EXPLANATORY MEMORANDUM TO

THE OFFENDER MANAGEMENT ACT 2007 (CONSEQUENTIAL AMENDMENTS) ORDER 2008

2008 No.

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 This Order makes amendments to legislation consequential to the coming into force of Part 1 of the Offender Management Act 2007 ("OMA 2007"), which contains new arrangements for the provision of probation services in England and Wales. Where there are references in primary and secondary legislation to the current probation structure of local probation boards established by Part 1 of the Criminal Justice and Court Services Act 2000 ("the CJCSA 2000") this Order amends the legislation to include references to the new probation structure.

2.2 This Order also substitutes references in primary legislation to "Her Majesty's Inspectorate of the National Probation Service for England and Wales" and "Her Majesty's Chief Inspector of the National Probation Services for England and Wales" with "Her Majesty's Inspectorate of Probation for England and Wales" and "Her Majesty's Chief Inspector of Probation for England and Wales" respectively to reflect the change to the Inspectorate's name made by section 12 of the OMA 2007.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 This Order makes amendments to legislation consequential to the new arrangements for the provision of probation services for England and Wales in Part 1 of the OMA 2007, and is the first use of the power to make consequential provisions contained in section 38 of the OMA 2007. The OMA 2007 received Royal Assent on 26 July 2007 and section 38 was brought into force on 1 November 2007.

4.2 Although a number of consequential amendments are made by Schedule 3 to the OMA 2007, it was made clear during the passage through Parliament of the then Offender Management Bill that those consequential amendments were illustrative of the Ministry of Justice's approach and that the Ministry would subsequently put before Parliament further consequential amendments using the power in section 38. During Committee Stage in the House of Lords Baroness Scotland of Asthal explained that,
"*A large number of consequential amendments need to be made to reflect the fact that probation boards will cease to exist in due course. Clause 35 [now section 38*

of the OMA 2007] enables consequential amendments to be made by order after the Bill is enacted, and this is the mechanism that we plan to use for most of them. However, we are making a small number in the Bill in areas that have raised particular interest and where we think it would be helpful to show the Committee how we are approaching these matters". (Hansard – 8.45pm 12 June 2007)

4.3 In particular, the Government committed to ensuring that the duties in relation to discrimination legislation would apply to all providers of probation services in the future. Speaking to an amendment tabled at the Committee Stage in the House of Lords by Baroness Gibson of Market Rasen and Baroness Turner of Camden that sought to apply disability and gender equality duties contained in secondary legislation to the new probation structure, Baroness Scotland of Asthal said: *"It is of course our intention that probation providers should adhere to the gender and disability equality duties under the new arrangements. This is one of a range of consequential amendments to secondary legislation—I should remind the Committee that this is currently in secondary legislation—which we will bring forward at the appropriate time prior to implementation using the power in Clause 35 [now section 38]. We have chosen to deal with the race amendment on the face of the Bill because of the significant interest shown in this issue during its passage to date through both Houses so that Parliament can be reassured about the way in which we propose to handle the other consequentials. We envisage dealing with the gender and disability duties in a similar way"*. (Hansard – 5.30pm 23 May 2007)
This Order accordingly makes the relevant amendments to the discrimination legislation.

4.4 The new structure may be commenced in phases resulting in two probation structures operating in England and Wales for a time, so the amendments in this Order ensure that legislation referring to probation arrangements will refer to the arrangements under both the CJCSA 2000 and the OMA 2007. References to "local probation boards" will be repealed using the power in section 38 when the last local probation board is abolished. It is expected that all boards will be replaced by probation trusts by 1st April 2010.

4.5 This Order is one of a series of Orders implementing the new arrangements for the provision of probation services in the OMA 2007. As well as amending discrimination legislation, this Order amends current references in primary and secondary legislation to "local probation boards" so that they include references to the new probation providers to ensure that the statutory duties and responsibilities applicable to the current probation arrangements will apply equally to the new arrangements. It also amends primary legislation to reflect the change of name of the Inspectorate.

4.6 The related Orders being prepared for the implementation of the first phase are a Commencement Order commencing the relevant provisions of the OMA 2007, an Order establishing probation trusts under section 5(1) of the OMA 2007 and an Order replacing Her Majesty's Inspectorate of the National Probation Service for England and Wales (Specified Organisations) Order 2007 (SI 2007/1172) to reflect the change in the Inspectorate's name.

