

# PRIVATISATION IN THE UNITED STATES AND AUSTRALIA: A COMPARATIVE ANALYSIS OF THE MODERN PRIVATISATION MOVEMENT IN CORRECTIONS

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The Twentieth Century brought about rapid change in the social policies of many Western nations, especially those of the Anglo-American nations of Australia, the United States and the United Kingdom. Winston Churchill once proclaimed that a society, and thus its social policy, can be judged by how well it treats its dissidents. Privatisation has been viewed by many as an efficient and valid method of improving conditions within the correctional system. Although several forms of quasi-private correctional systems have existed in the past, the modern privatisation movement in corrections is a relatively new phenomenon. It has been touted by proponents as an efficient method of improving the correctional system through a transfer of management and/or ownership from the public to the private sector. However, correctional privatisation has not been without controversy. It has been surrounded by skepticism, making it the topic of heated debate from its very inception.

This article seeks to explore some of the more salient issues associated with correctional privatisation. It is important to state that it does not attempt to address the numerous important philosophical, social and political questions which relate to the practices of modern day penology and correctional methods in general. These are expansive issues which warrant separate analysis. Instead, this treatment is a focused one, addressing the specific concerns, effects and history of correctional privatisation in Australia and the United States.

Prior to examining the specific issues related to the privatisation of correctional systems, a general description of the various processes of corporatisation and privatisation are briefly described. For the purpose of examining the privatisation process in the context of corrections, a brief analysis of the UK model of privatisation is outlined in order to illustrate the success of privatisation in other public sectors. The watershed literature in jurisprudence associated with the delegation of coercive power and the role of the state are briefly discussed. This article then takes a comparative approach, analysing both public and private forms of management and ownership in the corrections industries of the United States and Australia, outlining the potential positive and negative aspects of correctional privatisation. In closing, the author's opinion and probable path of correctional privatisation are presented.

## Introduction

The social crisis of the 1890s and 1900s in the United Kingdom and the United States provoked a complex series of political responses and initiatives. These political movements of calculation, realignment, transformation and reaction were - at least at first - neither uniform nor coherent. There was no easy resort to a self-adjusting social balance or to a ready-made strategy imposed by the ruling bloc. Instead, a complex pattern of responses emerged at a variety of different points and levels in the social formation: Institutions reconsidered and adjusted their practices, political parties altered their direction and manifestos, individuals and voluntary agencies pressed for specific forms of political action, and governments responded in more or less pragmatic fashion by means of legislation, propaganda, the appointment of inquiries and the deployment of force.<sup>1</sup>

Over one hundred years later, social policy makers are once again attempting to strike a balance through new social policy initiatives within the modern day debate that has arisen in the last two decades concerning the privatisation movement in both Australia and the United States of America. The modern day privatisation movement has been expanded over the last two decades to include the privatisation of correctional systems in both Australia and the United States. Correctional privatisation has spurred a plethora of public debate amongst academics, government employees, unions, civil rights groups and politicians. The privatisation movement presents a unique opportunity to examine the legal, economic and social effects of moving correctional systems management, development and ownership from the public sector into the private sector. There have been numerous empirical studies conducted over the last fifteen years in the United States and Australia which have sought to '...measure [the] various differences between these modes of ownership and operation'.<sup>2</sup> Much of the existing scholarship and media attention on the subject tends to be limited to singular aspects or issues related to correctional privatisation such as: the economic benefits of privatising prison systems,<sup>3</sup> the legality of privatising prison systems,<sup>4</sup> political<sup>5</sup> and ideological<sup>6</sup> concerns, ethical

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1 David Garland, *Punishment And Welfare: A History of Penal Strategies* (1985), 73.

2 Capitol Hill (Unsigned), 'Evaluations of Prison Privatization', <<http://www.geocities.com/CapitolHill/Lobby/6465/eval.html>>.

3 Allan Brown, 'Economic Aspects Of Prison Privatisation: The Queensland Experience' in David Biles (ed), *New Zealand Conference On Private Sector And Community Involvement In The Criminal Justice System (30 November- 2 December 1992, Wellington, New Zealand), (1994)*; See also *Crime And Punishment In America: Bringing Down Costs Through Privatization* (June 1995), <<http://www.ncpa.org/w/w82.html>>.

4 Charles W Thomas and Sherril Gautreaux, 'The Present Status Of State And Federal Law', (19 March 2000), <<http://web.crim.ufl.edu/pcp/html/statelaw.html>>.

5 'Getting Tough On Criminals', *The Miami Herald* (Miami, United States), 10 February 1997, 2B.

6 Australian Institute Of Criminology, R W Harding, *Prison Privatisation In Australia: A Glimpse Of The Future, Current Issues In Criminal Justice*, AIC Report No 36.

concerns,<sup>7</sup> the impact of privatisation upon the public correctional system,<sup>8</sup> and the threat of corporate corruption in private corrections and other specific issues. It can be generally stated that a great deal of literature focuses upon these issues without addressing the effects of the nexus between each of them as a whole. For example, there is little in-depth research which approaches the subject from a view which incorporates the nexus between the State and private corporations against the broader socio-economic, administrative, political and legal context in which it operates. '[Corrections] has risen from a murky past to a contentious present. It cannot distance itself from political, legal and economic forces, no matter how much it would like to do so.'<sup>9</sup>

Many criminologists and legal scholars are of the opinion that there are a number of inherent problems in reviewing the existing data in reference to the privatisation of prison systems. With the exception of only a handful of empirical studies, most notably those of Professor Charles W Thomas at the University of Florida, and Professor Charles Logan at the University of Connecticut, there is a great deal of bias in the use of statistical data within existing literature.<sup>10</sup> I believe that Charles Logan put it best when he stated:

There is one key principle that is absolutely crucial to thinking clearly about the issues involved. That principle is this: There must be no double standard. For any problems, questions, or concerns to be arguments against privatisation, it must be shown that they apply *more* to private than to governmental prisons.<sup>11</sup>

This treatment of the subject will seek to incorporate existing empirical studies, legal analysis and jurisprudence, economic research, public commentary and socio-political research in order to examine the issue of correctional privatisation using a holistic approach. Analysis of the existing data concerning the transition of control from governmental organisations to private organisations, will allow examination of the efficacy of privatising correctional institutions and the probable path that the privatisation movement will take in its development. It is important to state that this article does not pretend to address the numerous important philosophical, social and political questions which relate to the practices of modern penology and correctional methods in general. These are issues which are broad and merit ample attention through separate analysis. Instead, this treatment is a focused one, addressing the

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7 Jocelyn M Pollock-Byrne, *Ethics in Crime & Justice: Dilemmas & Decisions*(1989) 126-152.

8 Stephen Carter, 'Will Privatisation Impact Forecasting For Correctional Services?'; See also David Belton, 'Private Sector Involvement In Corrections' in David Biles (ed), *New Zealand Conference On Private Sector And Community Involvement In The Criminal Justice System (30 November- 2 December 1992, Wellington, New Zealand)* (1994) 119-138.

9 John Ellard, *Some Major Lessons To Be Learned From the History Of Corrections* (1988) 112.

10 'Theoretical speculations, anecdotes, and raw statistics abound, but there is as yet little dependable information'; DiIulio (1988).

11 Charles W Logan, *Prison Privatization: Objections and Refutations*, <<http://www.ucc.uconn.edu/~wwwspci/fraser.html>>.

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specific concerns, effects and history of correctional privatisation in Australia and the United States.

Prior to examining the specific issues related to the privatisation of correctional systems, it is useful to provide a general description of the various processes of corporatisation and privatisation as well as the historical origins, goals and efficiency of these processes within other sectors. For the purpose of examining the privatisation process in the context of corrections, a brief analysis of the UK model and its characteristics is useful in conducting a comparative analysis between public and private forms of management and ownership in the Corrections industry. Many of the concerns raised both against and in favour of correctional privatisation are closely related to the process by which the industry is privatised.

