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Privatisation of Prisons

by

Lenny Roth

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Lenny Roth

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EXECUTIVE SUMMARY

Prison Privatisation in Australia and Overseas (p 4-24)

The modern prison privatisation phenomenon emerged in the United States in the mid 1980s and quickly spread to Australia and the United Kingdom. In the United States, there are now over 100 private prisons in 31 states and the federal system, in the UK there are 11 private prisons, and in Australia there are seven. Queensland and Victoria each have two private prisons and NSW, South Australia and Western Australia each have one. Australia has the highest proportion of inmates in private prisons of any nation, at around 17 percent. The UK has almost 10 percent of its prisoners in private prisons. The United States has by far the highest number of prisoners in privately run facilities but this represents only about 7 percent of its total inmate population. New Zealand has one privately run prison but the current government has recently legislated against this policy. Private prisons have recently opened in South Africa and Canada.

New South Wales (p 25-34)

New South Wales was the second state in Australia, after Queensland, to introduce private prisons. The Greiner government engaged the private sector to design, build and operate the Junee Correctional Centre, which opened in 1993. The government believed that the private sector could offer more efficient and innovative prison management as well as providing a benchmark for the public sector. Junee remains the only privately run prison in NSW. The Carr Government awarded the private operator a new contract in 2001. There was speculation that two new correctional centres in NSW, which opened in July 2004, might be privatised. However, following negotiations with unions, the government approved the public operation of those prisons. The government said that a decision on the operation of third new centre at Wellington, which is due to open in 2006, would depend on successful implementation of a new workplace agreement.

The Debate (p 35-60)

There are three main arguments for private operation of prisons. Firstly, that the private sector will deliver cheaper and better prisons. This is because it is subject to the rigours of competition, it is free from bureaucracy, and it is more innovative. Secondly, private prisons will set new benchmarks for the public sector and act as a catalyst for reform of the entire prison system. Thirdly, privatisation will strengthen accountability through competition, establishment of objective performance standards and also because the state should be able to monitor a private operator better than it can monitor itself.

Critics question whether there will be real competition, whether private operators can save money without reducing standards, whether there are opportunities for innovations, and whether private companies will be able to deal with the highly complex task of prison administration. More fundamentally, critics argue that imprisonment is an essential state function that should not be delegated and, separately, that it is morally wrong to allow profits to be made from the infliction of punishment. They also contend that privatisation will weaken accountability. Furthermore, they argue that the profit

motive will conflict with prisoner welfare as private operators have an incentive to cut costs at the expense of standards and an incentive to make decisions that increase the length of an inmate's stay. Critics also fear that private corporations will form a powerful lobby for high-imprisonment policies.

Accountability (p 61-66)

According to Harding there are a number of key elements of accountability which the state must require of private contractors and which citizens must require of the state. Some of these are: maintaining a distinction between the *allocation* and *administration* of punishment, ensuring that the activities of the private sector and their relations with government are open and accessible, clearly specifying what is expected of the private sector, ensuring that the agreed services are supplied and that this is done to the contracted quality, retaining an appropriate degree of control over the appointment of staff, and retaining a right to reclaim private prisons if necessary. Harding also discusses the need to avoid "regulatory capture", whereby regulators become more concerned or aligned with the interests of the regulatees than the public interest.

Evaluations (p 67-93)

Research on the performance of private prisons in Australia is very limited. One study of prisons in Australia found that in the period 1990-99, public and private prisons had similar rates of death from all causes and from suicide specifically. In NSW, there has been no comprehensive study comparing the performance of Junee prison with public prisons in this state or assessing whether privatisation has impacted on the prison system. However, a four-year review of Junee by the NSW Department of Corrective Services and a number of reports from various statutory monitors give some insight into the private operator's performance.

An empirical study of one private prison in Queensland concluded that the private sector failed to deliver on the promises of both internal and external reform. This was explained on the basis that properly regulatory structures had not been put in place. In Victoria, an independent investigation into private prisons found that the introduction of the private sector had mixed results and made recommendations to promote greater cohesiveness across the system. The Metropolitan Women's prison in Victoria is the only private prison in Australia to have been reclaimed by the state due to deficiencies.

More empirical studies have been carried out in the UK and the US. A 2003 report by the UK National Audit Office concluded that private prisons in the UK had both encouraging and disappointing results. In the US, a 1998 report commissioned by the National Institute of Corrections, and a 2001 report by the Bureau of Justice Assistance (BJS), reviewed a number of studies and suggested that there was no definitive research evidence to support the conclusion that privately operated facilities were significantly cheaper or better in quality. The BJS report also published the results of survey of state prison privatisation, which came to a similar view. Private prison supporters have cited other recent studies suggesting otherwise.

1. INTRODUCTION

“Prison privatisation [was] the most significant development in penal policy in the second half of the 20th century.”¹

It was a development that emerged in the United States in the mid 1980s, and which New South Wales became part of in the early 1990s. In 1990, the Greiner government introduced legislation to enable it to contract out prison management; and in 1993, NSW became the second Australian state, after Queensland, to have a prison run by the private sector, with the opening of the Junee Correctional Centre. Since then, privately run prisons have been introduced in most other Australian states as well as in other countries including the United Kingdom, New Zealand, Canada and South Africa. The issue has ignited much debate wherever it has been introduced or proposed.

This background paper will trace the growth of private prisons in Australia and overseas and will explore the events leading to the Junee privatisation in NSW. It will also discuss the main arguments for and against privately run prisons as well as canvassing elements of accountability systems. Finally, this paper will present a summary of reports that evaluate the Junee prison and privately run prisons in other jurisdictions. First of all, however, this paper will provide a brief update on the situation in NSW and an explanation of the concept of prison privatisation.

2. UPDATE OF SITUATION IN NSW

Junee continues to be privately run, the operator having been awarded a new five-year contract in 2001.² No other prison in this state has been privatised. There was speculation early in 2004 that pressure from Treasury to save money might result in the NSW government privatising three of the state’s new prisons.³ These included the Mid-North Coast Correctional Centre at Kempsey and the Dillwynia Women’s Correctional Centre at Windsor, both opening this year⁴, and the Mid-Western Correctional Centre in Wellington, due to open in 2006. However, in March, the Minister Hon J. Hatzistergos MLC, announced that, following successful negotiations with the unions, the government had approved the public operation of Kempsey and Windsor correctional

¹ Harding R, “Private Prisons in Australia: The Second Phase” (April 1998) No. 84 *Australian Institute of Criminology - Trends and Issues in Crime and Criminal Justice* at 6. Since 2000, Professor Richard Harding has been the Inspector of Custodial Services in Western Australia.

² At one stage, the Labor government was planning for the NSW Department of Corrective Services to submit a bid to takeover Junee but these plans were ultimately abandoned. See below at p 26.

³ ‘Pressure for private jails fuels union fear’, *The Sun Herald*, 4/1/04, and ‘NSW: Prison privatisation question to go before NSW Cabinet’, *AAP*, 24/2/04.

⁴ Both opened on 15 July 2004.

centres.⁵ This would be “dependent on their continued effective and efficient operation which would be monitored.”⁶ The Minister said that the correctional centre at Wellington would be built according the public sector model but a decision on its operation would depend “on the successful implementation of the [workplace] agreement at Kempsey and Windsor correctional centres.”⁷

3. THE CONCEPT

3.1 What is prison privatisation?

Privatisation of prisons commonly refers to a government policy that involves contracting out the operation of one or more prisons to private enterprise. The policy might also involve contracting out one or more of the following elements involved in setting up a new prison: (a) design; (b) construction; (c) finance.⁸ In some cases, the private sector even owns the prison, at least for a specified period.⁹ The government pays the private company to operate the prison and the operating costs of the prison thus remain a public sector expense. The private sector’s commercial objective is to make a profit and it therefore factors a profit margin into the fees it charges the government.¹⁰

Once the government decides to privatise a prison it puts the prison contract out to tender. In some cases, the private sector competes with the public sector for a new contract. Prison management contracts range in length from five years up to twenty-five years.¹¹ The contract will specify the services to be provided and the standard of those services. The management fee payable under the contract usually includes a performance-linked fee. The contract will provide for a range of other matters such as compliance with legislation and policies, recruitment of staff, reporting and record keeping requirements, insurance and indemnities, and suspension and termination of the agreement.¹² In most jurisdictions, specific legislation has been enacted, primarily to

⁵ Hon J Hatzistergos, Minister for Justice and Minister Assisting the Premier on Citizenship, ‘Kempsey and Dilwynnia (Windsor) to be Publicly Operated’, *Media Release*, 3/3/04.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ The Junee prison in NSW was the first privately run prison in Australia to also be privately designed and built. Contracts for the design, construction, financing and management of a prison are known as “DCFM” contracts.

⁹ The privately run prisons in Victoria were privatised using the Build-Own-Operate-Transfer (“BOOT”) model. See further at note 73.

¹⁰ The reasons for privatisation are explained on the next page.

¹¹ Long-term (20-year) contracts are typically associated with the DCFM and BOOT models.

¹² See for example the Acacia Prison Services Agreement between the state of Western Australia and Corrections Corporation of Australia Pty Ltd, available on the WA Department of

deal with accountability issues. Generally private prisons are subject to the same accountability mechanisms as public prisons but are also subject to monitoring by a specially appointed monitor.

It has been suggested using the term “privatisation” is “something of a misnomer” because, in this context “the concept refers not to private ownership and control of an enterprise but to contract management, that is private sector...management of institutions which remain a public sector responsibility.”¹³ Harding states:

In this controversial area of penology and public administration even the terminology provides a battleground. Prison administrators tiptoe gently through the area talking about ‘contract management’ – a phrase calculated to reassure critics, as well as themselves, that these prisons are still *their* prisons and thus subject to the prevailing standards of public accountability. By contrast, observers who are ideologically opposed to this development emphasize the notion of ‘privatisation’ – a concept already partially discredited in the western world because of its association with inflated profiteering and abandonment of the public interest.¹⁴

In any event, it is clear that “no prison today is completely private, in the sense of being independent of government authority, control and revenue. Private prisons now operate only under contract to government.”¹⁵

3.2 Why privatise prisons?

Different governments have had different reasons for privatising prisons (discussed in more detail below) but the general theory behind privatisation is that, in a competitive environment, the private sector will be more efficient and will deliver cheaper and better prisons – both in relation to building and operation. Freiberg outlines various reasons why governments contract tasks out to the private sector:

The reasons for contractualisation are various: they include a general belief in the virtues of the free market, a belief in public choice theory (that a competitive market place produces goods and services more efficiently), a philosophical dislike of government, a practical recognition that the state cannot deliver the required services, the desire for greater flexibility in provision of services, the desire to free up state resources for other purposes and the need for increased control of services and costs.¹⁶

Justice website: <http://www.justice.wa.gov.au/portal/server.pt>. The Junee contract is not publicly available due to a commercial-in-confidence restriction.

¹³ Harding R, ‘Private Prisons in Australia, (May 1992) No. 36 *Australian Institute of Criminology - Trends and Issues in Crime and Criminal Justice* at 2.

¹⁴ Harding R W, *Private Prisons and Public Accountability*, Open University Press, Buckingham, 1997, p 1.

¹⁵ Logan C H, *Private Prisons Cons and Pros*, Oxford University Press, New York, 1990, p 14.

¹⁶ Freiberg A, ‘Commercial Confidentiality and Public Accountability for the Provision of Correctional Services’ (1999) 11(2) *Current Issues in Criminal Justice* 119 at 126.

3.3 Private sector involvement in corrections generally

By way of context, it is relevant to refer to the private sector's involvement in corrections generally. McCartney states:

Private sector involvement in corrections can take a number of forms, most of which remain uncontroversial. Non-profit organisations have a long history of working with offenders in the community, particularly juvenile offenders and those with drug or alcohol dependencies. The private sector has been involved for many years (mostly without objection) in custodial sanctions with the design and construction of correctional facilities, the provision of services such as food and health care and the employment of prisoners in private industry. Controversy arises when considering the wholesale handing over of responsibility for day-to-day operations of a [prison] to a private company.¹⁷

This paper is primarily concerned with this controversial aspect of private sector involvement in corrections. The focus is on private prisons¹⁸ for adult offenders.¹⁹

4. PRISON PRIVATISATION IN AUSTRALIA & OVERSEAS

4.1 Private prisons today

4.1.1 The most privatised nations: Australia, United Kingdom and United States

The modern prison privatisation phenomenon emerged in the United States in the mid 1980s and quickly spread to Australia and the United Kingdom.²⁰ In the United States, there are now over 100 private prisons in 31 states and the federal system, while in Australia there are 7 privately run prisons, and in the UK there are currently 11 private facilities. Australia has the highest proportion of inmates in private prisons of any nation, at around 17 percent. The UK has almost 10 percent of its prisoners in privately run facilities. The United States has by far the highest number of prisoners in privately

¹⁷ McCartney C, 'Corrections in Australia: Is the future private', in Chappell D and Wilson P, *Crime and the Criminal Justice System in Australia: 2000 and Beyond*, Butterworths, 2000, p 306. As to private sector involvement in corrections and the criminal justice system in the US see Shichor D and Gilbert M, *Privatization in Criminal Justice: Past, Present, and Future*, Anderson Publishing Co, Cincinnati, 2001.

¹⁸ For ease of reference, this paper uses the term "prison" rather than "correctional centre", the latter term being used in NSW and some other jurisdictions.

¹⁹ This paper does not deal with privately run immigration detention centres except to note that in Australia, as from late 1997, the federal government has contracted with the private sector to operate immigration detention centres.

²⁰ The private sector was involved with prisoners at an earlier point in history in Australia, the UK and the US. See Vallance S, 'Private Prison Management: Panacea or Pretence?', 1991 50(3) *Australian Journal of Public Administration* 397 at 397-398; and Smith B and Morn F, 'The History of Privatization in Criminal Justice', in Shichor and Gilbert, Note 17, p 3ff (US and UK).

run prisons (around 94,000 inmates) but this represents only about 7 percent of its total inmate population. New South Wales has around 10 percent of its prisoners in the Junee private prison, while Victoria has around 35 percent of its inmates in its two privately run prisons, which is the highest percentage of all the Australian states.

4.1.2 Recent developments in other nations:

Other nations have recently entered the private prisons field, or are considering doing so. New Zealand opened its first and only privately run prison in July 2000. The 300-bed Auckland Central Remand Prison is managed by Australasian Correctional Management under a five-year contract with the Department of Corrections, expiring in 2005.²¹ Privatisation took place under the former National government, which also had plans to privatise a further five new prisons and seven specialist youth facilities.²² However, the current government intends not to renew the private operator's contract and has recently legislated against private prisons.²³ In Canada, the first and only privately run prison opened in Ontario in 2001. It is a 'superjail', with a capacity of 1,184 inmates, which is run by the US-based Management and Training Corporation.²⁴

Developments in other countries are summarised in the following extract from a May 2002 article by Stephen Nathan:

.....South Africa has the world's two largest private prisons²⁵ and France's semi-private prisons, are becoming a 'third way' of choice for a number of governments.

²¹ Ibid.

²² Nathan S, *Private Adult Correctional Facilities: Fines, Failures and Dubious Practices* (April 2000) located on Ontario Public Service website: <http://www.opseu.org/ops/ministry/report/section1.htm>. As to early developments in NZ in the 1990s see Harding (1997), Note 14, p 9.

²³ *Corrections Act 2004* (assented to 3 June 2004). See NZ Department of Corrections website: <http://www.corrections.govt.nz/public/PolicyAndLegislation/correctionsact/>. See also the second reading speech to Bill, the Hon, Paul Swain, Hansard, 7/4/04 located at: <http://www.clerk.parliament.govt.nz/Hansard/Hansard.aspx>.

²⁴ See the Central North Correctional Centre website: <http://www.centralnorthcc.ca/> and also John Howard Society of Alberta, 'Private prisons', (2002), which is located on the website at <http://www.johnhoward.ab.ca/PUB/respaper/privpr02.htm>. As to developments at federal level and in other provinces in 1990s, see Harding (1997), Note 14, p 10.

²⁵ These two prisons were privately financed, designed, and built and are privately operated. Both prisons are maximum security with around 3,000 beds each. The Manguang prison in Bloemfontein opened in July 2001 and became fully operational in January 2002. It is run by the Denmark-based Group 4 Falck led consortium. The Kutama-Sinthumule prison at Louis Trichardt in Northern Province opened in February 2002 and is run by a consortium led by Florida-based Wackenhut Corrections Corporation. See Nathan S, 'Prison Privatisation: The International Experience and Implications for Africa' (2003) 11 *Southern African Human Rights Review* 7. See also Berg J, "Prison Privatization: Developments in South Africa" in Coyle et al, *Capitalist Punishment: Prison Privatization and Human Rights*, Clarity Press Inc, 2003, p 179.

Semi-private prisons - in which the private sector finances (or not, in the case of France's first 21) builds, maintains and operates all non-custodial services under contract, while the state employs the prison officers – are catching on. Belgium has one; the German state of Hesse is planning one; the prison service in England and Wales is strongly considering the idea. But Chile, under the watchful eye of the government of Peru, has signed the first three contracts of a programme of ten privately financed prisons. France has commissioned six more.

...Meanwhile, South Korea's ministry of corrections has invited religious groups as well as private companies to bid for a 300 bed prison management contract. And in Israel, long regarded by stock analysts as a potential market, the current minister of justice supports full privatisation of the prison service and the immediate establishment of private prisons.

Governments as diverse as Costa Rica, Lesotho, Lebanon, Thailand, the Netherlands and Venezuela are at various stages of feasibility studies or tendering processes while others, such as Poland, Malaysia and Hong Kong are closely watching developments, particularly in the UK. In a new twist, the government of Belize is attempting to contract out the management of its prisons department on a non-profit basis. That contract could, however, end up with a private company.

Payback for the industry is also expected after companies made sales pitches to conferences of ministers and senior corrections officials from the Caribbean, Central and South America, Southern, Central and Eastern Africa and 20 countries in the Asia/Pacific region between September 2000 and October 2001.²⁶

*The private prisons industry*²⁷: The two largest US private prison companies are Corrections Corporation of America (CCA) and Wackenhut Corrections Corporation (WCC) (now known as GEO Group Inc).²⁸ These two companies were the pioneers of private prisons in the US in the mid 1980s and expanded into Australia, the UK and other countries.²⁹ As at 1999, these two companies accounted for over 75% of the worldwide private prison market, with another 12 companies making up the remainder.³⁰ Other major players in the private prisons industry are:

²⁶ Nathan S, 'Aggressively seeking further opportunities', (2002, May issue) *Howard League Magazine* at p 5. For developments since May 2002 see Nathan S, "Private Prison Report International": located on the website <http://www.psir.org/justice/>. See also Nathan S, "Private Prisons: Emerging and Transformative Economies in Coyle et al, *Capitalist Punishment: Prison Privatization and Human Rights*, Clarity Press Inc (Atlanta) and Zed Books (London), 2003.

²⁷ This section is largely based on information contained in publications by Stephen Nathan including: "Aggressively seeking further opportunities", "Globalisation and private prisons", and "Private prisons an international overview"

²⁸ WCC was formerly a subsidiary of the US based Wackenhut Corporation. In 2002, Group 4 Falck (mentioned in the paper below) bought the Wackenhut Corporation and acquired a 57 percent stake in WCC. However, in 2003, WCC bought back that stake from Group 4. Therefore, while Group 4 now owns the Wackenhut Corporation, WCC (now GEO Inc) is a standalone company with no parent.

²⁹ CCA no longer has a presence in Australia.

³⁰ Austin J and Coventry G, 'Are We Better Off?: Comparing Private and Public Prisons in the United States (1999) 11(2) *Current Issues in Criminal Justice* 177 at 178.

- Group 4 Falck, a Denmark based multinational, whose prisons business operates under its Global Solutions (GSL) division. Through its subsidiaries, Group 4 has prison contracts in Australia, the UK and South Africa.³¹
- Sodexo SA, a France based multinational, which has prison contracts in Australia and the UK, through its subsidiaries (Australian Integrated Management Services – AIMS – and UK Detention Services). It also has prison contracts in France.
- Serco plc, a UK based multinational who has five prison contracts in the UK through its subsidiary, Premier Custodial Group.
- Management Training Corporation (MTC), a US based company that has recently expanded into Australia and Canada.

The total corporate revenues relating to private prisons and jails was estimated at \$1 billion in 1997.³²

4.2 Context in which private prisons emerged

4.2.1 *United States:*

As the United States was the first nation to embrace private prisons, it is appropriate to start with a look at the circumstances leading to that development. The policy of privatising prisons emerged in the US in response to a crisis in the nation's penal system that surfaced in the early 1980s. During a stage of unprecedented growth in the number of prisoners, largely due to tougher law and order policies (including the 'war on drugs') prisons across the country reached critical levels of overcrowding. Overcrowding in old prisons led to deteriorating conditions and a corresponding surge in litigation by inmates.³³ Federal Courts found crowding and other conditions of confinement in many prisons throughout the country to be so deficient as to be in violation of the US Constitution, and they ordered state governments to remedy the situation.³⁴

While pressure was mounting on states to do something urgently, many state governments were reaching their debt ceilings and they faced considerable difficulty in raising funds to finance the construction of new prisons.³⁵ In this climate, they saw a pressing need for alternatives and the private sector responded to this in the form of

³¹ Group 4 is currently in the process of merging with British firm Securicor, which runs the only private prison in Wales.

³² McDonald et al *Private Prison in the United States: An Assessment of Current Practice*, Abt Associates Inc, Cambridge, MA, 1998, p 7.

³³ Donahue J. D, *The Privatization Decision*, Basic Books Inc, New York, 1989, p 153.

³⁴ McDonald D and Patten C, *Governments' Management of Private Prisons*, Abt Associates Inc, Cambridge MA, 2003, p 3.

³⁵ McDonald et al (1998), Note 32, p 8.

privately owned companies specialising in the building and management of correctional facilities.³⁶ Turning to the private sector was an attractive solution because if a private firm financed, constructed and operated a new prison, payments could be charged against operations budgets, avoiding the problems of raising additional capital.³⁷ In addition, the belief was that the private sector could build new prisons faster and cheaper and create savings in operational costs.³⁸

By this stage, private organisations had some history of involvement in corrections, albeit outside the “deep end”³⁹ of corrections. McDonald et al state that “correctional agencies had began, during the late 1960s, to enlist small generally not-for-profit, organizations to operate halfway houses, work release facilities, and other ‘community based facilities.’”⁴⁰ In the 1960s and 1970s there was also a significant increase in the number of juvenile facilities being operated by private organisations.⁴¹ As well, in the late 1970s the federal immigration service began to contract with private organisations for the detention of illegal immigrants.⁴² McDonald et al state, “these...contracts provided the seedbed for the contemporary private prison industry in the United States, as several of the now significant players in the industry started with them.”⁴³

Significantly, the penal crisis was happening at a time of major political and ideological developments in the US. Privatisation “came to occupy a very important place on the political agenda of the New Right.”⁴⁴ Logan states that “[b]y the 1980s, taxpayers had begun to revolt and a presidential candidate [Reagan] with a platform of ‘getting the government off our backs’ was elected with popular support. This was also a time of growing interest in privatisation....”⁴⁵ Baldry refers to the comment by a US official on the political ethos of the day: ‘by the second Reagan term, officials took to joking that virtually any proposal could become...policy if it carried the label “privatisation’.”⁴⁶

³⁶ Logan, Note 15, p 10.

³⁷ McDonald et al (1998), Note 32, p 8.

³⁸ Harding R, ‘Prison Privatisation in Australia: A Glimpse of the Future’, (1992) 4(1) *Current Issues in Criminal Justice* 9 at 12.

³⁹ This phrase comes from Ryan M and Ward T, *Privatization and the Penal System: The American Experience and the Debate in Britain*, Open University Press, 1989.

⁴⁰ McDonald and Patten (2003), Note 34, p 1.

⁴¹ McDonald et al (1998), Note 32, p 5 and Austin and Coventry (1999), Note 30, p 183.

⁴² McDonald and Patten (2003), *supra*, p 2.

⁴³ McDonald et al (1998), *supra*, p 5.

⁴⁴ Ryan and Ward (1989), Note 39, p 1.

⁴⁵ Logan (1990), Note 15, p 3-4.

⁴⁶ Baldry E, ‘USA Prison Privateers; Neo-colonists in a Southern Land’, in Moyle P, *Private Prisons and Police: Recent Australian Trends*, Pluto Press Australia, 1994, p 129.

The first State government contract for management of an adult prison was awarded to US Corrections Corporation in 1985. Another company, Corrections Corporation of America, had in 1984 and 1985 been awarded contracts to run county facilities in Tennessee and Florida.⁴⁷ With these contracts, the door opened wider for private sector involvement in the deeper end of the corrections system. Soon afterwards, following a court order to upgrade the state of Tennessee's prison system, CCA launched a bold \$250 million bid to take over and run the state's entire prison system under a 99-year lease, in return for an annual fee. While the state rejected this offer, it ignited widespread media attention and public debate, and brought "the phenomenon of private prisons...into the public eye."⁴⁸ All of these events in the mid 1980s:

...set off a nationwide debate about the legality, propriety, and desirability of private imprisonment. Congress held hearings in 1986; the National Institute of Justice convened a conference; and many criminal justice professional associations took a stand. The latter included the American Federation of State, County, and Municipal Workers (opposed); the National Sheriff's Association (opposed), the American Correctional Association (cautious support), and the American Bar Association (which asked for a moratorium pending further study).⁴⁹

Before long, other private firms eager to take over prison and jail facilities joined CCA and the US Corrections Corporation.⁵⁰ However, in the face of opposition from groups such as those referred to above, the prison privatisation movement made only limited progress between the mid to late 1980s. By mid 1989, "about a dozen private companies were running about two dozen adult confinement institutions totalling some 7,000 beds in about a dozen states."⁵¹ This represented only about 1% of the national prisoner population.⁵² Ryan and Ward summarise the position in the US as at 1989:

...the American experience of privatising the delivery of punishment overall is both uneven and limited. It is uneven in that it is more prevalent in the south, where fiscal conservatism is strong and where unions are weak, than in the north...And it is limited in the sense that privatisation has had only a modest impact on the American penal system as a whole.⁵³

This is the backdrop against which private prisons were introduced into Australia and the UK in the late 1980s and early 1990s.

⁴⁷ Austin and Coventry (1999), Note 30, p 183 and Moyle P, *Profiting from Punishment: Private Prisons in Australia: Reform or Regression*, Pluto Press Australia, 2000, p 36.

⁴⁸ McDonald et al (1998), Note 32, p 4.

⁴⁹ Ibid at 6. As to groups that opposed privatisation, see Logan (1990), Note 15, p 10-12 and Ryan and Ward (1989), Note 39, p 31-38.

⁵⁰ Greene J, 'Comparing Private and Public Prison Services and Programs in Minnesota: Findings from Prisoner Interviews' (1999) 11(2) *Current Issues in Criminal Justice* 202 at 202.

⁵¹ Logan (1990), Note 15, p 20.

⁵² This figure was calculated by dividing 7000 beds by the rated capacity of state and federal prisons in the US as at 1990, which was roughly 700,000. The latter figure was taken from US Bureau of Justice Statistics, *Census of State and Federal Correctional Facilities 1995*, p 1.

⁵³ Ryan and Ward (1989), Note 39, p 31.

