PRISON PRIVATISATION IN AUSTRALIA:
A GLIMPSE OF THE FUTURE

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Abstract: With prison privatisation now part of the Australian correctional policy agenda, questions arise as to the dangers and the opportunities which can arise under such arrangements. Drawing upon experience in the United States, England, a previous unsuccessful initiative in Australia at Tallong, and the one currently operating private prison in Australia at Borallon, the article addresses the main problems. These are: that incarceration and penal policies generally may be driven by private profit motivations; that private imprisonment may be beyond the reach of public accountability; that a dual standard (public system squalor, private system affluence) may be created; and that the allocation of punishment as opposed to its administration may de facto become a private matter.

On the basis of present legislation and the practical arrangements at Borallon itself, it is concluded that privatisation can readily finesse all of these problems. Moreover, successful privatisation can act as a catalyst for improvements in the public prison system, both as to cost and as to programs. Private prisons are likely to become established as a small but significant part of the total Australian imprisonment system.

PRIVATISATION TAKES HOLD

The initial impetus for prison privatisation in Australia came from the Kennedy Report into Queensland corrective services.[1] Kennedy stated:

> There would be considerable advantage to the State from [privatising the management of Borallon Prison, near Brisbane]:
>
> - the problems of finding adequate good staff from within the system would be solved;
> - there would be added flexibility;
> - the market for corrective institutions in Australia and Queensland would be created;
> - there would be an important element of competition for correctional officers which could ultimately lift their status, pay and conditions;
> - career prospects for correctional officers and managers would be opened up; and
> - for the first time there would be competition providing a real measure against which to test the performance and costs of the Queensland corrective services.[2]

The Queensland National Government, entrammelled in political and administrative chaos, seized upon his suggestion as a way of symbolically breaking with a past system which seemed to have broken down. Tenders were called, and the management contract

1 Kennedy, J, *Final Report of the Commission of Review into Corrective Services in Queensland* (1988).
2 Id at 97.

let to Corrections Corporation of Australia (CCA). A month before Borallon was due to become operational, the ALP was, in December 1989, elected to office. The new government announced that it would honour the contract, whilst keeping it under close scrutiny. Borallon Prison thus opened in January 1990.

Since then, the private management of prisons has irrevocably been placed on the Australian correctional policy agenda. Contracts have been let to a consortium (ACM Ltd) headed by Wackenhut Corporation for the design, construction and management of a maximum security prison at Junee, New South Wales. The first inmates are expected to be received in March 1993. Also, in July 1991 the Northern Territory government called for "expressions of interest" from persons wishing to participate in the design, construction and management of the proposed new prison at Alice Springs. In October 1991 the Queensland Corrective Services Commission (QCSC), frustrated at attempts to negotiate a productivity agreement with the prison officers' branch of the State Services Union, likewise sought expressions of interest from companies wishing to be considered as contract manager of its new Remand and Reception Centre at Wacol, near Brisbane. Five tenders were received. Finally, there has even been a suggestion that a new medium security prison for the ACT might be constructed and operated as a private concern.[3]

In the event, the Alice Springs exercise came to naught. The specification had been quite different from that for Borallon, Junee or Wacol, involving within the one institution all levels of security for sentenced offenders, remand facilities, a section for female prisoners, and mobile workcamp facilities including home-base requirements. Evidently, none of the tenderers demonstrated the flexibility to put forward a viable plan to meet such unique requirements. The public system was able to adapt more successfully, and the decision was accordingly made not to privatise. This is an important point when the question arises whether privatisation may, as some observers fear, develop a runaway momentum. However, whilst this process had been occurring, the opportunity was taken to negotiate successfully several industrial and program delivery issues involving management and unions — also an important point when the benefits of privatisation are considered later.

The Wacol matter has been decisively and quickly resolved. In March 1992, the relevant Minister announced that the management contract had been let to the same consortium as had successfully tendered for Junee. Construction has virtually been finished, and the prison is expected to become operational on 1 July. Indicative of the ideological angst which the ALP government felt about this issue was the fact that the decision to privatise, which statutorily rests with the QCSC, was in fact at the request of the Minister couched as a recommendation to Cabinet, and in announcing the outcome the Minister said it was the toughest he had ever had to make. The pill seems to have been sweetened by the fact that the contract price of $10.5 million per annum was more than 40 per cent less than the estimated price of $18 million if it were run as a public prison. As will be seen, the issue of recurrent costs has previously been a highly ambivalent factor in the arguments for and against privatisation, but after the Wacol contract, the walls could, metaphorically, start tumbling down.

3 Biles, D, *Prison Accommodation and Occupancy, April 1987* (1991).

As for the ACT proposal, it has never been actively taken up. However, the day cannot be long delayed when the ACT must face up to its correctional responsibilities rather than, as now, export them at a fee to New South Wales.

For the time being, Borallon is still the only private prison currently operating in Australia, though it will soon be joined by Wacol and then Junee.

DEFINITIONS

"Privatisation" is something of a misnomer. In the context of prisons, it refers not to private ownership of an enterprise but to contract-management, that is, *private (or non-government) sector management* of institutions which remain a *public sector responsibility*. There may be lesser degrees of privatisation — for example, contracting out particular services, such as the supply of meals, to the private sector — or greater degrees — for example, the Junee arrangements whereby the managers will also be the designers, builders and venture capitalists.[4] But the key point is that the *allocation of punishment* remains the duty and prerogative of the State, whilst the contract managers merely *administer* that punishment in a day-to-day sense. Of course, this in itself raises crucial questions of *accountability*, which will be explored fully later.

