

Expert Panel

While the review has recommended that steps be taken to develop contract management and monitoring skills internally, there will still be a requirement for external expertise. This would be readily met by updating the requirements for the existing Detention Services Expert Panel and re-tendering.

Consultation

During the course of the review discussions were held with:

- The ANAO (to better understand the background to the findings and recommendations in their report “Management of Detention Centre Contracts – Part B” (Audit Report No.1 2005-2006));
- The Deputy Ombudsman and staff;
- Members of the Immigration Detention Advisory Group;
- Practitioners in the fields of institutional health, contract management and performance measurement;
- The Chief Executive Officer of GSL;
- Departmental officers in DIMA’s National Office, State Offices and Detention Centres, covering the background to the current Contract, contract management, finances, case management, centre management and experience with the current contract;
- Senior GSL staff at the three detention facilities visited, and
- The Australian Government Solicitor.

Mick Roche
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Mr Roche is a former head of the Defence Materiel Organisation, a former Deputy Secretary of the Department of Health, and a former Deputy CEO of the Australian Customs Service.