### **Corporatisation**

In the Anglo-American legal tradition, corporatisation can be defined as the transformation of a government-owned enterprise into a corporation which operates under Corporations Law. It is important to note that corporatisation and privatisation are two separate administrative processes which are quite different in both their procedures and objectives. Although both processes are closely related, as they both seek to effect administrative and structural change in a particular government-owned enterprise, it is important to delineate between each of them. Generally, corporatisation can be characterised by a retention of government ownership and management, whereas privatisation presents a definitive movement of ownership and/or management from the public to the private sector. Corporatisation is primarily a change in organisational governance, although in some cases it may involve a change of governmental ownership and management. This occurs in cases of corporatisation which result in intergovernmental management and/or ownership. Privatisation, on the other hand, involves a material change in the ownership of an enterprise and/or provision of services.

### **The Objectives of Corporatisation**

Corporatisation is a precursor to privatisation and as such, provides for the necessary changes which must occur in a government-owned enterprise (GOE) prior to its passage from public to private sector ownership. The primary goal of corporatising a GOE is to provide it with a business structure and a new legal entity in the form of a corporation. The process of corporatisation often includes a great deal of economic, structural and operational performance assessment in an attempt to gauge the marketability and efficaciousness of an enterprise. Therefore, corporatisation often includes activities which seek to strengthen the commercial objectives of an enterprise in readying it for sale and/or valuation prior to entering the process of privatisation. Thus, the objectives of corporatisation and privatisation are quite different.

### **The Process of Corporatisation**

There exists a number of general characterisations which can be attributed to the corporatisation process. Government organisations undergoing the process of corporatisation are faced with a great deal of adaptation in the transition from a highly bureaucratic enterprise, rooted in governmental structure and management with community service responsibilities, to that of a corporate enterprise with a business structure. Corporatised agencies are generally governed by a board of directors, and are liable to shareholders for achieving commercial objectives. They are often required to pay taxes on capital gains, and are typically required to raise capital on the open market without governmental support. As such, they are often freed from many pre-existing governmental restraints such as state mandated budget systems, employment policies and several other bureaucratic processes which interfere with achieving a profitable commercial end. In short, corporatisation can be characterised by the commercial reformation by a government organisation of a government-owned enterprise.

The process of corporatisation requires a transitional period with several transitional steps. The process involves a multi-disciplinary approach involving a conglomerate of professionals from several disciplines who must coordinate the process of adopting new legal and accounting principles. The process is likely to induce involvement by both public and private sector professionals including legal, accounting, administrative, financial and government experts.

The organisation must be transformed from its existing form as an arm of a government organisation through a process of restructuring which allows for the creation of a new legal entity, generally in the form of a company. The formation of this new entity is used to house the government enterprise and enable the adoption of private sector corporate governance principles. The process of corporatisation occurs across virtually all public and private sectors and a multitude of examples abound in both developed and developing countries worldwide.

There are several considerations to be taken into account in the corporatisation process. Generally, the enterprise will require a strengthening of high level management and may include the incorporation of private sector corporate governance principles. Often, the accounting principles will require wholesale change under differing accounting conventions which require the improvement of information management. Additionally, there may be some adaptations in the existing enterprise. The process will necessitate a change in workplace practices and will often include the adoption of 'best practices' and a corporate ethos within the newly formed 'corporate culture' which would seek to maximise workplace productivity. The newly corporatised entity should articulate a clear business purpose to its employees. 'Because of the often conflicting mix of social, political, and business objectives previously imposed on a government enterprise, its identity as a business venture might not be readily apparent.'<sup>12</sup>

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12 Henry Gibbon, 'Guide For Divesting Government-Owned Enterprises: How-To Guide No. 15', *The Reason Public Policy Institute*, <<http://www.privatization.org/Collection/>

## **Privatisation**

Privatisation is not a new concept. In fact, government owned and operated enterprises have been transferred, in varying degrees, to the private sector for many years. However, there has been a marked increase in privatisation over the last three decades with over 100 countries privatising government-owned enterprises. Privatisation can be defined as, '...the process whereby a government disposes of its assets and/or functions to the private sector'.<sup>13</sup> As one author put it, '[Privatisation is] ... the achievement of a public end through reliance on private means'.<sup>14</sup>

### **Forms of Privatisation**

Privatisation can occur in various forms. It may involve a partial or complete divestiture of a government-owned enterprise. Privatisation can provide for both a temporary or permanent movement of ownership and/or management from the public to the private sector. There are several steps that a government must take in the privatisation process. They include: setting objectives for the sale of the enterprise, considering the need for enabling and/or regulatory legislation, deciding whether the business should be organised to create a viable unit (through the process of corporatisation) or raising performance standards by introducing competition into the industry through a break-up of the enterprise into a number of smaller enterprises.<sup>15</sup>

The higher degree of competition within a market following its restructuring can produce significant improvements to an industry's efficiency. For example, in the UK, the privatisation of Britain's electrical utilities resulted in a reduction in the cost of electricity to both domestic and commercial end users of 7-10%.<sup>16</sup> This was a direct result of a break up of the government monopoly and the creation of competition amongst the more than twelve separate private sector corporations formed as a result of the privatisation. The method of privatisation adopted should be chosen with a high degree of care and planning. The most common forms of privatisation are as follows:

#### ***Floats or the Release of Shares on a Securities Market***

This form of privatisation ensures widespread ownership and often involves separate phases of public share offerings. In many cases, the initial public offering of stocks requires the purchase of shares in bundles with minimum investment blocs.

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Publications/htg\_15Bdivesting\_assets.htm>.

13 Homepage, [Web Document] Available At: <<http://www.privatization.org>>.

14 Paul Moyle, *Frequently Asked Questions* (2000), <<http://web.crim.ufl.edu/pcp/html/questions.html>>.

15 *Getting Tough On Criminals* above n 5, 2b.

16 Ibid.

### ***Trade Sales***

The full or partial sale of a government owned enterprise can be achieved through the use of various techniques or processes. These include Competitive Bidding Processes, Strategic or Negotiated Sales, Auctions, Management/Employee Buyouts (MEBOs), Combined Trade Sale/ Public Offering, Sale to Government Owned Companies, Placement with strategic investor groups, or more commonly Sealed Tenders.

### ***Outsourcing***

Outsourcing involves the formation of a contract with a private sector organisation to provide for partial or complete service within the public sector. This is by far the most common method of privatisation in the context of corrections.

### ***Management Contracts***

This is one form of contracting out or outsourcing and it includes the formation of a contract whereby the management and/or operation of a facility is outsourced to a private sector entity.

### ***Public-Private Competition or Market Testing***

Market testing is a form of privatisation where public services are exposed to competition on the open market. The most common form of market testing involves the participation of both public and private entities in the bidding process. Governments commonly use this method of privatisation prior to any widespread application in a particular market. Market testing is used to gauge the effects and probable outcome of further government divestitures within a market, especially in relation to the creation of competition within the market economy.

### ***Private Infrastructure Developmental and Operational Contracts***

There are several species of both infrastructure development and operational contracts. The three most common forms are described below:

#### ***Build-Operate-Transfer (BOT) Arrangements***

Build-Operate-Transfer arrangements involve the establishment of a contractual arrangement between a government organisation and a private sector company. In such contractual arrangements, the private sector organisation is responsible for financing, building and operating the facility for a specified duration or contract period. Upon the expiration of the contract, ownership of the facility reverts to the government organisation.

### ***Build-Transfer-Operate (BTO) Arrangement***

Build-Transfer-Operate arrangements are a form of privatisation wherein a contractual arrangement between a government organisation and a private sector company serves to facilitate the construction and operation of a facility for a specified duration or contract period. The ownership of the facility is transferred to the government upon completion of infrastructure construction. The private company is then contracted to operate the facility for a specified duration.

### ***Build-Own-Operate (BOO) Arrangements***

Build-Own-Operate arrangements represent the highest degree of privatisation. Such agreements involve a contractual arrangement between a government organisation and a private sector company, wherein the private sector organisation is responsible for the construction and operation of a facility while retaining permanent ownership. Through the use of a contractual arrangement, the private sector company effectively undertakes all aspects of the previously government operated agency.