It should be emphasised that *the pursuit of profit is not a necessary or inevitable aspect of privatisation*. Indeed, non-government organisation and voluntary sector participation in such matters as juvenile offender programs is historically quite normal in many places, including Australia, yet typically is not profit-directed. By contrast, private sector arrangements for the detention of illegal migrants — another custodial function which has been delegated in some jurisdictions, notably the United States and the UK — is very much profit-directed. The stark emergence of the profit motive with regard to imprisonment seems to have brought ideological divisions to the surface in a way which voluntary sector participation never has done and the detention of illegal immigrants never could.

EXPERIENCE AND MOTIVATIONS ELSEWHERE

Kennedy did not document how far he drew upon experience elsewhere. Since his report was published, the extent of privatisation in the United States has increased markedly, and the UK has moved from the stage of rather tentative debate to that of imminent and increasing participation. The diverse histories and developments in those countries assist in highlighting the dilemmas which must be resolved and the policies which must be clarified within Australian corrections as privatisation develops.

4 Another form of privatisation is where the private sector designs, finances and constructs prison buildings and leases them back to the State as operator. This has occurred in the USA, but is not generally found elsewhere. The nearest thing in Australia to such an arrangement was the deal whereby local government funds were advanced to the Western Australian Department of Corrective Services so as to hasten construction of a new prison in the Eastern Goldfields. In calling for expressions of interest with regard to Alice Springs prison, the Northern Territory government had, however, left open the possibility that the successful tenderer might design, finance, construct and lease back the prison.

(i) Experience in the United States

The United States is the furthest down the track in contract-management of various kinds.[5] By the end of 1990, approximately 20,000 prisoners — almost two per cent of the total prison population of the United States — were housed in private prisons.

In the early stages the pattern was that of privatisation at the soft end of the custodial continuum — minimum or even open security institutions housing "choir boys" or readily manageable inmates. The announcement in mid-1990 that for the first time a maximum security institution would be designed, built and managed under contract by the private sector seems to symbolise the maturation of the privatisation trend.[6] The projected new facility, at Leavenworth, Kansas, will house remand prisoners only; and although it must be said that, as a class, remandees are rather different maximum security prisoners than, say, convicted dangerous criminals, nevertheless this contract may possibly mark a significant turning-point in terms of private sector preparedness to tackle more difficult and sensitive custodial situations.

The forces impelling States towards privatisation have been crowding, cost-reduction, and difficulties with off-budget capital-raising. Crowding, in a country where the inmate population (in federal and state prisons and local gaols) has at least tripled between 1974 and 1991 and was of the order of 1,180,000 at the end of 1990, has left the public sector prison system in crisis.[7]In 1989 no less than 37 States were operating their prison systems under court orders, because of crowding.[8] At the same time, voters were increasingly denying state governments the power to raise building funds for new prisons by the issue of bonds, whilst both capital and recurrent costs of running prisons continued to increase.[9]

Privatisation seemed to offer a way out of these shackles. Much of the discussion seems to have proceeded on the basis that privatisation should be cheaper, both as to capital and recurrent costs. Moreover, it was also argued that construction and other new initiatives could be carried out by the private sector more quickly, thus making a more effective impact upon overcrowding.

However, with the passage of time these supposed advantages became less clear-cut. In particular, with regard to recurrent costs, much depends on precisely how the contract is written and negotiated and whether one is comparing like with like.[10] After a rather over-optimistic start, the consensus would now seem to be that "the claims of the private sector's superior cost effectiveness ... are less robust than they might first appear".[11] However, it should also be said that the true costs of the public prison system are also probably somewhat higher than is usually acknowledged.[12]

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5 Mullen, J, *The Privatization of Corrections* (1985); Donahue, J D, *The Privatization Decision: Public Ends, Private Means* (1989); Logan, C, *Private Prisons: Cons and Pros* (1990); McDonald, D, *Private Prisons and the Public Interest* (1990).

6 *Criminal Justice Newsletter*, Vol 21 No 13 (1990).

7 *Criminal Justice Newsletter* Vol 20 No 4 (1989), Vol 20 No 9 (1989), Vol 21 No 10 (1990).

8 *Criminal Justice Newsletter* Vol 20 No 1 (1989).

9 McDonald, above n5 at 1-10.

10 Mullen, above n5 at 102; Hackett, J, *Issues in Contracting for the Private Operation of Prisons and Jails* (1987); Donahue, above n5; Logan, above n5.

11 McDonald, above n5 at 86-103.

(ii) Experience in the United Kingdom

In the UK the first privately managed prison is expected to be opened in March 1992. It is a purpose-built remand prison, with the reassuringly rural name of The Wolds, situated adjacent to Everthorpe Prison, Lincolnshire. The Government has now announced that it intends to contract out the management of another prison, currently under construction. This will house both remand and sentenced prisoners, and will be operational by early 1993. In addition, plans to turn over prisoner escort services and court attendance supervision to the private sector are expected to be partially implemented during 1992.

The rhetoric behind privatisation has been different in the UK from that in the USA Most notably, neither the protagonists nor the opponents of privatisation have placed much reliance on cost arguments. Stephen Shaw, Director of the Prison Reform Trust, has stated: "[N]o one is really ... pretending that privatisation will actually save us any money".[13] What has primarily driven the debate has been overcrowding — as during the 1980s the UK moved to the top of the European imprisonment league, outstripping even Turkey, and peaking in 1989 at 50,000 or 97 per 100,000 general population. At that peak, 22 per cent of inmates were remandees. This fact, which would seem to cry out for a systemic approach to the administration of criminal justice with a view to reducing court delays and "unnecessary" remands in custody, as well as to the creation of bail hostels and the like, instead provoked a mechanistic response — the proposal to build more remand prisons and in particular a private one.