4.2.2 *Australia and the United Kingdom*

The growth of private prisons in the Australian states and in the UK is discussed in the next two parts of this section of the paper. By way of general overview, however, Harding summarised the “pressures for privatisation” in Australia, the UK and US:

Amongst the factors pushing governments and correctional agencies towards privatization are the following: (a) prison population matters, particularly crowding and difficulties in managing inmates housed in decaying stock; (b) excessive costs, both for capital for stock and recurrent in a labour intensive industry which is strongly unionized; (c) the need for more effective prisoner programs, coupled with a recognition that the public prison system seems to have difficulty responding to changing circumstances, so that private prisons might provide competition and set new benchmarks; A distinct sub-theme within each of those heads is (d) concern at the power of prison officer unions over prison operations

The weight of these factors varies across time and place; crowding for example, has been a far more potent force in the United States than in Australia.... Similarly, concern at union power has been a more explicit factor in the UK than in Australia, though probably the underlying significance of this factor has been as great here. At any rate, each of the above strands can be detected in Australian developments.⁵⁴

Political developments in Australian states and the UK were also influential in the rise of private prisons. In all of these jurisdictions the policy of privatising prisons has occurred under right-wing governments that were enthusiastically privatising a number of government enterprises in the 1980s and 1990s.

4.3 **Australia**

4.3.1 *Private prisons in Australia today*

The first privately run prison in Australia opened in Queensland in January 1990. Today, there are seven private prisons in Australia. There are two private prisons in Queensland, two in Victoria⁵⁵ and in each of New South Wales, South Australia and Western Australia. Neither Tasmania nor either of the territories has any privately run prisons. Overall, about 17 percent of all prisoners in Australia are held in private prisons.⁵⁶ Of the states, Victoria has the highest proportion (35%) of prisoners in

⁵⁴ Harding (1992), Note 13, p 2. See also Harding (1997), Note 14, p 17-20.

⁵⁵ Victoria had three until the government took over the Metropolitan Women’s Prison at Deer Park in October 2000.

⁵⁶ This figure is calculated by dividing the total current capacity of private prisons in Australia (4,132) (see table below) by the total prisoner population in Australia as at 30 June 2003 (23,555). The latter figure was reported in Australian Bureau of Statistics, ‘Prisoner numbers have increased by 50% over the past 10 years’, *Media Release*, 22/1/04. See also Rynne J, ‘Protection of Prisoners’ Rights in Australian Private Prisons’, in Brown D and Wilkie M, *Prisoners as Citizens: Human Rights in Australian Prisons*, Federation Press, NSW, 2002 at p 131 citing a 2001 report in support of the statement that “seven privately run custodial centres accommodate approximately 15% of the secure prisoner population in Australia.”

private prisons, followed by Western Australia (26%) and Queensland (24%). The privately run Junee prison in NSW holds about 10% of the state's prisoners.

Most private prisons hold medium-security and minimum-security prisoners but two private prisons hold maximum-security, remand and reception prisoners. As the Victorian government took over the Metropolitan Women's prison in October 2000, all privately run prisons in Australia now hold male prisoners only. Initially the contracts were for management only. NSW was the first contract that also involved design and construction by the private sector. The Victorian contracts all followed the Build, Own, Operate and Transfer ("BOOT") model and the recent Western Australian contract also involved private design, financing and construction ("DCFM").

Four private companies are involved with Australia's private prisons. They are:

- Australasian Correctional Management (ACM), which is a subsidiary of the US-based Wackenhut Corrections Corporation (now "GEO Inc"). ACM operates the Junee prison in NSW as well as the Arthur Gorrie prison in Queensland and Fulham prison in Victoria⁵⁷;
- Group 4 Falck, which operates the Mt Gambier prison in South Australia and the Port Phillip remand and reception prison in Victoria;
- Australian Integrated Management Services (AIMS), which runs the Acacia prison in Western Australia. AIMS was formerly known as Corrections Corporation of Australia and was a subsidiary of Corrections Corporation of America. AIMS is now a subsidiary of the French-based Sodexo-Alliance. Corrections Corporation of Australia previously operated the Metropolitan Women's prison in Victoria and, prior to 2001, it managed the Borallon prison in Queensland, which was the first private prison in Australia;
- Management and Training Corporation (MTC) replaced CCA as the operator of Borallon in January 2001.

The Table below summarises the growth of private prisons in Australia.

⁵⁷ ACM previously had the contracts to operate federal immigration detention centres but was replaced by Group 4 Falck Global Solutions Pty Ltd (Group 4) on 27 August 2003.

TABLE 4.3. The growth of private prisons in Australia: 1990-2004.⁵⁸

State	Centre	Date	Operator	Type ⁵⁹	Classification	Capacity ⁶⁰	Percent of state inmates ⁶¹
QLD	Borallon	Jan 1990 – Oct 2000	CCA	M	Medium, sentenced	492	24%
		Jan 2001	MTC				
	Arthur Gorrie	April 1992	ACM	M	High, remand and reception	710	
NSW	Junee	April 1993	ACM	DCM	Medium and Minimum; sentenced and remand	750	10%
SA	Mt Gambier	Nov 1995	Group 4	M	Medium and low; sentenced	110	7%
VIC	<i>Met. Women's - Deer Park</i> ⁶²	<i>Aug 1996– Oct 2000</i>	CCA	BOOT	<i>Female, remand and reception</i>	125	35%
	Fulham	April 1997	ACM	BOOT	Medium and low; sentenced	700	
	Port Phillip	Sept 1997	Group 4	BOOT	High; remand and reception	620	
WA	Acacia	April 2001	AIMS	DCFM	Medium; sentenced	750	26%

⁵⁸ This table was adapted from a table in Rynne J, Note 56, p 133.

⁵⁹ M = Management contract; DCM = Design, Construction and Management contract; BOOT = Build, Own, Operate, Transfer contract; and DCFM = DCM + Financing.

⁶⁰ The capacity figures are as reported in Rynne J, Note 56, p 133 except that figures for NSW and Victoria have been updated on the basis of different figures stated on the respective corrective service departments' websites.

⁶¹ Percentages were calculated by dividing combined prison capacities in each state (excluding the women's prison in Victoria) by the prison populations for that state, as at 30 June 2003. The prison population figures were taken from departments' 2002/03 annual reports.

⁶² As noted above, the government took over the running of this prison from October 2000.

4.3.2 *An overview of the growth of private prisons in Australia*

Queensland: The *Corrective Services (Administration) Bill* received assent on 1 December 1988 and Queensland became the first state in Australia to have a privately run prison when, in January 1990, a 240-bed medium security prison for convicted offenders was opened at Borallon.⁶³ The Queensland government built the prison and owns the land but leased it to Corrections Corporation of Australia, the private company that was contracted to operate the facility.⁶⁴ The contract was for three years with an option to renew for a further two years.⁶⁵ Soon after, in 1992, the second privately run prison in Queensland opened. This was the Arthur Gorrie Correctional Centre, a 380-bed high-security, remand and reception facility. ACM was awarded the contract, which was for a term of five years with a two-year option period.⁶⁶

The developments in Queensland flowed from recommendations in the Kennedy Report (1988), which was the end result of a Commission of Review into Corrective Services in the late 1980s. McCartney describes the developments in Queensland:

The pressure for reform of a decaying and inefficient penal system was at its height in Australia in the late 1980s. The need for reform and the urgent need to bring under control escalating costs while repairing old facilities prompted a Commission of Review into Corrective Services in Queensland ... The Kennedy Inquiry was concerned with the restructuring of Queensland's corrections system and establishing a statutory authority to monitor corrective services. The interim report rejected the privatisation option but the final report handed down in 1988 recommended full private sector involvement...

Kennedy...believed this would lead to widespread reform within the prison system; flexibility would be increased, it would scupper the power of the officers' union to stall reform...; and career prospects for officers would be improved. The introduction of competition was heralded as the impetus needed for reform and was in tandem with the widely held opinion that the government was inherently inefficient. Competition would create 'benchmarks' by which to measure public sector performance and stimulate greater effort at efficiency and better conditions...⁶⁷

New South Wales: NSW became the second state to pursue privatisation, when it contracted with Australasian Correctional Management for the design, construction, and management of the 600-bed medium and minimum-security prison at Junee, which opened in March 1993. The Greiner government was considering the prospect of involving the private sector in corrections in 1989; and it commissioned a report from management consultants, Kleinwort Benson, which recommended that a privately run prison be established. In November 1990, the government announced that the new

⁶³ Harding (1997), Note 14, p 5.

⁶⁴ McCartney (2000), Note 17, p 307.

⁶⁵ Macionis S, 'Purchaser and Provider; the Queensland Experience', Paper presented at the Australian Institute of Criminology Conference, 'Privatisation and Public Policy: A Correctional Case Study', Melbourne, June 1997, p 2.

⁶⁶ Ibid at 2.

⁶⁷ Ibid at 309.

prison to be built at Junee would be privately run, and introduced legislation providing for the management of a prison to be undertaken by the private sector on a contract basis. The reasons for pursuing privatisation were similar to those put forward in Queensland. The Junee privatisation is discussed in more detail in Section 5.

South Australia: South Australia was the next state to engage the private sector in managing prisons. The government decided to proceed with privatisation even though its *Correctional Services (Private Management Agreements) Bill 1994* was defeated in the Legislative Council; and before a Legislative Council Select Committee had reported on the issue.⁶⁸ In late 1995, the South Australian government contracted with Group 4, to operate a 125-bed, medium and low security prison at Mount Gambier.⁶⁹ However, due to the legislation not being passed, the situation at Mount Gambier is a little different to private prisons in other states. While Group 4 conducts the day-to-day running of the prison, the Department for Correctional Services maintains two staff members at the prison to exercise certain functions reserved for the CEO of the Department, which can only be delegated to Departmental employees.⁷⁰

Victoria: Victoria did not enter the private prisons arena until 1996 but then pursued this policy “with unmatched fervour”.⁷¹ In 1994, the Kennett government, which privatised a number of government enterprises during the 1990s, announced that within the next three years it would “move from an entirely state-run system to having 45 per cent of prisoners in private prisons.”⁷² In October 1994, enabling legislation was introduced in the form of the *Corrections Amendment Bill 1994*. The announcement then became a reality with the privatisation of three prisons in quick succession, including the 125-bed Metropolitan Women’s prison at Deer Park (1996), a 590-bed, medium and low security prison for males at Fulham (1997), and a high-security remand and reception centre for males at Port Phillip (1997). These were all Build-Own-Operate-Transfer (BOOT) contracts for a period of 20 years.⁷³ A different private company was contracted in relation to each of these prisons.

⁶⁸ Moyle (2000), Note 47, p 25.

⁶⁹ McCartney (2000), Note 17, p 308.

⁷⁰ Personal communication with Chris Johnson of Department of Corrective Services and information on South Australian Department for Correctional Services website: <http://www.corrections.sa.gov.au/opening.htm>

⁷¹ McCartney, *supra*, p 308.

⁷² Moyle (2000), Note 47, p 16.

⁷³ Harding (1998), Note 1, p 2 describes the Victorian contracts as follows: “...the private contractors have paid for and own the prison structure itself, with the contract requiring that the government repay capital and borrowing costs over a 20 year period. At the expiry of this period the private contractor continues to own the structure and has a further 20 year lease of the land upon which it stands. No further use as a prison is guaranteed by either side, however. Linked to this in each case are the initial five-year management contracts with the three-year renewal periods.”

Western Australia: Western Australia initially decided to reform the public sector rather than to look to private companies to run prisons.⁷⁴ In the early 1990s, the prison officers' union agreed with the state government (Liberal/ National Party coalition) to accept a restructuring package in return for a commitment by the government that it would not privatise prisons before the end of 1997.⁷⁵ However, in 1998, the government decided that it would engage the private sector to construct and operate a new prison and it called for expressions of interest.⁷⁶ The *Prisons Act Amendment Act 1999* was passed and the government contracted with the private sector to design, finance, construct and manage the new Acacia prison. The prison at Wooroloo South, which opened in 2001, is a medium security for males and, with a 750-bed capacity, is the largest prison in Western Australia.

4.3.3 *Subsequent developments and current government policies in these states*

Queensland: In 1995, the Borallon contract was renegotiated and extended for a further five years. In 2000, after a tender process a new contract was awarded to a different private company, Management and Training Corporation. ACM continues to manage the Arthur Gorrie prison, having been awarded a new contract in 2002. During the 1990s, the two privately run prisons both greatly expanded their capacity. In 1994, the government allowed the Queensland Corrective Services Commission (QCSC) to bid against the private sector to build and manage the new Woodford prison.⁷⁷ QCSC ultimately won the tender.⁷⁸ Soon after, the government split the purchaser and service provider roles of the QCSC. The service provider role was transferred to a newly created government corporation, QCORR, while QCSC remained the regulator and purchaser of prison services – from the private sector and QCORR. The present government has no current proposals to privatise other prisons.⁷⁹

New South Wales: This was covered in Section 2 above.

South Australia: The contract for Mount Gambier prison has been renewed on two occasions. The most recent contract with Group 4 is due to expire soon and the government is considering whether to renew the contract or to put it out to tender.⁸⁰

⁷⁴ Moyle (2000), Note 47, p 17-18.

⁷⁵ *Ibid* at 18.

⁷⁶ Harding R, 'Privatising Justice Support and Prison Administration Functions: A WA Exemplar of Effective Regulation and Accountability' (2000) 29 *Western Australian Law Review* 233 at 242.

⁷⁷ Harding (1998), Note 1, p 2.

⁷⁸ *Ibid*.

⁷⁹ Harding (1998), Note 1, p 2.

⁸⁰ Personal communication with Chris Johnson of Department of Corrective Services on 26 July 2004.

Victoria: In October 2000, the Bracks' government took control of the privately run Metropolitan women's prison, as a result of deficiencies and CCA's failure to respond to default notices.⁸¹ With respect to the other two private prisons, in September 2002, the government said that it would honour the 20-year contracts that the previous government had entered into; however, it would impose tough new standards on the private operators, as recommended by the Auditor-General and the Kirby Inquiry into private prisons.⁸² The government is currently building two new prisons under its "Partnerships Victoria" policy, in which a consortium, including private companies, will carry out the financial, design, construction and building maintenance responsibilities, while the public sector will provide all correctional services and operate the facility.⁸³

Western Australia: The present government has no current proposals to privatise any other prisons in Western Australia.

4.3.4 No private prisons in Tasmania, Northern Territory or ACT

Tasmania: In Tasmania, a 1999 Legislative Council Select Committee report recommended that facilities and services in the prison system be put out to tender, with both private companies and the Corrective Services Division eligible to tender.⁸⁴ This was subject to the proviso that at least one of two new prisons would remain under public management.⁸⁵ However, this recommendation has not been acted upon.⁸⁶

Northern Territory: At one stage in the 1990s, the Northern Territory government called for expressions of interest to manage a new 200-bed prison in Alice Springs but it ultimately decided not to engage a private company.⁸⁷ In 2000, the government passed legislation allowing the appointment of non-government employees as prison officers.⁸⁸ No such appointments took place and in 2002 the new government repealed this legislation.⁸⁹ The new Attorney General said, "employing private security guards within

⁸¹ See below, p 84.

⁸² Victorian Minister for Corrections, 'Government Sets Tough New Private Prison Standards', *Media Release*, 12 September 2002.

⁸³ Victorian Minister for Corrections, 'Work Starts on Two New Prisons 900 Bed Boost', *Media Release*, 27 February 2004.

⁸⁴ Tasmania, Parliament, Legislative Council, Select Committee on Correctional Services and Sentencing in Tasmania, *Report*, Tasmania Parliament, 1999, p 10.

⁸⁵ *Ibid* at 7.

⁸⁶ In a private communication with the Tasmania Prisons Service on 21 May 2004 the writer was told that there were no current proposals to privatise prisons in Tasmania.

⁸⁷ Moyle (2000), Note 47, p 17.

⁸⁸ Nathan S, *Prison Privatisation Report International*, May/June 2000

⁸⁹ *Prisons (Correctional Services) Amendment Bill 2002*.

the prison system is contrary to this government's policy. We prefer to work with the Prison Officers Association...."⁹⁰

Australian Capital Territory: The ACT does not have a prison although it does have a remand centre, which is publicly run. Prisoners sentenced in the ACT are held in NSW prisons. The ACT government is currently planning to build a correctional facility in the ACT to house both sentenced and remand prisoners.⁹¹ The prison is due to be operational by early 2007.⁹² The current government's intention is for the prison to be publicly operated⁹³ although a consultant's report prepared for the government in 2001 had recommended "...that the...Government partially or wholly outsources the operations of the facility and gives further thought to the merits of the "hybrid" approach, a combination of public sector management and private sector operations."⁹⁴

4.4 The United Kingdom

4.4.1 Private prisons in the UK today

The first privately run prison in the UK was the Wolds remand prison, which opened in May 1992. There are currently ten privately managed prisons in England and Wales⁹⁵, with another private prison due to open in March 2005.⁹⁶ In Scotland, which has its own prison service, there is also one privately run prison. The Kilmarnock high-security prison opened in March 1999.⁹⁷ In England and Wales, the private prisons hold over 7,000 prisoners, which represents almost 10 percent of the total prisoner population.⁹⁸

⁹⁰ Dr Toyne, *NTPR*, Legislative Assembly, 14/5/02.

⁹¹ See "The Prison Project" on the ACT Department of Corrective Services website: <http://www.cs.act.gov.au/>

⁹² According to a spokesperson from the Department of Corrective Services, as at 26 July 2004, the government had called for and received tenders for the role of project manager.

⁹³ Communication with Spokesperson for Department of Corrective Services, 26 July 2004.

⁹⁴ Rengain Pty Ltd, *ACT Prison Project Report*, 17 April 2001, prepared for Department of Justice and Community Safety.

⁹⁵ Including one institution at Ashfield for sentenced young adults and juveniles aged 15-21. See "Contracted Out Prisons", HM Prison Service website: <http://www.hmprisonservice.gov.uk/prisoninformation/privateprison/>

⁹⁶ The Peterborough Prison in Cambridgeshire. See "The Prison Website" <<http://www.prison.org.uk/prisons/lists/new.html>>

⁹⁷ In 2002, the Scottish Executive proposed that three new prisons be financed, built and operated. See Nathan S, "Searching for Solutions", (Summer 2002) *Prison Review International* 10 at 12.

⁹⁸ The number of prisoners in private prisons (7,218) was calculated by adding together the

The privately run prison in Scotland holds 600 prisoners, which is also around 10 percent of the total prisoner population in Scotland.⁹⁹

Most of the privately operated prisons in England and Wales are medium-security or lower but there is one maximum-security prison (Altcourse). The first private female prison opened in June 2004 (Bronzefield). UK Detention Services (UKDS) operate this prison – they also run Forest Bank prison and have the contract to manage Peterborough prison, which is due to open in 2005. Three other companies are involved in UK prisons, Premier Prison Services (five prisons¹⁰⁰), Group 4 (three prisons) and Securicor (one prison). Group 4 are in the process of merging with Securicor.¹⁰¹ Privatisation in the UK was initially limited to contracting out management only. However, after the first four management contracts, all private prisons have been undertaken on the “DCFM” model in accordance with the government’s “Private Finance Initiative.”

The table below summarises the growth and present state of private prisons in the UK.

numbers for each private prison in England and Wales as shown in the table below (but only those in operation as at 30 June 2004). The total prisoner population figure (74,468) was taken from HM Prison Service, *Monthly Population Bulletin June 2004*.

⁹⁹ Figures taken from Scottish Prison Service Website: <http://www.sps.gov.uk/>

¹⁰⁰ Including the private prison in Scotland.

¹⁰¹ Prison Report (Issue No 63, March 2004) at p 18.

TABLE 4.4. The growth of private prisons in the UK: 1992-2004.

Date	Prison	Operator ¹⁰²	Type	Classification ¹⁰³	No. of inmates ¹⁰⁴
1992	Wolds	Group 4	M	Initially remand only – now Cat C prison for sentenced.	354
1993 - 2001	<i>Blakenhurst</i> ¹⁰⁵	UKDS	M	Currently local Cat C.	868
June 1994	Doncaster	Premier	M	Local Cat B. for adult and young offenders.	1090
1994 – 2000	<i>Buckley Hall</i> ¹⁰⁶	Group 4	M	Cat. C.	308
Nov 1997	Parc (Wales)	Securicor	DCFM	Local Cat B for sentenced adults; and sentenced and remand young offenders.	1,007
Dec 1997	Altcourse	Group 4	DCFM	Core local Cat A for adult and young offenders; sentenced and remand.	985
Feb 1998	Lowdham Grange	Premier	DCFM	Cat B closed training prison for long-term prisoners.	516
Mar 1999	Kilmarnock (Scotland)	Premier	DCFM	Mainstream high security for remand and sentenced adults and remand young offenders	592
Nov 1999	Ashfield	Premier	DCFM	Sentenced young adults and juveniles (15-21 yrs)	304
Jan 2000	Forest Bank	UKDS	DCFM	Local Cat B for adults and young offenders	1,018
Jan 2001	Rye Hill	Group 4	DCFM	Cat. B training prison for sentenced.	658
July 2001	Dovegate	Premier	DCFM	Cat. B training prison	836
June 2004	Bronze field	UKDS	DCFM	Females	(450)
March 2005	Peterborough	UKDS	DCFM	Male and female	840

¹⁰² UKDS = United Kingdom Detention Services Ltd (originally a CCA company but now wholly owned by Sodexho); Premier = Premier Prison Services Ltd, part of the Premier Custodial Group Ltd (until May 2002, a joint venture between WCC and Serco – now jointly owned by Group 4 and Serco), and Securicor = Securicor Custodial Services)

¹⁰³ Security Categories are as follows: Cat A - prisoners whose escape would be highly dangerous to public; Cat B are prisoners for whom the very highest conditions of security are not necessary but for whom escape must be made very difficult; Cat C – prisoners who cannot be trusted in open conditions but who do not have the will or resource to make a determined escape attempt; Cat D – those who can reasonably be trusted to serve sentence in open conditions. Female and young prisoners are not classified.

¹⁰⁴ This is the number of inmates in the prison as at 30 June 2004, according to the HM Prison Service, *Monthly Population Bulletin June 2004* – except that figures for the new Bronze field prison and the future Peterborough prison are the capacities of those prisons.

¹⁰⁵ The private prison operator was replaced by the public sector after a tender process in 2001.

¹⁰⁶ The private prison operator was replaced by the public sector after a tender process in 2000.

4.4.2 *Brief background to growth of private prisons in the UK*¹⁰⁷

Having regard to the Thatcher government's general enthusiasm for privatisation, it is not surprising that the idea of privatising prisons also came to be considered in the UK in the mid to late 1980s. In 1986, a parliamentary Select Committee on Home Affairs examined the state and use of prisons in England and Wales. Members of the Committee visited private prisons in the US and in 1987 the Committee published a report entitled "Contract Provision of Prisons". The Committee said that "the present state of our prisons, blighted by age, severe overcrowding, insanitary conditions, and painfully slow progress in modernisation make it necessary to consider urgent new ways of dealing with these problems which at present seem almost insoluble."¹⁰⁸ The very brief report concluded:

...the Home Office should, as an experiment, enable private sector companies to tender for the construction and management of custodial institutions... We also recommend that tenders should be invited for the construction and management of new remand centres, because it is there that the worst overcrowding in the prison system is concentrated.¹⁰⁹

The Committee stated that the main advantages of contracting out were (1) that it relieves the taxpayer of the immediate burden of having to pay for their initial cost (2) it dramatically accelerates their building and (3) it produces greatly enhanced architectural efficiency and excellence.¹¹⁰ Initially, the former Home Secretary dismissed the idea of private involvement in corrections, but 18 months later, he announced that there was no objection in principle to a private company running a remand centre.¹¹¹

In 1988, a Green Paper entitled "Private Sector Involvement in the Remand System" referred to "the crisis of overcrowding in the prison system, [and to] the particular problems faced by remand prisoners" and the Green Paper asserted, "it would be wrong to ignore the possibility that...private sector involvement could make a speedier and more cost-effective contribution."¹¹² It made a distinction between remand and sentenced prisoners, arguing that the former would "raise fewer difficult operational questions or issues of principle."¹¹³ The Green Paper concluded:

¹⁰⁷ The following is largely based on Nathan S, 'Prison Privatization in the United Kingdom', in Coyle et al, *Capitalist Punishment: Prison Privatization and Human Rights*, Clarity Press Inc, 2003, p 163ff; and James A. et al, *Privatizing Prisons: Rhetoric and Reality*, Sage Publications, London, 1997, p 50ff.

¹⁰⁸ James A. et al, *ibid*, p 50.

¹⁰⁹ Nathan S, *supra*, p 163.

¹¹⁰ Nathan S, *ibid*, p 163.

¹¹¹ Porter R.G., 'The Privatisation of Prisons in the United States: A Policy that Britain Should Not Emulate', (1990) 29(2) *The Howard Journal* 65 at 68.

¹¹² James, Note 107, p 52.

¹¹³ *Ibid* at 52.

The government is committed to achieving real improvements in conditions in the Prison Service as quickly as possible and to improving value for money in the remand system. It is important to establish whether the private sector could play a greater role in securing these improvements.¹¹⁴

In 1990, the *Criminal Justice Bill 1990*, which provided for contracting out of remand prisons, was introduced into parliament. Amendments were made to the Bill in February 1991 and when it was passed into law the *Criminal Justice Act 1991* enabled the Home Secretary to make an order by statutory instrument to extend the power to contract-out to any prison, not just remand prisons.¹¹⁵ In May 1991, the Home Secretary announced that invitations to tender had been issued to potential contractors for the new Wolds remand prison. Group 4 was the successful tenderer, entering into a five-year contract to manage Wolds, which opened in May 1992.

In November 1992, the Conservative government announced its Private Finance Initiative, which had the aim of “increasing the involvement of the private sector in the provision of public services.”¹¹⁶ Allen explains that the private finance initiative:

...is a form of public-private partnership (PPP) that marries a public procurement programme, where the public sector purchases capital items from the private sector, to an extension of contracting out, where public services are contracted from the private sector...

Under the most common form of PFI, the private sector designs, builds, finances and operates... facilities based on... specifications decided by public managers and their departments.... The private sector already builds most public facilities but the PFI also enables the design, financing and operation of public services to be carried out by the private sector. Under the PFI, the public sector does not own an asset... but pays the PFI contractor a stream of committed revenue payments for use of the facilities over the contract period. Once the contract has expired, ownership of the asset either remains with the private sector contractor, or is returned to the public sector...¹¹⁷

In 1993, the government announced that all new prisons would be privately built and operated.¹¹⁸ By the end of 1994, three privately run prisons had opened: Blakenhurst, Doncaster and Buckley Hall. The Parc prison, the only private prison in Wales, which opened in 1997, was the first of many private prisons to be built and operated under the Private Finance Initiative (“PFI”) in the late 1990s and early 2000s.

The Conservative government’s policy of privatising prisons under the PFI was not halted by Labour’s election win in 1997. Nathan states, that “the policy has not just survived the election of a Labour government; it has thrived.”¹¹⁹ Prior to coming into

¹¹⁴ Ibid at 53.

¹¹⁵ Ibid at 57.

¹¹⁶ Allen G, *The Private Finance Initiative (PFI)*, House of Commons Library, Research Paper, 03/79, 21 October 2003, p 9.

¹¹⁷ Ibid at 9.

¹¹⁸ Nathan S, Note 107, p 164.