### **The UK Model of Privatisation**

A privatisation exercise demands the coordinated application of a wide range of skills and expertise, from broad conceptual sweep to logistical minutiae...From legalities to logistics, from the wide vision of large-scale marketing activities to the fine detail of documentation, the United Kingdom has spent over [two] decade[s] refining privatisation processes. The level of expertise developed in privatising industries in sectors ranging from airports to water supply, from electric utilities to rail services, from telecommunications providers to research and development laboratories has lent itself to wider application.<sup>17</sup>

Privatisation has been employed by government agencies in virtually all industrial sectors. Most countries, including Australia and the United States, follow a model of privatisation perfected by the UK over the last 20-25 years which was developed by the Thatcher regime in Great Britain. It is important to note that both the United States and Australia have adapted this model to their respective systems of government, economic policy and legislative directives.

The UK has enjoyed a great deal of success in privatising a wide spectrum of government owned enterprises, including British Telecom, British Rail, Railtrack, British Gas, National Bus, Britoil, British Petroleum, British Airways and the British National Oil Corporation to name a few. The application of privatisation in the UK has taken several forms based upon the objectives that the State sought in moving the enterprise to the private sector.

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17 Gibbon, above n 12.



Upon examination, it becomes obvious why the UK model has been so successful<sup>18</sup>. This model of privatisation forms the basis for a successful transition of ownership and/or management of a state-owned enterprise to the private sector. The UK Model offers some important safeguards which may assist in addressing some of the many concerns associated with correctional privatisation. The main characteristics of the UK Privatisation Model are:

- A wide application of privatisation in virtually all industrial sectors.
- Government and private sector support and commitment to the process.
- The use of privatisation as a tool in the promotion of efficiency in specific market economies through the creation and exposure of markets to previously absent competition.
- The facilitation of widespread public ownership in privatised enterprises, including employee ownership, in an attempt to foster a stakeholder relationship.
- Obtaining the best value both socially and fiscally in privatising a government-owned enterprise through the use of both public and private sector resources.
- A strong focus on the goals and objectives of privatisation through the use of regulatory tools and incentive programs rather than dictating the process of achieving desirable objectives.
- Openness and accountability in the contractual, regulatory and operational framework.
- The assessment of consumer demand and satisfaction.<sup>19</sup>
- The development of new ideas on service provision and quality.<sup>20</sup>
- Defining the desired levels and quality of private sector provisions.<sup>21</sup>
- Planning for and securing adequate financial resources for the privatisation process.<sup>22</sup>

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18 For an in-depth analysis of the UK Privatisation Program see, eg, C Graham, and T Prosser, *Rolling Back The Frontiers?: The Privatisation Of State Enterprises* in DJ Galligan (ed), *A Reader On Administrative Law* (1996) 62-89.

19 Audit Commission for Local Authorities In England And Wales, *Preparing For Compulsory Competition*, Occasional Paper No 7 (1989).

20 Ibid.

21 Ibid.

22 Ibid.

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- Managing the competitive tendering process.<sup>23</sup>
- Monitoring the achievement of set goals against government policy.<sup>24</sup>
- Building momentum and, in turn, ensuring success as a precursor to future privatisation programs through careful planning, administration and regulation throughout the process.

### **Gauging and Regulating the Performance of Privatisation**

Once the organisational structure within the privatisation process has been ascertained (ie full or partial privatisation, a division of the enterprise prior to privatisation, etc), it then becomes necessary for a privatising government organisation to develop methods of gauging and/or regulating the performance of a privatised entity. In the absence of ample competition in a market, or where a monopoly or oligopoly exists, it is important to provide for some method of comparing the performance of privatised enterprises with existing or pre-existing public enterprises. Therefore, prior to privatising a GOE, government agencies should seek to assess both private and public markets including operating costs, profit margins and in particular costs which a private enterprise may incur that the public entity did not (ie shadow costs such as inter-agency administrative support, computer support, taxes, etc.).

### **Federal, State and Local Level Privatisation in Australia and the United States**

Privatisation occurs at all levels of government across Federal, State and Municipal government agencies. At the Federal level of government, the United States has privatised a number of agencies over the past two decades. In the 1980s the case drawing the highest profile was the 1987 privatisation of Conrail which was sold in a public stock offering worth 1.65 Billion Dollars. The 1990's brought an increase in Federal level privatisation in the US. Between the years 1995-1996 Congress approved the sale of Alaska Power Marketing Administration, Naval petroleum reserves, and Bills were introduced to sell Amtrak, Air Traffic Control systems, the United States Postal Service, and the Tennessee Valley Authority. Prisons have been privatised by the three Federal Government departments concerned with correctional facilities, The Federal Bureau of Prisons, Immigration and Naturalisation Service and the US Marshals Service.

Australia has had a great deal of success in privatisation at the Federal Level as well. Both partial and full privatisation have occurred in Australia. Successful examples can be found in the privatisation of the Commonwealth Bank, Qantas and Telstra. In fact, the Telstra float, in 1997, was the largest initial public offering in the world. The most

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23 Ibid.

24 Ibid.

recent candidate being considered for privatisation is the Australian Quarantine and Inspection Service (AQIS).<sup>25</sup>

Both the United States and Australia have experienced success with privatisation at the State level of government. In the US, recent government divestitures have included the trade sale of the Michigan Accident Fund, the Port Authority of New York City and the New Jersey owned Vista Hotel at the World Trade Centre. The shopping centre at the World Trade Centre in New York City is currently under consideration as a candidate for privatisation. If successful, this would generate an increase of \$1.5 million in tax revenue per annum for the state of New York. Many US states have considered the privatisation of airports, water treatment plants, turnpikes, and prison facilities. Thirty-five states in the US have privatised at least one prison, with Texas having the highest degree of privatised prison facilities with forty-three.

The Australian privatisation experience at the state level has had incredible success. The most recent example of state privatisation in Australia can be found in the privatisation of the New South Wales horse racing gambling industry. The New South Wales government is currently in the process of selling off 100% of its interests in the TAB through a public stock offering. In Victoria, there has been widespread privatisation in the utilities and energy sectors which has resulted in a reduction in overall end-user costs. January of 1990 saw the construction of the first privatised prison in Australia which was the Borallon Correctional Centre near Ipswich in Queensland. In March 1992, a privatised remand and reception centre was built at Wacol, called the Arthur Gorrie Correctional Centre (named after a well-known Queensland Rotarian), which has an yearly operating budget of nearly 14 million dollars. In March 1993, the Junee Correctional Facility was built in NSW at a cost of \$45.3 million dollars. The facility was privately built and operated and is Australia's first 'Super Prison' with a full capacity of 600 prisoners.

Privatisation at the local level has occurred in both the United States and Australia. Sales at the local level have included the sale of municipal works such as: garbage collection services, golf courses, power plants, waste water treatment plants, airports, electric and gas utilities, parking facilities, sewer systems and even sporting arenas. In the context of corrections, privatisation has included the management of county jails, juvenile facilities and to a larger extent, community corrections such as halfway-houses, drug treatment centres and probation agencies.

## **Privatisation and Corrections: The Ideological and Political Debate**

Democratic societies face constant dilemmas about how best to respond to [the needs] of the criminal [justice system]...There are people who believe that only government departments can be held responsible for criminal justice programs,

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25 Adele Horin, 'Quarantine Service On Market', *Sydney Morning Herald* (Sydney), 2 November 2000, 2A.

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but there are others who believe that the private sector and community organisations have a role to play in this area.<sup>26</sup>

Privatisation has been viewed as a method of increasing efficiency and decreasing government costs in building, housing and managing prison populations.