There have been other factors present in the UK debate. They include a view that "privatisation offers an opportunity to break the monopoly of the Prison Officers' Association".[14] At Home Office level it could also have reflected concern at the suicide rate amongst young prisoners detained in old remand prisons or remand wings of old local prisons, about which criticism was mounting.[15] In addition, the free market ideology of Thatcherism undoubtedly, as so many other traditional State enterprises were being sold off, was pushing its way into every nook and cranny of public utilities, including prisons.

In addition, some of the rhetoric and probably also the reality has been about *better deployment of the resources of expensively-trained personnel* (for example, prison officers and police in relation to court and escort duties) *as well as diversification of services and*

12 Gottfredson, S and McConville, S, *America's Correctional Crisis: Prison Populations and Public Policy* (1987); McDonald, above n5 at 97-98, 192-3. In Australia, what slight evidence is available suggests that private contract arrangements may reduce State outlays. In 1990 the Australian Capital Territory government paid the New South Wales Corrective Services Department $135 per prisoner per day for accommodating its prisoners, whereas the Queensland Corrective Services Commission paid Corrections Corporation of Australia, operators of Borallon Prison, $92 per prisoner per day. However, Moyle (*Privatizing Prisons and Criminal Justice: A Need to Focus on the Underlying Issues*, in press) argues that the true costs of Borallon have been artificially deflated by not including an item for Commission overhead in the published figures.

13 Shaw, S, "Penal Sanctions: Private Affluence or Public Squalor?" In Farrell, M, *Punishment for Profit?* (1989).

14 Above n13; Rutherford, A, "Prison Privatization in Britain", in McDonald, D, *Private Prisons and the Public Interest* (1990) at 60-62.

15 Grindrod, H, *Suicides at Leeds Prison: An Inquiry into the Deaths of Five Teenagers During 1988/89* (1989).

improvement of prisoner programs. Only a few months before the outbreak of system-wide riots in UK prisons, culminating in the destruction of much of Strangeways Prison, the Head of the Remands Unit of the Home Office said: "It may not be wholly inappropriate now to ask ourselves whether ... direct central government provision is in the circumstances the option which best serves the interests of the public and of prisoners themselves. Might it not indeed be that greater diversity in the means of provision would stimulate new ideas and approaches which, if correctly channelled, would lead to a raising of standards all round?"[16]

THE ARRANGEMENTS AT BORALLON

(i) The prison and its inmates

Borallon is a 244 man prison located about 25 miles outside Brisbane. The prison was built and is owned by the Queensland Corrective Services Commission. Its design was originally intended to be maximum security in relation to 84 prisoners and medium security in relation to the remaining 160. However, the perimeter security is now considered only to meet medium security standards. As at the end of 1991 the population comprised 195 medium security, 32 low security and 10 open security prisoners, figures indicative of its likely future usage. It must be said that this slippage from the original security characteristics of the prison is a cause of concern inasmuch as, by definition, the prison is now over-designed in security terms, and thus unduly expensive in terms of fixed capital, for its actual muster.

The inmates themselves are not drawn just from the ranks of "choir boys", though they are certainly not a fully representative selection of the total prison population. In particular, there are no protection, HIV-positive or remand prisoners. Indeed, the management contract specifically provides that CCA Ltd is not obliged to accept any of these categories of prisoners. Clearly, there are some custodial functions which, in all likelihood, will always be left to the publicly-operated sector of the prison system.

However, Borallon now does house numerous long-term prisoners convicted of serious offences of violence, and also a growing population of Aborigines. The prison has an isolation block for troublesome prisoners; the records are starting to indicate that such persons are now persevered with rather than shipped out to a public prison.[17] This contrasts with the early perception that Borallon may have been a little too eager to export its problems back to the publicly-operated part of the system.

The prisoner muster as a whole is ultimately in the hands of the QCSC, which is committed to making the inmate profile progressively more akin to that found in prisons generally — subject to the contractual constraints. The obverse of this, possibly putting this policy under some tension, is that an application and queueing system has been

16 Fulton, R, "Private Sector Involvement in the Remand System", in Farrell, M, *Punishment for Profit?* (1989) at 9.

17 This comment is based on direct observation and discussion with Borallon authorities. Precise data, both direct and comparative, do exist but have not been published; clearly, this is the sort of matter about which there should be careful record-keeping and public scrutiny.

instituted for admission to Borallon; the sub-cultural message has got around that the regime is an acceptable one.

(ii) The financial arrangements

The costing of the Borallon management contract is based upon notional 100 per cent occupancy throughout the year, the onus thus being upon the QCSC, if it were to secure full contract value, to supply inmates as vacancies occurred. Financially, a shortfall would thus neither prejudice the contractor nor benefit the Commission.

The operating contract commenced in January 1990, and extends for three years, renewable. The contractor, CCA, is a company incorporated in Queensland in which Corrections Corporation of America, an Australian construction company (John Holland P/L) and an Australian security business (Wormald International) each holds one-third equity. The contract fee for that year was $8.2 million. Building maintenance costs remain a governmental responsibility; however, should further capital costs be necessary, these are to be the responsibility of CCA. In fact, an additional large workshed has already been constructed for about $60,000.

Financial information of this sort is accessible through Commission published accounts, Treasury bids and reports of the Auditor General. However, the fine details, *including the standards and the performance criteria*, of the management contract are said to be "commercial-in-confidence". With this first-ever such Australian contract, the QCSC succumbed to the argument that not only should it protect its own detailed work so as to be able to recover some outlays through consultancy to other Corrective Services Departments (as in the case of the Junee project) but also it should likewise protect CCA from having to, in effect, hand over its costing expertise to future competitors. Whatever the original justification was for this rationale, it seems to have disappeared altogether now that CCA has lost out on two subsequent contracts to ACM and now that the QCSC's original detailed work has been overtaken by other marketplace expertise.

