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Private Prisons in Australia: The Second Phase

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In 1997, the Australian Institute of Criminology convened a conference in Melbourne entitled "Privatisation and Public Policy: A Correctional Case Study". The aims of the conference were to explore the public policy implications of the privatisation of corrective services, and to examine the issues surrounding appropriate service provision in a privatised system.

The issue of privatisation of prisons remains a subject of vigorous public debate.

Professor Richard Harding was a keynote speaker at the conference, and this paper eloquently outlines the issues and recent performance in this controversial policy area.

Adam Graycar
Director

Location and Penal Role

Over recent years, private prisons have become integral to the operation and viability of Australian corrections. Other forms of correctional and justice services, such as detention of illegal immigrants, prisoner escort services, and court security are also being progressively privatised. Each of these matters is important in its own right; however, prison privatisation raises all the main issues of principle and practice relevant to these services. Table 1 traces the spread across jurisdictions and the growth in numbers held in private prisons.

The prisoner mix is important. Privatisation commenced in Australia at Borallon, Queensland, which had been built as a maximum / medium security prison but which mostly housed minimum security prisoners. They posed no special management or custodial problems, such as being HIV positive or dangerous or vulnerable. Critics saw this as giving the new industry an easy run. However, private prisons as a sector now accommodate protection (which has exponentially increased in the last ten years), remand, medical, psychiatric, maximum security and women prisoners, as well all other security ratings. This spectrum mirrors the public sector part of the total prison system.

Notable also is the spread across jurisdictions. Four States are actively committed to privatisation, with one of them (Victoria) housing a greater proportion of its prisoner population privately (50%) than any other jurisdiction in the world. Western Australia and the ACT seem inexorably on the path towards privatisation, and Tasmania has started to give in principle consideration to the possibility, with a Parliamentary Select Committee being appointed in late 1997 to consider replacing Risdon Prison with a privately built and operated centre. On the other hand, New South Wales, which currently operates one such prison at Junee, might well reverse direction if it were practicable (Prison Reform Trust 1997, p. 4). This is unlikely, but would be more practicable in that State than, say, in

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Table 1: *Private Prison Developments in Australia, 1990-2000**

Date	*Prison*	*Rated capacity*	*Cumulative numbers and (percentages of total prisoners)**	*Operator*
1990	Borallon (Qld)	240	240 (1.9%)	CCA
1992	Arthur Gorrie (Qld)	380	620 (4.4%)	ACM
1993	Junee (NSW)	600	1220 (8.0%)	ACM
1994	Arthur Gorrie (Qld), Phase 2	+ 198	1418 (9.3%)	ACM
1995	Mount Gambier (SA)	125	1543 (10.1%)	Group 4
1995	Borallon (Qld), Phase 2	+ 185	1728 (11.2%)	CCA
1996	Arthur Gorrie (Qld), Phase 3	+ 54	1782 (11.5%)	ACM
1996	Deer Park (Vic.)	125	1907 (12.2%)	CCA
1997	Fulham (Vic.)	600	2507 (14.7%)	ACM
1997	Port Phillip (Vic.)	600	3107 (18.3%)	Group 4
2000	Canberra (ACT)	(?)300	3407 (19.0%)	Probable
2000	Perth (WA)	750	4157 (23.1%)	Probable
2000	Adelaide (SA)	(?)600	4757 (26.4%)	Possible

* Percentages up to 1997 are based on the average daily population the year the prison became operational. Percentages from 1999 onwards are based on a projected prison population of 18 000.

Victoria because the Junee contract is such that the state government owns the land and has paid for the construction, and thus only has to disentangle itself from the *management* side of the contract.

Contract Arrangements

The latter comment points up that there has been a switch from the management only contracts of the early days to *design, construct, finance and manage* contracts. Victoria has led this move, which replicates the standard US approach to privatisation. The Victorian contracts are complex (Wilson 1997), but the key matter for present purposes is that the private contractors, or their financiers, 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 three-year renewal periods.