Officials of city, county and State governments [in both Australia and the United States] claim that their treasuries are caught in a crunch between limited revenue producing capabilities and increasing demands for public services in many forms.<sup>27</sup>

Prison privatisation occurs at varying degrees and may take many forms. The most common form of correctional privatisation is contracting out or outsourcing through the use of organised tenders. Particular services which may be privatised include: health/dental services,<sup>28</sup> alcohol and drug treatment, correctional facility construction, mental health services, prison operations, laundry services, catering services, education and even some forms of employment. Privatisation may involve the contracting out of prison management to a private corporation, or the fast tracking of prison construction by utilising a private corporation. In some cases, privatisation may include a combination of these forms. However, prior to examining the efficacy of privatising in the context of corrections one must examine whether or not

...the state *can* delegate its power in the criminal justice system generally, and specifically in the rights to imprison and use deadly force. [In western democratic society, especially in the UK, Australia and the United States]... the state developed through the assumption of sole responsibility and control of law-making, policing, adjudication and punishment, that is [what forms the basic principles behind], the rule of law [Emphasis added].<sup>29</sup>

The question then becomes, what exactly *is* the modern 'role of the state', and is it compatible with the delegation of power in privatising correctional facilities?

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26 David Biles (ed), *New Zealand Conference On Private Sector And Community Involvement In The Criminal Justice System (30 November- 2 December 1992, Wellington, New Zealand)*, (1994).

27 Jacqueline Moore, 'Prison Health Care: Problems And Alternatives In The Delivery Of Health Care To The Incarcerated' in David Biles (ed), *Current International Trends In Corrections* (1988).

28 Melody Peterson, 'Managed Health Care In Prisons Gains Favor Despite Complaints', *New York Times* (New York, USA), 26 December 1996.

29 A George, 'The State Tries An Escape' (1989) 14(2) *Legal Services Bulletin* 53.

### **The Role of the State**

The role of the state is a complex matter requiring detailed assessment and careful tailoring country by country which may imply different prescriptions for countries at different stages of development (or in different situations).

The World Bank

Generally, it can be said that the role of the state will differ according to the specific political, ideological and cultural values that predominate in the country at a particular time in its development. Privatisation may not enjoy the same success in every country nor at all periods in its development. The social policy in a nation state must reach a stage of development which affords a certain level of civil and legal protection and force in order to successfully facilitate and sustain the privatisation process. This is especially true in relation to the privatisation of agencies traditionally viewed as State functions, such as those found in the system of Corrections.

When objectively analysed, the current debate over correctional privatisation is extremely complex, with valid arguments from both proponents and opponents of correctional privatisation.

For new developments such as these do not just occur, they depend upon the availability of definite materials- knowledges, ideologies, institutional forms, techniques, etc - as discursive and technical resources, and upon the promulgation and utilisation of these resources by specific social forces.<sup>30</sup>

The modern debate can be divided into two broad ideologies: The Liberal and The Reformists. Ryan refers to the latter group as, The Radicals.<sup>31</sup>

For Jurisprudence the important question is ... the viability of the claims made for law and this in the end rests upon some analysis of the substantial claim which is implicitly made by formal justice rhetoric in legal discourse. The substance of justice is as much, if not more, a question of political philosophy as of jurisprudence. It is ultimately a question of perceptions of the relations of human beings in society.<sup>32</sup>

### **The Liberal Viewpoint**

The Liberal stance on the issue of privatising correctional systems is characterised by arguments focusing on the conceptual and ideological propriety of the State's

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30 Garland, above n 1.

31 Mick Ryan, 'Some Liberal And Radical Responses To Privatising The Penal System In Britain' in David Biles (ed), *New Zealand Conference On Private Sector And Community Involvement In The Criminal Justice System (30 November- 2 December 1992, Wellington, New Zealand)*, (1994).

32 Dr Hilaire McCoubrey and Dr Nigel D White, *Textbook On Jurisprudence* (1993) 243.

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discretionary powers. These powers allow for the punishment of offenders for crimes which are drafted, adjudicated and enforced by society through the use of State power. Many fear that government policy allowing the delegation of coercive State power will ultimately result in a negative product. The Howard League in the UK, represented by Professor Andrew Rutherford, argued before the House of Commons that the role of the state in regard to prisons is

...a public trust to be administered on behalf of the community in the name of justice. To open up the way for the private sector into the administration of prisons would undermine the very existence of the liberal democratic state.<sup>33</sup>

This Liberal stance regarding prisons has existed for hundreds of years. John Howard denounced private sector involvement in the punishment of prisoners as early as the late Eighteenth Century. Ignatieff argues that this early debate, although it rejected the involvement of commerce, resulted in a positive change in the practices of early correctional policy makers in the UK.

In place of a Benthamite conception of authority regulated by market forces, reformers...succeeded in vindicating a bureaucratic formalism that looked to inspection and rules...For opponents of the contract system, punishment was too delicate a social function to be left to private entrepreneurs. For state power to preserve legitimacy, it was essential that it remain untainted by the stain of commerce.<sup>34</sup>

Most liberal arguments centre around a fear of involving the private sector in correctional systems. It is often said that allowing a delegation of such power to those with a personal stake in gaining, or keeping inmates in prison would corrupt the system and aggravate existing problems caused by overcrowding and mandatory sentences. 'It would be in the interests of prison entrepreneurs to support longer sentences and have more people put in prison. That would be a disaster of the highest magnitude as sentencing policy is already excessive in this country.'<sup>35</sup> In short, the Liberal stance is one that views the relationship between the State and society as a social contract. Rousseau argued that any violation of this social contract by the State could result in a breakdown in the entire system's validity and legitimacy. In his view of society

. . . each one of us puts into the community his person and all his powers under the supreme direction of the general will; and as a body, we incorporate every member as an indivisible part of the whole . . . this act of association creates an artificial and corporate body composed of as many members as there are voters

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33 M Ryan and T Ward, 'Privatisation and the Penal System: Britain Misinterprets the American Experience' (1989) 14(1) *Criminal Justice Review* 71.

34 M Ignatieff, *A Just Measure Of Pain* (1978).

35 MP Brian Sedgemore speech quoted in M Ryan and T Ward, 'Privatisation and the Penal System: Britain Misinterprets the American Experience' (1989) 14(1) *Criminal Justice Review* 71.

in the assembly, and by this same act that body acquires its unity, its common ego, its life and its will.<sup>36</sup>

### **The Reformist Viewpoint**

The reformist viewpoint can be characterised by the willingness to at least consider, if not support, the delegation of state power to the private sector. There are a number of valid arguments supporting privatisation made in the name of reform. Logan disputes the notion that privatising the correctional system has any greater effect upon its legitimacy than that of granting of the same powers to public agents. In fact, Logan actually identifies several positive aspects of delegating the power of the state to the private sector. He argues that the rule of law is where punishment is allocated and that correctional systems, whether public or private, merely administer that punishment as agents of the State.

In a system characterised by the rule of law, state agencies and private agencies alike are bound by the law. For actors within either type of agency it is the law, not the civil status of the actor, that determines whether any particular use of force is legitimate. The law may specify that those authorised to use force in particular situations should be licensed or deputised and adequately trained for that purpose, but they need not be state employees.<sup>37</sup>

Because the rule of law applies equally to public and private entities, both hold equal accountability and legitimacy in carrying out corrective functions. Private prisons in both Australia and the United States are required to become certified by their respective national Corrections associations. Public prisons are rarely required to gain certification.<sup>38</sup> Private correctional institutions are more often than not held to higher standards than their government counterparts. Current research also unveils another salient fact. To date, '...no state is under court orders to rectify poor conditions caused by private operations, while the majority of American states are under such orders as the result of governmental failures'.<sup>39</sup>

Constitutional rights in the United States also form another safeguard for prisoners as the Constitutional standards of imprisonment and the personal rights of inmates apply equally whether prisons are run by contractual agents of the state or the private sector.<sup>40</sup> It has also been argued that private prisons offer a real possibility of improving the reformatory function of imprisonment through the use of superior rehabilitative

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36 JJ Rousseau, *The Social Contract: Translated By M Cranston* (first published 1743, 1968).

37 Charles Logan, *Privatizing Prisons: The Moral Case* (1987).

38 With the exception of prisons operating under the Federal Bureau of Prisons in the United States and prisons operating in the state of Florida per Logan, above n 37.

39 DiIulio, above n 10.

40 Charles W Thomas, 'Prisoners' Rights and Correctional Privatization: A Legal and Ethical Analysis' (1991) 10 *Business and Professional Ethics Journal* 3.