5. Territorial Extent and Application

5.1 This instrument applies to the United Kingdom. The extent of any amendment made by the Order is the same as that of the provision being amended.

6. European Convention on Human Rights

6.1 The Right Honourable David Hanson, Minister of State at the Ministry of Justice, has made the following statement regarding Human Rights:

In my view the provisions of the Offender Management Act 2007 (Consequential Amendments) Order 2008 are compatible with the Convention rights.

7. Policy background

7.1 Part 1 of the OMA 2007 implements the Government's policy to develop the way in which probation services are provided. The intention is to improve public protection and reduce re-offending with the support of a wider range of probation providers, including those from the private and third sector. The Government published a consultation paper on an alternative approach to probation in October 2005 ("Restructuring Probation to Reduce Reoffending"), which raised the options of introducing private and third sector organisations as potential providers of probation services.

7.2 The Government then published a response to the consultation in March 2006 ("Working with Probation to Protect the Public and Reduce Reoffending") outlining plans for taking this policy forward. The consultation revealed general support for the involvement of alternative providers and some support for commissioning as a means of driving up standards. However, concerns were expressed about the justification for, scale and timing of, change. Finally, the Government published a document (Improving Prisons and Probation Services: Public Value Partnerships), in August 2006, which provided a clearer view of the pace of change anticipated, reflecting not just the need for the OMA 2007 but also the requirement for a carefully planned transition from the current organisational structure to the new probation structure.

7.3 Currently, the requirement to provide probation services rests exclusively with local probation boards, which were established by Part 1 of the CJCSA 2000. This work includes giving assistance to courts; the management of offenders (such as supervising offenders in custody or on licence); and the delivery of interventions (such as drug treatment requirements as part of a community order). Probation services can only be provided by another supplier if sub-contracted directly by the local probation board. The OMA 2007 places the statutory duty to ensure that sufficient probation services are provided throughout England and Wales on the Secretary of State rather than on local probation boards (section 2(1) of the OMA 2007), and enables the Secretary of State either to provide the services himself or to enter into contractual arrangements with organisations from the public, private or third sector for the delivery of probation services (section 3(2) of the OMA 2007). Organisations that provide probation services under the new arrangements

are to be known as “providers of probation services” and are defined as such in section 3(6) of the OMA 2007.

7.4 The OMA 2007 also provides for the establishment of probation trusts as the new public sector provider of probation services. As the then Offender Management Bill was progressing through Parliament, concern was expressed that certain key probation services should remain within the public sector in the short term and it was decided that the provision of assistance to courts should be retained within the public sector until Parliament agrees, via an order subject to the affirmative resolution procedure, that it should be opened up to other providers (sections 4 and 15 of the OMA 2007).

7.5 The Secretary of State will enter into contractual arrangements with trusts for the provision of probation services. Contracts for the provision of probation services with private and third sector providers will also be taken forward, both at a local level with the trust and at a regional or national level with the Secretary of State. All contracts will be let in accordance with public sector procurement rules and in line with the Best Value regime being established for all probation provision. In the short term there will be a considerable emphasis on the continuing development of probation trusts as robust and successful organisations. Further, probation trusts will take the lead in identifying relevant opportunities and contracting with local private and third sector providers to deliver local services. This local delivery of services and partnerships will be complemented by national and regional contracting with other providers where best value can be attained. At all points there has been a clear view that this approach should be developed cautiously, allowing issues like the potential conflict of interest between providing services and earning a profit for example, to be fully considered. Throughout the development of the OMA 2007 and whilst working closely with the first wave trusts, there has been an understanding that the work of dealing appropriately with offenders remains our priority.

7.6 Contracts with probation trusts will include a service specification outlining the responsibilities of the trust under the contract and will include references to documentation such as probation circulars and national standards which set out the minimum requirements for any probation provision. A governance handbook including, for example, the standing financial instructions and codes of conduct required for a probation trust has also been developed and will be provided as a minimum standard for the trusts. These documents have been developed to ensure that they are appropriate and relevant in a delivery environment.