¹¹⁹ Ibid at 168.

office, the Labour party had opposed the government's policy of privatising prisons. For example, in 1994, "John Prescott, now deputy prime minister, pledged that 'Labour will take back private prisons in public ownership – it is the only safe way forward.'"¹²⁰ However, after coming into government, the Labour party changed its position. In May 1998, at a speech to the Prison Officers' Association annual conference the Home Secretary, Jack Straw, announced:

...that he had reviewed the recommendations of the Home Affairs Committee and decided that all new prisons in England and Wales would be both privately built and privately run... However he said that "the prison service will be allowed to bid for the chance to take over the management of existing privately managed prisons [when] the contracts expire."¹²¹

In October 2001, the Prisons Minister said that she expected eight percent of prisons to be privately operated by 2005 – 11 of 138 facilities for adults and young offenders.¹²²

4.4.3 *Significant developments in the UK*

*Tenders*¹²³: In 1999, Premier successfully re-tendered for Doncaster prison, which the company had operated since it opened in 1994; and in 2001 Group 4 secured a new ten-year contract to manage the Wolds prison. However the public sector has succeeded in winning contracts away from the private sector. In 2000, the public prison service won the contract for Buckley Hall prison, which had been run by Group since 1995; and in 2001 the public prison service took over the running of Blakenhurst prison from UKDS after a tender process. In addition, in 1994 and 2001, the public sector successfully tendered against the private sector to run Manchester prison. Interestingly, when the government conducted market testing in 2001 for the operation of Brixton prison, no private companies submitted a bid.

Government intervention at Ashfield: In May 2002, the government "took the unprecedented step of removing a company's prison director and installing public sector management at the Premier Prisons-run Ashfield, a prison for young offenders... The action was taken because of concerns over the safety of staff and prisoners and anxieties that Premier might lose effective control."¹²⁴

¹²⁰ Ibid at 168.

¹²¹ Ibid at 169.

¹²² Ibid at 169.

¹²³ The information in this paragraph was taken from Nathan S, Note 107; and from the HM Prison Service Website.

¹²⁴ Nathan S, Note 107, p 172. For a chronology of events leading to the Prison Service taking control at Ashfield, see National Audit Office, *The Operational Performance of PFI Prisons*, Report by the Comptroller and Auditor General, HC 700 Session 2002-03: 18 June 2003.

4.4.4 *The future of private prisons in the UK*

It seems that prison privatisation is set to continue in the UK. A 2003 report by Patrick Carter, who conducted a review of correctional services in the UK on behalf of the government, suggested that “[m]ore effective service delivery can be achieved through greater contestability, using providers of prison and probation from across the public, private and voluntary sectors.”¹²⁵ In January 2004, the government published a response to the Carter Report. That response refers to improvements in prisons resulting from competition, and states:

We intend therefore to encourage the private and ‘not for profit’ sectors to compete to manage more prisons and private and voluntary sector organizations to compete to manage offenders in the community. We want to encourage partnerships between public and private sector providers and the voluntary and community sectors which harness their respective strengths.¹²⁶

4.5 The United States

4.5.1 *Private prisons in the US today*

At the end of 2002, according to a bulletin published by the US Bureau of Justice Statistics (USBJS), 31 US states housed a total of 73,497 inmates in private prisons while the federal system had a further 20,274 inmates in private facilities (including 6,598 in non-secure, privately operated facilities). Thus, in total, there were 93,771 inmates in private prisons in the US.¹²⁷ Private prisons housed almost 6 percent of all state prisoners, over 12 percent of all federal prisoners, and 6.5 percent of all prisoners. Of the states, Texas (almost 17,000 inmates) and Oklahoma (over 6,000 inmates) had the largest number of prisoners in privately run prisons. Five states had at least 25 percent of their prison population in private facilities: New Mexico had the largest proportion (43%), followed by Alaska, Wyoming, Montana, and Oklahoma (28%). The use of private facilities was concentrated among Southern and Western states.

As to the number and type of facilities, a USBJS 2000 Census reports that, as at mid-year 2000, there were 101 privately run prisons in the US¹²⁸, including 65 medium-security, 32 minimum-security, and 4 maximum-security prisons.¹²⁹ Two of these

¹²⁵ Carter P, *Managing Offenders, Reducing Crime: A New Approach*, 11 December 2003, p 34.

¹²⁶ UK Home Office, *Reducing Crime, Changing Lives*, 6 January 2004, p 14.

¹²⁷ US Bureau of Justice Statistics, ‘Prisoners in 2002’, *Bureau of Justice Statistics Bulletin*, July 2003, p 6. These figures do not include privately run county jails or detention centres. The Bulletin is located on the BJS website: <http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf>

¹²⁸ Holding 76,170 inmates.

¹²⁹ Stephan J and Karberg J, US Bureau of Justice Statistics, *Census of State and Federal Correctional Facilities, 2000*, August 2003, p 16.

maximum-security prisons housed 1,000 inmates or more¹³⁰ but most privately run prisons held less than 500 inmates.¹³¹ Many of the privately run prisons were owned by the private operators or by other private entities.¹³² Two companies dominate the US market. In 1998, Corrections Corporation of America and Wackenhut both held about two-thirds of all contracts with state and federal correctional agencies.¹³³

The main mode of private prison contracting has been for the government to decide to contract for some of its needed state prison beds, and then to seek a contractor willing to provide these beds in-state. However another trend has developed whereby, rather than waiting for the states to issue the call for service, some private firms have taken the risk of building private facilities without first being assured of any prisoners from a particular corrections department (these are often called “spec” prisons, built as speculative ventures by private companies). Once built, they advertise their availability to corrections agencies anywhere in the country that are in need of prison beds. The firms that succeed in attracting prisoners may hold prisoners from a variety of different state agencies, both out of state as well as from the state in which they are located. As such, these facilities are oriented to what is essentially a national market.¹³⁴

4.5.2 Recent developments and the future of private prisons in the US

It is difficult to gauge the current state of the private prison market in the US. A couple of reports in late 2001 and 2002 suggested that the growth of state contracts for private prisons was slowing, and that some states had ended their relationship with private operators; but that the Federal Bureau of Prisons was increasingly turning to the private sector as a result of overcrowding in federal prisons.¹³⁵ In response to the latter development, at least one representative has introduced Bills into US Congress, on a couple of occasions, to prohibit the placement of federal prisoners in private prisons.¹³⁶ It is worthwhile also noting that one writer suggested in 2001 that private operation of local (county) jails in the US was “the next frontier” of privatisation.¹³⁷

¹³⁰ Austin J. and Coventry G., Bureau of Justice Assistance, *Emerging Issues on Privatized Prisons*, National Council on Crime and Delinquency, February 2001, p 40.

¹³¹ *Ibid* at 16.

¹³² McDonald et al (1998), Note 32, p 20.

¹³³ *Ibid* at 19.

¹³⁴ This paragraph was based on McDonald and Patten (2003), Note 34, p 5-9.

¹³⁵ Cheung A, *Prison Privatization and the Use of Incarceration*, The Sentencing Project, Briefing Paper 1/02, p 3-4; and Mattera P et al, *Jail Breaks: Economic Development Subsidies Given to Private Prisons*, Good Jobs First, October 2001, p 4-8.

¹³⁶ The Sentencing Project, *ibid* at p 5; and see *Public Safety Bill H.R 1994* introduced by Representative Ted Strickland 6 May 2003. The US Congress website says that the Bill has been referred to the Subcommittee on Crime, Terrorism and Homeland Security.

¹³⁷ Kiekbusch R, ‘Jail Privatization: The Next Frontier’, in Shichor and Gilbert, Note 17, p 133ff.

5. THE PRIVATE JUNEE PRISON IN NSW

5.1 Junee Correctional Centre¹³⁸

Junee Correctional Centre¹³⁹, which is located 40km from Wagga Wagga, is a medium/minimum security facility for male inmates; both sentenced and remand. It originally had a capacity of 600 inmates (500 in medium security and 100 in minimum security) but in 2001 this was increased to 750 inmates.¹⁴⁰ The prison was built at a cost of \$53 million.¹⁴¹ When it opened on 19 March 1993, it was the largest prison in NSW.¹⁴² There are currently 27 other prisons in NSW.¹⁴³

5.2 Private sector involvement¹⁴⁴

The private sector designed and built the Centre and has managed it since its inception. However, ownership of the Centre has remained with the State Government. The contracts for the design, construction and management of the Centre were awarded to Australian Correctional Services (ACS), a consortium of the US-based Wackenhut Corrections Corporation, ADT Australia, and Theiss Contractors. In turn, ACS entered into a contract with Theiss Contractors for the design and construction of the facility; and another contract with Australasian Correctional Management (ACM), a joint venture company formed by Wackenhut Corrections Corporation and ADT Australia, for the management of the Centre.¹⁴⁵ ACM currently manages the Centre. In 2002-03, the NSW government paid ACM a management fee of \$21 million.¹⁴⁶

¹³⁸The information in this paragraph was adapted from information on the *NSW Department of Corrective Services* website: <http://www.dcs.nsw.gov.au>

¹³⁹ Hereafter referred to as Junee prison.

¹⁴⁰ The increase in capacity was noted in NSW Department of Corrective Services, *Annual Report 2001/02*, p 112.

¹⁴¹ Diplock D. and Calabrese W, 'Privatisation and Industrial Relations: ACM's Experience', in Moyle P, *Private Prisons and Police: Recent Australian Trends*, Pluto Press Australia, 1994, p 113.

¹⁴² The Metropolitan Remand and Reception Centre at Silverwater, which opened in 1997 is now the largest prison in NSW.

¹⁴³ Including the two new prisons that opened in July 2004.

¹⁴⁴ This paragraph is based on information in Diplock and Calabrese, Note 141, p 106ff.

¹⁴⁵ ACM became a wholly owned subsidiary of Wackenhut Corrections Corporation in 1994.

¹⁴⁶ The Audit Office NSW, *New South Wales Auditor General's Report 2003*, Volume 6, p 341.

5.3 Phases of ACM's operation

ACM's initial five-year management contract expired on 31 March 1998 but was extended for a further three years pursuant to an option.¹⁴⁷ Prior to March 2001, the Labor Government decided to put the Junee management contract out to tender. The Government initially announced that it was planning to submit a tender to take over Junee when ACM's contract expired.¹⁴⁸ The Corrective Services Minister Bob Debus said the public sector's bid to run Junee was based on philosophical grounds rather than concerns about the private operator.¹⁴⁹ However the Government ultimately abandoned its plans to submit a tender, on the basis that the tender process was an unreasonable diversion of the efforts from other major projects underway in the prison system.¹⁵⁰ ACM was the successful tenderer again, entering into a new management contract, commencing on 1 April 2001, for a term of 5 years, with an option to extend for three more years.¹⁵¹ The contract was reportedly worth \$90.5 million over five years.¹⁵²

5.4 Background to privatisation

5.4.1 *The Liberal/National Party coalition is elected*

In March 1988, the Liberal/National Party coalition was elected and Michael Yabsley became the new Minister for Corrective Services. In September, the NSW Liberal Party's state convention reportedly urged the Government to hand over the running of minimum-security jails to the private sector.¹⁵³ In November, the new Corrective Services Minister chaired a promotional meeting in Sydney for Corrections Corporation of America (CCA), which had been sponsored by the John Holland Construction Group.¹⁵⁴ Then, in March 1989, Minister Yabsley announced that he would ask for expressions of interest from private companies in relation to the jobs of catering, perimeter patrols and escort duties for minimum-security jails.¹⁵⁵ At the time of this announcement, Minister Yabsley said he was impressed by the operation of CCA and he believed that similar companies in Australia could play a part in the

¹⁴⁷ Moyle (2000), Note 47, p 353 (footnote 35).

¹⁴⁸ 'Carr wants to take over jail', *Sunday Telegraph*, 2/4/00.

¹⁴⁹ *Ibid.*

¹⁵⁰ 'Labor backs off private jail bid', *Sunday Telegraph*, 11/6/00.

¹⁵¹ NSW Department of Corrective Services, *Annual Report 2000/01*, p 69.

¹⁵² Inspector General of Corrective Services, *Annual Report 2001/02*, p 48.

¹⁵³ 'Private Jail Guards on Way', *Daily Mirror*, 8/3/89

¹⁵⁴ Baldry E, Note 46, p 126.

¹⁵⁵ Private Jail Guards on Way', *Daily Mirror*, 8/3/89

housing, work and rehabilitation of prisoners, particularly minimum security prisoners.¹⁵⁶ On 13 June 1989, Minister Yabsley met with representatives from another company involved with prisons in the US, the Wackenhut Corporation.¹⁵⁷

5.4.2 *Overcrowding and prison construction*

By early 1989, overcrowding was becoming a serious problem for NSW prisons and one that was attracting a large amount of media attention. Moreover, it was going to get worse with the government's introduction of "truth in sentencing" legislation later in 1989.¹⁵⁸ That legislation would abolish remissions and ensure all prisoners served at least 75 percent of their sentences in prison.¹⁵⁹ The Government's main response to the overcrowding problem was to undertake what the Minister described as "the largest prison construction program in the history of NSW".¹⁶⁰ This building program included plans to build three new maximum-security jails to provide an additional 1,000 cells.¹⁶¹ Lithgow and South Windsor were locations for two of the new prisons, and in May 1989 Junee was selected as the site for the third new jail.¹⁶² Budget funds had been allocated to build these new prisons, so the situation was not quite the same as in the US, where the inability of state governments to finance the construction of new prisons was a major factor driving privatisation.¹⁶³ The Minister was, however, under pressure from the Premier to achieve productivity savings in the corrective services budget.¹⁶⁴

5.4.3 *Minister briefs merchant bank to investigate prospect of private sector involvement*

In June 1989, Minister Yabsley commissioned a merchant bank, Kleinwort Benson Australia Limited, to investigate the prospects for involvement of the private sector in the NSW prison system.¹⁶⁵ The brief from the Minister involved considering the practicality of private sector involvement in services such as catering, perimeter security, escort services and prison industries; and determining whether there were

¹⁵⁶ 'Private Jails Guards on Way', *Daily Mirror*, 8/3/89

¹⁵⁷ Baldry, Note 46, p 128.

¹⁵⁸ 'Tough new law on jail terms', *Sydney Morning Herald*, 24/4/89

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ 'Overcrowding strikes fear into officers', *The Daily Telegraph*, 22/7/89

¹⁶² Ibid.

¹⁶³ Baldry, Note 46, p 129.

¹⁶⁴ 'Greiner slashes prison funding', *The Daily Telegraph*, 29/06/89

¹⁶⁵ Kleinwort Benson Australia, *Investigation into Private Sector Involvement in the New South Wales Corrective Services System: Stage 1*, September 1989, p 2.

models of private sector involvement in prisons in other countries that could be relevant to NSW.¹⁶⁶ The reason for this study was to decide whether some private sector involvement might assist in alleviating some of the extensively-reported problems with the prison system, including high operating expenses, overcrowding, antiquated facilities, lack of staff training, outdated work practices, staff shortages, and low staff morale.¹⁶⁷ The Minister said the Government wanted to “look at all opportunities...that exist for doing things in the most cost-efficient and effective way.”¹⁶⁸

5.4.4 *Kleinwort Benson Report*

In September 1989, Kleinwort Benson delivered its twenty-three-page report, which recommended that the State Government approve the operation of privately run minimum and medium security prisons, subject to strict monitoring procedures.¹⁶⁹ The report also recommended that the operator of the privately run prison be responsible for its design, in conformity with standards set by the Department.¹⁷⁰ The consultancy firm earmarked one of the new prisons at Lithgow, South Windsor or Junee for development by the private sector.¹⁷¹ In support of its recommendation, the report stated, “a privately run-prison at one of these locations should not only achieve economic benefits but would also provide a yardstick against which the public system can be measured.”¹⁷²

The benefits of privatisation were identified earlier in the report as follows:

- (1) The private prison could be used as a precedent for introducing an alternative style of management or accelerating change within public prisons;
- (2) To the extent that private contractors can participate in ownership or funding of a prison, benefits will accrue to the Government by releasing funds from its capital budget;
- (3) Operating savings could be achieved – in this regard, the report noted that the private prison at Borallon in Queensland was expected to save the Government 7.5 to 10 percent and that in the US “savings of up to 30% to 40% have been quoted, although these figures are frequently the subject of debate”;

¹⁶⁶ Ibid at 2.

¹⁶⁷ Ibid at 2.

¹⁶⁸ ‘Prison services may be privatised’, *The Daily Telegraph*, 24/06/89

¹⁶⁹ Supra at 18, 23. The report also recommended private sector involvement in the operation of remand centres, prison industries and possibly in catering services (p 23).

¹⁷⁰ Ibid at 19, 23

¹⁷¹ Ibid at 19, 23

¹⁷² Ibid at 19.

- (4) A private prison would provide a benchmark to assess the efficiency of the present NSW system;
- (5) Competition between public prisons and those operated by private contractor provides incentive for greater efficiencies and better management throughout the system.¹⁷³

In conclusion, the report stated, “overseas experience appears to support the argument that benefits would be achieved in NSW from private prisons”.¹⁷⁴ The report listed other issues which required careful consideration. For example, legal protection of private contractors, changes in legislation, allocation of prisoners to the private prison, and the issues of renegotiating or terminating the contract.¹⁷⁵ However it was noted that these issues had been resolved to the satisfaction of the Governments in Queensland and in the US and were currently being dealt with in the UK.¹⁷⁶ In addition, the report briefly discussed public policy issues, namely, whether the government should delegate its responsibility for custody of prisoners to the private sector; and whether or not it was acceptable for profits to be made from corrections.¹⁷⁷ The consultants expressed the view that there was nothing inherently wrong with either of these outcomes.¹⁷⁸

5.4.5 The decision to privatise Junee prison

In November 1989, the Government released the Kleinwort Benson report. Minister Yabsley endorsed the recommendations in the report and said that the proposed prison in Junee might be downgraded from its maximum security rating so that it could become NSW’ first privately run prison. He indicated that it could be operating by 1992.¹⁷⁹ Then, in December 1989, the Minister went on an 11-day tour of privately run prisons in the US, including in Texas, Florida and Los Angeles.¹⁸⁰

Upon returning, the Minister said that in the new year he would recommend to Cabinet that there be a partial privatisation of the prison system, beginning with a new privately run remand centre in the inner city.¹⁸¹ The Minister said he was extremely impressed

¹⁷³ Ibid at 17

¹⁷⁴ Ibid at 18

¹⁷⁵ Ibid at 17-18

¹⁷⁶ Ibid at 18

¹⁷⁷ Ibid at 20

¹⁷⁸ Ibid at 20

¹⁷⁹ ‘Report urges private prisons for NSW’, *Financial Review*, 9/11/89; and ‘Yabsley backs profit prisons’, *Sydney Morning Herald*, 9/11/89

¹⁸⁰ ‘Yabsley’s Hard Cell’, *Sydney Morning Herald*, 16/12/89 and ‘Yabsley seeks private remand jail in Sydney’, *Sun Herald*, 24/12/89.

¹⁸¹ ‘Privately-run jails for NSW in two years’, *Sunday Telegraph*, 24/12/89

with the private prisons he toured in the US. While noting that only about six percent of America's prisons were privately run and that they had been running for only five years, the Minister said, "the inescapable conclusion is that they are extremely successful."¹⁸² He said construction costs were much lower, and there were also significant savings in recurrent costs and manning levels.¹⁸³ However, the Minister said the quality of the result was of most importance and that privately run prisons had shown themselves as being very superior in terms of programs for prisoners and rehabilitation.¹⁸⁴

In January 1990, the first privately operated prison in Australia opened at Borallon in Queensland. In May 1990, Minister Yabsley unveiled plans for the Junee prison, stating that the management of Junee jail by the private sector was a distinct possibility, and that it would be built with that possibility clearly in mind.¹⁸⁵ In September 1990, the Government called for expressions of interest from private enterprise in relation to the prison's design, construction, financing and management.¹⁸⁶ By this stage, Cabinet had agreed to private sector involvement in the first three stages of the project but no formal decision had been made to allow the prison to be managed by the private sector.¹⁸⁷ Also, by this stage, the plans for the jail had been changed from a 400-cell medium security prison, including a 50-bed periodic detention unit, to a 500-cell medium-security and 100-cell minimum-security prison.¹⁸⁸ In November 1990, the Minister announced that a new privately run jail would be established at Junee within two years.¹⁸⁹

5.4.6 Legislation introduced into Parliament

On 20 November 1990, Minister Yabsley introduced the *Prisons (Contract Management) Amendment Bill 1990* into Parliament. The Bill provided for the management of a prison to be undertaken by the private sector on a contract basis. In his second reading speech, the Minister said:

The amendments before the House represent the opportunity for a much needed and fresh approach to corrections. The legislation will be the beginning of a new era in correctional administration and prison management that will break new ground in this State. The contracting out will be within the confines of the principles that have been specified by the Government. These are to provide optimal conditions for modern, humane, rehabilitative and cost effective forms of management. Prisons of the future will be designed and built to facilitate particular management methods. The Junee development provides an opportunity for

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ 'Junee site for private sector jail', *Daily Mirror*, 31/05/90

¹⁸⁶ 'Govt looks to privately run jail', *Sydney Morning Herald*, 22/09/90

¹⁸⁷ Ibid

¹⁸⁸ Ibid

¹⁸⁹ 'Private jail at Junee', *Newcastle Herald*, 15/11/90

the private sector to prove it has the capacity to be cost effective and innovative in providing a model of how best to house and manage 600 medium and minimum security prisoners.

...The majority of prisons were built last century or early this century to specifications based on the management principles of isolation and punishment. Such designs make the introduction of modern management practices based on positive interaction between prisoners and staff particularly difficult...Junee prison will be a model, thereby providing a yardstick against which the performance of publicly managed prisons can be compared, measured and improved.

...Profit can only be made by more effective and efficient management practices, and fundamentally, that is what this proposal is intended to encourage, at the same time providing a model and benchmark for the public sector.

...In general terms, the contracting out of prison management must be seen as an opportunity to introduce innovation and reduce some of the pressures on a difficult area of public administration.¹⁹⁰

The Minister referred to the fact that the new Labor Government in Queensland had retained and supported the arrangements at the Borallon prison, which indicated “the value of the contribution which the contractor is making in the field of corrections in Queensland.”¹⁹¹ In relation to involving the private sector at the design and construction stages, the Minister said, “we have learnt from Queensland [where the public sector designed and built the prison] the need to have a cohesive approach towards the whole process of design, construction and management. Experience has shown that fragmentation of those three elements leads to inbuilt inefficiencies.”¹⁹² In addition, in relation to anticipated concerns about standards in the privately run prison, the Minister referred to research by the United States National Institute of Justice indicating that conditions for prisoners compared favourably in privately managed institutions.¹⁹³

5.4.7 Passing of legislation, award of contracts and opening of Junee

While there was much debate about this legislation in Parliament¹⁹⁴, the *Prisons (Contract Management) Amendment Act 1990* was ultimately passed and was assented to on 13 December 1990. The details of the legislation are outlined below. In 1991, the contracts were awarded to the Australian Correctional Services consortium. Construction of the Correctional Centre began in August 1991 and it opened on 19 March 1993.¹⁹⁵ It was the second privately operated prison in Australia, and the first to be designed, built and managed by the private sector.

¹⁹⁰ NSWPD, 20/11/90, p 10031-10033.

¹⁹¹ NSWPD, 20/11/90, p 10034.

¹⁹² NSWPD, 20/11/90, p 10032.

¹⁹³ NSWPD, 20/11/90, p 10033.

¹⁹⁴ NSWPD, Legislative Assembly: 20/11/90; 28/11/90; 29/11/90 and Legislative Council: 30/11/90. For a summary, see Moyle (2000), Note 47, p 65.

¹⁹⁵ NSW Department of Corrective Services website: <http://www.dcs.nsw.gov.au>

5.5 The legislation¹⁹⁶

5.5.1 Management agreements

The Act provides that the Commission of Corrective Services may enter into a management agreement with a corporation providing for the management of one or more correctional centres.¹⁹⁷ The management agreement must provide for:

- (a) compliance by the management company with the provisions of this Act and the regulations, and of any other Act or law, so far as they affect the correctional centre and the welfare of its inmates, and
- (b) objectives and performance standards for the management company in relation to the management of the correctional centre, and
- (c) employment by the management company of a person competent to exercise the functions of the governor of the correctional centre and of sufficient and competent custodial and paramedical and other staff to enable it to discharge its obligations under the agreement, and
- (d) remuneration of the management company, and
- (e) submission to the Commissioner of periodic reports and audited accounts in relation to the management of the correctional centre, and
- (f) prohibition of subcontracting by the management company, otherwise than as allowed by a submanagement agreement or as approved by the Commissioner, and
- (g) indemnity by the management company of the Crown and the Commissioner for damage to the correctional centre and any associated public property in the possession or under the control of the management company, and
- (h) notification of any variation of the controlling interests in the management company or of its management structure, and
- (i) such other matters as may be prescribed by the regulations.¹⁹⁸

The management agreement may make such other provision, not inconsistent with the Act or Regulations, as may be agreed.¹⁹⁹ The management agreement is not publicly available due to commercial-in-confidence restrictions.²⁰⁰

¹⁹⁶ The *Prisons (Contract Management) Amendment Act 1990* added to the *Prisons Act 1952* by inserting a new Part 6A entitled "Engagement of Contractors". In 1996, the *Prisons Act 1952* was renamed the *Correctional Centres Act 1952* and that Act was later replaced by the current *Crimes (Administration of Sentences) Act 1999*. Accordingly, the contract management provisions are now found in Part 12 of the *Crimes (Administration of Sentences) Act 1999*. This paper will refer to sections in the 1999 Act.

¹⁹⁷ Section 238(1).

¹⁹⁸ Section 238(2).

¹⁹⁹ Section 238(3).

²⁰⁰ Rynne J, Note 56, p 140-41.

With the approval of the Commissioner, the management company may enter into a sub-management agreement with respect to the management of the prison on its behalf and in accordance with the management agreement.²⁰¹

5.5.2 *Standards*

The Commissioner must prepare a written statement setting out minimum standards in relation to the exercise of any functions by a management company or sub-management company; and the Minister must cause the statement to be laid before each House of Parliament within 10 days of execution of an agreement.²⁰²

5.5.3 *Staff*

Authorisation of staff: The Commissioner's authorisation is required before a person can be employed as the governor of the centre, a custodian of offenders or in any other capacity prescribed by the regulations.²⁰³ The Commissioner can refuse to issue an authority on certain grounds, eg if the person has not undertaken an accredited course of training. The Commissioner may also revoke an authority on certain grounds, eg if the person fails to comply with provisions in the Act or Regulations.²⁰⁴

Status of staff: The person who is appointed by the management company to exercise the functions of the Governor is, for the purposes of the Act, the Governor of the prison.²⁰⁵ In addition, a person employed for the purposes of a management agreement is, in the performance of duties of employment, subject to the provisions of the regulations, and any directions given by the Commissioner.²⁰⁶

5.5.4 *Monitoring and Scrutiny*

Scrutiny as if public entity: The *Independent Commission Against Corruption Act 1988* applies to the management company and to its directors, officers and employees who require an authority from the Commissioner.²⁰⁷ The *Ombudsman Act 1974* applies to the company, the governor of the centre, and to directors, officers and employees who require an authority from the Commissioner.²⁰⁸ The *Freedom of Information Act 1989* applies to the company and to its members and employees.²⁰⁹

²⁰¹ Section 239.

²⁰² Section 248.

²⁰³ Section 240(1).

²⁰⁴ Section 240(2), (3).

²⁰⁵ Section 241(1).

²⁰⁶ Section 241(2).

²⁰⁷ Section 245.

²⁰⁸ Section 246.

²⁰⁹ Section 247.