(iii) Performance criteria and compliance

This arrangement means that standards and performance criteria are locked within the bureaucracy and management, rather than available to the general public, inmates and interest groups. This seems to undermine the notion of accountability somewhat. This observation is given extra point by the fact that the terms of the management contract relating to Wacol are also expected to be treated as commercial-in-confidence.[18] The same is also true of the Junee contract.

By contrast, the performance standards required in the UK both in relation to the operation of The Wolds and also in relation to the proposed second private prison are publicly accessible. The Queensland, and now the New South Wales, practice certainly seems to raise real problems of principle. Whatever else they are, operating standards for

18 Moyle (in *Practical and Legislative Restrictions to Access of Information for Private Prison Research in Queensland*, in press) has raised the question of the potential impact of the proposed FOI legislation upon this arrangement. As New South Wales already has such legislation, the matter may be tested in relation to the terms of the Junee contract.

prisons, in the days of the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Standard Guidelines for Corrections in Australia 1989, can hardly be characterised as predominantly "commercial".

However, it is known[19] that the performance criteria as to the supply of work, education, medical and leisure programs are quite precise and thus susceptible in principle to effective audit. For example, a 24-hour in-house medical service is required; this is actually available, not a mere chimera. The Commission's own internal standards document for public prisons, *Mandatory Standards for Secure Facilities for Audit Purposes*, is applicable also to Borallon. Indeed, all the general safeguards which now apply to the prison system in that state — the official visitor system, the Ombudsman's supervisory jurisdiction, parliamentary accountability of the Commission itself, not to mention unrelenting media attention — are applicable also to Borallon. The position with regard to proposed freedom of information legislation is as yet unclear.[20]

The Commission also employs a monitor who has regular and unrestricted access to the site and to prisoners; she visits two or three days a week and reports directly to Director level. The arrangement thus recognises, at least in the abstract, that "annual or semi-annual inspections of privately operated secure facilities are simply not enough".[21] The Commission, by providing for regular turnover of monitoring personnel, has also recognised that "whistle-blowing can be a lonely and onerous profession" and that a monitor could be subject to "subtle co-optation" by the contractors.[22] This arrangement is fortified by the fact that an audit team from the Commission makes six-monthly evaluations of Borallon, as of all other institutions.

However, the point has been made[23] that neither the monitoring nor the audit procedure are truly qualitative. Rather, they look to formal matters such as correct record-keeping and to individual prisoner issues or problems. As audit reports are not published, it is not possible to evaluate the weight of this criticism directly. But off the record QCSC officials will concede that it has some validity.

(iv) Statutory provisions relating to staffing

It should be emphasised that the authority for the contractors to run Borallon is derived directly from the general law relating to prisons and corrections. Under section 18 of the *Corrective Services Act* 1988, the Director General of Corrective Services can confer all the powers of a "general manager" of a prison upon the person nominated by the Corrections Corporation of Australia to be the operational head of Borallon; and *without*

19 CCA will talk freely about many aspects of the contract as will the QCSC. One can thus get a line on the main specifications in the contract. In the case of Junee, the tender document specified in great detail the minimum standards which the contractor would have to meet. However, the fine details of the contract were settled by "commercial-in-confidence" negotiations, and variations to the tender standards are not publicly known.

20 Above n18.

21 Keating, J M, "Monitoring Private Prison Performance", in McDonald, D, *Private Prisons and the Public Interest* (1990), at 145.

22 Id at 146.

23 Above n12.

these powers he could not run the prison. In other words, the Commission could effectively veto the private contractor's choice of operational head.

Similarly, under section 19 of the *Corrective Services (Administration) Act* 1988 the Commission may engage an outside body to "conduct on [its] behalf ... any part of its operations"; and where it does so it may also authorise in writing persons to carry out functions as custodial officers. In the case of Borallon, such officers are employees of one of the joint venturers, Wormald International, and they must undergo and pass a training program accredited by the Commission. Wormald's have in fact trained an excess number of their employees. Thus, during weekends, evenings and other times when the public sector rostering system leads to wages blow-outs, the roster can be filled by staff whose principal work for Wormald's is not at Borallon but who have nevertheless passed the accredited training course.

The corollary to this arrangement is that the custodial officers, qualified to perform other security tasks for their employer and thus less dependent on hierarchical career opportunities within the prison system, seem not to be developing those intense sub-cultural values which characterise conventional prison officers in Australia, and elsewhere.[24] They are also members of a different union — the Miscellaneous Workers' Union rather than the State Services Union. Impressionistically, the inmates at Borallon seem to be markedly less combative towards them than are inmates of public prisons towards career prison officers. It is, perhaps, worth noting that the only submissions which Kennedy received from inmates following the publication of his interim report were strongly supportive of privatisation.[25]

FORESTALLING THE HAZARDS OF PRIVATISATION

Pausing at this point, it can readily be seen that these arrangements have so far largely, but not completely, forestalled three of the main anxieties of those who are ideologically opposed to contract-management of prisons. The first is that occupancy rates and, ultimately, incarceration policies might be driven by the private profit motive. The second is that the private sector component of imprisonment will de facto be beyond governmental control. The third is that a dual standard system will be created in terms both of facilities available and also of inmate mix.

(i) Occupancy rates and incarceration policies

McDonald[26] has documented, in the United States context, the concern that "private operators, whose business opportunities derive from the shortfall of cell space relative to demand, [may] push for sentencing laws that maintain or even heighten the demand." Rutherford[27] has argued, in the British context, that even in the absence of some such sinister strategy, the very existence of private prisons would serve to distract attention

24 Williams, T, "Custody and Conflict: An Organisational Study of Prison Officers' Roles and Attitudes" (1983), 16 *ANZ J Crim* at 44.