Such an arrangement in practice gives the owner / operator a powerful position in bidding for the continuance of the initial contract. Whilst theoretically the same ownership arrangements could accommodate a change of operator, there would be commercial inhibitions and complexities. Loss of a management contract to a competitor — an important element in effective accountability — is thus unlikely. In reality, a change might only eventuate in the extreme circumstance of the government exercising its "step-in" rights following major malfeasance by the contractor.

The Purchaser/Provider split

Privatisation has also been the catalyst for a split between the purchaser of prison services and the provider. This mirrors structural developments in many service areas previously the primary responsibility of various levels of government, for example water and sewage services, energy production and distribution, garbage collection, and, in Australia, unemployment advice and assistance.

The oddity of a public sector prison provider purchasing services from the private sector to carry out its own core activity, i.e. providing prison services, soon began to throw up tensions, not least because of some accountability slippage or capture (Harding 1997, pp. 42-7; 86-8). As the private sector provider was in effect the delegate or agent of the public sector provider and as the latter was also responsible for the private sector's adherence to contractual and legislative standards, there was a distinct danger of diminished vigilance (Harding 1997, pp. 47-9; 158-65). In conceptual terms this is a subtle but acute form of regulatory capture.

Queensland. These structural tensions were exacerbated when, in 1994, Queensland took the step of permitting its public sector provider (the Queensland Corrective Services Commission (QCSC) to bid *against the private sector* for the construction and management of Woodford Prison. The bid of the QCSC and its construction company consortium partner was successful. However, the private companies argued that for all the Chinese walls erected within the QCSC, the public sector provider must inevitably have been judge in its own cause. Although a Parliamentary inquiry upheld the probity of the process (Queensland Legislative Assembly 1996), mutual trust between the QCSC and the private companies had begun to evaporate and this process was accelerated by the tender evaluation arrangements.

The Queensland government accordingly moved to the next logical stage — to remove its service provider role from the QCSC and transfer it to a newly-created government corporation, QCORR. The authority of QCORR was to extend to all public prisons (including Wood-

ford). A streamlined QCSC would act as the purchaser of prison services from either the private sector or QCORR and would also become the overall regulator, monitoring standards, implementing quality control measures, and developing correctional policy.

The corollary of this is the expectation that there will be a "churn" rate — from the public sector to the private sector *and vice-versa* — at the end of contract periods or service level agreements (the name given to public sector "contracts"). As each arrangement comes to an end, there will, in principle, be full competitive re-bidding, that is *genuine* contests between public and private service providers for contracts to manage facilities. The QCSC will evaluate tenders and award contracts. Thus, Borallon *could* go next time to QCORR, Woodford to ACM, Lotus Glen to CCA, and so on. Significantly, QCORR and the private companies are about to engage in a bidding contest for the new 350-bed Rockhampton prison, scheduled to open in 2000.

Victoria has evaded this key issue; genuine and direct competition between the public and private service providers is not possible. The quasi-corporatised body, CORE, set up within the Ministry of Justice to run public sector prisons, will not be permitted to bid against the private sector companies as their management contracts run out. The only competition private contractors may get will be from each other. However, as mentioned above, "competition" will be a theoretical rather than a practical possibility.

Victoria did recognise that a standards-setting, sentence management, policy development and monitoring body was required, separate from the public sector providers. Accordingly, the autonomous Office of Correctional Services Commission was set up; its functions relate to both public and private providers. A structural fault remains with this arrangement. The Correctional Services Commission has no responsibility for letting or renewing the contracts which in a sense it is supervising. The Government decided to reserve this key role to itself.

New South Wales and **South Australia** have not split the roles of purchaser and provider. Their model is the rather elementary one with which privatisation commenced in Australia. This involves the public sector provider both purchasing services from the private sector provider directly and also purporting to supervise and monitor the contractual arrangements. It is not a model which facilitates gaining the optimum benefits out of privatisation.