Monitor: A monitor is to be appointed under the *Public Sector Management Act 1988*.²¹⁰ The monitor is responsible to the Commissioner for the assessment and review of the management of the correctional centre.²¹¹ A monitor must make an annual report in writing to the Commissioner of his/her findings regarding the management of the centre and any activity undertaken in accordance with the management agreement that affects the centre.²¹² A copy of the report must also be given to the Inspector General.²¹³ The monitor is to have free and unfettered access at all times to all parts of the centre, to all centre records, to all offenders held in custody at the centre, and to all employees.²¹⁴

Corrections Health Service: The CEO of the Corrections Health Service is to ensure that the provisions of the legislation relating to the health of offenders, or to their medical or dental treatment, are being complied with at the centre.²¹⁵ For that purpose, the CEO is to have free and unfettered access at all times to all parts of the correctional centre, to all medical records held at the centre and to all offenders held in custody.²¹⁶

Community Advisory Councils: To assist in the monitoring of a managed centre, and to encourage involvement in the oversight of its management, the Minister is to appoint a community advisory council for the centre, made up of persons the Minister considers suitably qualified and representative of the interests of the local community.²¹⁷ The Council is to make quarterly reports in writing to the Minister of its findings regarding the management of the Centre, and must give a copy to the Inspector General.²¹⁸

²¹⁰ Section 242(1).

²¹¹ Section 242(2).

²¹² Section 242(4).

²¹³ Section 242(5).

²¹⁴ Section 242(8).

²¹⁵ Section 244(1).

²¹⁶ Section 244(1).

²¹⁷ Section 243(1), (2).

²¹⁸ Section 243(3), (4).

6. THE DEBATE

6.1 Overview

This section outlines the main arguments for and against private prisons.²¹⁹ The arguments are presented from a theoretical perspective. Critics and supporters of private prisons would also cite empirical evidence in support of their arguments. That evidence is covered in Section 8. The Table below contains a summary of the arguments. Note that arguments listed in the “arguments for” column from row four onwards are, in effect, answers to arguments in the “arguments against” column.

Table 6.1. Arguments for and against privately operated prisons

	Arguments for	Arguments against
1	Private sector is more efficient and innovative and will operate cheaper and better prisons.	Private sector will not be more efficient or innovative and will operate worse prisons
2	Privatisation will be a catalyst for reform: cross-fertilisation	Privatisation will not result in reform and it could even hinder reform.
3	Privatisation will strengthen accountability	Privatisation will weaken accountability
4	There is nothing wrong in principle with contracting out prison management.	Imprisonment is an essential government function that should not be delegated
5	The private sector’s profit motive does not make it less trustworthy as prison manager	It is wrong to place prisons in hands of private sector which, rather than being motivated to do good, is motivated by profits
6	The profit motive will not conflict with doing justice and can actually coincide with it.	The profit motive will conflict with doing justice.
7	Private prison operators will not cut costs at the expense of standards.	Private prison operators will cut costs at the expense of standards.
8	Private prison operators will not make decisions that increase the length of an inmate’s stay	Private prison operators will make decisions that increase the length of an inmate’s stay.
9	It is not immoral for profits to be made from imprisonment	It is immoral for profits to be made from imprisonment.
10	Private prison companies will not bring lobbying to a field where none exists.	Private prison companies will form a powerful lobby for high-imprisonment policies.

²¹⁹ The focus is on arguments relating to private operation of prisons rather than private sector design, financing and construction of prisons.

6.2 Arguments for private prisons

6.2.1 *Private sector is more efficient and innovative and will operate cheaper and better prisons.*

The private sector claims that it can and will run cheaper and better prisons. The core component of this argument is that the private sector, which is subject to the rigours of competition and is free from bureaucratic constraints, will be more efficient and motivated than the public sector. It will therefore provide better value for money in prison operations - even allowing for a profit margin. The main reasons advanced in support of the private sector's claim to higher efficiency are as follows:

- (i) *Competition creates incentives to be efficient:* Competition among private companies creates incentives that are absent in public monopolies.²²⁰ Private companies will want to provide the best quality at the lowest cost to gain an edge over their competitors.²²¹ In contrast, the argument is that public sector agencies, which have a monopoly, are more concerned with spending allocated funds and growing their budgets than with delivering cost effective services.²²²
- (ii) *Private operators free of red tape and have greater management flexibility:* McCartney states, "Private companies...claim to be free of costly red tape; making them effective purchasers of goods and services with more flexible management; responsive to needs and less bureaucratic."²²³ Operating without red tape and with greater flexibility in management also allows private companies to deploy the work force more productively.²²⁴ It is also said that private operators can achieve efficiency by introducing new management techniques.²²⁵
- (iii) *Private operators can achieve significant savings in labour costs:* Private companies claim that savings can be made through reducing staff costs, which represents the main cost in operating a facility. This can be done in a number of ways. The number of staff can be reduced by designing facilities that require

²²⁰ McDonald and Patten (2003), Note 34, p xx.

²²¹ Joel D C, 'The Privatization of Secure Adult Prisons: Issues and Evidence', in Bowman G et al, *Privatizing Correctional Institutions*, Transaction Publishers, New Brunswick, 1993, p 55.

²²² McDonald and Patten (2003), supra, p xx. See also Logan (1990), Note 15, p 84-85; Joel, ibid, p 55.

²²³ McCartney, Note 17 p 311. See also McDonald and Patten (2003), Note 34, p xix, and Vallance, Note 20, p 404.

²²⁴ McDonald D, 'The Costs of Operating Public and Private Correctional Facilities', in McDonald D et al, *Private Prisons and the Public Interest*, Rutgers University Press, New Brunswick, NJ, 1990, p 86.

²²⁵ Vallance, Note 20, p 406.

less staff and by increased use of electronic surveillance.²²⁶ Also, the freedom from bureaucracy and the use of non-union labour gives private operators more flexibility in hiring, firing, and deploying staff.²²⁷ Vallance states, “[p]rivate prison companies make...savings through more efficient allocation of staff. The elimination of overtime, the use of part-time staff, and a reduction in staff turnover, all contribute to significant cost savings.”²²⁸

In addition to innovations leading to greater efficiency, the private sector claims that it will introduce innovations that improve the quality of prisons. In particular, innovations relating to inmate rehabilitation. The private sector also argues it can develop a better working culture amongst staff, which will also result in better prison management. Further, the private sector argues that the contracting process would force the government to “clarify and specify their goals and performance measures”²²⁹ and that this would result in better prisons – both private and public. As to questions about their ability to cope with the difficult task of running prisons, the private sector would point out that their managerial staff comprise people who have had many years of experience in corrections; and that custodial and other staff would receive comprehensive training in accordance with government regulations.

6.2.2 *Privatisation will be a catalyst for reform: cross-fertilisation*

The introduction of the private sector will have a “positive influence...on the performance of public sector prisons, and thereby on the improved efficiency and quality of the whole prison system.”²³⁰ This would occur as result of the public sector being exposed to competition and as “ideas and good practices identified within the private sector would feed through into the public sector.”²³¹ Harding states:

The point of privatisation is system-wide change and improvementthe catalyst is competition....

²²⁶ McCartney, Note 17, p 311 and Vallance, Note 20, p 405. Note, however, that this may be more of an argument for the private design of facilities as distinct from operation.

²²⁷ Austin and Coventry (2001), Note 130, p 16; McDonald and Patten (2003), Note 34, p xx; and McDonald (1990), Note 224, p 86; and Shichor D, *Punishment for Profit: Private Prisons Public Concerns*, Sage Publications Inc, 1995, p 149-50.

²²⁸ Vallance, Note 20, p 405.

²²⁹ Logan, Note 15, p 128.

²³⁰ Bottomley K and James A, ‘Evaluating Private Prisons: Comparisons, Competition and Cross-fertilization’, (1997) 30 *The Australian and New Zealand Journal of Criminology* 259 at 269, referring to Harding (1997).

²³¹ House of Commons, *Second Report from the Home Affairs Committee, Session 1996-97: The Management of the Prison Service (Public and Private), Volume I*, The Stationery Office London, cited in Bottomley and James, *ibid*, p 268.

The objective above all... is to launch an upward spiral of improved penal practice from the stagnant plateau which has all too often over many decades characterized purely public systems....²³²

It should be noted that Harding argues that cross-fertilisation can only be achieved if private prisons are “effectively regulated and properly accountable.”²³³ He also notes that there are barriers to change in the form of attitudes of all levels of public prison personnel. But he says these are not insuperable.²³⁴ Reform of the public system was undoubtedly an important consideration in privatising the Junee prison in NSW.²³⁵

6.2.3 *Privatisation will strengthen accountability*

The John Howard Society of Alberta summarises this argument:

Proponents argue that privatisation increases accountability in several ways. First, the market processes of competition adds to the traditional political pressures that surrounds corrections. Second, government is able to monitor and regulate a private contracting agency better than it can monitor itself, as a degree of independence ensures critical appraisal. Next, private sector interests encourage government to address the issue of objective performance measures that have yet to be developed. As well, private contract monitoring creates an adherence by staff to procedure. This limits and controls the discretion available to administrators regarding discipline of inmates.

Proponents further assert that privately contracted prisons are more visible and accountable, receiving greater attention from media, advocacy groups and the public....Further, proponents suggest that competition encourages private contracting agencies to police each other, adding an additional control mechanism. Finally, they argue that private contracting offers ease in altering the status quo, when “bad management has become entrenched and resistant to reform.”²³⁶

In response to the argument that privatisation will lead to a break in the chain of accountability, McDonald states:

Unfortunately, control over public correctional facilities in many places is neither as direct or effective as the idealized model of the unbroken chain of command suggests...

...Political and administrative controls over correctional administration are excessively fragmented; too many correctional agencies are insulated from the higher levels of government, which has given administrators room to wield broad discretionary powers; and administrators have resisted being held accountable for their performance...²³⁷

²³² Harding (1997), Note 14, p 148.

²³³ Ibid at 165.

²³⁴ Ibid at 137.

²³⁵ See extracts of second reading speech above at p 30-31. See also Bottomley and James, Note 203, p 268.

²³⁶ The John Howard Society of Alberta (2002), Note 24, p 15-16.

²³⁷ McDonald D, ‘When Government Fails: Going Private as a Last Resort’, in McDonald D C, *Private Prisons and the Public Interest*, Rutgers University Press, 1990, p 189.

Ryan and Ward also suggest that the accountability of public prisons is stronger in form than it is in substance.²³⁸ Supporters of prison privatisation also point out that private prisons are subject to monitoring and other safeguards *in addition to* the same accountability mechanisms that apply to public sector prisons (eg legislative and judicial mechanisms as well as the Ombudsman, Official Visitors, etc).

6.2.4 *There is nothing wrong in principle with contracting out prison management.*

(i) *Distinction between allocation and administration of punishment*

Harding distinguishes between the *allocation* (or *imposition*) of punishment and the *administration* of punishment. He says that the former is an essential state function that can never be delegated, while the latter can be delegated as long as the state remains accountable:

...the ‘communal nature of punishment’, the ‘deprivation of citizens of their liberty’ is protected and preserved as an essential function of the state by the fact that punishment is imposed or *allocated* by an independent judiciary which represents state authority both symbolically and practically. On this view, the administration or delivery of punishment is a second level aspect of state authority, delegable in a day-to-day sense, as long as the state remains accountable for its exercise to its citizens – who are the source from which its own legitimacy derives. The key question thus becomes whether the contractor is effectively accountable to the state and whether the state is effectively accountable to its citizens. If accountability is structured effectively, then...the message continues to be conveyed through agents who are public in the sense of being ultimately answerable to the state.²³⁹

Harding recognises that some aspects of operating a prison could shade into the allocation of punishment (eg disciplinary decisions) but he suggests that privatisation can be structured in a way that does not allow this to happen.²⁴⁰

(ii) *Logan’s arguments*²⁴¹

Firstly, while Logan acknowledges that prisons are recognised as one of the basic functions of government, he submits that contracting out prison management to the private sector does not constitute an abdication of government responsibility. He states:

²³⁸ Ryan and Ward, Note 39, p 76 (original emphasis). See also *ibid*.

²³⁹ Harding (1997), Note 14, p 22

²⁴⁰ See Harding (1997), *ibid*, p 27, 40, 88-84. For example, Harding notes that, in the UK beyond laying charges, private prison operators possess no direct disciplinary powers in relation to prisoners. As to the position in relation to the privately run Junee prison and disciplinary decisions, see below at p 59. For an in-depth discussion of the division between the allocation and administration of punishment, see Moyle (2000), Note 47, Chapter 6.

²⁴¹ The following is a summary of Logan’s arguments in Logan, Note 15, p 49ff.

It must be made clear that contractually managed prisons are still government prisons. They do not exist on their own authority. A case might be made for truly private prisons independent of government authority, but no one arguing for prison *contracting* is attempting to make *that* case. In the current argument, the choice is only between (a) direct governmental provision through salaried employees versus (b) governmental procurement through contract.²⁴² (original emphasis)

Secondly, Logan refers to Locke's theory that people contract to form a state and completely give over to it their power to punish those who break the law;²⁴³ and Logan suggests that, under the 'social contract', the state has an implied power to delegate its power to punish:

Whatever reasons exist for placing the power to punish in the hands of the state, the major point is that it must be transferred; it does not originate with the state. The power and authority of the state to imprison are derived from the consent of the governed and may with similar consent be delegated further. Because the power does not originate with the state, it does not attach inherently to it, and can be passed along to private agencies....

In short, the state does not own the right to punish. It merely administers it in trust, on behalf of the people and under the rule of law. There is no reason why subsidiary trustees cannot be designated, as long as they too, are ultimately accountable to the people and subject to the same provisions of law that direct the state.²⁴⁴

Thirdly, Logan deals with the claim that only state employees can legitimately use force:

In a system characterized by the rule of law, state and private agents 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 exercise of force is legitimate. The law may specify that those authorized to use force in certain situations should be licensed or deputised and adequately trained for this purpose, but they need not be state employees.²⁴⁵

Fourthly, Logan answers the argument by critics as to the symbolic importance of having prisons run by the state. He says that prisoners will care more about how officers treat them than what insignia grace their uniforms.²⁴⁶ Logan also makes the point that public employees in prisons are hired not elected; and they represent the public not through their selection but by virtue of their function.²⁴⁷ He says that how well they do their job determines how well they represent the public. Logan asserts that "[t]he important question...is whether relevant legal values will be served more faithfully by public employees or by contractual agents"²⁴⁸, and he says this is an empirical question

²⁴² Ibid at 50-51

²⁴³ Ibid at 52

²⁴⁴ Ibid at 53-54

²⁴⁵ Ibid at 54

²⁴⁶ Ibid at 56.

²⁴⁷ Ibid at 57.

²⁴⁸ Ibid at 57.

rather than one of principle. He concludes, "...what we are ultimately trying to symbolize is legal authority, not government employment. Employment is merely one method of conveying or delegating legal authority; contracting is another."²⁴⁹

Lastly, Logan refers to other aspects of criminal justice that have been privatised to varying degrees; in many cases with little or no controversy. He gives examples including community security, bail services, bounty hunting, prosecution, transport of prisoners, prison services, halfway houses, community corrections programs and probation services. He then points out that "other functions widely regarded as 'governmental' have also been privately delegated or contracted."²⁵⁰ He refers to examples such as national defence, police protection, capital punishment, and the entire administration of some cities.

Logan says that "it is hard to find any specific governmental function or power, the administration of which has not been delegated at least in some part at some time to private agents"²⁵¹; and he concludes, "there is...no type of government function or power that can never be delegated in any degree."²⁵² He then goes on to consider the *extent* to which government functions such as imprisonment can be delegated to the private sector – eg whether decisions affecting prisoner liberty could be delegated to the private sector (eg disciplinary decisions).²⁵³ He suggests that, as "long as the government retains the final authority and the power to review over [such decisions] delegation...would not be 'excessive' because sovereignty will not have been lost."²⁵⁴

(iii) Making prisons better is more important than ideological positions

It is argued that what matters most is not the status of the of the service provider, whether public or private, but the quality of the service.²⁵⁵ Harding elaborates:

A moral position which is blinkered from the realities which exist on the ground may be self-sustaining and may well comfort its adherents; but it does not take debates about penal policy in any useful direction. Indeed, this is the point at which morality starts to give way to fundamentalism. It sometimes seems as if all the data in the world – even if they showed that private prisons were cheaper, prisoner health was better, recidivism rates were lower, and so on – it would not convince some opponents.

²⁴⁹ Ibid at 57.

²⁵⁰ Ibid at 59.

²⁵¹ Ibid at 59.

²⁵² Ibid at 59

²⁵³ Ibid at 59-60. For a critique of Logan's counter-arguments see Moyle (2000), Note 47, p 159-61; p 163-66.

²⁵⁴ Ibid at 60.

²⁵⁵ McDonald D, 'Public Imprisonment by Private Means: The Re-Emergence of Private Prisons and Jails in the United States, the United Kingdom and Australia', (1994) 34 *British Journal of Criminology* 29 at 39.

Neither does moral or ideological fundamentalism help the people who actually inhabit prisons...Prisoners may not be particularly cheered by the knowledge that grandiose strategies about ideological realignment can so readily be constructed out of their predicament. They are left stranded as irrelevant symbols of supposedly greater issues. Their own identities and preferences are of no interest. This is their ultimate disempowerment. A debate which *par excellence* possesses profound human connotations is reduced simply to moral or ideological abstractions.²⁵⁶

6.2.5 *The private sector's profit motive does not make it less trustworthy as prison manager*

Supporters of private prisons respond to the argument made by critics that the private sector is motivated to make profits rather than to do justice. Donahue replies:

These arguments on their own are unconvincing briefs against privatisation. To insist that everyone involved in a public enterprise be driven by wholly altruistic motives would imply rejecting Medicaid (since it relies on private doctors)...and indeed virtually all governmental undertakings. The question is not whether supplier goals are identical with the public purpose; this coincidence of interests, while generally helpful and sometimes essential, is by no means always necessary. Neither civil service prison employees nor corrections entrepreneurs can be expected to share in every particular the "purposes of the courts" or to be motivated by a commanding "sensitivity to the needs and rights of prisoners". The question is, what form of relationship between the public and its agents best harnesses the efforts of agents to the common purpose...?²⁵⁷

Logan makes several points.²⁵⁸ Firstly, he says that, strictly speaking, the motivation of those who apply a punishment, as distinct from determining the punishment, is not relevant either to the justice or to the effectiveness of the punishment.

Secondly, Logan submits that a consistent objection requires one to compare the motives operating in the public sector. He asks whether it is wrong for state employees to have a financial stake in the existence of a prison system? Whether it is wrong for unions to profit by exacting compulsory dues from those employees? Whether it is wrong for state prison bureaucracy to seek growth through seizing the profits of others (taxation) rather than through reinvestment of its own profits? Logan says that it is simply an expression of prejudice to say that any activity becomes suspect if it is carried out for profit, as compared to salary and other benefits.

Thirdly, Logan contends that of various possible motivations for serving as an agent of punishment, the profit motive is among the most benign. He says to compare some alternative motives such as enjoyment of power, arrogance, malice, cruelty, resentment, or prejudice. Logan argues that criminal justice policies and practices must be judged by their consequences, not by their motives. He says that public service should be judged

²⁵⁶ Harding (1997), Note 14, p 23-24.

²⁵⁷ Donahue, Note 33, p 155-56.

²⁵⁸ The following is based on Logan, Note 15, p 71-73.

as an outcome, regardless of whether the motivating force behind it is probity, power or profit. In conclusion, Logan asserts:

“Replacing “public servants” with “profit seekers” in the management of prisons will not trade those whose motives are noble for those whose motives are base. Rather, it will replace actors whose motives we suspect too little with actors whose motives we might suspect too much.”²⁵⁹

6.2.6 The profit motive does not conflict with doing justice and can actually coincide with it

In response to the suggestion that private prison operators will put their own welfare (ie making profit) ahead of the welfare of inmates and of the public interest, Logan says²⁶⁰ that this concern is legitimate but it is at least partially misplaced when it is portrayed as a problem unique to commercial enterprises. Actually, he says, the problem exists for public as well as private, and for non-profit as well as profit making organizations. Logan argues that if justice and the profit motive were really incompatible then justice would be doomed, because in one form or another the profit motive is universal. He says that, like the rest of society, politicians, government bureaucrats and other state agents are motivated by self-interest. Logan also suggests that the profit motive is more controllable than are the motives operating in public bureaucracies. In conclusion, Logan states “the profit motive is not necessarily in conflict with the pursuit of justice, it can in fact be conducive to it.”²⁶¹

6.2.7 Private prison operators will not cut costs at the expense of standards.

Supporters of private prisons argue that they will cut costs at the expense of standards because it would not be in their interests to do so.

Firstly, because it would create morale problems for inmates and staff and may lead to unrest, disturbances or even riots.²⁶² Such conditions would not further the interests of a private prison operator; they would make the prison more difficult and costly to manage, as well as making the prison a harder place to work, thus resulting in higher staff turnover and associated costs.²⁶³ In addition, worse conditions in prisons could lead to prisoner and staff, litigation, which would increase costs, including insurance premiums.²⁶⁴ A spokesman for CCA at Borallon private prison in Queensland states:

²⁵⁹ Ibid at 73.

²⁶⁰ The following is based on Logan, Note 15, p 73-75.

²⁶¹ Ibid at 75.

²⁶² McDonald (1994), Note 255, p 42; and McDonald (1990), Note 237, p 191.

²⁶³ Ibid.

²⁶⁴ Ibid at 191.

A more productively occupied and settled prison population means there is less need for prison guards. The biggest cost blow-out is overtime; round the clock prison guards can easily consume \$500,000 extra overtime if there are disturbances...Our interest is not in locking up prisoners for longer periods or feeding them scraps...but keeping them in meaningful occupations, well housed and fed. It is one of those instances in which the profit motive coincides with what is best for prisoner accommodation and rehabilitation.²⁶⁵

Secondly, under private prison contracts, a component of the fees payable to private operators are generally linked to specified performance criteria²⁶⁶; and in relation to some contracts, the government can impose fines on private operators for breaches.

Thirdly, private prison companies “won’t cut corners to make the bottom line, because [they] wouldn’t stay in business”.²⁶⁷ If private operators did not maintain standards they would risk having their contract terminated or not renewed.

Private prison enthusiasts also make the point that this argument against privatisation also applies to public prisons. Budgetary pressures applying to public prisons can mean that they cut costs at the expense of standards and prisoner welfare.

Lastly, and relating to the previous point, Logan suggests that the potential for deterioration in standards in private prisons might only arise if the government puts cost before quality in the tender process:

...whether...profit-seeking lead[s] to corner cutting...will depend less on the intrinsic nature of private business than on the nature of the government’s oversight and regulation of the contracting process. If government becomes caught up in the lowest bidder syndrome, competition for business and the need for profit may indeed cause a reduction in standards. For this reason, concern with cost savings should not outweigh considerations of quality when evaluating programs or proposals.²⁶⁸

6.2.8 *Private prison operators will not make decisions that increase the length of an inmate’s stay*

Supporters of private prisons claim that critics are wrong to suggest that private operators will make decisions – relating to parole, discipline etc - that increase the length of time that inmates spend in prison, in order to maximise profits. Supporters make several points.

²⁶⁵ ACT Corrective Services, *Establishment of a Correctional Facility; Discussion Paper*, Chapter 4, quoting Stewart (1992). Located on ACTCS website: <http://www.cs.act.gov.au/>.

²⁶⁶ The contract for operating the Junee private prison in NSW provides for a performance-linked-fee, see NSW Department of Corrective Services, *Annual Report 2002/03*, p 120-121.

²⁶⁷ See Donahue, Note 33, p 170. See also McDonald (1994), Note 255, p 42.

²⁶⁸ Logan (1990), Note 15, p 120.

Firstly, the contract may not be tied to the number of inmates held in prison and if so, there would be no incentive for private prison operators to make such decisions. In any event, the incentive to keep inmates in prison for longer only exists if non-replacement of inmates is assumed; and with rising prisoner numbers that is not a good assumption.²⁶⁹ In addition, private operators have an incentive to maintain a reputation for fairness and integrity, as this helps to secure and renew contracts and cuts the cost of inmate conflict and litigation.²⁷⁰

Furthermore, the legislative scheme for parole recommendations, disciplinary decisions may provide limited or no scope for private operators in relation to such decisions.²⁷¹ Also, any potential for making improper decisions can be addressed by putting into place appropriate procedural safeguards. For example, a system for monitoring relevant decisions and for appeals against those decisions to an independent body.²⁷² Lastly, supporters point out that public officials have self-interests that may bias decisions.²⁷³ For example, saving face and maintaining personal authority can influence public officers in disciplinary matters.²⁷⁴

6.2.9 *It is not immoral for profits to be made from imprisonment*

Private prison enthusiasts point out that private companies have for many years provided services to prisons on a purely commercial basis, such as food, maintenance, clothing and utilities; and they argue that there is no moral distinction between profiting from these services and profiting from prison management.²⁷⁵ Secondly, there are many businesses in society which involve the private sector profiting from the misfortune of others, e.g. private hospitals, doctors, lawyers, panel beaters, and funeral directors.²⁷⁶ Thirdly, employees in the public prison system are paid for their labour and therefore also profit from imprisonment. Fourthly, if private operators can improve the quality of prisons, it should not matter that they make a profit from the activity. McDonald asks rhetorically, “In the case of imprisonment, if market incentives can in fact be taken advantage of to raise the standard of services, why is that not acceptable?”²⁷⁷

²⁶⁹ Ibid at 67; see also Gold M, ‘The Privatization of Prisons’, (1996) 28(3) *The Urban Lawyer* 359 at 377.

²⁷⁰ Ibid at 69.

²⁷¹ As is the case with private prisons in the UK, see below p 65.

²⁷² Supra at 65 and 69-70.

²⁷³ Ibid at 64, 68-69, and 74.

²⁷⁴ Ibid at 69; see generally at 68-69 and 71-75.

²⁷⁵ Group 4 submission to Tasmanian Legislative Council Select Committee, Note 84, p 81.

²⁷⁶ Ibid. See also ACT Department of Corrective Services, Note 265, Chapter 4.

²⁷⁷ McDonald (1990), Note 237, p 185.

6.2.10 *Private prison corporations will not bring lobbying to a field where none exists.*

Private prison enthusiasts make a couple of responses to the argument that private prison corporations will become a powerful lobby group for tougher law and order policies and more prisons. They point out that dramatic increases in the prison population have always *preceded* moves by governments in various jurisdictions to privatise prisons.²⁷⁸ In addition, Logan argues that the private sector will not bring politics and lobbies to a field where none now exists.²⁷⁹ Corrections policy, he says, is already a political arena, which is strongly influenced by special interest groups.²⁸⁰ He says that *public* employee unions are one of the strongest lobby groups and corrections staff unions campaign for a similar cause to the one that critics fear private prison companies will advance.²⁸¹ Similarly, Harding states:

Penal policy, like it or not, has become everybody's business. Private correctional companies must certainly be scrutinised so that any lobbying they attempt will be recognised and where appropriate stigmatised. But in a broad sense they can hardly be quarantined from participation in a debate in which everyone else seems to be participating.²⁸²

²⁷⁸ Harding (1997), Note 14, p 95.

²⁷⁹ Logan (1990), Note 15, p 155.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid* at 156-158.

²⁸² Harding (1997) at 28. For other arguments in relation to this issue, see Logan at 154-161 and Ryan M, 'Private Prisons in the United Kingdom: Radical Change and Opposition', in Moyle P, *Private Prisons and Police: Recent Australian Trends*, Pluto Press, 1994 p 249-252.