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programs and the ability to implement modern correctional practices where public agencies have failed to do so.

Stetson and Cowell further argue that the power of the State is already dispersed in the Anglo-American criminal justice system.

There is no single engine room of power, whether in refined conceptions of the ruling class, patriarchy and so on. Rather, power is dispensed, it exists in the capillaries, the nooks and crannies across the whole terrain of society. Instead of a monolith of power, or coherent structure of oppression, we may equally envisage increasing diversification and pluralism of power.<sup>41</sup>

### **The Jurisprudence of Privatising Correctional Facilities**

When considering the validity of delegating the coercive power of the state to the private sector one must begin by asking,

Whether a means of avoiding a potentially damaging application of a given system will simply create new problems, including those of uncertainty . . .<sup>42</sup>

The watershed literature in modern Jurisprudential discourse, relating to the responsibilities of the state and the theory of justice, have been written by John Rawls<sup>43</sup> and Robert Nozick.<sup>44</sup> The differing viewpoints held by each author are representative of the high degree of conflict and divergence in the ideological dichotomy which exists within political debate. Similar beliefs concerning the role of the state have been espoused by social policy makers in democratic nation states including the UK, USA and Australia over the last two decades. The jurisprudential debate surrounding the role of the state and its lawmakers merits examination, as it relates to the political climate which has given birth to the privatisation movement. Both Rawls and Nozick approach the role of the state using social contract theory, however, the intention of both theories differs markedly.

Rawls' *Theory Of Justice* is based upon a definition of *Justice As Fairness*<sup>45</sup> and as such he approaches the notion of an ideally 'just' law-making body as inherently objective, independent from personal advantage and for the common good. It is his belief that in order for justice to prevail, the makers of law, which he calls the original actors, must be placed behind a 'veil of ignorance' absent of individualistic knowledge, particularly as to the effect of law upon their own self-interests. In order to attain justice, the law must

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41 K Stenson and D Cowell, *The Politics Of Crime Control* (1991) 14.

42 Gibbon, above n 12, 233. Although the author is discussing judicial discretion, the question is relevant when ascertaining the validity of an alteration of long standing government policy which can be viewed as synonymous social law.

43 John Rawls, *A Theory Of Justice* (1973).

44 Robert Nozick, *Anarchy, State And Utopia* (1974).

45 John Rawls, 'Justice As Fairness' (1958) 67 *Philosophy Review* 164.



be developed within the framework of '...a fair procedure so that any principles agreed to will be just...[and] the effects of [temptation from] special contingencies [must be nullified.]...' This is meant to ensure that '...social and natural circumstances' will not be used to 'their advantage ... [leaving lawmakers] obliged to evaluate principles solely on the basis of general considerations'.<sup>46</sup> Rawls asserts in his theory that the consequences of such a process would result in justice such that '...a person [drafting the law] would choose for the design of a society in which his enemy is to assign him his place'.<sup>47</sup> Rawls focuses upon the importance of the common social good in attaining justice in society as a precursor to attaining a 'full theoretical goodness' in society. In particular, he stresses two principles of justice which would require necessary adherence in his utopian theory of justice.

The first is that each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. The second is that social and economic inequalities are to be arranged so that they are both to the greatest benefit to the least advantaged [and] attached to offices and positions open to all under conditions of fair equality of opportunity.<sup>48</sup>

According to Rawls, a loss of rights should only take place when it is consistent with the best interests of the least advantaged. It is Rawls' belief that when this advantage is shifted in such a way as to place the offender at a disadvantage to society, punishment must cease.

Put crudely, one of the achievements of Rawl's theory was to show how an impartialist, procedural account of justice could incorporate a concern for consequences. To a degree this has meant that the traditional way of presenting moral and political theory as a debate between consequentialism and deontology has been replaced by a series of debates between liberalism and various critics: communitarians; post-modernists; feminists; environmentalists; civil rights groups; etc.<sup>49</sup>

The alternative to Rawls' theory of justice can be found in Robert Nozick's *Anarchy, State and Utopia* where Nozick views the role of the state as a 'dominant protective association'<sup>50</sup> which exists between the state and its clients. In Nozick's theory, the 'minimal state' must hold 'an appropriate monopoly of force in the territory [which provides for the] protection of everyone in the territory rather than a limited client base...[the price of which is to be borne by all clients of the state]'.<sup>51</sup> Nozick's theory supports the state's monopoly of criminal justice and he views this monopoly as an

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46 Privatization.org above n 13, 36-37.

47 Ibid.

48 Dr Hilaire McCoubrey and Dr Nigel D White, *Textbook On Jurisprudence* (1993) 237.

49 Matt Matravers (ed), *Punishment and Political Theory* (1999) 3.

50 Robert Nozick, *Anarchy, State And Utopia*' (1974), 15-17 in Matt Matravers (ed), *Punishment and Political Theory* (1999).

51 Ibid.

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intrinsic responsibility of the state in order to carry out its protective functions. Nozick theory puts forth a moral argument for the state's power to punish:

One might ... derive the right to punish from other moral considerations: from the right to protect, combined with the view that a moral wrong-doer's moral boundaries change. One might take a contract-like view of moral prohibitions and hold that those who themselves violate another's boundaries forfeit the right to have certain of their own boundaries respected. On this view, one is not morally prohibited from doing certain sorts of things to others who have violated certain prohibitions. Certain wrong-doing gives others a liberty to cross certain boundaries; the details might be those of some retributive view.<sup>52</sup>

One may ask if the same moral argument holds true when considering a system where the state retains the power to dictate and adjudicate on the boundaries of acceptable social behaviour, but where the administration of punishment involves the private sector. 'Unlike the 'moral entrepreneur,' who may be motivated by deep convictions, the 'social-control entrepreneurs' operate essentially in terms of direct, economic self-interest.'<sup>53</sup>

## The History of Privatisation in Corrections

The history of private sector involvement in corrections is unbelievably bleak, a well documented tale of inmate abuse and political corruption. In many instances, private contractors worked inmates to death, beat or killed them for minor rule infractions, and/ or failed to provide inmates with the quality and quantity of life's necessities (food, clothing, shelter etc) specified in their often meticulously drafted contracts.<sup>54</sup>

Historically, there has been some degree of documented involvement by the private sector in prison systems as far back as the middle ages.<sup>55</sup> In Australia and the United States, there has been involvement by the private sector as early as the late Eighteenth Century. This involvement continued until the late nineteenth century in Australia and the early Twentieth Century in the United States.<sup>56</sup> In Australia, there existed a system of private sector involvement in granting 'tickets of leave' for prisoners, and in the United States there was the infamous 'prisoner lease system.' However, these forms of private sector involvement cannot be classified as true privatisation. They were instead, legal forms of prisoner slavery and have long been abolished. In the case of the United States, legislation was enacted in the late 19<sup>th</sup> Century prohibiting the private ownership

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52 Robert Nozick, *Anarchy, State And Utopia* (1974) 137-138.

53 Joseph E Scott and Travis Hirschi, *Controversial Issues In Crime And Justice* (1988) 162.

54 JJ DiIulio, 'Private Prisons' (1988), *Institute Of Justice Crime File*, US Department Of Justice.

55 S Borna, 'Free Enterprise Goes To Prison' (1986) 26(4) *British Journal Of Criminology* 326.

56 S Vallance, 'Private Prison Management: Panacea or Pretence' (1991) 50 *Australian Journal Of Public Administration* 197.

of prisons due to the gross corruption which existed in such institutions, and the horrific mistreatment of inmates under such systems.

### **The Impetus for the Modern Prison Privatisation Movement in Australia**

The modern prison privatisation movement began in the early 1980's. The emergence of private prisons in Australia and the United States occurred for several different reasons. The impetus for prison privatisation in Australia is largely related to the need for modern correctional facilities to replace the deteriorating facilities in existence.