Potential Benefits of Privatisation

Costs/value for money

Apart from the important philosophical issues as to whether privatisation of imprisonment could ever be morally defensible (Harding 1997, pp. 21-7; 88-94), the debate about privatisation focused initially on the question of the *comparative costs* of the public and private sectors. In many jurisdictions this discussion has now developed more meaningfully into questions about *cost-effectiveness* or *value for money*. This concept relates to the whole question of standards, or what Logan (1992) has called the "confinement quality index". Logan's objective was to identify comparators which were "normative rather than consequentialist or utilitarian." Prisons should be judged "primarily on what goes on inside their walls — factors over which prison officials may have considerable control" (Logan 1992, p. 579).

With these beginnings the literature inevitably contains a great deal of comparative public/private material. Cost comparisons have not been very enlightening, mostly degenerating into arguments as to what costs should be brought into the equation and whether like is being compared with like. However, the literature is gradually settling into a pattern whereby, controlling as best one can if somewhat imprecisely for quality and comparing as nearly as is feasible like with like, a rough "meta-picture" starts to emerge. The best current view as to the range within which savings on operational costs is thought to fall is as follows: from 10 to 22 per cent in the UK (Home Office 1997; House of Commons 1997; HM Prison Service 1997; Prison Reform Trust 1998: p. 3); 11 to 14 per cent in Louisiana (Archambeault & Deis 1996); 13 to 17 per cent in Arizona (Thomas 1997, p.93); and around 9 to 13 per cent in Queensland (Macionis 1994; Brown 1994). These figures are similar enough to be indicative, if not definitive.

Scrutiny of Performance

The question then becomes whether cost-savings are nothing more than a function of reduced quality of confinement or whether, conversely, there has been maintenance or even improvement in quality so that one can say that privatisation has also been cost-effective. This is not a simple question to answer, and is by its nature subject to assertion and counter-assertion.

This has occurred because private prisons have been subjected to intensive scrutiny by the media as well as academic, civil libertarian and prisoners' action groups. In the UK, for example, the Prison Reform Trust has published several special reports as well as a knowledgeable periodical, *Private Prisons*

Report International, whilst the Penal Lexicon website (http://www.penlex.org.uk) also keeps privatisation under careful review. In the USA, regular *Private Prison Watch News Briefs*, available on the Internet (ppwatch@hotmail.com), likewise exposes to public gaze and criticism private prison operational matters from all USA states. Since the development of the profound problems in Group 4's Port Phillip prison in Victoria, a special Australian section has also found its way on to the ppwatch system.

The Port Phillip prison, which opened in Australia in September 1997, experienced seven deaths within a period of five months (Prison Reform Trust 1998: pp. 1-2). However, appalling as this record is, it should be seen in the context of the facts that (a) the overall rate of deaths in private prisons is still marginally lower than that of deaths in public prisons (Biles 1997) and (b) that the public sector is still liable to perform at an unacceptable level, as WA's system-wide record of seven deaths in the first ten weeks of 1998 demonstrates. Nevertheless, a sustained high level of deaths and self-harm incidents — there are estimated to have been over 100 such incidents at Port Phillip in the first six months' operation — is usually a cogent indicator that other aspects of prison management are also breaking down (Harding 1994), so the serious riot which broke out on 11 March 1998 was perhaps inevitable. This was followed by a crisis response: a long lock-down of the prison and numerous other emergency measures. At the time of writing the problems remain unresolved. The Victoria Government has commenced a special inquiry into the situation through the Correctional Services Commissioner, who has been seconded to a task force for this purpose.

Strong and active women's groups have focused attention also upon the first private prison for women in Australia, the Metropolitan Women's Correctional Centre of Victoria (Deer Park). This CCA-managed prison was opened in August 1996, and almost immediately its operations became contentious because of a suicide. In its first year of operation, there have been numerous allegations of other critical incidents and unacceptable practices.

It should be acknowledged that virtually *all* new prisons seem to have rough beginnings. (Harding 1997, pp. 123-6), usually due to bringing prisons up to full operational capacity far too quickly — something imposed on all prison operators by the very governments whose policies have brought about such acute overcrowding. That was the case with both Port Phillip and Deer Park.