7.7 The consequential amendments made by this Order are necessary to ensure that providers of probation services under the OMA 2007 are subject to the duties and requirements in legislation that currently apply to local probation boards. They are broadly technical amendments which insert references to the new probation structure where there are currently references to a local probation board or an officer of a local probation board. They do not seek to change the policy in the provisions being amended.

7.8 The amendments can be divided into three categories. The first category relates to provisions that specify core probation activities and duties such as the supervision of offenders, the provision of court reports and taking steps to ascertain whether the victim(s) of a crime wishes to receive information in respect of an offender's licence conditions. An example of this type of amendment is the amendment to section 202(7) of the Criminal Justice Act 2003 which requires local probation boards to approve premises as providing facilities suitable for offenders subject to a programme requirement as part of a community order. The amendments to these provisions ensure that these core probation activities and duties are also placed on providers of probation services under the OMA 2007.

7.9 The second category concerns legislation that places a requirement on local organisations, including local probation boards, to work in partnership to achieve certain aims, such as safeguarding children. An example of this type of amendment is the amendment to section 5 of the Crime and Disorder Act 1998 which contains provisions on crime and disorder strategies in local government areas.

7.10 The third broad category concerns requirements that are placed on public authorities, including local probation boards. Where appropriate this Order ensures that these requirements are placed on probation trusts as the public sector providers, and on other probation providers in respect of the activities of a public nature they are carrying out under the arrangements they have entered into with the Secretary of State. This approach has been adopted in relation to the discrimination legislation, including the Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 which require listed bodies to produce and update at regular intervals a discrimination equality scheme. There are a small number of consequential amendments in this category where the relevant duty has been placed on probation trusts as the public sector provider but not on other probation providers.

7.11 This Order also makes consequential amendments to legislation to reflect the new name of the probation Inspectorate under section 12 of the OMA 2007. The

change in name from “Her Majesty’s Inspectorate of the National Probation Service for England and Wales” to “Her Majesty’s Inspectorate of Probation for England and Wales” reflects the broader objective of Part 1 of the OMA 2007 of developing a range of providers of probation services that include private and third sector organisations.

8. Impact

8.1 A Regulatory Impact Assessment was prepared prior to the introduction into Parliament of the then Offender Management Bill receiving Royal Assent and is attached to this memorandum.

8.2 The impact on the public sector has been identified in the attached Regulatory Impact Assessment which notes,
“The evidence from the custodial sector’s experience over the past decade indicates that the introduction of competition for the operation of prisons and related services has contributed towards increases in efficiency. This introduction - aligned with strong organisational leadership - has led to efficiency savings of up to 8.5%. While it is not possible to forecast perfectly in advance, we believe that the introduction of commissioning and contestability for probation services can emulate the improvements delivered within the custodial sector”.

During the passage of the then Offender Management Bill through a number of amendments made. One of these was the requirement to retain assistance to the courts as a public sector activity until, via an order subject to the affirmative resolution procedure, Parliament decides otherwise (section 4 and 15 of the OMA 2007). However, the legislation has provided a sufficient foundation to ensure that efficiency savings can still be realised. There are a number of probation services like interventions work for example, (which could include drug treatment requirements as part of a community order) that may be undertaken by alternative suppliers from the third and private sectors.

9. Contact

9.1 Angie Munley at the Ministry of Justice Tel: 020 7217 5594 or e-mail: angela.munley@cjs.gsi.gov.uk can answer any queries regarding the instrument.

Annex A
Regulatory Impact Assessment

1. TITLE OF PROPOSAL

New arrangements for the provision of probation services.

2. PURPOSE AND INTENDED EFFECT

Objective

The objective is to enable the Secretary of State to commission probation services from a range of providers in the public, private and third sectors so as to improve performance overall and contribute to the reduction of reoffending and the better protection of the public.

Background

In December 2003, Lord Carter published his report, "Managing Offenders, Reducing Crime", which recommended the establishment of a National Offender Management Service (NOMS) with the aim of reducing reoffending through more consistent and effective offender management. A key recommendation of the report was that more effective service delivery could be achieved through greater competition, using providers of prison and probation from across the public, private and voluntary sectors, and through a separation of the line-management of public sector providers and the commissioning of services.