25 Above n1 at 90.

26 McDonald, above n5 at 14; see also Robbins, I, *The Legal Dimensions of Private Incarceration* (1988) at 64-5.

27 Above n14 at 64; see also Shaw, above n13 at 52.

from the key question of reducing prison populations: "To view the private sector as being able to rescue British prisons from a desperate state of affairs is to confuse prison and penal reform." In other words, there is a danger of neglecting the sentencing and penal system as a whole if we become diverted by improving conditions in one or two special prisons.

In Australia, George[28] has taken up a similar theme: "Private prisons will and have tried to impact on government policy through lobbying, just as any business concern does. Reductions in sentences and the promotion of alternatives to prison will clearly affect the potential market of private prisons. They will be in a position, however, to publish lurid descriptions of violence in prisons reinforcing a perceived need for increased facilities. This will feed the imagination of the media creating an environment of fear in the community. Such tactics will support policies that ensure that beds are full. Unlike government, private enterprise is under no obligation rationally to discuss the broad issues that are involved in offending behaviour and corrections policy." Yet, in a context where payment is based on a notional 100 per cent occupancy regardless of the actual occupancy and against the backdrop that the State is not, turning over the entire system of imprisonment to the private sector but only a small part of it, such fears seem groundless, indeed somewhat fanciful.[29]

A further perspective is that, since Borallon commenced operations, the Queensland imprisonment rate has fallen from 75.8 per 100,000 to 69.3, whilst the overall Australian rate has risen from 73.7 to 81.4. One public prison (Woodford) has been closed down altogether, and the worst in the State (Boggo Road) will soon be closed. Whatever else is driving incarceration policies in Queensland, it certainly does not seem to be a private prisons lobby intent on swelling the population.

(ii) Accountability

This concern is epitomised by Rutherford's view that "the lack of visibility that commonly characterises prison administration will be exacerbated".[30] On the basis of the Borallon experience to date, that fear seems likewise to be groundless.

Run-of-the-mill matters within Borallon are no less accountable than in any other Queensland prison; and with the added factor of an official monitor it could even be said that there is greater accountability. Moreover, the endless procession of semi-official visitors which Borallon willingly accepts is in contrast to the secretiveness which some public prison systems still exhibit. As for emergency problems, the Corrective Services Commission not only could discontinue the contract at the end of its initial term but also could terminate it under the applicable legislation at any moment, by withdrawing the authorisation of the general manager and his staff. Improbable as this may seem, it could become relevant in the case of riot or serious breaches of care by the operators. Borallon

28 George, A, "The State Tries an Escape" (1989), 14 *Legal Service Bulletin.*

29 It should be noted that if the ACT were to privatise its proposed medium security prison, leaving only the remand detention centre within the public custodial system, about two-thirds of the custodial system would be private sector. This would seem to distort the balance and lend some credence to the fears expressed by George.

30 Above n14 at 63.

remains the Commission's prison at all times. As Logan has said: "It must be made clear that contractually managed prisons are still government prisons.[31]

However, as previously mentioned, lack of full public access to the standards and performance criteria documentation erodes this accountability, in the sense that oversight must always principally emanate from official, rather than unofficial, sources.

(iii) Dual standards

Private prisons certainly could be run in such a way as to create a dual standard system. Fulton[32] stated that to avoid having a run-down (public) system and a reasonably salubrious (private) system, "private sector involvement would have to be introduced in a way which genuinely relieved pressure on the existing system." In Queensland, this has been done, and since Borallon was opened it has been possible to close down one prison, and soon a second — the most squalid of the old prisons, Boggo Road. The "choir boy" point, however, does seem to possess some validity, as pointed out above. But by the same token positive efforts are being made to make the population of Borallon more representative.

Of course, the concern that facilities for hard-core maximum security prisoners will be allowed progressively to run down is a proper one. This concern is understandably exacerbated if the less oppressive environments into which building funds are poured seem, in security terms, to be over-designed for the particular class of inmates who actually, as in Borallon, come to occupy them. This aspect of Borallon's operations is therefore a matter of some concern.

(iv) The allocation of punishment

The fourth concern which should be addressed concerns the question of the *allocation* of punishment. As mentioned previously, the private prisons debate purports to be merely about the *administration* of such punishment. But what if administration in practice spills over into allocation? It is this concern which partly underlies the first objection, about the creation of a lobby group of private operators whose aim is to see an increase in raw inmate numbers so as to ensure continuing profitability. If that concern is too crude to be credible, it may nevertheless possess some validity in relation to such matters as prison discipline, work release and parole decisions — anything, indeed, which de facto extends the period of incarceration for any particular prisoner.

The Queensland arrangements seem to meet this concern. As already explained, Borallon is an institution falling within the direct legislative responsibility of the QCSC, with the prison manager and his custodial officers deriving their legal authority from the general legislation of the State as administered by the Commission. It is not legal chicanery but administrative reality to say that, for all matters affecting prisoners' rights within the institution, they are no less answerable than public prison personnel to the Commission and to the general law. The particular case of parole epitomises this.

31 Logan, above n5 at 50.
32 Above n16 at 10.

Parole decisions in Queensland are made under Part IV of the *Corrective Services Act* 1988 by the Queensland Community Corrections Board. The Act lays down clear rules as to eligibility and procedures; these include the right of the applicant to put his case in writing or through a legal representative, and the duty of the Board to give written reasons for refusal. The Board in each case considers the report of a community corrections officer. This report will be written on the basis of diverse factual material: home assessment; previous performance of the offender on temporary release programs; psychological or medical information where appropriate; above all progress as measured against his individual case management plan; and reports upon custodial conduct. In other words, all information, including custodial information, is mediated through the report of an independent officer working to a different line of command. The strong impression of persons involved in this system is that, normally, the least important source of information is prison performance.