[Australian] society has always seen the allocation of public funds towards prisons as a low budget priority, resulting in a variety of problems ranging from overcrowding, poor conditions, lack of services and riots, to staff discontent, and industrial action.<sup>57</sup>

Many prisons operating in Australia during the early 1980's had been constructed during the mid to late 1800's, making them over a century old. The conditions that both male and female prisoners were living under were in some cases inhumane. For example, buckets were still being utilised as toilets in prison cells in some of the oldest prisons such as the Beechworth Prison in Victoria and the Yatala prison in Adelaide. These antiquated prisons were also very expensive to manage and operate. Modern offender management principles were in some cases impossible to implement simply due to the design of the prisons. In many cases, the only remedy was to hire additional staff to make up for the inadequacies of the facility.

The late 1970's and early 1980's saw a major increase in the prison population of Australia. Many cells designed to house one prisoner were holding two and sometimes three prisoners. As a result, innovative early release programs and community correctional measures were implemented to temporarily relieve overcrowding. The governments of Victoria, New South Wales, Queensland, South Australia and the Northern Territory all embarked upon a comprehensive building program to replace these older prisons and to implement modern programs in prison management. The aforementioned problems resulted in the establishment of several Royal Commissions and enquiries by both state and federal governments to examine the state of existing corrective services and plan for their improvement.

The impetus for prison privatisation in Queensland, Australia was the result of the 'Royal Commission of Review into Corrective Services in Queensland' carried out by Jim Kennedy.<sup>58</sup> The Kennedy Report, as it is now known, was released in August, 1988. The report was a comprehensive review of Queensland's correctional facilities which involved

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57 Brian Dickson, 'The Challenge Of Change' in David Biles (ed), *New Zealand Conference On Private Sector And Community Involvement In The Criminal Justice System (30 November-2 December 1992, Wellington, New Zealand)*, (1994).

58 J Kennedy, *Commission Of Review Into Corrective Services In Queensland*, Kennedy Report (31 August 1988), State Government Printer, Brisbane.

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the establishment of a statutory authority to monitor corrective services. The authority established was the Queensland Corrective Services Commission (QCSC). A new legislative arrangement for the operation of corrective services in Queensland was put into place called *The Corrective Services Act 1988 (Qld)*. The Act embodies the power to establish and operate prisons as well as the various forms of community correctional centres relating to convicted persons in Queensland. The Kennedy Report contained many recommendations for the reformation of Queensland's corrective services. However, the most innovative recommendation made by Mr Kennedy was a suggestion that Queensland should involve the private sector in its corrective services program.

The early debate in Australia ... was necessarily based upon forecast, theory, opinion and conjecture simply because there was no Australian precedent and consequently, no gauge for an accurate prediction for success or failure of a privatisation experiment. There was certainly the American experience available, from which to draw partisan and selective conclusions, but nevertheless, the impact of privately contracted correctional services upon the Australian ethos, industrial relations, community perceptions and the inmate population itself, was entirely unpredictable.<sup>59</sup>

A good example of this unpredictability can be found in an examination Kennedy's comments. As illustrated in his comment below, Mr Kennedy initially came very close to deserting the notion of private sector involvement in corrections.

In summary, the option for Private Sector involvement should be rejected for several reasons. First, the market for Correctional Services is not developed. Moreover, I also share the reservations about the ethics of the State relinquishing its supervision over sentenced offenders and committing them to the control of Companies.<sup>60</sup>

However, as his review progressed, Kennedy grew to view the involvement of the private sector as an opportunity to improve the correctional system in Queensland. His initial support of privatisation was economically charged.

The opportunity to do this may not arise again. If Borallon is opened and staffed by the QCSC considerable resistance may arise in any attempt to subsequently privatise it. It is too good an opportunity to miss.<sup>61</sup>

Several years after the report was issued, Kennedy's views had evolved and he came to view private sector involvement as a method of improving the rehabilitative function of corrections.

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59 Ibid, 26.

60 J Kennedy, Commission Of Review Into Corrective Services In Queensland, *Interim Report* (1988), State Government Printer, Brisbane.

61 J Kennedy, Commission Of Review Into Corrective Services In Queensland, *Final Report* (1988), State Government Printer, Brisbane.

At the moment you have a private prison running and I'm sure, successfully running within its budgets. It'll probably be cheaper, but that isn't the essential element of it. It also has the capacity to escape from the past and to become genuinely, a prison in which the main purpose of looking after the people is to correct their behaviour and to send them out with skills they didn't have when they came in, and hopefully send them out as better people.<sup>62</sup>

A contract was signed with Corrections Corporation of Australia (CCA) in September 1989 for the management and operation of the Borallon Correctional Centre. January 1990 saw the management and operation of the first privatised prison in Australia in Ipswich, Queensland. The project has been an incredible success with an average savings of fifteen to twenty percent per annum. There are currently fourteen privatised prisons in Australia located in Queensland, New South Wales, South Australia, Victoria and Western Australia. Victoria has been the most aggressive state of them all, with the highest percentage of privately housed inmates in the world. Nearly fifty percent of Victoria's inmates are housed in privatised prisons.

### **The Impetus for the Modern Prison Privatisation Movement in the United States**

The impetus for prison privatisation in the United States is directly related to the critical levels of overcrowding that prisons reached in the early 1980's. The strengthening of federal law under the Reagan administration included mandatory sentencing provisions for drug offenders, and this zero tolerance policy can be directly linked to the prison overcrowding problem. The increase in the US inmate population has also been connected with the increase of the gross population within the most active offender demographic. This can be accorded to the 'Baby Boomer' population that was the result of the postwar increase in the overall US birth rate. In response to that increase, the prison population experienced a 134% increase in less than a decade. The inmate population reached 800,000 inmates by 1983 and by 1995 the population had reached 1 million. There are currently just over 1.7 million inmates housed in US prisons with a projected increase to 2.26 million inmates by 2005.<sup>63</sup>

The first private prison was built in 1984 under contract with Hamilton County in Tennessee by the Corrections Corporation of America, the largest multinational prison corporation worldwide.<sup>64</sup> There are currently 158 private prisons operating in 35 states, The District of Columbia and Puerto Rico. Although at first glance, this may seem to be

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62 J Kennedy, in a speech presented to The Corrections Corporation of Australia's management group (1991) in Brain Dickson, *The Challenge Of Change* in David Biles (ed), *New Zealand Conference On Private Sector And Community Involvement In The Criminal Justice System (30 November- 2 December 1992, Wellington, New Zealand)*, (1994).

63 National Centre for Policy Analysis, *Prisons Are A Growing Business*, <<http://www.ncpa.org/pi/crime/cr11297b.html>>.

64 Charles Logan, *Private Prisons: Cons & Pros* (1990) 23.

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an incredibly high degree of involvement by the private sector, it is not. In fact, private prisons house less than three percent of the US inmate population.<sup>65</sup> However, the twenty-five percent rate of growth per annum in the private prison industry in the United States is a clear indication that private prisons are increasingly being utilised by the state.

The Private Prison industry has developed to the point where private corporations have built prisons in several states on speculation, prior to gaining a government contract. With the inmate population growing at a rate of 8% per year, experts estimate that two new 1,000 bed facilities must be built each week just to keep up with the demand.<sup>66</sup>

### **The Privatisation of Prisons: Positive and Negative Aspects**

As can be expected with most public policies, there exists a lot of rhetoric surrounding the debate over privatising prisons. Existing research and current trends in government policy would seem to support the proposition that privatising prisons is an efficient and positive option. However, there have been some problems in Australia in assessing the performance of privatised prisons. Government auditors generally inspect prisons only once per week and most of their time is spent on administrative duties. There has been a lot of debate concerning the transparency of prison facilities and the methods used in assessing both public and private prisons. Many of the problems related to transparency have been solved by Freedom of Information Legislation in Australia which allows certain information to come under public scrutiny.

However, there are still problems in assessing the savings that have resulted from the privatisation of prisons in Australia and the United States. One of the main problems is that when public prisons issue financial reports, they often do not include the costs of many State services that they receive at no additional cost such as administrative, accounting and computer support. Privately run institutions include all of the costs that are incurred in their financial reports and still outperform their public counterparts. Even when full financial reports are available for comparison, it is nearly impossible to find public and private prisons that are similar in size, capacity and location. This can make it very difficult to conduct a true, 'apples to apples' comparison.