In January 2004, the Government published its response, "Reducing Crime, Changing Lives", which broadly accepted Lord Carter's conclusions, and NOMS was established in June 2004. Since then we have made some progress in improving performance within the probation service and in establishing the structures necessary for commissioning at national and regional level. This provides a solid foundation on which to build.

However, we need to do more. NOMS has a target to reduce the reconviction rate by 5% by 2008 and by 10% by 2010. This is an ambitious target. If it is to be met, we now need to pick up the pace of change to make a reality of Carter's original vision. In particular, we need to harness the dynamism of as wide a range of talents as possible from the private, voluntary and public sectors to ensure that offender services are only delivered by those who show they can do the best job.

The Government's intention to introduce greater diversity of provision was reiterated in both "A Five Year Strategy for Protecting the Public and Reducing Re-offending" (published in February 2006) and "Rebalancing the criminal justice system in favour of the law-abiding majority" (July 2006). In August 2006, the Government published "Improving Prison and Probation Services: Public Value Partnerships", which outlined the vision for contestability and indicated the pace and scale of change envisaged.

Rationale for Government Intervention

Under the current legislation the statutory duty to make arrangements for the provision of probation services rests exclusively with the local probation board. Unlike custodial services, probation services cannot currently be provided by any other organisation unless sub-contracted directly by probation boards themselves. This applies regardless of how well the local board is itself performing or how appropriate the geographical boundaries of that area are for the service concerned.

A new framework is needed that allows us to work in stronger and more creative partnerships with a wide range of other organisations. Commissioners need to build a complex range of partnerships to match provision to demand, and to draw on the skills of a wide range of organisations working together to common goals and each playing to their strengths. A mixed

economy of providers is needed. Our aim is to utilise the talents of a diverse pool of public, private and voluntary providers, each with their own set of skills and expertise.
The Government now proposes to legislate in the Offender Management Bill:

1 to give to the Secretary of State the statutory duty to make arrangements with others to provide probation services, so enabling him to commission from providers in the public, private and third sectors; and
2 to abolish local probation boards and establish probation trusts, as the public sector provider with whom he may contract.

3. CONSULTATION

The case for change was first set out in "Restructuring Probation to Reduce Re-offending" in October 2005. The responses, along with the Government's proposals for taking the policy forward, were published in March 2006 in "Working with Probation to Protect the Public and Reduce Re-offending". The consultation revealed general support for the involvement of alternative providers and some support for commissioning as a means of driving up standards. But concerns were expressed about the justification for, and scale and timing of, change.
This Regulatory Impact Assessment, together with "Improving Prison and Probation Services: Public Value Partnerships", sets out the pace and scale of change envisaged. We intend to move from boards to trusts in a measured and phased way, using clear and objective criteria (on which we will consult stakeholders) for determining which boards move when. Subject to parliamentary approval, we envisage that the first trusts will be established, and the first contracts awarded, in April 2008.

4. OPTIONS

This RIA provides an assessment of the overall benefits of the Government's proposals to introduce full contestability to probation services set against a "no legislation" option. Year-on-year performance improvements are expected of any public sector organisation as a matter of course. These are assumed under this RIA, and are therefore stripped out of the calculations, which simply compare the additional impact of full contestability. Although the impact of the introduction of a fully contestable environment - where all services are subject to both internal and external competition - is shown in financial terms, this is only to illustrate how our proposals compare with the option of retaining the existing legislative framework. It is anticipated that the resources released through innovation and efficiency improvements as a result of the introduction of a fully contestable environment will be reinvested to deliver service improvements.

Introduction of a fully contestable environment will stimulate more efficient and effective provision of offender management and interventions services, providing better value for money. Contestability will encourage innovative approaches through opening up service provision to a wide range of providers. This will enable services to be commissioned across geographical boundaries and facilitate wider working across different organisations.

In summary, the two options being assessed in this RIA are:

- ***Option 1: Do not introduce a change in legislation****, whereby new legislation is not introduced and probation boards remain the sole statutory providers of probation services and access to alternative providers is only via the existing boards;*

- ***Option 2: Remove the statutory restriction on the provision of probation services,*** which creates the potential to open all of the current and future business of probation boards to competition.