Of course, individual prison managers or even custodial officers — whether employed by CCA or by the QCSC itself — are entitled to write directly to the Board in relation to any given case. So, too, are members of the general public, members of Parliament, victims, or anyone else. Such communications are simply another factor in the decision-making equation. In this regard, Borallon staff are in no more nor less favourable a position than anyone else, including staff employed directly by the Commission.

In summary, there is almost total separation of parole decisions from custodial minutiae; the allocation of punishment should not become entwined with its administration. The line between traditional State responsibility and private sector activity should never become blurred, because the line between custodial management generally and due process consideration of parole applications is sharply differentiated. Of course, in those jurisdictions where parole is solely formula-driven, the role of all custodial officers — publicly or privately employed — is equally immaterial.

It should be said that there are some general provisions of the *Corrective Services Act* that are objectionable. A prime example is the provision of section 101 whereby prisoners charged with "major [disciplinary] breaches" are not entitled to legal representation. Moyle[33] has documented the quixotic way in which due process may be over-ridden as a consequence. His example relates to Borallon itself. However, the objection seems to be a general one relating to legal regimes within prisons, rather than one arising simply out of the nature of private management of prisons.

FLAWED PRIVATISATION: AN AUSTRALIAN CASE STUDY

The most notable previous example of privatised detention was the Sydney City Mission Wilderness program, which operated at Tallong, near Goulburn, New South Wales, for about one year until late 1985. The program was based upon the Vision Quest model used in the United States.[34] After several reviews,[35] a request for government funding was refused, leading to Tallong's closure.

33 Above n12.

34 Greenwood, P and Zimring, F, *One More Chance: The Pursuit of Promising Intervention Strategies for*

A principal problem was that the program's very existence did, indeed, tend to drive incarceration policies. To be viable, it ideally needed about 40 youths participating at each of the four stages of the year-long program. As 40 "graduated" from stage 4, another 40 should be entering at stage 1.

The main route by which youths arrived at Tallong was via the juvenile court as a condition of probation or being bound over. The youth would previously have been assessed by the operators of the program, a key aspect of this assessment being willingness to sign a contract to remain in the program for the full period of one year. In addition, the Sydney City Mission retained ultimate control of admission, automatically excluding any youth whose offences involved premeditated violence or drug use of any kind. In other words, the inmates were *predominantly low-risk youths who would probably not otherwise have been incarcerated in the public juvenile detention system at all*, or at any rate not have been detained for as long as a year.

How did it come about that courts sentenced in this way? Mainly because they had been persuaded by the infectious enthusiasm and misplaced goodwill of those responsible for the program that this would be in the youths' best interests. Those people, in turn, could not help but be aware of the critical mass of inmates needed to make the program viable.

The program was also de facto beyond public control, at least in a day-to-day sense. It was situated in an isolated area, on private land to which there was no general right of public access; record-keeping and case notes were fragmentary at best, thus making any assessment of treatment methods virtually impossible; there were no objectively stated or publicly accredited standards for staff recruitment; staff turnover was exceedingly high; the policy input of the State Department of Youth and Community Services was virtually non-existent; and there was very little Departmental monitoring of the Tallong regime.

Worst of all, the private agency was in reality allocating punishment, not merely administering it. Primarily this was done indirectly, by persuading courts to send youths to the program as a condition of some other penal order. But also, as the whole arrangement operated without statutory authorisation, both the imposition of disciplinary sanctions upon recalcitrants and also the recapture of "escapees" by the camp staff amounted to allocation of new punishment rather than administration of old.

Tallong was an exemplar of what critics fear about private corrections. The point of citing it is to highlight how far Australia has come in such a short time in its understanding of the key philosophical and practical issues, as epitomised by the Borallon arrangements.

Chronic Juvenile Offenders (1985).

35 Hawkins, G, "Review of the Sydney City Mission Wilderness Programme Proposal" (1985); Findlay, M, "Independent Analysis and Assessment of the Sydney City Mission Wilderness Programme" (1985); Harding, R, "Sydney City Mission Wilderness Programme: A Preliminary Evaluation" (1985): all unpublished papers for the Department of Youth and Community Services, New South Wales.

THE STANDARDS OF PUBLIC PRISONS

It must be remembered that in, most English-speaking western nations, there has been a plethora of crises which have highlighted the moral and managerial bankruptcy of significant components of the publicly-operated prison system: for example, in the United States, Attica[36] and Santa Fe;[37] in the UK, the April 1986 riots in several English prisons[38] and the April 1990 riots in six English prisons, particularly Strangeways;[39] and, in Australia, the Nagle Report[40] relating to the New South Wales prison system, the 1987 fire at Pentridge prison,[41] the 1988 riots at Fremantle prison,[42] and generally the Final Report of the Royal Commission into Aboriginal Deaths in Custody.[43]

It is paradoxical that, not infrequently, the very same people who deplore the standards of publicly-run prisons generally and who are justifiably most vociferous at times of such crises can also be found, when the question of private sector management comes up, defending those very same public prisons as if they were paragons of compliance with the United Nations Standard Minimum Rules. Stephen Shaw, Director of the UK Prison Reform Trust and himself a leading opponent of prison privatisation in that country, frankly acknowledged his own dilemma when he stated: "I think, however, the case against privatisation would be that much stronger *if there were not substantial evidence that the public system is either squalid or ludicrously wasteful of resources. The opponents of privatisation have to be careful not to be defenders of the public squalor*".[44]

From this point of view, the issue surely becomes that of starting to create a less awful prisons and corrections system overall than we have at present. Thus, "privatization, rather than being viewed as an outcome, might be viewed more usefully as a process".[45]

PRIVATISATION AS A SYMBOL OF CLEARER OBJECTIVES?