There are a number of commonly raised aspects, both positive and negative, in privatising the prison industry.

#### **Positive Aspects of Correctional Privatisation**

- Privatisation can allow badly needed new inmate housing to be brought online much faster.

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65 Gail DeGeorge and Julia Flynn, 'Go Directly To Jail' (United States), *Business Week Magazine*, 15 December 1997.

66 Robin M Grugal, 'Prison Operator Thrives In Crime Crackdown' (United States), *Investor's Business Daily*, 4 March 1996.

- Research has shown a 15%-25% reduction in both construction and operating costs in private prisons.
- There is evidence that the quality of services and programs offered by privatised facilities are superior to those of public facilities. This is related to the often superior design that private corporations choose when building new facilities as well as the innovative programs implemented in private prisons.
- Legal liability costs associated with operating jails and prisons can be substantially reduced by privatisation.
- Changes in the nature and scope of various prisoner programs can be made quickly and easily in a privatised setting allowing for a greater degree of flexibility.
- The existence of privatised correctional facilities in a jurisdiction promotes improvements and competition in the public facilities of that jurisdiction.
- Public prisons have to deal with a high degree of bureaucracy in the procurement of goods and services by issuing tenders and reviewing bids. This process can be time consuming and expensive. Private prisons can more easily enter into contracts for goods and services or provide them in-house. There is less waste as private prisons have a stake in keeping their costs down in order to retain profits.
- Privately run prisons in Australia and the United States must conform to regulations requiring minimum standards that are superior to those of public prisons.
- Market forces act to reinforce best practices in private prisons as they seek to build a good reputation and attain additional government contracts.

### **Negative Aspects of Correctional Privatisation**

- Some believe that privatising prisons is not appropriate for philosophical and conceptual reasons (ie, they believe that corrections should remain a function of the State). The state drafts, implements, enforces and administers the law. Many hold the belief that there is a danger in privatising the punishment of offenders and delegating coercive power to the private sector.
- Privatisation lacks effective competition in 'follow-on' contracts.
- The quality of correctional services may be reduced in an effort to maximise profits.
- Opponents of correctional privatisation have claimed that the process reduces the professionalism and morale of staff. These claims have been based upon an

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assumption that staff are underpaid and receive little or no employee benefits in privately run prisons.

- The increased availability of inmate housing may promote the use of stronger sentencing guidelines and weaken the use of alternatives to incarceration.
- Privatising a prison reduces the ability to coordinate with other public agencies.
- Privatising a prison may jeopardise the safety of the public and the inmates in the case of an emergency such as a riot, escape or strike. Government run institutions are able to more effectively coordinate safety measures for such occurrences with other government agencies.
- Privatising prisons may encourage the government to neglect its ultimate responsibility for prison systems.
- Privatisation of prison systems creates new opportunities for corruption such as bribes, kickbacks, political promises and other conflicts of interest.
- The allocation of coercive power such as inmate punishment may result in an abuse of such powers. Three areas of concern have been identified: prison discipline, parole decision processes and the classification of prisoners upon their entry into the correctional system.

On the whole, it is probably an error to entrust private prison operators with a task which drives the subsequent experiences of prisoners within the system; the public prison authorities thereby tend to lose clear control not just of a particular inmate in relation to a particular prison but also of the engine-room of the whole system.<sup>67</sup>

### **The Retention of Power and Prerogative of Control by the State in Privatised Prisons**

There are several methods of regulating privatised industries where there is little competition or market force to provide a yardstick from which to measure the quality and quantity of performance of a particular privatised agency. The methods used by Australia and the United States in regulating private sector involvement in corrections have involved the use of legislation, auditing bodies, contractual regulation and incentive programs.

By far, the most common method of assuring accountability is through the use of contractual agreements. Correctional contracts between public and private entities

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67 Richard W Harding, 'Privatising Prisons: Principle And Practice' in David Biles (ed), *New Zealand Conference On Private Sector And Community Involvement In The Criminal Justice System (30 November- 2 December 1992, Wellington, New Zealand)*, (1994).



generally include: the minimum standards and provisions under which inmates will be housed, a method of monitoring the performance of the private institution including the frequency and extent of monitoring, the format to be used in reporting specific data to the monitoring agency, the official records and information that will be made available for inspection, the penalties for a breach of particular contractual agreements, means for terminating the contract and the powers which the State will have in intervening with the management and/ or operation of the institution.

### **Australia**

Each state or territory in Australia has the power to enact statutory legislation governing the guidelines that exist within contract agreements with private correctional institutions. In fact, Queensland, New South Wales and Victoria have all adopted different approaches to legislating and contracting with private sector prison corporations. In Queensland, according to s18(2)(a) and (b) of the *Corrective Services Act*, the person authorising the General Manager of a private prison to have powers under the Act may veto that power. In other words, the Corrections Commission may effectively circumvent the authority of the General Manager by introducing its own rules for the management of a correctional facility.

In New South Wales contractual agreements are made with private corporations for the management of prisons. The power to authorise persons to perform duties in the facility is given to the Director General. The power to revoke authority once it has been issued is very broad. This allows the state to retain control of correctional operations and management. The Director-General may authorise or revoke any order given to prison staff managed by a private corporation under a contractual agreement with the state.

Victoria, the state with the highest percentage of inmates held in private prisons, has taken an entirely different approach to private sector involvement. The state has signed twenty year contracts for three new prisons which will result in a large increase in the already high percentage of prisoners (sixty -five percent of female prisoners and forty percent of the male inmate population<sup>68</sup>) held in private facilities. Additionally, Victoria has separated the activities of correctional policy making from service delivery. It has also established a separate Corrections Department, responsible for purchasing correctional services, drafting policy, monitoring both private and public corrections agencies and evaluating the quality of correctional institutions. A separate Correctional Services Agency also exists. It is charged with providing for public correctional services within the public correctional facilities in Victoria. Through the use of a competitive tendering process, both state and private sector agencies compete for the provision of correctional services which are sought by the Corrections Department on behalf of the State.

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68 Privatization.com, '*Corrections: Trends In Privatization*', <<http://www.privatization.org/Collection/SpecificServiceAreas/Corrections-local.html>>.

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Victoria has used innovative methods of contracting with private sector corporations for the provision of correctional services. The state issues payment to private corporations based upon specific performance measures which are included in state contracts with private prison companies. Furthermore, the state divides these payments into three separate task specific streams, two of which are guaranteed and a third which is dependent upon the quality of the private facilities' performance.

The private operators receive three revenue streams from the government. An accommodation-service fee pays for housing the prisoners; this essentially offsets the private debt incurred in constructing the facility. A correction-service fee covers specific services, such as correctional officers, health care, food, education and rehabilitation programs. A performance-linked fee aligns the company's long-term interests with the government's goal of quality services. The fee is tied to a set of performance indicators, including escapes, deaths in custody, assaults on inmates, and assaults on staff. As long as the company meets standards in these areas, based on averages from public prisons, it receives the full fee.<sup>69</sup>

In addition to legislative and contractual measures of regulation, every state in Australia has set up an auditor that reviews both public and privatised prisons on a regular basis to verify that they are in compliance with minimum standards. It has been suggested that a government official in the form of either an ombudsman or auditor be stationed at all privatised prisons on a 24-hour basis in order to promote maximum productivity.<sup>70</sup> Discrepancies with the auditing process have been identified by several researchers. The auditing agency is all too often the very same agency that recommended the appointment of the private company as a service provider. There is a definitive conflict of interest in having such an agency acting as a monitor.

To the extent that the corrections agency has promoted the concept of privatisation and/or was involved in the selection process for the awarding of the contract, it will be seen to be at least partly responsible if serious breaches of contract or other improprieties are revealed by the monitoring process.<sup>71</sup>

Furthermore, public agencies tend to focus on the means of operations rather than the end results. This could result in a skewed view of a private prison's performance and a false impression about how the prison is performing its contractual duties.

### **United States**

In the United States each state has the power to enact statutory legislation in relation to privatising prisons. The legislative body of each state enjoys the power to prohibit its own Executive Branch Agencies, such as the Department of Corrections, from housing

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69 Ibid.