5. BENEFITS AND COSTS

NOMS is currently developing the National Provider Network, a central directory of providers that will speed up the process of tendering and reduce the associated costs. This will provide benefits and savings to the work of commissioners separate from the introduction or not of legislation. As such, it has been decided not to include these benefits in the modelled scenarios.

Option 1: Do not introduce a change in legislation.

Under current legislation, Probation Boards have an exclusive statutory duty to provide probation services, and without a change in legislation access to alternative providers would remain via the existing Probation Boards. In this situation other providers remain as sub-contractors only, when they might themselves be lead contractors with the commissioner, and it does not provide a mechanism for addressing a failing probation board. It is also envisaged that under this continued situation there would be limited multi-regional contracts, which would inhibit the ability to commission across organisational and geographical boundaries plus reduce the potential for economies of scale that larger contracts could bring.

It would remain the decision of individual probation boards, in consultation with the commissioner, albeit recognising targets for partnership working through subcontracting, as to the services and volumes to be delivered through partnership working. However, sub-contracting of services by individual Boards can well be advantageous on a local level, and when trusts are in place such arrangements may still continue, but with greater direction setting by the commissioner who can decide if the local benefit is aligned with any regional/national perspectives. That said, the increase in partnership working targets modelled in this option is assumed to result in increased partnership working by Probation Boards and a general increase in the level of benefits realised.

In 2005-06 around £12.5m[1] of offender services within probation was subcontracted which equates to approximately 2.5% of Probation Board expenditure on probation services. The level of partnership working at year end modelled in this option is laid out in the table below.

Table 1	Assumptions on extent of partnership working
2005-06	2.5% in value of services (£12.5m)
2006-07	5% in value of services (£25m)
2007-08	10.0% in value of services (£50m)

[1] *Total estimated value of sub-contracted probation business is £12.5m (2005/06)- this includes training, operation of some approved premises and the provision of a proportion of interventions.*

Assuming efficiency savings in the order of 3.5% to 8.5% and taking account of tendering and contract management costs, it is estimated that average annual savings through the increase in sub-contracting to partner organisations would be around £280k at 3.5% savings rate and around per £2m annum at a savings rate of 8.5%.

The cost of subcontracting this level of business is estimated at 4% of contract value and the cost of managing these contracts is estimated at 1.2% of contract value. Discounted over 25 years to allow for inflation, this option would have a positive net present value (ie net savings) of £4m at a 3.5% savings rate and £33m at a 8.5% savings rate (figures expressed at 2006-07 prices).

Option 2: Transfer the statutory responsibility for provision of probation services from Probation Boards to the Secretary of State.

The changes will help NOMS to reduce re-offending and better protect the public by:

- getting more out of existing resources and freeing up resources to reinvest;
- enabling commissioners to require in service specifications joined up working and seamless delivery across prisons and probation institutional boundaries;
- allowing providers with new and better ways of doing things, including synergies with their existing operations, to propose how they would provide services.

The evidence from the custodial sector's experience over the past decade indicates that the introduction of competition for the operation of prisons and related services has contributed towards increases in efficiency. This introduction - aligned with strong organisational leadership - has led to efficiency savings of up to 8.5%. While it is not possible to forecast perfectly in advance, we believe that the introduction of commissioning and contestability for probation services can emulate the improvements delivered within the custodial sector.
While we recognise that there are differences between the custodial and probation sectors, the custodial sector is still the best comparator to use when modelling the impact of full contestability for probation services. The figure of 8.5% is considered reasonable for the upper end of the expected savings and as such a range of savings rates, with 8.5% as an upper limit, have been used to demonstrate the impact of the use of the legislation.
The level of savings generated can be estimated by taking a selection of different aspects of probation services - from the provision of specific interventions to the running of the a whole probation board - and then modelling these on a rolling programme of competition.
Using a range of savings rates starting at 3.5% of the value of business contested and taking the upper limit of savings as 8.5% it is anticipated that there will be annual savings of over £2m at 3.5% and around £13m at 8.5%. These figures apply once the programme of contestability is established.
Applying these rates of savings to the programme over a period of 25 years and discounting to allow for inflation, a positive net present value of £35m is generated at a savings rate of 3.5% and at 8.5% the net present value rises to £212m.