But this is not the whole answer. Satisfactory resolution of problems has not been helped by the fact that some critics have been threatened by the operators with defamation writs. Whilst this is certainly the operators' legal entitlement, it is not conducive to achieving that measure of informed debate which in the end the private contractors depend upon if their position is to be understood. Similarly, it is clumsy and ultimately counterproductive for the regulators, as in Victoria, to persist in their attitude that some parts of the applicable operating standards will not be made public (*The Age*, 16 October 1997). The spurious argument has been invoked that to reveal the contractual operating standards as to, for example, suicide prevention requirements is to breach commercial-in-confidence undertakings. This regressive argument was abandoned in Queensland in 1995 (Harding 1997, p. 70).

Are such matters distractions from the theme of potential benefits of privatisation or are they structurally endemic to the whole exercise? This is a crucial issue. The theme of *Private Prisons and Public Accountability* (Harding 1997) was that if private prisons were effectively regulated and properly accountable they could both improve existing standards and act as a catalyst for improvement across the whole service delivery system, public and private. The increasing volume of allegations of unacceptable standards obliges one to examine that thesis once more.

Accountability

The oft-repeated theme (Harding 1997) that the regulatory regime bears a major responsibility for ensuring that the private operators do what is expected of them — and also for ensuring that what is expected of them is clearly, rigorously and equitably spelt out in the management contract — is strikingly illustrated by experience in Victoria. Continuing secretiveness about contract conditions, mentioned above, is a regulatory defect. So is failure to have an intensive and continuous on-site monitoring presence, particularly, in the early days; this is the single most important regulatory error that can be made (Harding 1997, pp. 42-5). In each of the two Victorian prisons, there were numerous early warning signs which, in the absence of on-site monitors, were either missed or were misinterpreted. The argument that privatisation could be beneficial to the prison system as a whole means *privatisation with effective accountability*.

Standards

Australian work on comparative private sector/public sector standards is still not fully developed.[1] Moyle's attempt to evalu-

1. The present author has received an ARC grant to identify and evaluate cross-fertilisation between the operations of two private and two public prisons in Queensland.

ate operations at Borallon stalled because of lack of access to what seemed to be key documentation (Moyle 1994). Comparison of Lotus Glen (a public sector prison) with Borallon has also not yet been completed. Beyond that, Australian work to this point is confined to comparisons of easily countable matters such as numbers of "incidents" or escapes or positive drug tests (Harding 1997, pp. 127-32).

However, the evidence is better documented in both the UK and the USA, for example: out-of-cell hours; more flexible visiting hours and less cumbersome procedures; privacy keys to cells; prisoner swipe cards to facilitate authorised movements within the prison (Harding 1997, pp. 134-5). Bottomley et al. (1996) and Bottomley and James (1997, p. 267) point to higher staff morale and better staff-inmate relations in private prisons.

HM Chief Inspector of Prisons (1996, Preface) stated that Doncaster was "the most progressive [prison] in the country" with regard to its anti-bullying strategies, its management of young offenders, its care of potentially suicidal prisoners and several other key functions. Experience at Buckley Hall was similar: "the treatment of prisoners ... is better and more imaginative than in many public sector prisons" and in particular "the developments involving local agencies ... in preparing prisoners for release" were commendable (HM Chief Inspector of Prisons 1997, Preface).

Recidivism: The litmus test

Ultimately, the question everyone would wish to see answered is whether private prisons have a superior success rate with regard to recidivism. However, this is not a test by which public prison systems themselves would desire to stand or fall. In Australia, recidivism rates are generally not cited as a performance indicator in the various Corporate Plans of the public sector agencies. Methodologically any such evaluation is fraught with complexities — notably the fundamental question of the extent to which the imprisonment experience in *any* prison is a key component affecting post-release offending behaviour, and also the problem of how to control for the fact that prisoners can in the course of serving any given sentence be confined in both private and public sector prisons (Harding 1997, p. 113).

In the USA, however, a recent pilot study (Lanza-Kaduce & Parker 1998) suggests that the recidivism rates of private prison inmates in Florida may be only half as high as those of public prison inmates. The study, although involving relatively small numbers, is methodologically robust and should be replicated, with longer follow-up times. An important clue to the initial findings may be that program completion rates were significantly higher in private than public prisons — a result of the contractual requirement to achieve and record outcomes as a prerequisite to contractual payment.