6.3 Arguments against private prisons

6.3.1 *Private sector will not be more efficient or innovative and will operate worse prisons*

Critics argue that privatising prisons will not achieve greater efficiency, cost savings, or innovations leading to better quality prisons. In other words, the main benefits said to arise from prison privatisation will not eventuate. Critics make a number of points:

- (i) *Real competition?* Critics query whether there will be real competition in the private prison industry. Vallance states, “[p]rivate prisons are unlikely ever to generate significant profits for their corporations, and as a consequence it is doubtful that the corrections field will ever experience true competition.”²⁸³ Donahue refers to barriers to competition such as high entry costs, long-term contracts, and disruption that would be caused by changing contractors.²⁸⁴ One commentator notes that “a private monopoly is no more efficient than a public monopoly, and no more preferable.”²⁸⁵
- (ii) *Profit margin and extra costs associated with private prisons:* Detractors suggest that any cost savings through greater efficiency will be offset by the profit margin earned by private operators and by costs associated with contracting, eg drawing up the contract, the tender process, negotiations as well as significant monitoring costs.²⁸⁶
- (iii) *Limited opportunities for operational innovations:* Donahue queried whether there were many opportunities for innovations leading to cost savings:

...in general, incarcerating people is an enterprise with relatively little scope for resource-sparing technical progress...Once the task is defined as imprisonment, the range of alternative technologies is relatively narrow (broadening the task to include rehabilitation would obviously expand this range, and vastly complicate the definition and measurement of efficiency) Prisoners must be sheltered, cared for when sick, protected from each other, and prevented from escaping. These do not appear to be tasks that allow for radical innovation in technique.²⁸⁷

Vallance also questioned whether the private sector can be innovative:

Private prison management is not an area where private prison companies have by tradition had their own niche in the marketplace. And given that senior management in

²⁸³ Vallance, Note 20, p 405.

²⁸⁴ Ibid at 405-406. See also Donahue, Note 33, p 165 and Logan, Note 15, p 225ff.

²⁸⁵ Gold, Note 269, p 366.

²⁸⁶ Logan, Note 15, p 103-04.

²⁸⁷ Donahue, Note 33, p 162.

privately operated prisons is drawn almost without exception from the public sector, the degree to which that management can reasonably be expected to be innovative is perhaps insignificant. A plausible counter-argument, of course, may be that current management practices in certain government prisons stifle innovation and experimentation by senior staff.²⁸⁸

(iv) *Competence of private prison operators?* Critics questioned the competency of private companies in such a complex area as prison administration, where the companies had no or little experience. Even “open-minded and pragmatic observers of privatisation”²⁸⁹ were concerned whether private operators could deal with the most difficult custodial issues. Harding explains:

Prison management is hard enough business at the best of times, even with an established workforce. Understandably, there is some concern that private operators, necessarily cost-conscious and initially dependent upon inexperienced staff, may not handle the most sensitive difficulties confidently or well...

What, then are these special custodial issues? They seem to fall into four main categories. First, there is the overarching problem of overcrowding...Second, there is the question of how to deal with riots and disturbances. Next, there is a group of other security issues, such as the imposition of discipline, drug use by prisoners and the control of escapes. Finally comes the question of the prison regime as it affects inmates – such matters as suicide prevention; health services; the management of the vulnerable, HIV-positive and protection prisoners; race relations; intimidation and bullying by prisoners; food; and visits.²⁹⁰

(v) *Any cost savings will come at the expense of quality:* Critics argue that cost reductions will only be achieved by cutting corners, ie by sacrificing quality. For example, in relation to labour costs, some critics have expressed concerns that private prisons will attempt to cut costs by offering lower wages, which will mean lower quality candidates, and worse prison conditions.²⁹¹

(vi) *Prison officer unions argue that private prisons are a threat to wages and working conditions:* In addition to claims that private prisons will be worse for prisoners, prison officer unions argue that private prisons are a threat to existing wages and working conditions in prisons; and they believe that there will be a lowering of the standards of care in private prisons which has the potential to prejudice the safety and welfare of officers²⁹²

²⁸⁸ Vallance, Note 20, p 406.

²⁸⁹ Harding (1997), Note 14, p 121.

²⁹⁰ Ibid.

²⁹¹ See below at 6.3.7.

²⁹² See Belton D, ‘The Industrial Issues of Private Prisons: A Union’s Perspective in Moyle P, *Private Prisons and Police: Recent Australian Trends*, Pluto Press, 1994, p 91ff.

(vii) *Private operators will engage in skimming*: Critics claim that private operators “may ‘skim’ the best inmates by exempting from the prison’s intake any ‘costly’ inmates – such as HIV/AIDS inmates, high escape risks, ‘troublesome prisoners’, mentally unstable or suicide risks”²⁹³. Thus, while the private sector will make claims to being more efficient and less costly than public prisons, in truth this will be because their inmates will be easier and less costly to manage.

(viii) *Danger of ‘low-balling’ by private companies*: Logan describes this problem:

A common objection to contracting of all sorts is the danger of “lowballing.” In lowballing, an unrealistically low bid is used to win an initial contract. Losses are then recovered through cost overruns or inflated subsequent contracts. If competitors cannot quickly enter the market and if the government would incur high costs in resuming the operation itself, the existing contractor can raise its price gradually but continually.²⁹⁴

6.3.2 *Privatisation will not result in reform and it could even hinder reform*

Opponents of privatisation argue that private prisons will not set benchmarks for the public sector and will not be a panacea for the prison system. They contend that the government should instead focus on improving public sector prison management. They pose the question: why can’t the public sector do what the private sector claims that it can do? Some critics are of the view that privatisation is a distraction from the more important issues such as developing alternatives to imprisonment. McCartney states:

...we need perhaps to examine our use of custodial sanctions, rather than debating ways of coping with growing prison populations. We may be turning to capitalist enterprise for quick-fix solutions rather than facing the more intractable problems of our dependence on imprisonment; prison conditions; the collapse of community corrections; and recidivism.²⁹⁵

In addition, critics have argued that privatisation may create a two tier prison system²⁹⁶, a quality private prison system and a depressed an run-down public system, which “may even hinder the progress of meaningful prison reform, as the state faces the high costs and problems associated with housing the most dangerous offenders.”²⁹⁷ Also, it has been argued that privatisation can lead to a fragmented system resulting in breakdowns in communication between public and private prisons and confusion as to procedures for prisoners transferred between public and private prisons.²⁹⁸

²⁹³ McCartney, Note 17, p 314.

²⁹⁴ Logan, Note 15, p 221. Note, Logan suggests low-balling can be controlled (p 222-225).

²⁹⁵ McCartney, *supra*, p 316.

²⁹⁶ Harding (1992), Note 13, p 3.

²⁹⁷ *Supra* at p 314.

²⁹⁸ Levey-Williams J, ‘A Challenge to the State Government: Australia’s Experiment with Privatised Corrections’, (2001) 23 *Just Policy* 16 at 18.

6.3.3 *Imprisonment is an essential government function that should not be delegated*

Critics argue that “the provision of prisons is so fundamentally a part of the action of governments that delegation should not be permitted”.²⁹⁹ This ideological argument is one of the most important and complex arguments in the debate about prison privatisation. It is an argument that applies irrespective of the profit motive of private prison operators and it would therefore apply equally to the running of prisons by not-for-profit organisations.³⁰⁰

Field argues that “[p]rison privatisation represents the government’s abdication of one of its most basic responsibilities to its people.”³⁰¹ He states:

Corrections is not separate from the criminal law; rather, it is a component of an integrated criminal justice system. Just as the state is responsible for promulgating the criminal code, it also has a responsibility to see that the laws are enforced and its offenders are punished. Transferring the provision of corrections to the private sector is tantamount to transferring an important element of government responsibility.

Not only is corrections one of the government’s most basic responsibilities, it is probably the most sobering. The ability to deprive citizens of their freedom, force them to live behind bars and totally regulate their lives, is unlike any other power the government has. The responsibility for corrections goes beyond issues of cost efficiency and touches on whether a private company should be able to regulate the affairs of a citizen deprived of his freedom.³⁰²

Later in his article, Field concludes that delegation of prison management to the private sector would break the social contract and undermine the important symbolic aspect of publicly operated prisons:

The government, not private companies, is allowed to exercise such power because of the concepts of the social contract and the legitimacy of government. Under our system, we agree to accept the laws of society and the power of the state to enforce those laws. When we violate these laws, we agree to let the state punish us. We accept such an arrangement because, like a covenant, it has benefits and burdens. We accept the law because while it punishes us, it also protects us. Yet our acceptance of the law will only continue if it is made and enforced by a separate body known as the State through its authorized agents. Once laws are made or sought to be enforced by those other than the accepted entity of the State (i.e. private interests), the social contract has been violated.

The conclusion is that only the government should have the power to limit people’s freedom. Power should remain with the government as “a matter of symbolism.”³⁰³

²⁹⁹ Porter R, Note 111, p 77.

³⁰⁰ Ryan, Note 282, p 247.

³⁰¹ Field J, ‘Making Prisons Private: An Improper Delegation of a Governmental Power’, (1986-1987) 15 *Hofstra Law Review* 649 at 668.

³⁰² *Ibid* at 668-69.

³⁰³ *Ibid* at 673-74.

Field elaborates on the symbolic aspect of government operation of prisons. He states, “[w]hen applied to the administration of justice and exercise of coercive power, the symbolic element is of paramount importance. Meting out justice is a communicative act, its public character ought not to be confused.”³⁰⁴ Robbins raised the importance of symbolism in the privatisation context in these terms:

When a court enters a judgment of conviction and imposes a sentence, a court exercises its authority, both actually and symbolically. Does it weaken that authority, however – as well as the system of *justice* – when an inmate looks at his keeper’s uniform and, instead of encountering an emblem that reads, “Federal Bureau of Prisons” or “State Department of Corrections”, he sees one that says “Acme Corrections Company”?³⁰⁵

Similarly, DiIulio writes:

In my judgment, to remain legitimate and morally significant, the authority to govern behind bars, to deprive citizens of their liberty, to coerce (and even kill) them, must remain in the hands of government authorities...[The] message that those who abuse liberty shall live without it...ought to be conveyed by the offended community of law-abiding citizens, through its public agents, to the incarcerated individual. The administration of prisons involves the legally sanctioned exercise of coercion by some citizens over others. This coercion is exercised in the name of the offended public. The badge of the arresting policeman, the robes of the judge, and the state patch on the uniform of the corrections officer are symbols of the inherently public nature of crime and punishment.³⁰⁶

DiIulio also argues that “the formulation and administration of criminal laws by recognized public authorities is one of the liberal state’s most central and historic functions, and he suggests that “...‘employing the force of the community’ via private penal management undermines the moral writ of the community itself.”³⁰⁷ This is similar to Field’s argument that prison privatisation would break the social contract.³⁰⁸ Andrew Rutherford, of the Howard League for Penal Reform, expressed a similar view:

Prisons [are] a public trust to be administered on behalf of the community in the name of justice. To open the way for the private sector into the administration of prisons would undermine the very essence of a liberal democratic state.³⁰⁹

³⁰⁴ Ibid at 674 (note 213).

³⁰⁵ Robbins I, ‘Privatization of Corrections: Defining the Issues’, (1987) 40 *Vanderbilt Law Review* 813 at 826.

³⁰⁶ Dilulio J, ‘What’s Wrong with Private Prisons’ (1988) 92 *The Public Interest* at 79. Dilulio draws an analogy with a hypothetical example of a national medal of honour being awarded to a citizen at a ceremony on the White House Lawn, the ceremony being conducted by a private company, complete with a stand in “president”. Dilulio asks rhetorically, “ought not the nation to express its gratitude directly through the agency of its elected and duly appointed public representatives [and by analogy] is it not the community of law abiding citizens that is offended by criminals and should dole out their punishment?” (p 80-81).

³⁰⁷ Ibid at 81.

³⁰⁸ See McDonald (1990), Note 237, p 186 for an interpretation of this argument.

³⁰⁹ Quoted in Ryan and Ward, Note 39, p 69. For other similar versions of the argument against delegation see Moyle (2000), Note 47, p 158-166 and Harding (1997), Note 14, p 21-22.

DiIulio identified two problems with the contention made by supporters of private prison, that imprisonment can be delegated because it involves the *administration* rather than the *allocation* of punishment. The two problems were:

First it rests on the untenable presumption that that the administration of penal facilities involves little or no exercise of discretion by the administrators, or at least none that would affect the duration of an inmate's stay or the basic conditions of his confinement. There is a mountain of empirical studies that show how much discretion at every level – from the commissioner's office to the cell block – is of necessity vested in those who run prisons...

Secondly, it is simply unclear how one can distinguish morally between private and public courts, and between private and public policing, and yet see no difference between private and public corrections... Those who claim that [privatisation of prisons] is legitimate have little basis for rejecting not only private police but also private judges, [and] juries...³¹⁰

The first problem that DiIulio identifies is that imprisonment goes beyond the *administration* of punishment; it also involves the *allocation* of punishment.

6.3.4 Accountability will be weakened

Critics argue that privatisation will weaken accountability; and that this is an area of government responsibility where accountability is vitally important. The New Zealand Minister for Corrections put the following argument against private prisons:

The management of prisons involves the exercise of some of the State's most highly coercive powers against individuals. There needs to be direct accountability for the exercise of such powers, and that can best be achieved through a Government department directly accountable to a responsible Minister.³¹¹

The reasons why critics argue that privatisation will reduce accountability are, in part, explained by the following extract from McDonald:

At the root of much of the concern about delegating operational responsibilities to private firms is the belief that such delegation weakens public control of correctional facilities... Private facilities are [said to be] less accountable and less responsive to governments because a formal legal boundary separates the public sector from the private sector. In public correctional facilities, an unbroken chain of command... exist[s] between the officer who deals with inmates on a day-to-day basis and the highest elected public official in the jurisdiction. [In] private [facilities], no such direct linkage exists. A legal barrier divides the governing entity and private correctional firms, and this divide is bridged by contractual agreements... The barrier, the break that it makes in the administrative chain of command, and the rigidity of the contract that bridges private firms and governments... increase the difficulties in controlling prisons... They are also... reduce the likelihood that private facilities will conform to legal and professional standards.³¹²

³¹⁰ DiIulio, Note 306, p 82.

³¹¹ Hon Paul Swain, Hansard, Legislative Assembly, 7/5/04

³¹² This is an adapted version of McDonald (1990), Note 237, p 188.

Logan summarises critics' arguments concerning accountability as follows:

Critics claim that contracting reduces accountability because private actors are insulated from the public and not subject to the same political controls as are government actors. Also, critics charge, contracting diffuses responsibility; government and private actors can blame the other when something goes wrong. Further, contracting may encourage the government to neglect or avoid its ultimate responsibility for prisons; supervision may slacken.³¹³

While opponents recognise that the government can put in place a system to monitor private operator's performance and compliance with standards, opponents point to the problem of "capture"³¹⁴ and note that "...the government may have a vested interest in ensuring that breaches or inadequacies are not publicly revealed."³¹⁵ They also argue that a private prison corporation, "...possesses a powerful motivation to cover up any problems with which it may have been dealing if it is to maintain its relationship and its profits."³¹⁶ In any event, opponents suggest that "full effective monitoring is a tall order."³¹⁷ In addition, opponents point out that prisoners will have no rights to make private operators comply with the terms of the contract; and that there may be obstacles to the government terminating the contract. Lastly, critics argue that the lack of accountability of private prisons is even more worrying when one has regard to a number of other arguments against the concept (as outlined below).³¹⁸

6.3.5 It is wrong to place prisons in hands of private sector which, rather than being motivated to do good, is motivated by profits

Opponents submit that it is wrong to entrust the management of prisons to private operators who, rather than being motivated to administer justice or serve the public interest, are motivated solely to make profits. Ira P. Robbins, of the American Bar Association, stated:

In short, the private sector is more interested in doing well than in doing good. This idea was succinctly expressed recently by the director of program development of...a multimillion dollar Utah based company that has been considering proposing a privately run county jail...: "We'll hopefully make a buck at it. I'm not going to kid any of you and say we are in this for humanitarian reasons."³¹⁹

³¹³ Logan, Note 15, p 194.

³¹⁴ See below at 7.2.2.

³¹⁵ Justice Frank Vincent, 'Contracting Out Community Corrections: The Judicial Perspective', Paper presented at the Australian Institute of Criminology Conference, 'Privatisation and Public Policy: A Correctional Case Study', Melbourne, June 1997, p 3.

³¹⁶ Ibid.

³¹⁷ Donahue, Note 33, p 171.

³¹⁸ See also Section 7, which discusses accountability issues.

³¹⁹ Robbins, Note 305, p 816.

Similarly, the founder of Corrections Corporation of America said of entering the prisons business, “You just sell it like you were selling cars or real estate or hamburgers.”³²⁰ One commentator asks “...aren’t the purposes of...private jailers different from the purposes of the courts that sent [the prisoners] to jail?”³²¹ Similarly, Lekachman states, “the men and women who administer punishment are state agents, responsible to elected public officials and elected or appointed judges. Private prisons...are driven by profit maximization, not sensitivity to the needs or rights of prisoners.”³²² If the welfare of inmates is not a priority for private operators, how will those inmates be treated? Won’t private prison operators be more likely to turn a blind eye to abuse of inmates by prison officers and other inmates?³²³ The private sector’s historical record with prisons is stained by exploitation and abuse. In relation to this argument, it is also relevant to note that some critics have cast doubts over the ethical conduct of private prison corporations in business generally.³²⁴

6.3.6 *The profit motive will conflict with doing justice*

This is an extension of the previous argument. Critics believe that:

...“criminal justice and profits don’t mix.” The [American Civil Liberties Union]...has complained repeatedly that “the profit motive is incompatible with doing justice.”³²⁵

These statements are based on the view that private prison operators will be “driven by profit” and will put its own welfare ahead of the welfare of inmates, the needs of the state, or the interests of justice.³²⁶ The two main subsets of this argument are:

- Private operators will cut costs and compromise standards in the pursuit of profit;
- Private operators will make decisions relating to discipline and parole that increase the length of an inmate’s stay in prison.

These two arguments are discussed below. Another argument along these lines is that private operators will exploit inmate labour, in terms of wages and working conditions.³²⁷ It should be noted that one premise common to all of these arguments is that there will be scope for private operators to engage in such conduct without detection or repercussions. In this regard, the point has been made that:

³²⁰ Quoted in Baldry, Note 46, p 126.

³²¹ Quoted in Donahue, Note 33, p 155.

³²² Ibid.

³²³ See here Donahue, supra, p 170.

³²⁴ See for example, Baldry, Note 46, p 134-136.

³²⁵ Logan, Note 15, p 72.

³²⁶ Ibid at 73.

³²⁷ See, for example, Moyle (2000), Note 47, p 264-274, and 294-301, for a discussion of inmate labour in the context of the Borallon prison in Queensland.

Because prisons are so hidden from public view, the likelihood of detecting...violations is low, and prisoners are relatively powerless to bring attention to their grievances.³²⁸

Critics' concerns that such conduct by private operators will go by unchecked are even greater having regard to their views that private prisons lack effective accountability.³²⁹

6.3.7 Private prison operators will cut costs at the expense of standards.

This argument is often made in relation to privatisation of government services. Critics fear that, in order to maximise profits, private prison operators will cut costs at the expense of standards.³³⁰ That is to say, private operators will 'cut corners' because they benefit from "every [cent] not spent".³³¹ Critics suggest that compromising standards will impact on prisoner welfare and ultimately on rehabilitation and recidivism.

Porter discusses the conflict of interest and the issue of cost cutting:

The introduction of the profit motive to the area of corrections demonstrates, in the clearest possible terms, how duty and interest may pull the private entrepreneur in opposite directions. The most worrisome aspect of this is that wherever the entrepreneur decides to cut costs it seems most likely that it will be the interests of the individual inmate that will be harmed.

...

Cost-cutting at the expense of providing good conditions can occur in a number of instances. Though the provision of good staff is the most obvious (and arguably the most fundamental to the promotion of good prison conditions), there is an endless list of potential savings for the entrepreneur; paying less for heating, providing fewer blankets, providing just slightly less and poorer quality food. All these and others like them reduce marginal costs, increase profits and are extremely difficult to observe and monitor. Those best placed to notice inadequacies and deficiencies, the inmates, are too often ignored.³³²

Some critics fear that private prison operators will lock prisoners up in their cells for longer periods of time to save costs. It has also been suggested that disciplinary decisions that result in a loss of privileges or services "would reduce the operating costs of the private operator and would promote its administrative convenience."³³³

Additionally, giving inmates low-cost and less-skilled work programs may be "more profitable [for the private operator] but less useful in rehabilitating inmates."³³⁴

³²⁸ McDonald (1994), Note 255, p 42. See also Donahue at 170.

³²⁹ See above at 6.3.4.

³³⁰ Note, some critics suggest that the only way that the private prisons can be cheaper than public prisons is if private operators cut corners and sacrifice quality.

³³¹ See Shichor, Note 227, p 187 citing Gentry (1986).

³³² Porter, Note 111, p 73-74.

³³³ Robbins, cited in Logan, Note 15, p 68.

³³⁴ Moyle (2000), Note 47, p 313.

Similarly, concerns exist that private operators will attempt to save costs by reducing the number and quality of rehabilitation programs. This would also further the interests of private operators in the long run, since increased recidivism would mean more prisoners and more demand for bed-space.³³⁵ Another concern is that cost-cutting will affect prison security, as Porter explains:

Even if large sections of the public are indifferent (or even hostile) to the notion of prisoners' rights, they should still be concerned about the cost-saving financial bias of private companies. Another area in which costs may, at least potentially, be saved is the area of security. All sides in the prison privatisation debate are agreed upon the necessity of effective security. Handing over the running of prisons to companies that might be willing to compromise security levels would not merely be irresponsible, but also potentially very harmful to the public that is supposed to be protected from the inmates.³³⁶

McCartney refers to concerns about security and safety, of inmates and staff, having regard to the incentive for private operators to save labour costs by employing fewer staff and by employing staff who have received less training and who are less qualified:

Staffing levels in private facilities may cause unease when considering security and safety. Staff shortages can lead to inmate intimidation, leaving staff open to abuse while drug taking and sexual harassment may flourish under inadequate supervision. As old facilities are closed (with little hope of the re-employment of officers), officers in private facilities may be paid less, receive less benefits and suffer greater job insecurity. Lower wages may attract lesser quality candidates, while questions remain over the quality of training private operators receive as private companies save costs by cutting back on initial and continued training throughout the officer's career...³³⁷

Critics believe that the government monitoring will not be effective to prevent or detect corner cutting by private operators.³³⁸ In addition, they point out that "[m]any of these practices are such that it is hard to pin them down, especially if they are done in small increments that make them hardly visible and noticeable."³³⁹

6.3.8 Private prison operators will make decisions that increase the length of an inmate's stay.

Critics argue that a conflict of interest arises in relation to private prison operators' power to make decisions or recommendations that affect the duration of an inmate's stay. For example, disciplinary decisions and recommendations for parole.³⁴⁰ If profits

³³⁵ See Porter, Note 111, p 73 asking "Is a successfully-run private prison one that is always full or is it one attacking the problem of recidivism? If it is the latter then success will mean that the company will always be striving to put itself out of business (Borna 1986)."

³³⁶ Ibid at 74.

³³⁷ McCartney, Note 17, p 313. See also Logan, Note 15, p 120.

³³⁸ See above at 6.3.4 as to argument that accountability will be weakened

³³⁹ Shichor, Note 227, p 186.

³⁴⁰ There is a separate argument that private operators should have no role to play in relation to

are tied to the number of inmates being detained, this creates an incentive for private prison operators to keep inmates in prison for longer. Porter describes the conflict of interest as follows:

If a private contractor is to run a profitable concern then the facility should be full. Granting 'good time' and making favourable parole recommendations might be considered as working directly against this. It is not difficult to imagine a situation in which the private manager is pulled in one direction by his duty to the company, and in another by his responsibilities towards the individual prisoner and towards the criminal justice system at large. This conflict of interest is particularly alarming as it is worked out against the backdrop of considerable discretion afforded to prison administrators.³⁴¹

Chan expresses similar concerns:

Where private prison operators are doing more than simply managing the physical plant and basic services of prisons, but are given the power to establish prison rules, discipline prisoners and make recommendations regarding the suitability of parole, an untested dimension of privatised justice arises. Since prison operators are paid according to the number of prisoners being institutionalised, a figure obviously affected by the length of sentence served, it is simple arithmetic to demonstrate how private jails could increase profit by refusing parole or taking away remissions...³⁴²

Donahue suggests that manipulation of the prison population will "...[n]ot necessarily [occur], perhaps not even probably". But he says "it could happen", and he adds, "[p]ublic prison officials are at least free of any direct financial temptation to manipulate the prison population."³⁴³ Donahue also notes that there could be an incentive for early release of inmates who are costly to detain:

It is even conceivable that an unscrupulous corrections entrepreneur would perversely rig parole recommendations to release prisoners who are troublesome, dangerous, sickly, or otherwise expensive to detain, while holding on to the more profitable inmates.³⁴⁴

Moyle gives an example of an incident at the Borallon private prison in Queensland, which involved prison officers manufacturing a disciplinary breach for alleged drug use in order to transfer a problem inmate.³⁴⁵ Moyle reports that the Manager of Operations indicated that it was acceptable to 'breach' inmates because they were 'a problem at the

these decisions because they involve the allocation of punishment rather than its administration (see above at 6.2.4)

³⁴¹ Porter, Note 111, p 75

³⁴² Chan J, 'Privatisation of Punishment: A Review of the Key Issues', in Moyle P, *Private Prisons and Police: Recent Australian Trends*, Pluto Press, 1994, p 54.

³⁴³ Donahue, Note 33, p 176.

³⁴⁴ Ibid.

³⁴⁵ Moyle (2000), Note 47, p 182-184.

Centre'.³⁴⁶ The Manager of Operations clarified the meaning of 'problem at the Centre' as 'protecting [the company's] business name'. Moyle states:

This evidence raises more than just due process issues and indicates that in this instance, the commercial interest of [the private prison operator] influenced a decision to 'breach' an inmate, the evaluation of evidence during the breach, and also the final outcome of a review of the breach.³⁴⁷

The extent to which this argument could apply in NSW

It is relevant to consider the extent to which this argument could apply in relation to the private prison in NSW. This requires a look at the private prison contract and the legislative scheme for remissions, parole and disciplinary decisions.

The contract: According to Harding, the original contract with the private operator of Junee was costed on the basis of 100 percent occupancy throughout the year. In other words, the number of inmates housed in the private facility did not affect the fee paid to the operator.³⁴⁸ It could therefore be argued that there would be no incentive for the private operator to try to keep inmates in for longer; in fact the operator would have an incentive to do the opposite. However, critics could still argue that private operators would have an incentive to increase prisoner terms and numbers because this would create demand for additional prisons, which they could run.

Remissions and parole: Remissions (credits for good time) have been abolished in NSW.³⁴⁹ Parole is automatic for prisoners who have been sentenced to imprisonment for 3 years or less, at the expiry of the minimum term.³⁵⁰ For prisoners sentenced to more than 3 years imprisonment, eligibility for parole on the expiration of the minimum term is at the discretion of the Parole Board.³⁵¹ One of the matters that the Parole Board must take into account when making a decision is "the offender's conduct to date while serving his or her sentence."³⁵² In this regard, the Parole Board would receive a report from the offender's prison, which would contain an assessment of the prisoner.³⁵³ The report would be compiled by the prison (and in the case of a private prison, by the

³⁴⁶ Ibid at 184.