Introducing a commissioning system and competition for provision of probation services will incur costs in the following: running procurement exercises; contract management; in-house bids; and in-house contract compliance. These are estimated at 1% of contract value, 1.2% of contract value, 4.0% of bid total and 0.5% per annum respectively.

Public protection through a reduction in re-offending

It is clear that providers are not yet able to play to their strengths, as Probation Boards have a 97.5% market share. As such we are not availing ourselves of the benefits and opportunities that working with a complete spectrum of providers would bring to the provision of correctional services. There are a large number of providers outside the public sector already working with offenders, such as private sector prison management, prisoner escort services and electronic monitoring of offenders in the community. Elsewhere, they are providing specialist services – for example, community chaplaincy services. In other areas, and particularly in probation work, private and third sector provision is often minimal, and may only be offered opportunities to get involved in a limited range of services. We believe there is potential for service improvement by accessing a wider range of providers, with much greater input from current providers, to deliver the wide range of services for offenders with varying needs. In an environment of full contestability, we expect providers will look critically at themselves to review what could be done better by working in partnership. We want all providers to play to their strengths. In doing this, we expect service delivery to improve

In addition to the financial benefits from contestability, the National Audit Office has concluded that the introduction of competition for custodial services has had a positive impact on the decency agenda which aims to treat offenders with decency in a caring and secure environment.

> "…Competition has been important within the prison system for improving both management and conditions for prisoners…A key innovation by the private sector has been in promoting a more constructive staff/prisoner relationship….The private companies involved in PFI consider that a major private sector innovation has been in the attitude of staff towards prisoners. Our prisoner survey supported this assertion by finding that prisoners held in PFI prisons felt that they were shown greater respect and were treated better than prisoners in public prisons. The Institute of Criminology (Cambridge University) has undertaken pioneering work in this area and is collaborating with the Prison Service on measuring this aspect of the quality of life in prisons. We view this as a positive development which will help the Prison Service take the decency agenda forward."[2]

Further, there is evidence that competition has helped provide the impetus for improved performance across many public sector organisations and it is expected that a similar "ripple effect" will be seen with the introduction of full competition across probation services. That said, due to the difficulties of quantifying this effect, the additional potential benefits arising from this improved performance have not been modelled.

The assumptions that have been made in modelling the costs and benefits are explained in the technical note.

6. SMALL FIRMS IMPACT TEST

The measure does not adversely impact on small businesses. Some additional business opportunities for the small business sector may be created through the increased competition for services.

7. COMPETITION ASSESSMENT

There is an existing private sector market for the provision of custodial services (£227m) and prisoner escorts (£135m). It is expected that private and voluntary sector providers will be interested in increasing their partnership working with the Probation Service and will respond to

[2] *National Audit Office: The Operational Performance of PFI Prisons, 2003*

invitations to tender placed by NOMS. In fact, there are already large numbers of voluntary sector organisations working with the public and private sectors to deliver services. Over 900 different organisations in total are currently working with offenders, with more than 600 projects working with probation in the community.

8. ENFORCEMENT, SANCTIONS AND MONITORING

The success of contestability in contributing to the driving up of performance will be routinely monitored by the Home Office Group Executive Board and by the Prime Minister's Delivery Unit. The cashable and non-cashable savings from contestability will be included in the NOMS Value for Money strategy monitored by the Office of Government Commerce.

9. POST-IMPLEMENTATION REVIEW

An illustrative programme of contestability for probation services is costed above. This programme will be subject to review after each year of contestability is completed following the introduction of legislation, with the first review in 2009-10 of the 2008-09 round.

10. SUMMARY AND RECOMMENDATION

Some performance and cost improvements can be obtained (with cost savings to be reinvested in service provision) by influencing Probation Boards to make greater use of external providers in service delivery. But it will not be possible to meet the Government's target on reducing re-offending without significantly driving up performance in the delivery of offender services, including probation services. One of the tools for doing this is to open the full spectrum of service delivery within NOMS to a full range of providers. This will give commissioners a wider choice of providers, and the freedom to move services from poorer performing providers. This requires the removal of the statutory duty limiting provision of probation services to Probation Boards. The potential performance and cost benefits of increasing commissioners' freedoms to buy from the best providers are up to £288m (on a discounted costs basis) over the next twenty-five years and it will also serve the Government's aim of increasing the involvement of the voluntary and community sectors in the delivery of NOMS services.