Cross-fertilisation

It has been suggested that these examples of private sector performance cross over into enhanced public sector performance (Harding 1997, pp. 137-44). However, the mechanisms by which this occurs are not always easy to identify, leading to scepticism in some quarters (DiIulio 1990, pp. 171-2; Shichor 1995, p. 244; Bottomley et al. 1996, p. 3; Bottomley & James 1997) that this process occurs at all. Indeed, the UK Chief Inspector of Prisons did not see "any direct evidence that the lessons of good practice learned from these [private] establishments are being applied to the management of establishments run in the Public Service" (Chief Inspector of Prisons 1996, Preface). By contrast, however, at Buckley Hall there was clear evidence of the private sector "adopting good practice developed in [the public sector], in particular the adoption of a [Young Offenders Institution] anti-bullying model" (Chief Inspector of Prisons 1997, Preface).

The cross-fertilisation process could be systematised and fortified if the two sectors truly were regarded by all the main players as an integrated system with parallel incentives. Mechanisms available would include: clearer delineation of prisoners' rights and correctional authorities' obligations; joint public sector / private sector in-service training; and the establishment of a national accreditation system.

National Standards

At present each State and Territory system is self-contained. Some confluence of standards arises from regular meetings of heads of correctional agencies, and from the document, *Standard Guidelines for Corrections in Australia* (1989; revised 1996). However, that document neither creates rights for prisoners nor imposes obligations upon authorities. Its intent goes a little, but not much, further than the *UN Standard Minimum Rules for the Treatment of Prisoners.*

The Royal Commission into Aboriginal Deaths in Custody shows that jurisdictions are ineffective at learning from each other. Custodial death rates have increased since the Final Report, and no sooner has one State got its problems under control, than another seems to go haywire. Generally, it is fortuitous whether successful programs migrate from one jurisdiction to another or whether programs known to

be unsuccessful in one place nevertheless are replicated in another.

The federal government has now started to take an active interest in corrections. Recent Industry Commission Reports (1997; 1998) have examined basic indicators and broad outcomes in relation to costs and systems efficiency of custodial and other corrective services. This has served to highlight in a different forum the well-known disparities between States (Aboriginal imprisonment, remand rates, deaths in custody, health services, and duty of care issues) as to what they do and how they do it. Also, the Commonwealth Grants Commission is seeking to develop a reliable formula to take account of endemic costing differentials between jurisdictions so as to build them into future governmental funding formulae.

A simple way of achieving better value for each correctional dollar would be to relate funding to standards — a notion which in turn invites the creation of a National Custodial Standards Agency (Biles 1996).

It is likely that if such an agency were to be established, the private sector prison operators would by and large be eager both to influence the content of accreditation standards and to subject themselves to the necessary inspections and assessment. Their own contractual requirements are already much more focused than the general operating procedures and the *Standard Guidelines* of the public sector, so that they would not regard participation as threatening or demeaning. This was the case in the USA (Harding 1997, pp. 63-5), and it would also be the case in Australia.

The public sector would culturally be more resistant, but the participation of the private sector — added to the financial carrot-and-stick of the federal government — would force its hand. A robust mechanism for not only implementing national standards but also stimulating sectoral and jurisdictional cross-fertilisation would thus have been created.

Summary

Prison privatisation is the most significant development in penal policy in the second half of the 20th century. It is undeniable that, if it is not properly regulated and made rigorously accountable, privatisation could have regressive effects — an observation which is historically validated also in relation to the public sector prison system and contemporaneously illustrated by the loose accountability structures and the naive belief in market-force discipline found, say, in relation to such privatised monopolistic enterprises as Yorkshire Water (1995) or Mercury (Auckland) Power (1998): *see* Hutton 1998.

The challenge is to ensure that privatisation is harnessed and driven for the benefit of imprisonment standards as a whole. There are now numerous markers to indicate how this may be done. Governments have a responsibility to cement and improve regulatory procedures not as a matter of economic rationalism but as one of equity, decency and purposiveness in Australian prisons policy and administration — both private and public.

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