³⁴⁷ Moyle at 184.

³⁴⁸ Harding (1992), Note 13, p 4. See also The Audit Office NSW, *New South Wales Auditor General's Report 1999*, Volume 2, p 101. The terms of the current contract are unknown.

³⁴⁹ See above at 5.4.2.

³⁵⁰ Section 50(1) *Crimes (Sentencing Procedure) Act 1999*. Note however that the Parole Board can revoke an automatic parole order on certain grounds, including misbehaviour in prison: see s 130 *Crimes (Administration of Sentences) Act 1999*.

³⁵¹ Sections 134, 135 *Crimes (Administration of Sentences) Act 1999*.

³⁵² Section 135(2)(f) *Crimes (Administration of Sentences Act) 1999*.

³⁵³ Private communication with Secretary of Parole Board (NSW).

private operator) and would include a comment from the Governor of the Centre.³⁵⁴ The report would usually mention any disciplinary breaches by the prisoner.³⁵⁵

Disciplinary decisions: Legislation in NSW refers to breaches as “correctional centre offences”.³⁵⁶ At present, the legislation distinguishes between *minor* and *major* offences. The Governor may conduct an inquiry into minor offences but major offences must be referred to a visiting magistrate.³⁵⁷ Findings that a prisoner has committed a minor or major offence can result in certain penalties including deprivation of privileges, confinement in cell for a certain period, and in the case of *major offences* only, extension of the prisoner’s sentence for up to 28 days.³⁵⁸ There is no provision for appealing against a Governor’s decision. New legislation has recently been passed which affects the disciplinary regime.³⁵⁹ The distinction between minor and major offences has been abolished and the Governor is allowed to determine charges for all offences but *may* refer more serious charges to a magistrate. The Governor still cannot extend the length of a prisoner’s sentence; a magistrate can only impose this penalty.

6.3.9 *It is immoral for profits to be made from imprisonment*

Opponents argue that it is morally or ethically wrong to allow entrepreneurs to make profits from imprisonment; it is offensive for private enterprise to profit from the deliberate infliction of punishment and suffering on human beings.³⁶⁰ While there are other private companies in society that profit from the misfortune of others (eg private hospitals), the objective of those companies is to alleviate human suffering rather than to administer it. Furthermore, in response to the argument that employees in the public prison system from imprisonment, opponents assert that there is a fundamental difference “between those who sell their labour power (and may have very limited choice about whom they sell it to) and those who own and control capital.”³⁶¹

³⁵⁴ Ibid.

³⁵⁵ Ibid. Harding (1992) notes that in practice the Parole Board “takes note only of factual matters such as continued drug use or involvement in bashings rather than judgmental ones.” Harding (1992), Note 13.

³⁵⁶ See Division 6 of *Crimes (Administration of Sentences) Act 1999* and Schedule 2 to *Crimes (Administration of Sentences) Regulations 2001*.

³⁵⁷ Sections 52 and 54 *Crimes (Administration of Sentences) Act 1999*.

³⁵⁸ Sections 53 and 56 *Crimes (Administration of Sentences) Act 1999*.

³⁵⁹ *Crimes (Administration of Sentences) Amendment Act 2004*. The Bill was passed 24 June 2004 and assented to 6 July 2004.

³⁶⁰ See, for example, Ryan and Ward, Note 39, p 70; Schichor, Note 227, p 83-84.

³⁶¹ Ryan and Ward, *ibid*, p 70; Shichor, *ibid*, p 87.

6.3.10 *Private prison companies will form a powerful lobby for high-imprisonment policies.*

Critics fear that private prison corporations, who will grow richer with a rising prisoner population, will be a powerful lobby for tougher ‘law and order’ policies that will result in more people being locked up for longer periods of time. Porter states:

The possibility of private prison companies joining the hardcore law and order lobby is not at all hard to envisage, albeit a fundamentally disturbing notion that people’s liberty should be potentially affected in this manner in pursuance of the profit motive.³⁶²

Another critic states, “[w]ith the public’s unabating fear of crime, and lawmakers shrinking from any move that appears to be soft on criminals, the developing private prison lobby will be hard to resist.” In a similar vein, Chan says that the danger of private companies manipulating official and public opinion is “real and difficult to avoid”; and she adds:

Politicians are also more than willing to take advantage of law and order panics for political gains. The existence of a well-funded motivated force behind a push for tougher policies will pose additional problems in any effort to arrive at more rational and humane penal policies.³⁶³

Others have suggested that that private prison lobby, with a vested interest in expansionist penal policy, could come to resemble the ‘military-industrial complex’.³⁶⁴

³⁶² Porter, Note 111, p 75. See also Donahue, Note 33, p 177 and Keliher Dr L, ‘Corrections in the Year 2000?’, Paper presented at the Australian Institute of Criminology Conference, ‘Privatisation and Public Policy: A Correctional Case Study’, Melbourne, June 1997, p 3.

³⁶³ Chan J, Note 342, p 55.

³⁶⁴ See McDonald (1994), Note 255, p 43 and Ryan and Ward, Note 39, p 71. As to the penal lobby argument generally, see also Harding (1997), Note 14, p 94.

7. ACCOUNTABILITY

7.1 Outline

This section presents a summary of the main elements of accountability, as discussed by Richard Harding in his book entitled “Private Prisons and Public Accountability” (1997). This paper makes no comment on the merits of the opinions expressed by Harding. The purpose here is simply to raise issues for consideration.

A discussion of the elements of accountability will be relevant in two senses. First, it can be seen from the previous section that accountability is an important issue in the debate about private prisons. To reach a conclusion on that issue it may be necessary to know what an accountability system for private prisons would comprise. Second, it is relevant to look at issues that will help the reader to assess the strength of the accountability system that operates in relation to the private prison in NSW.³⁶⁵

7.2 Elements of accountability

7.2.1 Harding’s ten tenets of accountability

According to Harding, there are ten tenets of accountability, which the state must require of private contractors and which citizens must require of the state:

- (1) The distinction between the allocation and the administration of punishment must be strictly maintained, with the private sector’s role being confined to the administration;
- (2) Penal policy must not be driven by those who stand to make a profit out of it;
- (3) The activities of the private sector and their relations with government must be open and publicly accessible;
- (4) What is expected of the private sector must be clearly specified;
- (5) A dual system must not be allowed to evolve in which there is a run down and demoralised public sector and a vibrant private sector;
- (6) Independent research and evaluation, with untrammelled publication rights, must be built into private sector arrangements (accountability involves knowing whether we are on the right track);

³⁶⁵ See above at 5.5 as to monitoring and scrutiny under NSW legislation. For a summary of the main accountability mechanisms applying to public and private prisons in the various states in Australia, see Rynne J, Note 56; and Harding (1997), Note 14, Chapter 4.

- (7) Custodial regimes, programmes and personnel must be culturally appropriate (the state should therefore retain an appropriate degree of control over staffing);
- (8) There must be control over the probity of the private contractors (there are some fast talking opportunists in every new commercial field);
- (9) There must be financial accountability (ie ensuring that the agreed services are supplied and that this is done to the contracted quality);
- (10) The state must in the last resort be able to reclaim private prisons (both as a legal matter and as a practical matter).³⁶⁶

7.2.2 *Accountability, monitoring and capture*

Harding explains that accountability for private prisons is not as straightforward as setting up a special mechanism to monitor or audit contract compliance in addition to all the general accountability mechanisms applicable to public prisons. He refers to the problem of “capture” where “regulators come to be more concerned to serve the interests of the industry with which they are in regular contact than the more remote and abstract public interest.”³⁶⁷ A number of overlapping factors predispose regulators to capture including: (i) being recruited from the same professional background as persons being regulated; (ii) working in an environment where the disparity between the resources of the regulator and the size of the job to be done means that short-cuts must be found and discretions must be exercised; and (iii) working in a culture where there is little organisational support for a firm approach towards regulation. Harding elaborates on the theory of capture, stating:

...as regulators become more and more involved with an industry, they come to perceive the dilemmas and share the values and priorities of their regulatees. This understanding then starts to work its way into how they carry out their tasks, and law enforcement as a means of regulation tends to give way to what they perceive as co-operative compliance. These observations will be seen to be apposite to the accountability mechanisms applicable to the private prisons industry.³⁶⁸

Harding points out that in other areas of public administration, strong regulatees capture weak regulators. He says “[t]here is an initial power imbalance which in turn feeds the other predisposing factors.” Harding notes that this is not the case in relation to prisons, where the public sector is much stronger than the private sector. However, he says that there are other factors that create a high risk that some degree of capture will occur in relation to private prisons. The regulator operates in the same business as the regulatees, and has delegated the achievement of its goals and the discharge of its responsibilities to them. Consequently, “[f]ailure by the delegates is tant amount to failure by the agency

³⁶⁶ Harding (1997), Note 14, p 27-31. This is an abbreviated version of those pages.

³⁶⁷ Ibid at 33 quoting Grabosky and Braithwaite (1986)

³⁶⁸ Ibid at p 37.

itself...The regulator...thus has a vested interest in its delegates appearing to be doing a satisfactory job.”³⁶⁹

Harding refers to monitoring arrangements that exist in various jurisdictions that have adopted private prisons and he constructs a vulnerability rating to the extent that the status and autonomy of monitors’ positions are factors in the capture of the regulatory process. He ranks the UK ahead of NSW and Victoria and those states ahead of Queensland. Harding then refers to signs of capture in those jurisdictions. For example, in NSW, he notes that the first appointed monitor was relatively junior; that the post was redesignated as a ‘liason officer’; that the role was moved off-site and that the monitor’s initial performance reviews were processual in tone and did not refer to a major riot that had taken place at the prison. After reviewing the various jurisdictions, he concludes that “even the most robust monitoring system...has not been completely immune from the hazards of possible capture, whilst the weaker system examined – that of Queensland – seems readily to have succumbed.”³⁷⁰

7.2.3 *Letting the contract and setting the terms*

Contracts: Harding states, “[c]ontract compliance is a central element of accountability. It follows from this that the less prescriptive the contract is, the looser will be the accountability which it underpins, and vice versa.”³⁷¹ By way of example, Harding refers a general term in the Junee contract about education that led to disagreements, which were eventually resolved. Harding refers to the need for a fuller specification of outputs (which emphasise the ends, the means being flexible), rather than inputs (which emphasise the means), when it comes to private prisons, so that performance can be measured against something that is more tangible.

Secrecy: Harding states, “[b]ut accountability to the [government] is not in itself enough, because of the risk of capture. In the public interest, contract specifications should be on the open record. That way prisoners themselves, members of legislatures, academics and the media and above all ginger groups, such as civil liberties and prisoners’ support organizations, can bring pressure to bear on the contractor as well as on the contracting agency whose duty is to monitor compliance.”³⁷² Harding refers to the secrecy that has existed in several jurisdictions, in which the contracts were treated as “commercial-in-confidence” documents that would not be made publicly available.

³⁶⁹ Ibid at 48.

³⁷⁰ Ibid at 47.

³⁷¹ Ibid at p 67. See also Curran L, ‘Unlocking the Doors on Transparency and Accountability’, (1999) 11(2) *Current Issues in Criminal Justice* 135 at 140-143; and Freiberg A, ‘Commercial Confidentiality and Public Accountability for the Provision of Correctional Services’, (1999) 11(2) *Current Issues in Criminal Justice* 119 at 120ff.

³⁷² Ibid at 69.

While other jurisdictions have since made contracts available to the public, eg Victoria, Queensland and Western Australia, this appears not to be the case in NSW.³⁷³

Evaluating bids: Harding says that decisions to open a new prison, and relating to the siting of the prison, need to be scrutinised to ensure that procedural proprieties have been met having regard to the concern that the private sector may have an undue influence over penal policy. Harding also refers to other stages in the process such as formulating operational standards and selecting the successful bidder. With respect to the latter issue, he discusses the two questions of who chooses and by what criteria. As to who chooses, Harding says there are three basic models, (i) the public sector agency as part of its normal management process (this is what happened with Junee); (ii) the public sector agency with some kind of quarantined “Chinese wall” system in place; and (iii) a separate agency not directly involved with the day to day management of any part of the public system. Harding also discusses the need to check the probity of private companies who submit tenders for prison contracts. He states, “fraudulent or malevolent contractors can circumvent the best-designed accountability systems or at the very least push them to the extremes of their limits.”³⁷⁴

7.2.4 Prison personnel

Personnel: Harding states:

Prisons are a human service; the quality of the employed personnel is crucial. In all states, private prison personnel derive their status and coercive legal powers from the enabling legislation. If these personnel are ill trained or poorly managed, however, even the most robustly constructed accountability system will not be able to prevent the particular prison regime from starting to wobble or even toppling to the ground....An element of an accountability system, then, is the extent to which the supervising agency can influence or control the appointment or the dismissal of custodial staff selected by the contractor to work at the private prison.³⁷⁵

Harding then surveys the legislation in various jurisdictions with regard to government control over private prison staff. Harding notes that the legislation in NSW is similar to that in Victoria, Queensland and the UK; prior authorisation or veto of all custodial staff on specified grounds, plus the power of revocation. Harding notes, however, that in practice, in NSW and Queensland, the governments have treated the issue as one for the contractor. He also refers to the fact that prison management is “to some degree culture specific” and he questions whether it is appropriate for US managers to be put in charge of running private prisons in Australia.

³⁷³ For further reading on freedom of information and private prison contracts, see Curran, Note 371, p 144-47.

³⁷⁴ *Supra* at 78.

³⁷⁵ *Ibid* at 83.

7.2.5 *The allocation of punishment and its administration*³⁷⁶

Harding says that there are three areas where the distinction between the allocation and administration of punishment may become blurred. They are: (i) disciplinary decisions and penalties; (ii) classification, sentence planning and transfer; (iii) release decisions, such as parole or work release. Harding criticises Australian states for allowing private prison operators to deal with disciplinary matters. He refers to the situation in the UK where a public official, the controller, deals with adjudications of all disciplinary charges laid in the private prisons. In relation to classification, Harding notes that “assessments made at initial reception into the prison system affect crucially the type of regime an inmate will have to endure...If that initial decision is made by the private contractor rather than by the state, the line between allocating and administering punishment starts to become blurred.”³⁷⁷ Harding criticises the Queensland model for allowing private contractors to classify newly convicted prisoners – no comment is made about the situation at Junee. As to the third area, Harding notes that parole decisions in all states are made by autonomous authorities but that prison staff may be able to have an input by reporting on the inmate’s conduct in prison.

7.2.6 *Financial accountability and control*

Harding introduces this section of his book by stating:

...financial accountability starts with the terms of the contract itself. A contract which unambiguously sets out precisely what services must be provided to what standard for what payments facilitates accountability; a loose contract leaves the operator room for discretion, and thus the temptation to exercise it to the benefit of its own balance sheet. Similarly, a contract which identifies the amount and manner of payments for breach enhances accountability over one which leaves the matter to the general uncertainties of the law of contract and thus potential litigation.

No less important are the processes for achieving financial accountability. Are they ongoing or retrospective, internal or external, regular or random? Questions such as these bear upon the effectiveness of accountability arrangements.³⁷⁸

Harding discusses the issue of not selecting bids on the basis of their price alone, and he refers to payments which are linked to occupancy rates. He then discusses sanctions for breaches of the contract. He says it is “standard in all jurisdictions for there to be either a statutory provision or a contractual clause or both permitting termination of the whole arrangement at very short notice.”³⁷⁹ Harding also refers to the need for some form of

³⁷⁶ Note, this relates back to the argument at 6.2.4.

³⁷⁷ *Supra* at p 92.

³⁷⁸ *Ibid* at 99

³⁷⁹ *Ibid* at 105.

lesser financial sanction, which “treats the contract as of continuing validity but which nevertheless enables the public authority to assert some control.”³⁸⁰

7.2.7 *A model for public accountability of private prisons*

Harding states:

A model of public accountability must satisfactorily cover the ten key tenets identified and discussed...

...

It has emerged that some systems are strong on some points but weak on others. No system meets every tenet, but no system is in breach of every tenet. Moreover, though some breaches of some tenets by some states are flagrant, mostly they are matters of emphasis – a shade of grey rather than black. Also, most failures are a function of naivety or lack of imagination rather than bad faith...

All states have recognized that, whatever their public prison accountability mechanisms, there must be an add-on component for private prisons. This component is variously known as the monitor, controller or liaison officer. However, a weakness shared by all states is that the monitoring system has often been less rigorous than it should. This is mainly because of the principle of capture....³⁸¹

Harding then says that “a model of accountability should be structured to achieve three things: routine compliance by the private sector with the ten key tenets of accountability; the avoidance of capture; and encouragement of cross-fertilization.”³⁸²

Harding proposes a model in which both the public and private sectors are “equally accountable to an independent body, one which is not in the business of managing prisons in a day-to-day sense but which nevertheless possesses powers to impose sanctions upon those, from either sector, who fall short of acceptable performance.”³⁸³ This new “Prisons Authority” would not only scrutinize the existing system but also play a role in shaping that system. It would take over new prison projects from the outset, and call for tenders. On expiry of contracts, it would initiate rebidding by both public and private sectors. Harding points out that the length of the initial contracts, “whilst sufficient to enable the operator to implement its regime and programmes, should be short enough to ensure the operator does not start to think of itself as indispensable and virtually unaccountable.”³⁸⁴ He criticises the 25-year and 40-year periods in recent UK and Victoria contracts. The Prisons Authority could also set up an accreditation system for prisons and provide a reporting point for prisoner complaints. Expertise about contract specifications would be enhanced more quickly and the Authority could work out service-level agreements with the public sector.³⁸⁵

³⁸⁰ Ibid at 105.

³⁸¹ Ibid at 158.

³⁸² Ibid at 159.

³⁸³ Ibid at 161.

³⁸⁴ Ibid at 163

³⁸⁵ Harding’s model is outlined in more detail at p 161-165 of his book.

8. EVALUATIONS

8.1 Outline

It is beyond the scope of this paper to present a comprehensive evaluation of private prisons. This section will summarise various reports that are relevant to an evaluation of the Junee prison; and will briefly refer to some recent evaluations that have been done of private prisons in other states and overseas.³⁸⁶ This section focuses on reports that compare private prisons with public prisons and will not cover media reports that discuss incidents at private prisons.³⁸⁷ However, reference will be made to major problems at two private prisons in Victoria and at one in the UK, which have resulted in serious government action. Before looking at each of the jurisdictions, this section will briefly touch on issues in evaluating private prisons.

8.2 Issues

Evaluating the comparative cost and quality of private and public prisons is problematic. On the question of whether private prisons save the government money, one report states:

It is reasonable to expect that one could easily answer the question by comparing expenditures for imprisoning offenders in a public correctional agency to the payments to private firms. Unfortunately, such comparisons are usually not so straightforward and indeed, are often misleading for [two] principal reasons. First, the facilities may differ in ways that confound comparison of costs. Second, differences between public and private sector accounting procedures make the very identification of comparable costs difficult. Although several studies comparing public and private correctional costs have sought to overcome these and other difficulties, not all have succeeded fully.³⁸⁸

To expand on the first point raised, private prisons may differ from public prisons in terms of their design, age, size and mix of inmates.³⁸⁹ Even prisons that have the same security classification may house a different mix of inmates, in terms of their security

³⁸⁶ Performance reviews of the Acacia prison in Western Australia are not covered in this paper: see WA Department of Justice website: <http://www.justice.wa.gov.au/portal/server.pt> (access "Prisons" and then "Acacia Prison"). See also Inspection Reports of Acacia by the Inspector of Custodial Services in WA: <http://www.custodialinspector.wa.gov.au/>

³⁸⁷ It would be misleading to discuss media reports about incidents at private prisons without doing the same for public prisons. Note also that incidents at private prisons may be more likely to get media coverage than those at public prisons, because of their novelty. For reports on problems at private prisons see, for example, Ontario Public Service, "Private adult correctional facilities: fines, failures and dubious practices", April 2000. Located at <http://www.opseu.org/ops/ministry/report/index.htm>; and Prison Privatisation Report International, located at <http://www.psir.org/justice/>.

³⁸⁸ McDonald et al (1998), Note 32, p 33-34.

³⁸⁹ Ibid at 34-35.

levels, status, age, and health.³⁹⁰ Differences between private and public prisons in these respects also pose a problem in terms of effectively evaluating comparative quality; and there is a further issue of how “quality” should be defined and measured.³⁹¹

8.3 Inmate deaths in Australia

The Australian Institute of Criminology published a study entitled “Deaths in Private Prisons 1990:99: A comparative study”, which compared the rates of death and suicide in private and public prisons in Australia.³⁹² The finding of the study was that “Public and private prisons had similar rates of death from all causes and from suicide specifically.”³⁹³ Note, however, that the report states, “these results should be viewed with caution as Australia is still at an early stage in the process of privatising correctional services and the pattern of the findings may change over time.”³⁹⁴

8.4 New South Wales

8.4.1 Outline

No study has thoroughly evaluated the performance of Junee prison in comparison to publicly run prisons in NSW. This section will present a summary of a number of different public reports that are relevant to an evaluation of Junee. These include:

- Auditor General’s annual reports
- Junee Monitor’s annual reports
- Four year review of Junee by the Department of Corrective Services
- Ombudsman’s annual reports
- Inspector-General’s annual reports

8.4.2 Auditor General’s Reports

The 2002/03 report: According to the Auditor-General’s Report for 2002-03, the estimated annual net cost per inmate to the Department of Corrective Services for Junee (a medium and minimum security prison) was \$34,145 in that year (\$33,595 in 2001-

³⁹⁰ Ibid at 34-35.

³⁹¹ As to methodologies for measuring the quality of prisons see for example Ibid at p 47ff; Harding (1997), Note 14, p113ff; and UK National Audit Office, Note 124, p 13ff. As to inadequacies with evaluations of private prisons, see Camp S and Gaes G, ‘Private Prisons: What do we really know and why don’t we know more’, in Shichor and Gilbert, Note 17, p 283ff.

³⁹² Biles D and Dalton V, ‘Deaths in Private Prisons 1990-99: A Comparative Study’ No. 120 *Australian Institute of Criminology Trends and Issues*, June 1999

³⁹³ Ibid at 1.

³⁹⁴ Ibid at 6.

02).³⁹⁵ The average annual costs per inmate in publicly operated prisons for the corresponding period, were as follows, according to security classification:

Classification	2002-03	2001-02
Maximum	79, 829	72, 015
Medium	61, 813	56, 838
Minimum	63, 061	55, 520
Weighted average	68, 419	61, 265

Difficulties of comparison: The Auditor-General's report gives the following qualification in relation to comparing inmate costs at Junee with the weighted average:

The Department has advised us that this cost cannot be readily compared to its weighted average cost for reasons such as:

- The Department's maximum security facilities have higher operating costs than for medium/maximum facilities like Junee;
- The Department's female inmate facilities cater for the special needs of inmates, and have a higher cost structure than male only facilities like Junee;

Further difficulties of comparison were identified by Hon. R. Debus MP (then Corrective Services Minister) and Mr Leo Kelliher (then Commissioner of Corrective Services) at a budget estimates hearing in June 2000. Mr Debus was asked why, according to 1999 figures, the Junee Centre could house inmates \$20,000 cheaper than publicly run facilities.³⁹⁶ He said that it was hard to compare the costs of accommodating inmates from one correctional centre to another, because the conditions are so different.³⁹⁷ Mr Debus and Mr Kelliher made the following two points of distinction between Junee and public prisons:³⁹⁸

- Junee is a relatively new establishment and new prisons are generally more efficient than older ones;
- The vast majority (two thirds to three quarters) of inmates at Junee are protection inmates. They are generally sex offenders, many of which are middle aged or older men. They are fairly quiet people and generally well behaved. That means they are easier and therefore less costly to manage: certain programs are not needed and the prison does not require the same level of security as would exist at another medium security facility;

³⁹⁵ Auditor-General's Report 2002-03, Note 146, Vol 6, p 341

³⁹⁶ NSW Parliament, Legislative Council, General Purposes Standing Committee 5, *Examination of Proposed Expenditure for the Portfolio Areas: Environment, Emergency Services and Corrective Services*, transcript, 6 June 2000, p 720-21.

³⁹⁷ *ibid* at 721.

³⁹⁸ *ibid* at 721.

Mr Kelliher suggested that the other medium security prisons comparable to Junee were Bathurst and Goulburn.³⁹⁹ He pointed out that the average daily cost per inmate at the maximum-security Silverwater Metropolitan and Remand Centre was only about 8-10 percent higher per day than at Junee.⁴⁰⁰ He did say, however, that the private managers of Junee were able to achieve savings over the Department with respect to some of the operating procedures and salary structures they put into place.⁴⁰¹ Mr Kelliher added that the Department was negotiating with the unions to examine ways to enhance and streamline the services provided, and thereby minimise costs.⁴⁰²

8.4.3 Junee Monitor: annual performance reviews

The Junee Monitor and the scope of the annual reviews: As outlined above in Section 5, under the relevant legislation, an appointed monitor must make an annual report in writing to the Commissioner of his/her findings regarding the management of the Junee prison and any activity undertaken in accordance with the management agreement that affects the centre. The Junee Monitor has explained the methodology for the annual reviews as follows:

- Completion of a checklist to assess ACM's performance in the key result areas, derived from the minimum standards provided for in the management agreement;
- Interviews with various managers, staff and inmates
- Regular inspections of the Centre, including random sampling of records, files and documents
- Incorporating the results of the reviews/inspections conducted by Departmental specialists, including Inmates Services and Programs Branch; Inmate Classification and Programs; Security and Investigations; Corrections Health Services; Facilities Management Branch and Corrective Services Industries.⁴⁰³

Rynne states, “[o]riginally located on-site, the role has since altered, with monitoring now occurring through random visits...As the Liason Officer is now off-site, the role is effectively that of a contract compliance auditor tasked with ensuring that minimum standards are maintained.”⁴⁰⁴

Summary of performance reviews: 1993-2003: In each of the ten years of review, the Monitor found that ACM had performed at least satisfactorily and in accordance with the terms of the management agreement in all, or almost all, of the areas reviewed. In 1995/96, the Monitor said that ACM had achieved a “high standard of performance in discharging obligations under the management agreement”⁴⁰⁵ and in 1996/97 the

³⁹⁹ Ibid at 721.

⁴⁰⁰ Ibid at 721.

⁴⁰¹ Ibid at 721

⁴⁰² Ibid at 721.

⁴⁰³ See NSW Department of Corrective Services, *Annual Report 2002-03*, p 119-120.

⁴⁰⁴ Rynne, Note 56, p 143.

⁴⁰⁵ NSW Department of Corrective Services, *Annual Report 1995-96*, p 116.

Monitor concluded that ACM “has again achieved a very high standard of performance.”⁴⁰⁶ In more recent years, ACM’s overall performance has been described as “satisfactory”. Over the years, though mainly in the first five years of operation, the Monitor has noted that ACM achieved some significant improvements in a number of the key results areas. In many of the reports, the Monitor found some deficiencies in ACM’s performance; or identified areas of concern (outlined below).