APPENDIX – COST ASSUMPTIONS TECHNICAL NOTE

COSTS AND BENEFITS

Option 1: Do Nothing

Access to alternative providers would be possible only at the discretion of individual probation boards which would need to take the decision to contract out services. Currently some £12.5m of probation business is contracted out. This includes training contracts, provision of some interventions and the operation of some approved premises. These figures were extract from the activity costing returns produced by probation board for the financial year 2005-06.There is no power for the Secretary of State to compel boards to subcontract or market test core services. Without direct intervention it is felt raising this to £50m by 2007-08 is realistic maximum expansion of contracting out. To deliver more than £50m of contracting out would require significant areas of activity either currently or planned to be undertaken my core probation staff to be contracted out and it considered unlikely that Probation Boards would be willing to embark on major revision of recently agreed staffing structures.

Assuming efficiency savings within the range of 3.5% to 8.5% the estimated annual savings of contracting out a further £37.5m of probation business would be in the range of £0.3 to £2m per annum. The basis for modelling assumption within this range is the experience gained from contracting out within the Prison Service. The upper estimate of 8.5% annual efficiency was achieved in a number of large establishments, where there was greater scope for efficiencies. 3.0% was the minimum level of efficiency improvement delivered through contracting out Prison Service activity. A high proportion of Prison Service costs are fixed infrastructure costs with over £450m of resource cost being required for the maintenance and capital charges on the estate alone. The probation service has proportionately higher levels of staff related costs and the scope for medium term efficiencies is therefore at least comparable and probably far higher that in the Prison Service where the nature of the estate imposes severe constraints on restructuring. A lower estimate of 3.5% has therefore been used.

The minimum cost of contracting out this level of business is estimated at £20k per board, a total of £840k. This figure was estimated to the full costs of one member of staff for four months writing tender specifications, reviewing bids and letting contracts. The minimum cost of managing these contracts is estimated at 0.9% of contract value. This is based on the average contract management costs on the major contracts (including Prisoner Escort and Custody Service and the various electronic monitoring contracts) already let within the NOMS area and includes the staff costs and associated overheads of the directly employed contract management staff.

Option 2: Transfer the statutory responsibility for provision of probation services from boards to the Secretary of State.

Benefits are expected to arise as follows:

- to help NOMS achieve its aim of reducing reoffending, by getting more out of existing resources and freeing up resources to reinvest, by enabling ROMs as commissioners to insist (in service specifications) on common approaches and seamless delivery across prisons and probation institutional boundaries, and by allowing providers with new and better ways of doing things, including synergies with their existing operations, to provide services.

Some of these benefits can be evidenced from the example of competition for the operation of prisons over the past decade. Some benefits can be costed, others cannot.

Reduction in Reoffending

Together with the introduction of offender management within NOMS, the creation of a purchaser provider model and the introduction of increased competitive forces in to the market for the provision of correctional service is a core enabling measure designed to deliver an additional reduction in crime through a further five per cent reduction in reoffending.

Performance enhancements

In addition to the tangible and costed benefits from contestability, there is widespread acceptance that introduction of competition for custodial services has had a positive impact on the decency agenda which aims to treat offenders with decency in a caring and secure environment. This helps develop positive relationships with prisoners and increase the probability that they will be more likely to go on to live useful and law-abiding lives that will benefit them as individuals and society as a whole.

There is also evidence that competition has helped provide the impetus for improved performance in prisons across a wide spectrum of measures. Prisons are rated on a 1 to 4 performance scale on the basis of a weighted scorecard of measures: level 4 is awarded to excellent establishments that are delivering exceptionally high performance and level 1 indicates a poor performer. Currently 18% of contracted prisons are rated at performance level 4, compared to 15% of public sector prisons.[3]

Delivering financial efficiency in a competitive market: evidence from custodial sector

The custodial sector provides the following examples of delivering financial efficiencies in a competitive market:

- a number of prisons have been market tested. As a consequence of this the annual cost of providing those prisons has reduced from £82m to £75m, a saving of 8.5%;
- the outsourcing of the Prisoner Escort Service has delivered savings of £3.8m per annum, equivalent to 3% of the cost of providing the service;
- a small number of prisons have been privately built and are privately managed. The estimated savings are £15.9m equivalent to about 6% on a base of about £250m;
- performance testing of prisons has generated savings of £2.8m, equivalent to 3% on those prisons where performance testing has been carried out;
- this evidence from the Prison Service suggests that further market testing of services within the National Probation Service could deliver savings within the range of 3.5% to 8.5%;

The assumptions that have been made in modelling the costs and benefits are explained in the following paragraphs.