In his discussion of enterprise privatisation generally, Donahue[46] observes that "the fundamental distinction is between competitive output-based relationships and non-competitive input-based relationships, rather than between profit-seekers and civil servants per se." Throughout the twentieth century and particularly since the Second World War, prison administrators have had to function within societies whose penal

36 Weiss, R, "Attica: 1971-91. A Commemorative Issue" (1991), 18/3 *Social Justice.*
37 Dinitz, S, "Are Safe and Humane Prisons Possible?" (1981), 14/3 *ANZ J Crim.*
38 Her Majesty's Inspector of Prisons, "Report of an Inquiry into the Disturbances in Prison Service Establishments in England Between 29 April/2 May 1986" (1987), *HMSO*, London.
39 Woolf, H, "Prison Disturbances, April 1990: Report of an Inquiry" (1991), Cm 1456, *HMSO*, London.
40 Nagle, J, *Report of an Inquiry into the New South Wales Department of Corrective Services* (1978).
41 Hallenstein, H, "Finding of Inquisition Held at Coroner's Court, Melbourne Into the Deaths of James Richard Logloughnan and Others" (1989), Office of the Victoria State Coroner, Melbourne.
42 McGivern, J, "Report of the Enquiry into the Causes of the Riot, Fire and Hostage-Taking at Fremantle Prison on the 4th/5th January 1988" (1988), Department of Corrective Services, Perth.
43 Johnston, E, *National Report of the Royal Commission into Aboriginal Deaths in Custody* (1991), Vol 3 at 301-324.
44 Above n13, emphasis added.
45 O'Hare, N, "The Privatization of Imprisonment: A Managerial Perspective", in McDonald, D, *Private Prisons and the Public Interest* (1990).
46 Donahue, above n5 at 79-80.

objectives have been confused and conflicting. We have swung around between the aims of rehabilitation and incapacitation; between "nothing works" and special prison-based rehabilitation programs; between decarceration and "real time" or truth in sentencing. Quite often, indeed, we have embraced several of these philosophies simultaneously. Not having clear, consistent or coherent objectives, and thus no reliable measure of their attainment, we have been compelled to rely upon input-based relationships. Their attraction is that this structure enables the task at hand to be constantly revised, with the minimum of philosophical or bureaucratic angst and whilst continuing to fudge objectives.

Privatisation compels one to define what one hopes to achieve within the prison system. In the absence of stated objectives, there can hardly be a contract. In Queensland, political and social upheavals of the last five years have stimulated the clarification of penal objectives. These are spelt out in the *Philosophy and Direction* document of the Corrective Services Commission, and in relation to offenders boil down to "correcting offending behaviour through positive self-development of the offender." There is nothing very radical about the notion of self-development — except, perhaps, that in Queensland they actually now appear to be starting to mean it. In the prison setting such a philosophy involves work programs, educational programs, good health care, a degree of self-management, opportunity for constructive leisure activities, hygienic living conditions, the provision of adequate nourishing food, and the right to be protected from other inmates or staff. It involves also, as mentioned above, individual case management in which progress is measured against targets.

All these things are capable of being specified — indeed, *must be specified in great detail* if performance criteria are to be laid down for tenderers and if the performance of the successful bidder is to be subsequently audited. This process of specification turns the whole system into one which is output-based — to turn out as far as is feasible in the light of the human variables, such as the nature of the offender and the length of incarceration, inmates who have had a real opportunity for self-development.

A prime example where the process of clarifying goals for the purpose of contract specification brought about spectacular results is that of the reform of the Massachusetts Department of Youth Services by Jerome Miller in 1971–72. The decision to privatise produced three critical results: first, the clarification of objectives; second, the necessity for care providers to find different ways to do their jobs and develop new programs; and third, the creation of different patterns of information flow concerning youth care, so that the less focussed area of professional associations and relationships began to complement the official and inevitably introverted departmental patterns.[47] Competition and diversity produced debate and evaluation, and created yardsticks and benchmarks for comparison across systems.

This notion of competition and diversity is one which many of the commentators have hoped for, if not expected, with the introduction of privately-managed prisons. In Queensland itself, work and education programs throughout the *whole* system have now

47 Above n45 at 118–120.

become more extensive; also, the cost of running public prisons has diminished to the point where they are now competitive with Borallon, without prejudice to programs; and finally, as already mentioned, one prison has been closed down and another soon will be.

Clearly, Borallon has been both an effect of and a further catalyst for a system getting its act together after a long period of apathy and drift. Maybe all this could have happened without going down the path of contract-management; but the tangible fact is that it had not previously done so.

SPILLOVER EFFECTS: COMMUNITY CORRECTIONS

There are other agendas and achievements, this time in the area of community-based corrections. Some privatisation moves in Australia have simply been based on financial factors: for example, electronic monitoring of home detainees in Western Australia by a security company. But other diverse motives can creep in by the side door. For example, Aborigines are still very much over-represented in imprisonment figures: about 16 times. Whilst they are also over-represented in community-based corrections orders, the disparity is much less: about 10 times. In other words, sentencers still seem significantly less likely to impose non-custodial sentences rather than imprisonment upon Aborigines, relative to non-Aborigines.

Contributing to this reluctance is a belief that there is widespread Aboriginal non-compliance with this quintessentially "white-fella" mode of disposition — one which typically involves turning up to report or to work or to participate in a development program at fixed times and places.

It has often been said that community-based corrections for Aborigines should be administered, at least in part, by Aborigines; until this has been tried, it is premature to dismiss the possibility of compliance. Yet this has been difficult to achieve, smacking perhaps too much of "community justice mechanisms" — shades of apartheid from one perspective, of unacceptable positive discrimination from another.