Main deficiencies and areas of concern identified by Monitor: The Monitor identified the following deficiencies and areas of concern in the Monitor’s annual reports for 1993-2003:

- Urinalysis procedures: inmates with positive results not charged with breach of discipline (1995/96-2000/01)
- Sanitation and hygiene in relation to kitchen (1995/96, 1996/97)
- Low levels of custodial staff (1996/97-1997/98)
- Management of inmates’ private property (1997/98)
- High levels of inmate unemployment (1996-2003)
- Buildings and maintenance (1999/00-2002/03)
- Core welfare services (1998/99-2001/02)
- Alcohol and drugs services (1998/99-2001/02)
- Case Management - including recording and management of inmate applications and failure to comply with requirement to carry out six monthly review of Case Plans (1999/00-2002/03)
- Reception Screening – protocols not adhered to (2001/02-2002/03)

8.4.4 *Junee: a four-year review (DCS research publication)*

The research reports: The Department of Corrective services carried out a research study, examining the first four years of operation of Junee prison (1993-1997). The aims of this study were threefold:

- To provide an historical record of how Junee developed from the time it became operational;
- To identify and illustrate differences in the way Junee operated compared with departmental facilities; and
- To identify those aspects of the Junee operation that were innovative.⁴⁰⁷

The areas examined in the study included: operations, programs, health services, industries and human resources.⁴⁰⁸ Operations included security, events in custody, inmate rights and privileges and inmate management. A separate report was published

⁴⁰⁶ NSW Department of Corrective Services, *Annual Report 1996-97*, p 102.

⁴⁰⁷ Bowrey M, *Private Prisons in NSW: Junee – a four-year review*, NSW Department of Corrective Services, Research Publication No. 42, July 1999, p v. Note, the brief “did not include an examination of the cost-effectiveness of Junee nor did it include an examination of ACM’s compliance with the management contract.” (p 2).

⁴⁰⁸ *Ibid* at 3.

for each of the four years of review, culminating in the fourth year report, which was published in July 1999.⁴⁰⁹ That report gives a review of the four-year period.

The four-year review - general: The review identified a number of “clearly discernible differences in the way Junee operated compared with departmental policies and practices.”⁴¹⁰ The differences related to the following areas:

- Corporate culture
- Organisational structure (eg multi-skilling and use of multidisciplinary groups)
- Committees (members drawn from staff working at variety of locations in the centre)
- Staff training and development (training monitored by a staff training monitor)
- Occupational health and safety (on-site OH&S officer)
- Monthly reporting by managers to Governor
- Inmate management (Integration program - mixing of different protection inmates)

A separate section of the report, entitled, “Summary”, looks at innovations introduced by ACM and the way in which ACM has interacted with the Department of Corrective Services. This summary is presented below:

Throughout the first four years of operation, as the reports in this series clearly show, there has been substantial exchange of ideas and information between the Department and the ACM staff at Junee. This is particularly noticeable in inmate management and the provision of programs and services.

Departmental initiatives aimed at ensuring inmates receive a consistent level of treatment and access to programs and services throughout NSW were extended to Junee...

Likewise, ACM program initiatives (eg HRAT, AOD96, SORT) were evaluated by departmental staff with regard to their suitability for incorporation into departmental programs.

Other ACM initiatives...are similar to policies and practices operating within departmental centres.

Thus, by the end of year four opportunities for innovation in inmate management and the provision of programs and services were limited. The only initiative introduced by ACM in this area which remained unique to Junee was the Integration program. This initiative was proven to be a successful and innovative response to circumstances prevailing at the time.

The areas of operation at Junee which presented the greatest opportunity for innovation were Human Resources and Administration and it was in these areas that innovation was most noticeable over the four year period covered by this study. For example:

- The staff training program which applied to all staff...was innovative in that the Training Officer was able to monitor the attendance of staff (using the payroll system) and the courses attended;

⁴⁰⁹ Reports were prepared in relation to each of the first four years that were reviewed, culminating in the “four year-review” publication. As far as the writer is aware, this is the most recent research study of the Junee prison.

⁴¹⁰ *Supra* at 76.

- Occupational health and safety – the employment of a full-time on-site [OH&S] Officer ensured a focus upon health and safety issues. ACM’s adoption of the NSCA’s 5-star program reinforced commitment to OH&S issues and placed responsibility for ensuring compliance with staff.

The success of this initiative is evidenced by the low level of average days lost per employee per month over the four-year period.

Over time a strong working relationship has developed between ACM and the Department with Junee staff attending some departmental training courses, visiting departmental centres and sharing information with their colleagues in departmental centres.⁴¹¹

The reports for each year in the four-year period also contain data comparing Junee with public prisons in the following areas:

- (1) Events in custody
- (2) Time out of cells
- (3) Enrolment in educational programs
- (4) Inmate employment

The results of these comparisons are summarised below:

(1) Events in custody: Events in custody include deaths in custody, escapes, acts of deliberate self-harm, assaults and fights, use of force, hunger strikes and fires.

Significant events in custody: Before looking at the comparisons, it is relevant to outline the “significant events in custody” at Junee (not including deaths in custody and escapes, covered below) that were mentioned in each of the four reports. In the first year, there were 5 significant events: (i) a serious assault on an inmate; (ii) an inmate being stabbed; (iii) a disturbance involving a number inmates which was quelled through use of chemical agents; (iv) a break in at the canteen and theft of a number of items; and (v) a group of inmates who refused to muster, leading to minimum use of force and restraint. In the second year, there were 4 major incidents: (i) a serious assault on two inmates, (ii) an inmate who was sexually assaulted; (iii) an attempt by normal discipline inmates to enter an area housing protection inmates, and (iv) inmates in two sections of a unit going on a rampage and shattering windows, which was contained by using CS gas. In the third year, there were 4 incidents of inmates being found stabbed in their cell or in the day room. In the last year of review, there was 1 significant event, which involved an inmate being stabbed in the recreation yard.

Comparisons: Each of the reports in the four-year series compares the various types of events in custody at Junee prison with the events in custody at three public prisons in NSW, or with a statewide average. The three public prisons selected were Bathurst, Grafton and Goulburn.⁴¹² The results of these comparisons are summarised below:

⁴¹¹ Ibid at 79-80.

⁴¹² The report explains: “These prisons were chosen because they contained a significant number of inmates of the same classification as those held at Junee. Although there have been changes in the inmate mix at all these centres during the period of this study, these facilities were retained for comparative purposes. Bathurst, Grafton and Junee are designated medium

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- (i) *Escapes from custody*: There were six escapes from custody in the first three years, and none in the fourth year.⁴¹³ For minimum-security inmates, the rate of escapes from Junee was below the statewide average for each of the four years; while for medium security inmates the rate of escapes from Junee was close to or below the statewide average for each of the four years.
 - (ii) *Deaths in custody*⁴¹⁴: there were six deaths in custody in the four-year period⁴¹⁵. In each of the four years, the death rate at Junee was close to or below the statewide rate for male deaths in custody.
 - (iii) *Deliberate self-harm*⁴¹⁶: In the second and third years, in terms of the rate per 100 inmates of deliberate self-harm, Junee had a slightly worse record than two out of the three public prisons, and a slightly better record than one of the public prisons. In year four, the rate at Junee was slightly better than Bathurst, the same as Grafton, and slightly higher than Goulburn.⁴¹⁷
 - (iv) *Assaults by inmates on inmates*: There were 60 reported assaults at Junee in the first year, 45 in the second year, 40 in year 3, and 37 in year 4. In the first three years, the rate of assaults at Junee was lower than two of the public prisons but higher than one of the public prisons; and in the fourth year the rate of assaults at Junee was lower than all three public prisons.⁴¹⁸
 - (v) *Fights between inmates*: There were 29 reported fights in the first year, 38 in the second year, 48 in the third year, and 52 in the fourth year. In the first year, the rate of fights at Junee was similar to Grafton and Goulburn and lower than Bathurst. In year 2, Junee had a slightly lower

security facilities which also contain accommodation for minimum security inmates. Goulburn is designated as a maximum security facility with mixed accommodation".⁴¹²

⁴¹³ One in the Year 1, two in Year 2, 4 in Year 3 and 0 in Year 4. All were subsequently recaptured.

⁴¹⁴ These include deaths from natural causes, murder, misadventure or suicide.

⁴¹⁵ One in year 1, two in Years 2 and 3, and one in Year 4.

⁴¹⁶ Reported instances of deliberate self-harm range from threats to attempted suicides. In Year 4, most instances were reported as cuts and lacerations.

⁴¹⁷ In Year 4, the rate at Junee was 5.1 compared to 6 at Bathurst and 3.5 at Goulburn. In Year 1, Junee had a slightly better record than all three public prisons but this excluded the first 4 months of Junee's operation.

⁴¹⁸ Bowrey, Note 407, p 21. The rate at Junee was 6.3 compared to 8.2 at Grafton, 10.7 at Bathurst and 18.7 at Goulburn.

rate of fights than Bathurst, a similar rate to Grafton, and a slightly higher rate than Goulburn. In year three, Junee had a slightly better record than Bathurst and Grafton, but a slightly worse rate than Goulburn. In the fourth year, the rate of fights at Junee was slightly higher than all three public prisons.⁴¹⁹

- (vi) *Assaults by inmates on officers:* There were 33 assaults on officers in the first year, 74 in the second year, 20 in the third year, and 9 in the fourth year. In year one, the assault rate at Junee was similar to Goulburn but slightly higher than Bathurst and Grafton. In year two, the assault rate at Junee was significantly higher than at any of the three public prisons.⁴²⁰ In year three, the assault rate at Junee was roughly the same as Bathurst and Grafton and well below the rate at Goulburn.⁴²¹ In the fourth year, the assault rate at Junee was slightly lower than all three public prisons.
- (vii) *Offences in custody:* A total of 977 charges were heard in year one, 1259 heard in year two, 778 heard in year three and 646 in the fourth year. The average monthly rate by hearing date per 100 inmates at Junee was compared with the monthly rate for the three public prisons. In year one, the rate at Junee was close to Bathurst and Grafton but higher than Goulburn. In year two, the rate at Junee was slightly lower than Bathurst, but significantly higher than Grafton and Goulburn. In years three and four, Junee had lower rates than at all of the three public prisons.
- (viii) *Use of force*⁴²²: In the second year, force was reportedly used on 56 occasions, compared to 29 instances in the third year and 28 in the following year.⁴²³ Comparisons were made with the public prisons in terms of numbers rather than rates. In the second year, officers at Junee used force much more frequently than at all three public prisons.⁴²⁴ In years three and four, Junee officers reportedly used force about as many times as at Goulburn but this far exceeded Bathurst and Grafton.⁴²⁵
- (ix) *Hunger strikes and fires:* For years two to four of the review, there were a similar number of hunger strikes at Junee to Bathurst and Goulburn,

⁴¹⁹ Bowrey, Note 407, p 21.

⁴²⁰ The rate at Junee was 13.4 while the rate at Goulburn (the highest of the three public prisons) was 5.1.

⁴²¹ The rate at Junee was 3.4 while the rate at Goulburn was 10.5.

⁴²² In most instances, force was used in order to move an inmate from one area to another or to restrain an inmate or where an inmate refuses a lawful direction (Bowrey, p 23-24)

⁴²³ Bowrey, Note 407, p 24. Data was not available for the first year of operations.

⁴²⁴ Goulburn had the most with 33 instances.

⁴²⁵ Bathurst had 6 and 8 instances. Grafton had 15 and 5 instances.

but a slightly higher number than Grafton.

- (x) *Fires:* For years two to four of the review, there were more minor fires at Junee (19) than there were at all three public prisons combined (13).

(2) *Time out of cells:* In all four years, the minimum hours per day that inmates at Junee were allowed out of their cells was higher than at the three public prisons. In year 4, for example, the minimum hours per day at Junee were 14 (for medium security) and 15 (for minimum security) while inmates at Bathurst were allowed out for a minimum of 12.5 hours, and inmates at Goulburn were allowed out for 12.5 hours.⁴²⁶

(3) *Enrolment in educational programs:*

- (i) *On-site programs* - Individual inmate enrolments in educational programs at Junee were calculated as a percentage of the average monthly inmate population and these figures were compared with the statewide average. In each of the four years the percentage of Junee inmates enrolled in educational programs was lower than the statewide average - by 10-20 percentage points.⁴²⁷ However, it appears that data for Junee enrolments was missing for part of each of the years of review.⁴²⁸
- (ii) *Distance education* - Data on Junee inmates enrolled in courses by correspondence were calculated as a percentage of the inmate population and compared with the statewide average. In the first year of operations, the percentage of inmates at Junee enrolled in distance education (12%) was lower than the statewide average (22%) but for years two to four of the review Junee had a higher percentage than the statewide average.

(4) *Employment of inmates:* The percentage of inmates employed at Junee increased from 57 percent in the first year to 68 percent in the fourth year. In the first three years of review, the percentage of inmates employed at Junee was lower than at Bathurst, Grafton and Goulburn. In those years, at Bathurst the percentage fell from 77 to 71 percent, while at Grafton the percentage fell from 67 percent to 59 percent and then rose to 65 percent. At Goulburn the percentage increased from 61 to 81 percent. In year four, the percentage of inmates employed at Junee (68%) was higher than at Grafton (59%) and Goulburn (67%) but lower than Bathurst (79%).

⁴²⁶ At Bathurst, Grafton and Goulburn some inmates were allowed out for less hours per day.

⁴²⁷ See p 44 of the Year 4 report.

⁴²⁸ See p 44 of Year 4 report.

8.4.5 Ombudsman

The number of complaints to the Ombudsman

The table below compares the number of complaints to the Ombudsman by prisoners at Junee with the number of complaints from prisoners at publicly run prisons for the period 1993-2003.⁴²⁹

TABLE 8.4 Comparison of Ombudsman complaints 1993 – 2003⁴³⁰

Year	Junee complaints ⁴³¹	Ranking ⁴³²	Complaints about public prisons ⁴³³	Junee – percent of all complaints ⁴³⁴
1993/94	32	Fourth highest	428	7
1994/95	46	Highest	397	10
1995/96	36	Highest	335	10
1996/97	52	Highest	338	13
1997/98	(47) 355	Highest	(348) 1785	17
1998/99	(27) 196	Second highest	(319) 2030	9
1999/00	(18) 179	Second highest	(227) 1674	10
2000/01	(34) 236	Highest	(204) 1640	13
2001/02	(40) 318	Highest	(182) 2148	13
2002/03	(18) 154	Third highest	(212) 1820	8

⁴²⁹ These figures should be interpreted in light of comments made by the Ombudsman in annual reports for the respective years. These are outlined below.

⁴³⁰ Figures obtained from annual reports of NSW Ombudsman.

⁴³¹ The number of complaints for the years 1993/94 to 1996/97 are confined to written complaints. For the following years the numbers in brackets are written complaints and the adjacent numbers are the total number of complaints (written & oral).

⁴³² This column shows where Junee sits in comparison to complaints from the other prisons in the NSW prison system. "Fourth highest", for example, means that Junee had the fourth highest number of complaints out of all the prisons in NSW. Up until 1997, Junee was the largest prison in NSW with around 600 inmates. In July 1997, the Metropolitan Remand and Reception Centre opened within the Silverwater complex and became the largest prison in NSW. The MRRC would accommodate 900 prisoners by the year 2000.

⁴³³ This column shows the total number of complaints from all publicly run prisons in NSW. The figure excludes a large number of complaints which were reported as having been made to the Department of Corrective Services about departmental issues.

⁴³⁴ This column shows the number of complaints from Junee as a percentage of all prisons in NSW. Junee currently holds around 10% of the prisoner population in NSW. For years from 1997/98 onwards, the percentage is calculated on the basis of total complaints (written & oral).

Comments by the Ombudsman in the annual reports for 1993-2003

The following is a summary of comments made by the Ombudsman in its annual reports. For the years 1993/94 to 1996/97 the Ombudsman made some general comments about complaints relating to Junee. For the following years Junee was only referred to in case studies covering issues that arose in various correctional centres during the relevant year of review.

*1993/94*⁴³⁵: The Ombudsman noted that prisoners had complained about the isolation of the prison (ie distance from relatives etc) but that otherwise complaints were much the same as encountered at other prisons. The report refers to some positive aspects of Junee including the design of the prison, the approach by staff to inmates, and medical and dental treatment. However, the Ombudsman also referred to some potentially negative aspects including the high staff turnover rate, problems recruiting specialist non-custodial staff, lack of useful work for inmates and a rising number of assaults and other acts of violence, including some nasty bashings and a murder. It was noted, however, that acts of violence were rising across the whole system.

*1994/95*⁴³⁶: The Ombudsman remarked that Junee was the most complained about prison in the state but that this was not surprising given that Junee was NSW's largest prison. The Ombudsman also suggested that this was not helped by the lack of an Official Visitor to deal with minor local matters. It was also pointed out that during 1994/95, Junee had a dangerous mix of various classifications and some protection inmates (not through the fault of the operator), and that during this time tension was high and violent incidents increased. It was noted that prisoners were unhappy about leaving and arriving because of the isolation of the prison, and that they were more difficult to manage as a result. It was also noted that officers were struggling to keep up with the changing security settings and faces. On the other hand, the Ombudsman believed that the prison would benefit from its new function in managing protection prisoners who were generally less difficult to manage, more productive and less likely to suffer from fewer visits. The Ombudsman said that senior management was focusing on settling the prison down after a disruptive period.

*1995/96 & 1996/97*⁴³⁷: For 1995/96, the Ombudsman noted that complaints had slowed and were not different to complaints from publicly run prisons. The Ombudsman said that there were signs that Junee was settling down since the disruptive changes involved in establishing the protection inmates in the prison. But there was still a problem with mixing of minimum and medium security inmates. The report also suggested that there would be difficult challenges for management in relation to the prison's remand and reception function and in providing worthwhile options for work release and day leave. In relation to 1996/97, the report noted that Junee had retained its position as the prison

⁴³⁵ Based on NSW Ombudsman, *Annual Report 1993-94*, p 103-105.

⁴³⁶ Based on NSW Ombudsman, *Annual Report 1994/95*, p 86-87.

⁴³⁷ Based on NSW Ombudsman, *Annual Report 1995-96*, p 82 and NSW Ombudsman, *Annual Report 1996-97*, p 88.

about which the most complaints were made. The Ombudsman said that the range of complaints was similar to previous years – lost property was the main complaint followed by problems with officers ranging from alleged assault to threats and abuse.

The reports for the above years also contain case studies involving Junee amongst case studies involving a number of prisons. The Junee case studies involved:

- At internal hearing for abusive language and other charges inmate improperly excluded from room when witness arrived – after Ombudsman report, Governor agreed that the practice adopted was unacceptable (1994/95)
- Junee used a different inmate cash system which resulted in delays in inmate receiving money when transferred to another prison (1996/97)

1997/98 – 2002/03: These annual reports refer to a number of case studies involving prisoners at Junee prison. The following incidents were discussed:

- Inmate refused permission to attend father's funeral - staff at Junee did not follow the correct procedures – letter of regret provided to inmate (97/98)
- Segregation of inmate not in accordance with proper procedures (98/99)
- Inmate paid for items not received and staff at centre lost an inmate's wedding ring – resolved (98/99)
- Inmates complained about number of times they were locked in their cells or denied access – inadequate recording of lockdowns at Junee – system changed (2001/02)
- Prisoner released from Junee did not have enough money to travel to Adelaide where he was to report to the police – departmental checklist deficient – resolved (2001/02)
- Inmate kept in segregation for longer than allowed – procedures needed to be improved but staff motivated to ensure inmate not harmed by others (2002/03)
- Inmate's CD player went missing after he was transferred to another section of the prison – staff had not secured his property – following intervention by Ombudsman, ACM agreed to pay compensation to inmate (2002/03).

8.4.6 *Inspector-General of Corrective Services*

The Inspector-General was appointed in 1999 and has submitted annual reports to the Minister for the years 1999/00 through to 2002/03. That was the last report as the major functions of the Inspector-General were transferred to the Ombudsman in October 2003.⁴³⁸ The Inspector-General had a variety of functions including investigating the Department's operations, resolving complaints, reviewing the monitor's reports on Junee, and investigating matters as directed by the Minister. Some of the Inspector-General's reports refer specifically to Junee and these are outlined below.

In the 1999/00 report, the Inspector General reported on Junee as follows:

I visited the Junee Correctional Centre for the first time on 14 June 2000. During this visit I met with the General Manager and a number of staff, the [Inmate Development Committee] and ten inmates. I have also had regular telephone contact with inmates. The IDC raised the following

⁴³⁸ Minister for Justice, 'Inspector-General annual report highlights corrective services achievements', Media Release, undated (referring to 2002/03 annual report).

issues with me:

- Access to medical and dental treatment was too slow.
- Inconsistency with the implementation of urinalysis program, non-compliance with procedures such as failing to seal samples in the presence of inmates and treating the inability of inmates to produce urine as a refusal to provide a sample.
- Inmates not permitted to inspect their case file, sometimes being required to wait long periods to see case files or not given access to all documents in files.
- Problems as to appropriate communication between officers and inmates.
- Lack of adequate consultation and discussion with the monitor.

Individual inmates raised such issues as education expenses, difficulties with timing of classification meetings, quality and quantity of food, cost of television rentals, cost of STD telephone calls.

The above matters were referred to the General Manager of the centre for examination and action and I will review their status in the new financial year.⁴³⁹

In 2000/01, the Inspector General investigated allegations that management at Junee failed to allow an inmate of the Islamic faith to consume methadone in the evening so that he could observe fasting during Ramadan. The Inspector-General found that Junee Management was adhering to Corrections Health Service guidelines as to dispensing of methadone. Recommendations were made to accommodate prisoners of the Islamic faith.⁴⁴⁰ In the same year, the Inspector-General conducted a review to assess correctional centre compliance with a range of obligations contained in the Department's Operations and Procedures Manual (OPM). The scope and results of the review were as follows:

The review incorporated an assessment of the administrative structure of the OPM's at twelve correctional centres including the privately managed Junee correctional centre, visits to correctional centres, interviews with Governors and their staff and analysis of functional documentation held in correctional centres.

...

My inspection of the Junee correctional centre revealed that compliance levels were generally higher at that centre when compared to the Department's centres. This was clearly apparent from the quality of documentation provided for assessment and the general level of demonstrated compliance.⁴⁴¹

The 2001/02 report contains data showing that the number of incidents of prisoners being locked in cells because of staff shortages were lower at Junee than at Bathurst, Goulburn and Grafton. Other data presented in the report shows that the number of incidents⁴⁴² reported at Junee compared favourably to Bathurst, Grafton and Goulburn. The 2001/02 report also has the following comment about the Junee Monitor's reports:

⁴³⁹ NSW Inspector-General of Corrective Services, *1999/00 Annual Report*, p 10.

⁴⁴⁰ NSW Inspector-General of Corrective Services, *2000/01 Annual Report*, p 7.

⁴⁴¹ *Ibid* at 11.

⁴⁴² Including threat/risk of self-harm, assaults, use of force by staff, lock downs, hospital attendance.

There appear to be a number of ongoing areas where the contractor and the Department have disagreed in terms of service delivery, but these matters never seem to be resolved. Nevertheless, the Department continues to find that the contractor satisfactorily meets its contractual obligations.

....

While it seems that the Junee Correctional Centre outperforms the Department's operations, that does not mean that outstanding issues should remain unresolved. The Department needs to be more robust in sorting out matters of concern with the contractor.⁴⁴³

8.5 Queensland

The only detailed evaluation of private prisons in Queensland was a study of the Borallon prison by an academic, Paul Moyle⁴⁴⁴. The findings of this study were published in 2000, in a book entitled "Profiting from punishment: Private prisons in Australia: Reform or Regression".⁴⁴⁵ This work explored "the impact of Borallon on the reform process in the Queensland corrections system between 1988 and 1993"⁴⁴⁶ and made comparisons with the publicly run Lotus Glen prison. The research examined internal reforms (things which can be controlled or influenced by a centre's management)⁴⁴⁷ and external reforms (areas which influence the corrections system as a whole).⁴⁴⁸ The hypothesis was that "private sector involvement would enhance the reform process by providing for a more open, accountable and humane correctional environment with clearer penological objectives."⁴⁴⁹ Moyle's conclusions were:

.... The introduction of Borallon did not lead to any appreciable internal or external reform as defined in this book. The difficult issue is to isolate the reason for this. Every indication is that the way that Borallon was set up allowed CCA to pursue its corporate objectives without being accountable to the organisational and policy objectives of the [Queensland Corrective Services Commission].

⁴⁴³ NSW Inspector-General of Corrective Services, *2001/02 Annual Report*, p 40-41. No relevant comments were included in the Inspector-General's 2002/03 annual report.

⁴⁴⁴ Lecturer at the law school of the University of Western Australia.

⁴⁴⁵ Moyle (2000), Note 47.

⁴⁴⁶ *Ibid* at 1.

⁴⁴⁷ The internal areas explored were: implementing better-quality programs for inmates; providing industrial and trade training; improving staff and inmate interpersonal relations; reducing levels of violence and assault; and improving provision and utilisation of amenities (*Ibid* at p 313)

⁴⁴⁸ The external areas explored were: the avoidance of a dual system, ensuring that Borallon is complying with the QCSC policies and procedures; ensuring that Borallon is not reducing accountability to external stakeholders within the Qld prison system, and maintaining a distinction between the allocation and administration of punishment (*Ibid* at p 321)

⁴⁴⁹ *Ibid* at 2.

Arguably, corrections reform via the private sector is possible if proper regulatory structures are put into place before the introduction of the policy. Yet the comparison between Borallon and Lotus Glen show that the state run Lotus Glen was the centre that achieved reform. This suggests that privatisation was not a necessary precondition for reform. The key question may not be whether the private or public sector delivers better programs or other correctional services, but whether regulatory mechanisms are effective in ensuring that service providers satisfy a specified level of service to a measurable predetermined quality.

....

Returning to the issue of reform, it has been suggested that the process by which Borallon was introduced meant that many of the internal and external reforms...were not achieved. CCA was invited to contract manage an entire facility. This step, in the context of a poorly developed regulatory arrangement, contributed towards deficiencies in inmate programs, management style, custodial officer training, staffing levels, introduction of case management and community focus. In this regard, a more effective way to implement private prisons policy... would be to use a supplementation model....This requires the private sector to establish specific improvements before it is given the opportunity to manage entire correctional centres.

It has been shown that commercial interests do have an impact upon internal and external reform. Both programs and accountability will be affected if a change in approach is not made.

...

Effective correctional reform involves more than simply introducing one new policy initiative. The private sector, seen as a catalyst for reform since the Kennedy Review, has largely failed to deliver on the promises of both internal and external reform. The results of this research, apart from identifying some of the complexities of private prisons policy, suggest that a more sophisticated approach to correctional reform is needed if the potential of the private sector is to be harnessed.

In conclusion, the impact of private contract management upon the Queensland corrections system during the early 1990s was not revolutionary or for that matter particularly innovative. Therefore, the hypothesis that the private sector will introduce important improvements relating to implementing better quality programs, providing industrial and trade training, improving staff and inmate perceptions of interpersonal relations, reducing levels of violence and assault and improving the provision and utilisation of amenities, was not proved. Borallon did not comply with QCSC policies and procedures and reduced accountability to external stakeholders. Finally, the distinction between the allocation and administration of punishment was breached...For those who advocate privatisation, the challenge is to justify such a radical departure in terms of its reforming impact upon the corrections system.

...In the final analysis, the status of the service provider may be less relevant than the pivotal role of the regulatory agency in establishing, monitoring and evaluating the implementation of correctional reform.⁴⁵⁰

⁴⁵⁰ Extracts from Ibid at p 332-336. See also p 2.