Released Resources

In the standard estimate it is assumed that work that has been subject to a formal market test process will generate efficiencies within the first year after testing,

[3] *Source:* Prison Service Performance Ratings August 2005

A key assumption is that the process of market testing will deliver efficiencies from suppliers, irrespective of whether the process results in a change of supplier. As part of the testing process, it is envisaged that existing providers will be expected to produce bids that offer better value for money that the existing provision.
Although expressed as financial savings for modelling purposes, the expectation is that the benefits will be delivered through a combination of undertaking additional work with offenders within the same level of financial resources. It is further assumed that the process will create additional capacity to generate innovative solutions to address re-offending which will be at least as, and probably more, effective in addressing the rehabilitation needs of offenders and thus deliver a greater impact on reducing re-offending and hence crime.

Central costs of market testing regimes

Evidence from the custodial sector

The evidence from the custodial sector is as follows:

- Design, Construct and Manage (DCM) Prisons: The prisons at Peterborough and Bronzefield have recently opened and are DCM Prisons, designed, constructed and managed by the private sector. The estimated cost of running the competition for these prisons is estimated at £2m, equivalent to £1m a prison. It is now estimated that further DCM Prisons might cost £1.1m to procure. These costs are made up as follows (and could be reduced in the event of there being more DCM prisons):

    - £120K – Financial advisors
    - £360K – Legal advisors
    - £40K – Insurance
    - £220K – Compliance Engineers
    - £340K – Staff
    - £20K – Expenses

- Market Testing Prisons where an individual prison is marked tested and put out to competition with the private sector. This is estimated to cost about £700k per prison as follows:

    - £70K – Financial advisors
    - £200K – Legal advisors
    - £40K – Insurance
    - £300K – Compliance Engineers (condition surveys)
    - £100K – Staff
    - £10K – Expenses

- Performance Testing Prisons where a prison is required considerably to improve its performance or be subject to market testing/competition. it is estimated that performance testing a prison costs £350k. this is £100k for the staff in the Competitions Unit within NOMS and £250k for the in-house bid team within the prison service.

Inferences For Probation Market/Performance Testing

The average prison has a budget of about £12m. This figure is on a par with the average budget for individual probation areas (excluding London). It is estimated that market testing a whole

probation area might cost broadly the equivalent to the cost of market testing a prison. Until the market testing approach is agreed, this is the simplest approach to estimating probation market testing costs. If that assumption is valid then the cost would be in the region of £700k. However, it is questionable whether it would be necessary to spend £300k on building condition surveys. All probation buildings have regularly been subjected to condition surveys so this expenditure might not be required, reducing the cost to £400K.

In House Bid Costs

There are costs for the supplier in preparing bids. It is estimated that performance testing a prison costs £350K. This is £100K for the staff in the Competitions Unit within NOMS and £250K for the in-house bid team within the Prison Service. It is assumed that a learning curve effect would reduce this to £200k by the end of the testing cycle. Using this as a benchmark, the cost of in-house bid preparation for contracts to the value of expenditure currently committed to the 42 probation areas would total £9.1m.

In house contract compliance costs

In addition to the existing reporting requirements, it is estimated that the additional costs associated with the move to a contractual relationship are likely to be of the order of £50k per annum per probation area. These are primarily legal costs associated with contract compliance and would be additional to existing financial and performance reporting requirements.

Contract Management Costs

The average annual costs of future probation contract management is estimated at 1.2% of contract value. This assumption is based on evidence of the contracted management costs of the current contracted out prisons, the electronic monitoring contracts and the PECS contracts. These contracts are larger than those anticipated for probation and consequently contract management represents a smaller percentage than assumed above for probation services contracts.