70 Paul Moyle, 'Privatising Prisons And Criminal Justice: A Need To Focus On The Underlying Issues' (1992) 17(3) *Alternative Law Journal* 114.

71 Brown, above n 3.

its prisoners in a privatised prison. The Federal Bureau of Prisons arguably has the power to erect a Federal prison in any state whether it is a private or public facility. Several states have resisted attempts by the Federal Bureau of Prisons to build private prisons within their borders. To date, there has been no case law precedent, but it would seem that the Supremacy Clause in the US Constitution would favour the Federal Bureau of Prisons. Currently, there are currently 28 States that have expressly authorised contracts for private prisons, and 10 states that have legislation broad enough to provide for contracts with private prison corporations. Two states, New York and Illinois, have statutes expressly prohibiting contractual agreements for the privatisation of prison industries.

Private prisons in the US are required to undergo government certification on a yearly basis. There are auditing offices in each state and prison ombudsman available to prisoners which treat private and public prisons as legal equivalents. Constitutional standards also form an indirect regulatory function in setting minimum standards for the treatment of prisoners and the quality of the facilities that they are housed in.

## **Conclusion**

In acceptance of the unfortunate fact that we necessarily have prisons in society, and that it is not envisaged that prisons will be abolished in the foreseeable future, conditions for prisoners and prison officers should be improved to the highest standards possible. The potential that may be found in privatising correctional systems is threefold being of benefit to the public sector, private sector and to the inmate. Private sector corporations have the ability to provide efficient, standard conscious correctional facilities that are of a better quality than their public counterparts. The potential economic and social benefits that can be enjoyed in privatising prisons, coupled with the problems of overcrowding and aging facilities, all point towards the inevitability of increased prison privatisation in the Twenty-First Century. I believe that the evidence clearly supports the proposition that the private sector can provide a benefit to the State, its citizens and its inmates if their involvement in the correctional system is properly planned for and regulated. Private corporations have the potential to provide superior services at a lower cost to taxpayers through the process of privatisation. This can be achieved through a more streamlined process while maintaining the legitimacy of the State. However, the delegation of State penal power to the private sector should be conducted with great caution. Contractual agreements and government policies relating to prison privatisation should follow the lead of Victoria in aligning the profit of private sector corporations with their satisfactory performance. Normative principles should be established as to the use and limits of delegated State powers. The State should seek to include safeguards such as those imposed in New South Wales and Queensland that allow State intervention and ultimate control. The privatisation process should remain transparent and flexible and should be regularly monitored by agencies independent of the process.

One of the hallmarks of private prisons has been the success in implementing innovative education and modern rehabilitation programs. Improvements in education and

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vocational training have directly corresponded to lower recidivism rates in public institutions. In keeping with the rehabilitative and 'corrective' function of the Correctional System, private institutions may be better equipped to attain such objectives. In one US prison which has been partially privatised, and which also runs a prison garment industry called 'Prison Blues,' the recidivism rate of those inmates who participated in the program was only 6.6% as opposed to the 22% rate that existed for inmates that did not participate.

In both Australia and the United States surveys taken in prison systems indicate an inmate preference to be housed in privatised institutions.<sup>72</sup> Improvements in management and design in private institutions, such as the use of unit management<sup>73</sup> instead of antiquated tier systems of management, have been shown to lower the risk of prison riots and injuries to both inmates and staff. Unit management has also been linked to higher morale among corrections officers and an increase in inmate/officer relations. A number of benefits in adopting the unit management method of correctional management have been identified including: a sense of group identity, increased frequency of officer/inmate contact, early detection of problems within the unit and lower staff/inmate ratios. Unit management often allows for the building of stronger inmate/officer relationships and thus the propensity for the 'corrective' function of incarceration to operate more successfully.

Evidence is emerging which supports the positive impact of private sector competition upon public correctional systems. In effect, it raises the lowest common denominator of correctional facilities and improves the entire system. Competition in the correctional market may also provide some basis upon which to measure the performance of prisons on the whole. '[A]s with any service, the best test, and the best guarantee, of quality is competition and comparison.'<sup>74</sup> In privatising prisons, government organisations should attempt to foster a 'genuine cross-fertilisation [between public and private institutions]... so as to improve the whole system'.<sup>75</sup>

The ideological debate from both proponents and opponents of prison privatisation have impeded the ability of policy makers to address more fundamental issues. Policy makers should focus their debates on issues such as the rehabilitative function of correctional

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72 Pollock-Byrne, above n 7.

73 Unit management refers to a system of inmate management based upon the cottage system. Inmates are classified and housed together in small units where a small number of inmates (50-120) are permanently assigned together within a separate housing unit. A multidisciplinary staff consisting of a unit manager, case manager(s), correctional counselor(s), full or part-time psychologist, and clerk-typist are located adjacent to the inmate housing unit and permanently assigned to manage the inmates of that particular unit.

74 Logan, *Prison Privatization: Objections and Refutations*, above n 11.

75 Richard W Harding, 'Privatising Prisons: Principle And Practice' in David Biles (ed), *New Zealand Conference On Private Sector And Community Involvement In The Criminal Justice System (30 November- 2 December 1992, Wellington, New Zealand)*, (1994).

institutions in order to strike at the base of crime in reducing recidivism rates. 'The issue of who provides the service should be addressed only after a clear definition of the objectives for incarceration have been clearly defined in terms of a continuum of care.'<sup>76</sup> As Paul Moyle has noted,

A clear policy justification for privatising prisons needs to be established before the next wave of privatisation occurs. This should proceed on the notion of maximum availability of information about the objectives, methods, standards and operation of private correctional facilities. The challenge for policy makers today is to establish the foundation and parameters for sensible penal reform along carefully justified and monitored channels.<sup>77</sup>

In order to effectuate responsible and productive correctional policies, including privatisation policies, government organisations must view the problem in the broad and inclusive context of all aspects of society, including the entirety of issues in their debate.

In the Twenty-First Century the need for corrective services of all types is unlikely to diminish. This is especially true if the trends evident within the criminal justice system of the last several decades continue. The criminal justice system, and particularly the Correctional system, has proven unable to shoulder the burden of the unprecedented influx of offenders in the system. The opportunity to form partnerships, through the use of contractual agreements and strategic alliances, between public and private correctional care providers may provide some answers. Australia is in a position to proactively address the question of correctional privatisation before the system reaches the level of desperation that has been reached in the United States in reference to the particular problem of overcrowding. The United States has already made significant inroads in the realm of prison privatisation, although the debate is far from complete. The economic success or failure, in terms of savings in government expenditure, that privatisation produces over the next decade will be indicative of its progression. The political forces that shape correctional policy have been narrowly focused on this end result.

Only recently have academics in the various disciplines attempted to analyse the underlying issues raised by the privatisation of correctional systems. Perhaps this can be attributed to the previous lack of sufficient data and field research. Perhaps the entire notion of privatising prison systems was simply viewed as too radical of an idea or simply viewed as unworthy of analysis. Those views are beginning to change. The prison industry is experiencing exponential growth and as a result is attracting greater interdisciplinary attention.

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76 Stephen Carter, 'Will Privatisation Impact Forecasting For Correctional Services?' in David Biles (ed), *New Zealand Conference On Private Sector And Community Involvement In The Criminal Justice System (30 November- 2 December 1992, Wellington, New Zealand)*, (1994) 120-126.

77 Paul Moyle, 'Privatisation of Prisons In Australia: Lessons From Queensland' (1993) 32 *The Howard Journal Of Criminal Justice* 231.

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In dismissing the notion of prison privatisation altogether on the basis of partisan views or prior to any meaningful analysis is to be 'analytically myopic and politically naïve'.<sup>78</sup> In the words of the father of Criminology, Jeremy Bentham, 'This much is certain...the system that is never to be censored will never be improved. That is nothing found fault with, nothing will ever be mended'.

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78 Robert J Lilly and Mathieu Deflem, 'Profit and Penalty: An Analysis of the Corrections-Commercial Complex (1996) 42 *Crime And Delinquency* 2.