8.6 Victoria

8.6.1 Reports on operation of private prisons in Victoria

An independent investigation into the management and operation of Victoria's private prisons was completed in October 2000.⁴⁵¹ The Independent Panel was set up after the findings of a coronial inquest into the five deaths in custody at Port Phillip prison between October 1997 and March 1998;⁴⁵² and after "a number of significant reviews had...suggested the prison system was not working as it should, including the Auditor General's report and the Russell review, which had both highlighted serious deficiencies."⁴⁵³ It should be noted that the Russell review also identified benefits associated with private prisons.⁴⁵⁴ The report of the independent investigation, known as the "Kirby Report", did not evaluate private prisons in comparison to public prisons. It examined the contractual arrangements and looked at a number of areas in the prison system – public and private – that needed improvement. The conclusions in the Kirby Report were summarised in a media release by the Minister for Corrections:

The Kirby Report concluded that the introduction of the private prisons has had mixed results for the delivery of correctional services in Victoria.

Benefits included the construction of more modern prisons to replace antiquated facilities such as Pentridge and Fairlea and the development of clearer standards to guide the operations of all Victoria's prisons.

However, Mr Kirby said the report found anticipated benefits of competition have not been realised.

"The contractual arrangements with the private prison operators provide much less flexibility for Government to change arrangements and adopt new initiatives.

"The system has also become increasingly fragmented, with effectively three different systems operating within the state," Mr Kirby said.

The Panel concluded the underlying policy framework, established by the former Government, of encouraging competition between private providers was no longer appropriate.

⁴⁵¹ Kirby P et al, 'Report of the independent investigation into the management and operation of Victoria's private prisons' (October 2000). Located on Corrections Victoria website: <http://www.justice.vic.gov.au/>

⁴⁵² Victorian Minister for Corrections, "Minister receives Kirby private prison report", *Media Release*, 28 November 2000.

⁴⁵³ *Ibid.*

⁴⁵⁴ Including cost savings in the construction of three new prisons, competitive pressure being placed on public providers leading to improved performance, clearer performance measures, and transferral of risk to the private sector. See Naylor Dr B, 'Prisons, privatisation and human rights', Paper presented at Castan Centre for Human Rights Law Conference, 'Human Rights and Global Challenges, Melbourne, 10 December 2001.

The Report makes recommendations for changes aimed at improving the effectiveness of correctional programs and promoting greater cohesiveness across the prison system.

Other key findings and recommendations of the Panel include:

- There is limited capacity to increase the flexibility of the contracts which now form such a major part of the operation of the State's prison system.
- Performance measures specified in the current contracts are inadequate in gauging the performance of a prison. The quality of correctional services in prisons should be assessed through regular reviews of each prison's performance and the outcomes of these reviews should be publicly available.
- Recruitment, selection and training of custodial staff should be strengthened.
- Prisoner health services are particularly fragmented. All health services should be centrally coordinated but delivered locally as far as is practicable.
- Self-harm procedures now provide adequate safeguards in terms of suicide risk assessment and the management of high-risk prisoners but other programs directed to the rehabilitation of prisoners need strengthening.⁴⁵⁵

8.6.2 *Major problems resulting in serious government intervention*

Metropolitan Women's: This prison opened in August 1996. As a result of deficiencies, on 3 October 2000, the state government took control of the prison pursuant to its powers in the legislation⁴⁵⁶; and on 2 November, the government announced that it had reached agreement with the operator, CCA, to transfer ownership and management of the prison to the public sector.⁴⁵⁷ The government's decision to take control of the prison followed three default notices and a report from the Correctional Services Commissioner, which found that the operator was failing in relation to fundamental security and drug prevention operations.⁴⁵⁸ The Commissioner found that CCA remained non-compliant in five of the nine issues identified in default notices:

- The maintenance of security, through inadequate staffing levels;
- The maintenance of security, through a lack of proper security systems;
- The control of illicit drugs within the prison;
- The identification and management of prisoners at risk of self harm or suicide
- Excessive lock downs to cover staff shortages and other critical problems.

The Minister said that “the operator was given repeated opportunities to fix the

⁴⁵⁵ Media release, *supra*.

⁴⁵⁶ Under s 8F of the *Corrections Act (Vic)* and clause 27B of the prison contract, the Government had the power to appoint an administrator to carry out the functions of the prison general manager if the Minister considered that there was an emergency, the contractor failed to provide competent management of the service, or the Minister considered it was in the public interest or in the interest of the safe custody and welfare of prisoners to intervene.

⁴⁵⁷ Victorian Minister for Corrections, “Government terminates prison contract”, Media release from the Minister for Corrections, 2 November 2000.

⁴⁵⁸ Victorian Minister for Corrections, “Government takes control of women's prison”, Media Release, 2 October 2000. For a commentary of the problems at MWCC, see Kirby Report, Note 451, p 109ff and Nathan S, ‘Victoria's flagship PFI prison sinks’ *The PFI Report* (February 2001) (www.pfi.online.com).

problems and meet its contractual obligations, but failed to adequately respond to verbal and written warnings and three default notices.”⁴⁵⁹

Port Phillip: This maximum-security remand and reception prison opened in September 1997. The Victorian Auditor General outlines early problems in the prison’s operation:

Despite the identification of significant areas of poor performance at Port Phillip Prison during the first 5 months of operations, the Commissioner's Office attributed the position to "teething problems".

The circumstances at Port Phillip Prison reached a point when, on the days of 11 and 12 March 1998, the prison experienced the extremely serious situation of a major disturbance.

A Ministerial Task Force established to investigate the major disturbance reported to the Minister in May 1998 and was highly critical of the operator's management of Port Phillip Prison.

The Government chose not to take the extreme position of exercising its termination right but opted to work with the operator at Port Phillip Prison in an attempt to achieve effective resolution of all of the matters raised by the Task Force.

On the basis of the latest reports issued by the Commissioner, progressive improvement in performance at Port Phillip Prison has occurred up to February 1999 but the prison operator is still to satisfy the Commissioner that it is meeting all required service delivery outcomes.⁴⁶⁰

Later, a coronial inquest inquired into five deaths in custody at Port Phillip prison between October 1997 and March 1998. The findings were released in April 2000; and prompted the government to establish the independent investigation referred to above.⁴⁶¹ In October 2003, the state government issued the operators of Port Phillip prison with a default notice “over reported security breaches at the maximum security prison”.⁴⁶² The breaches were: (i) In May 2003, a search by the private operator revealed a small loaded handgun, a mobile phone and significant quantity of drugs; and (ii) a search the following day discovered contraband including mobile telephones and a digital camera. The Corrections Commissioner ordered an independent security review and the operator responded to the findings of that review.⁴⁶³ However, in August, there was a further security breach where a prisoner was unable to be located for more than 7 hours; and this prompted the default notice.⁴⁶⁴

⁴⁵⁹ Ibid.

⁴⁶⁰ Auditor General: Victoria, ‘Victoria’s prison system: community protection and prisoner welfare’, Special Report No. 60 (Tabled 27 May 1999).

⁴⁶¹ The findings are not currently available from the coroner’s website.

⁴⁶² Victorian Minister for Corrections, ‘State issues default notice on Port Phillip prison’, *Media Release*, 22 October 2003.

⁴⁶³ Ibid.

⁴⁶⁴ Group 4 issued a media statement on 22 October 2003. See Nathan S, ‘Victoria: Default notice for Group 4, 53 *Prison Privatisation Report International*, December 2003.

8.7 United Kingdom

The National Audit Office⁴⁶⁵ evaluated the performance of privately operated prisons in the UK in its June 2003 report entitled “The Operational Performance of PFI Prisons”.⁴⁶⁶ “PFI” stands for “Private Finance Initiative”.⁴⁶⁷ The report is divided into three sections. The first section examines the performance of PFI prisons in terms of contract compliance. The second section compares the performance of seven PFI prisons, two privately managed prisons, and twelve public sector prisons. The final section considers whether the use of PFI prisons brought benefits to the Prison Service. Extracts from the executive summary of the report are presented below:

“Performance of PFI prisons against contract has been mixed”:

Irrespective of whether a prison is publicly or privately managed, the opening period will be difficult for staff and management. All but one of the PFI prisons have incurred financial deductions for poor performance, although the level of financial deductions in themselves do not provide a full picture of performance in a prison. In most cases, the financial deductions tended to be highest in the first year of operation and generally reduced in the following years. The main exception to this is Ashfield, where the level of financial deductions has increased since the prison opened in 1999. The Prison Service took control of Ashfield for five months in 2002, following concerns about the safety of prisoners there. In October 2002, the Prison Service considered that the improvement in performance at Ashfield was such that control could now be returned to Premier Prison Services (Premier). Following a visit in April 2003, the Prisons and Probation Ombudsman concluded that Ashfield was providing custodial care of a good quality. However, he also noted that it was at half of its operating capacity but with a full complement of staff. The Prison Service has made clear to Premier that the prospect of contract termination remains, if the improvement in performance is not sustained.⁴⁶⁸

“PFI prisons span the range of prison performance”:

Within our study group of prisons, the best PFI prisons are outperforming most public prisons but the lowest performing PFI prison is among the worst in the prison estate. Our analysis split the prisons in our study into three groups. Only one PFI prison was in the lowest performing group (prisons with five or more indicators or weaknesses), whereas four PFI prisons were in the

⁴⁶⁵ The National Audit Office (NAO) explains its functions as follows: “The National Audit Office scrutinises public spending on behalf of Parliament. We are totally independent of Government. We audit the accounts of all government departments and agencies as well as a wide range of other public bodies, and report to Parliament on the economy, efficiency and effectiveness with which government bodies have used public money.” NAO website <http://www.nao.org.uk/>

⁴⁶⁶ National Audit Office Report, Note 124: see report on NAO website at: http://www.nao.org.uk/publications/nao_reports/02-03/0203700.pdf. For earlier evaluations of private prisons in the UK, see for example Park I, ‘Review of Comparative Costs and Performance of Privately and Publicly Operated Prisons: 1998-99’, Home Office Statistical Bulletin No. 6 (23 March 2000); and Bottomley K and James A, ‘Evaluating Private Prisons: Comparisons, Competition and Cross-fertilization’, (1997) 30 The Australian and New Zealand Journal of Criminology 259 (see also a reply by Professor Richard Harding at p 314).

⁴⁶⁷ See above a p 21.

⁴⁶⁸ NAO Report, supra at 6.

highest performing group (two or less such indicators). The two privately-managed prisons, Wolds and Doncaster, were also in the highest performing group. PFI prisons tend to be better than public prisons in areas related to decency and regimes (such as the purposeful activities available to prisoners). They perform less well in other areas, such as safety and security. However it is unusual for any prison, whether privately or publicly managed, to perform equally well on both counts which suggests there is a difficult balance to be struck between the two areas of work.⁴⁶⁹

“The private sector has brought benefits to the prison service”:

Competition has been important within the prison system for improving both management and conditions for prisoners. The success with PFI prisons at a time when the Private Finance Initiative was faltering in other sectors was critical for sustaining a competitive market for the benefit of the Prison Service. However, as the bids become increasingly competitive, so there appears to be evidence that both private contractors and successful in-house bid teams are struggling to meet required standards of performance. This is apparent in the problems faced by Ashfield, Dovegate and Rye Hill in recruiting and retaining staff to the levels stipulated in their contracts and in concerns regarding staffing levels voiced to us by the staff at Manchester. Prison Custody Officer (PCO) shortfalls can be accommodated by transferring staff from other prisons managed by the contractor, but such strategies can only be viewed as a short-term solution. The Prison Service considers that the competitions [for] Peterborough and Ashford (Middlesex) in 2002 may have addressed this problem since in terms of cost per place, these appear more expensive than recent bids. However, Ashford will have to compete for staff within the vicinity of Heathrow Airport, and both Peterborough and Ashford will contain female prisoners which usually makes such prisons more expensive.

The use of the PFI has brought innovation, mainly in the recruitment and deployment of staff and use of new technology; however, there appears little difference in terms of the daily routines of prisons. A key innovation by the private sector has been in promoting a more constructive staff/prisoner relationship. PCOs are encouraged to treat prisoners in a more positive manner, for example through the use of first names and mentoring schemes. The senior management of the Prison Service has been able to use the success of the private sector in nurturing better staff/prisoner relationships to encourage their own staff to adopt a similar approach.

.... The use of the PFI to build new prisons has helped the Prison Service cope with [the] increase [in the prison population] speedily and cost effectively and has created the necessary conditions for competition in the management of existing public prisons. Although the PFI has brought an increase in capacity, the operational performance of the prisons has been mixed. Furthermore, there has been only limited evidence that the innovation and good practice of PFI prisons is easily applicable to the rest of the Prison Service. However, the Prison Service has successfully integrated private management within its national arrangements for making the best use of available accommodation which has in turn, helped generate a common correction professionalism, irrespective of employer.⁴⁷⁰

The general conclusion made by the National Audit Office was that:

The use of the PFI is neither a guarantee of success nor the cause of inevitable failure. Like other forms of providing public services, there are successes and failures and they cannot be ascribed to a single factor. This report shows therefore what we should expect. A relatively new procurement method such as the PFI is associated with encouraging and disappointing results and that performance will improve over time. But a general verdict that the PFI is either good or bad in the

⁴⁶⁹ Ibid at 7. Note that the report refers to a number of difficulties in comparing the performance and cost of PFI prisons against publicly managed prisons.

⁴⁷⁰ Report at p 7, 9.

case of prisons, or more generally, cannot be justified.⁴⁷¹

8.8 United States

8.8.1 Overview

Below are summaries of evaluations of private prisons in:

- (1) A 1998 report by Abt Associates Inc, commissioned by the National Institute of Corrections (Abt Report, 1998); and
- (2) A 2001 report by the US Bureau of Justice Assistance, which is a division of the US Department of Justice.

Both reports review prior research studies into the performance of private prisons. The latter report also presents the findings of its own research into private prisons. This paper will also refer to evaluations relied on by private prison enthusiasts.

8.8.2 *Abt Report (1998)*⁴⁷²

In 1997, the US Congress requested the Attorney General to “conduct a study of correctional privatisation, including a review of relevant research and related legal issues, and comparative analysis of the cost effectiveness and feasibility of private sector and Federal, State, and local governmental operation of prisons and corrections programs at all security levels.”⁴⁷³ The National Institute of Corrections subsequently commissioned Abt Associates Inc to conduct the study.⁴⁷⁴ The findings in the report in relation to studies on comparative costs and quality are outlined below:

Regarding the question of whether contracting for prison operations saves money, the report concluded:

...only a handful of [private prisons] have been studied to learn if contracting is less costly to the taxpayer. Fewer still have employed reasonably strong research designs and reported the data in sufficient detail to permit an assessment of the validity of the findings. The results are mixed and subject to different interpretations.

Some studies report finding that contracting saved the taxpayers money; others report small differences, if any. Some of these apparent differences may not reflect actual savings but may instead be accounting artefacts, especially those associated with lower estimated costs of government overhead activities...

⁴⁷¹ Report at p 9.

⁴⁷² McDonald et al (1998), Note 32.

⁴⁷³ Ibid at i (Executive Summary)

⁴⁷⁴ Ibid.

Other apparent sources of savings in some states reflect lower spending for prisoner health care and perhaps, in other aspects of facility operations, including lower salaries for line staff in some jurisdictions.

Our conclusion regarding costs and savings is that the few existing studies and other available data do not provide strong evidence of any general pattern. Some states may be willing to pay high prices for private imprisonment if they need beds to solve short-term deficiencies. In other states, expenditures for contracting may indeed be lower than for direct public provision. However, the bottom line with respect to costs and savings is difficult to discern given the data and the assumptions made by the analysts. Drawing conclusions about the inherent superiority of one or the other mode of provision, based on a few studies, is premature.⁴⁷⁵

In answer to the question of whether privately operated facilities provide better services, the report states, in summary:

Few studies have been conducted to compare the relative performance of privately and publicly operated prisons. Most are affected by a variety of methodological problems that severely limit the conclusions that one can draw from them....Given these shortcomings and the paucity of systematic comparisons, one cannot conclude whether the performance of privately managed prisons is different from or similar to that of publicly operated ones.

With respect to public safety and inmate programming, the available data do not support definite conclusions...The available surveys of either privately or publicly operated facilities do not provide the information needed to compare the quality of [programs for inmates] or the extent of prisoners' engagement with them.⁴⁷⁶

8.8.3 *Bureau of Justice Assistance report (Feb 2001)*⁴⁷⁷

The Bureau of Justice Assistance of the US Department of Justice published a report in February 2001 entitled "Emerging Issues on Private Prisons". There are two main sections of the report. One section of the report examined the results of some of the well-known studies in the US, which had attempted an empirically based comparison of public and private prisons.⁴⁷⁸ It was noted, however, that only about 13 private facilities had previously been evaluated in those studies. To secure a more comprehensive overview of all privately operated prisons, the Bureau funded a national survey of state prison privatisation. The results of this survey formed the basis of the other main section of the report.⁴⁷⁹ The summaries in both sections of the report are presented below followed by the report's general conclusion.

(1) Review of prior research finding: The report noted that "a few dozen studies have attempted an empirically based comparison of public and private facilities"; and that the report "examines the results of some of the more well-known comparative institutional

⁴⁷⁵ Ibid at iv –v (Executive Summary)

⁴⁷⁶ Ibid at v (Executive Summary)

⁴⁷⁷ Austin and Coventry (2001), Note 130.

⁴⁷⁸ Ibid at 21ff

⁴⁷⁹ Ibid at 39ff

studies...”. The report reviewed studies that had been done on “Costs”, and separately on “Inmate Services, Quality of Confinement and Public Safety”, as well as in relation to “Health Care.” In relation to studies on cost savings, the report concluded:

In summary, the cost benefits of privatisation have not materialized to the extent promised by the private sector. Although there are examples of cost savings, there are other examples in which such benefits have not been realized. Moreover, it is probably too early to determine if the initial cost savings can be sustained over a long time period. It only takes one major disturbance for such costs to greatly accelerate.⁴⁸⁰

The general summary of the results from prior research was that:

Only a few studies can be relied upon in a debate over cost efficiency of prisons. It is generally accepted that the best research conducted to date was the Tennessee study that showed no or very minimal differences with respect to costs. The remaining studies had serious methodological flaws that limit their ability to reach firm conclusions. In general, these flaws pertain to an inability to control for factors known to be associated with inmate conduct and costs in making comparisons between public and privately operated facilities. For example, facilities chosen for comparisons often had inmates that differed on key attributes such as inmate age and classification level – factors known to be associated with inmate conduct.

...

...The studies thus far are essentially one-time studies that measure attributes of private and public facilities at a given time. To date, no long-term studies have been conducted to determine whether privately operated facilities can sustain their cost savings or quality of confinement over an extended period of time, especially if staff salaries and fringe benefits increase as their service tenure lengthens.

...one could argue that the private sector has simply drawn upon the methods used by the public sector with respect to inmate management and staffing and only attempted to reduce the costs associated with that model. In effect, the private sector may be applying a more efficient model that is essentially mimicking the public sector...

For these reasons it may be concluded that there are no data to support the contention that privately operated facilities offer cost savings over publicly managed facilities. Similarly, no definitive research evidence would lead to the conclusion that inmate services and the quality of confinement are significantly improved in privately operated facilities. It is clear that private prisons can function as well as public-sector prisons for certain types of inmates (such as minimum security).⁴⁸¹

(2) *National survey of state prison privatisation*: A national survey was conducted in 1997 of 65 private prisons in the US, and this was compared with the five-year Bureau of Justice census of state correctional facilities as at midyear 1995. The aim of the study was to “compare and contrast public and private prisons on a range of issues, argued to [be] some of the critical indicators of the efficiency and efficacy of introducing privatisation into US State correctional programs”.⁴⁸² The results of the survey were summarised as follows:

⁴⁸⁰ Ibid at 29.

⁴⁸¹ Ibid at 37-38. See also page x (Executive Summary).

⁴⁸² Austin and Coventry (1999), Note 30, p 177.

The previous analysis suggests that private facilities do not differ substantially from publicly operated facilities, with three possible exceptions. First, the number of staff assigned to private facilities is approximately 15 percent lower than the number of staff assigned to public facilities. (28 per 100 inmates in private facilities versus 32 per 100 inmates in public). Second, management information system (MIS) capabilities appear to be lacking in private facilities. Third, the rate of major incidents is higher at private facilities than at public facilities.

The data was then reanalysed to take into account the fact that the 1995 public prison census included all types of facilities, whereas private facilities were primarily medium and minimum security facilities.⁴⁸³ The conclusion after re-analysis was:

The results are similar to the original analysis with one major exception: in this comparison, the privately operated facilities have a much higher rate of inmate-on-inmate and inmate-on-staff assaults and other disturbances. These differences may be related to other factors such as reporting standards or the fact that correctional facilities often experience management difficulties when they are newly opened... However insufficient training for and lack of qualified staff in key positions may also be a valid explanation for these differences. This would be consistent with the claims of critics of privatisation who charge that private prisons are inadequately staffed by inexperienced and poorly trained correctional officers. Coupled with a lack of programs and work assignments, higher rates of misconduct from inmates predictably occur. Nevertheless, the notion that privately operated prisons are safer or better managed than public facilities is not supported by these results.⁴⁸⁴

(3) *General summary*

The diminishing returns on privatisation

This report supports the basic premise that private facilities appear to perform at the same level of efficiency as public facilities. Although they tend to house a higher proportion of minimum custody inmates in relatively new facilities, private facilities tend to have the same staffing patterns, provide the same levels of work, education and counselling programs for inmates, and have the same rates of serious inmate misconduct as public facilities. The few credible impact studies also show few differences and more similarities between the two methods of operations.

What seems to have evolved in the United States is a model that essentially mimics the public model but achieves modest cost savings, at least initially, by making modest reductions in staffing patterns, fringe benefits, and other labour related costs. But there is no evidence that private prisons will have a dramatic impact on how prisons operate. The promises of 20 per cent savings in operational costs have simply not materialised.⁴⁸⁵

Today it appears that achieving even a 10-percent market share will prove to be increasingly difficult for several reasons. The...number of well-publicized stories of poor performance in private prisons is growing.... The problems associated with the CCA-operated Northeast Ohio Correction Center in Youngstown, Ohio, have dramatized how badly a privatized prison can be operated. In this facility, 17 inmates were stabbed, 2 were murdered, and 6 escaped in the first 15 months of operation. Operational flaws were linked to inexperienced staff, inadequate training, and a willingness on the part of prison authorities to accept inmates who should not have been transferred to the facility (Clark, 1998). If nothing else, the private sector has shown that it is as equally capable of mismanaging prisons as the public sector.

⁴⁸³ *Supra* at 32.

⁴⁸⁴ *Ibid* at 52.

⁴⁸⁵ *Ibid* at 59.

...It may well be that the difficulties private prisons are experiencing may increase simply because they, like prisons in the public sector, are finding it increasingly difficult to recruit competent staff.

The future of privatization

Despite these criticisms, privatization still provides a vital function within the correctional system. Although the private sector has been unable to keep its promise of greatly improving prison operations, its mere presence has had a significant impact on traditional prison operations. Gaes and colleagues (1998) acknowledge that privatization has forced the public sector to reexamine how it conducts business. Certainly in those markets where correctional officer salaries and fringe benefits have been excessive, privatization has fostered a reexamination of those costs, which has led to cost savings. In this sense, privatization has served as a catalyst for change by demonstrating other means for doing the business of corrections. As limited as they are, however, these cost-saving innovations should not be the only items on the privatization agenda.

It would be extremely interesting and productive for the private sector, in partnership with the public sector, to become the vehicle for testing far more substantive changes in correctional policy in a number of areas—not just prisons and jails....⁴⁸⁶

8.8.4 Studies providing support for cost and quality benefits of privatisation

While the above two reports did not find reliable evidence that private prisons achieve significant cost savings or improvements in quality, the Corrections Corporation of America website lists a number of studies that apparently provide evidence of such outcomes.⁴⁸⁷ One study that is listed is a 2002 publication by the Los-Angeles based Reason Public Policy Institute⁴⁸⁸ entitled “Weighing the Watchmen: Evaluating the Costs and Benefits of Outsourcing Correctional Services: PT II: Reviewing the Literature on Cost and Quality Comparisons.” This study looks at empirical studies in the US, Australia and the UK and reports as follows:

We identified 28 studies that analyze cost data to measure the relative costs of correctional facilities managed by government vs. private firms - 22 of which found significant savings from privatisation. We also identified 18 studies that use various approaches to measure the relative quality of care at correctional facilities managed by government vs. private firms - 16 of which conclude that quality at private facilities is as good or better than at government-run facilities.⁴⁸⁹

In conclusion, the authors state:

The cost and quality comparison literature tells us two things. First, it is remarkable that such a

⁴⁸⁶ Ibid at 59-60.

⁴⁸⁷ See CCA website: <http://www.correctionscorp.com/researchfindings.html>

⁴⁸⁸ This organisation (RPPI) is described in the report as “a non-partisan public-policy think tank promoting choice, competition, and a dynamic market economy as the foundation for human dignity and progress.”

⁴⁸⁹ Segal G and Moore A, ‘Weighing the Watchmen: Evaluating the Costs and Benefits of Outsourcing Correctional Services: PT II: Reviewing the Literature on Cost and Quality Comparisons’, January 2002, p 1.

wide variety of approaches spanning over a decade and a half of research conducted in states across the nation repeatedly comes to the same conclusion – that privatisation saves money without reducing quality. Second, there is good reason to continue to conduct such comparisons and strive to improve data collection and comparison techniques.

Furthermore, there is clear and significant evidence that private prisons actually improve quality. Independent accreditation by the American Correctional Association (ACA) is designed to show a facility meets nationally accepted standards for quality of operation, management and maintenance...no more than 10 percent of government correctional facilities have been accredited, whereas 44 percent of private facilities have been accredited. This dramatic difference suggests that private prisons are providing quality services, while remaining cost-efficient and providing significant cost savings.⁴⁹⁰

⁴⁹⁰ At Ibid at 14. For other evaluations of private prisons see, for example, the National Institute of Corrections website: <http://www.nicic.org>

9. CONCLUSION

It is now more than eleven years since the first and only private prison opened in NSW. In this time, private prisons have become a significant feature of the correctional landscapes in Australia, the United Kingdom and the United States; as well as being introduced elsewhere. Prison privatisation was driven by many pragmatic factors including overcrowding, pressure on prison budgets, and a desire to reform inadequate prison systems. But ideological beliefs about the role of the state were just as important in this development. There was strong opposition to this policy from those who held a different belief, namely that imprisonment is an essential state function, and on the basis that the profit motive would conflict with the welfare of prisoners and staff.

The debate about private prisons continues but it is no longer purely theoretical. Anecdotal evidence now exists along with a number of empirical studies that have evaluated the performance of private prisons. Most of these studies have been carried out in the US and the UK. As McCartney states, “private prison research is still in its infancy in Australia” and “if claims by privatisation supporters or dissenting arguments by its detractors are to be upheld or discredited, it is evident that there is a need for more research.” In NSW, the Department of Corrective Services conducted a four-year review of the Junee private prison and a number of different statutory officers have reported on activities at Junee. However, this evidence does not allow for a proper comparison with public prisons in NSW or for a proper determination of whether Junee has had any impact (positive or negative) on the NSW prison system.

In the next decade, looking overseas, we can expect private prisons to experience further growth in the UK and at the federal level in the US. There were some signs in the US that state contracts were slowing and the Bureau of Justice Assistance report in 2001 suggested that achieving a ten percent share of the US market might be difficult. New Zealand has legislated against private prisons but the concept has been introduced in South Africa and Canada and is being considered in other countries. In Australia, in contrast to the political situation in the early 1990s, Labor now dominates state and territory governments. While this situation continues it is unlikely that private prisons will keep growing in this country. In NSW, the Carr government has recently confirmed its preference for public sector prison management but has not ruled out privatisation of the Mid-Western Correctional Centre at Wellington, due to open in 2006.

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