The Queensland Corrective Services Commission has now contracted out the management of Gwandalan Community Corrections centre (a supervised residence) to an Aboriginal community group; all offenders placed there will be Aborigines. A similar arrangement has been made at Aurukun. The success or otherwise of these initiatives will be carefully monitored and evaluated. If they improve the reintegration rate of Aboriginal prisoners into the community, it will be able to be said that the vehicle of private sector contract management will have brought about something that the public sector has been inhibited from tackling. Privatisation has, in a sense, facilitated "niche marketing" of correctional services.

The Queensland system has five other contracted community centres, plus one which is operated under a grant. Apparently, several other proposals have already been made by a wide variety of community groups. The performance of the existing centres will in itself provide fascinating information about modes of delivery of correctional services and have a direct bearing upon the development of this aspect of the correctional system.

THE FUTURE OF PRISON PRIVATISATION IN AUSTRALIA

Pressures upon the future of the public prison system include: (a) recurrent costs; (b) capital costs; (c) crowding; and (d) program development and delivery. It is against these factors that the possible scope for the development of the privately-managed part of the system should be considered.

(i) Recurrent costs

Recurrent costs of the prison system will remain a source of concern to Australian governments, particularly at a time when public sector spending generally has to be reined in. The largest single item of recurrent costs, and also that which is most susceptible to reduction, is labour costs. However, within the framework of the highly-unionised stranglehold exercised by uniformed officers, significant cost reduction cannot realistically be sought. Privatisation is a prerequisite of cost reduction, therefore, and as Queensland experience has shown this may well then spread into the public sector. Corrections administrators understand this factor, and it is part of their agenda.

In this regard, experience in the Northern Territory should be referred to in more detail. As mentioned, whilst the ultimately unsatisfactory tenders were being submitted and assessed, negotiations were also underway with the unions representing public prison staff. As a consequence, it was conceded that some expensive work practices could be progressively abandoned, and a formal Memorandum of Understanding between the Department and the unions has been drawn up. This in turn should facilitate more flexible and effective delivery of some prisoner programs.

However, the Borallon experience also suggests that, certainly in the short term, any reduction in labour costs will mostly be diverted into program costs. The overall cost may not be substantially less, but the product should be tangibly improved. Privatisation primarily involves redeployment of resources. However, the second wave of privatisation — Wacol and beyond — could, as the new contract suggests, start to deliver tangible savings to governments.

(ii) Capital costs

The capital costs of building new prisons are becoming horrendous. For example, the most recently commissioned new prison in Australia — Casuarina, Western Australia, which is a 400-bed maximum security institution — cost $90 million to construct. These sorts of sums are simply not going to be available up-front for the foreseeable future.

That is why at Junee the New South Wales government was looking for a private enterprise commitment to design, finance, construct and operate a new prison. Indeed, the contractor has entered into a work-site labour agreement which will deliver a 600-bed prison for $57 million — about half the estimated cost which the State government itself would have incurred.[48]

Present economic conditions are favourable to this sort of development. Far better for a venture capitalist to invest in a construction which will have a guaranteed end-user, rather

48 *Financial Review*, 17 February 1992.

than yet another empty CBD office building. And far better for governments to let private developers try to take on the building unions, which in the case of the Casuarina development are semi-officially estimated to have featherbedded the project to the extent of $15 million.

(iii) Crowding

Crowding will continue to exert pressure for new prison construction, as well as extensive refurbishment of existing plant. This will particularly be so in New South Wales, which — more than any other Australian State — has dramatically increased its imprisonment rates and numbers between April 1988 (when the Liberal–National Party government came to office) and November 1991. Specifically, the prisoner population has gone from 4,000 to almost 6,000 — this as a result of a deliberate and quite explicit "law and order" policy coupled with "truth in sentencing" or "real time" legislation. In November 1991, the imprisonment rate was 100.2 per 100,000 — the highest since 1907. Accommodation, already inadequate when the prison population was 4,000,[49] has lagged further and further behind. A much vaunted government prison construction program has failed to eventuate. In this context, looking to the private sector has not just an air of desperation but also one of inevitability.

(iv) Programs

With regard to programs, uniformed officers, through their unions, have in the past tended to exercise significant control.[50] Like most such peer-groups, Australian prison officers have been seen by their managements as being very conservative. There has even been high-level speculation that a spate of escapes from Queensland prisons between May and July 1991 may have been condoned, if not positively engineered, by uniformed officers trying to hold back the pace of prison reform.[51]

Such a claim is not necessarily fanciful; the 1987 Inquiry into riots at several English prisons in 1986 found evidence that at least one outbreak (at Gloucester prison) was deliberately provoked by prison officers intent on forestalling reform.[52] Concern about costs thus neatly dovetails with concern about introducing innovative programs.

(v) Value and costs

In his famous discussion of the "contract management" of prisons, Jeremy Bentham pointed out that "amongst unfit things, there are degrees of unfitness".[53] That observation instantly reminds us that the dichotomy is not between public sector institutions of glowing excellence, on the one hand, and private sector institutions of inexorable squalor, on the other. Rather, we should regard each part of the system pragmatically and see how fit it is for its avowed purpose.

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49 Biles, D, *Prison Accommodation and Occupancy, April 1987* (1987).

50 Vinson, T, *Wilful Obstruction: The Frustration of Prison Reform* (1982); O'Hare, above n45 at 118; Woolf, above n38 at 338-342.

51 *The Australian*, 16 July 1991.

52 Above n38 at 18-20.

53 Bentham, J, in Bowring J (ed) *The Works of Jeremy Bentham* (1962), (Vol 4) at 128..

In this context, it is likely that the future of private corrections will turn not so much on *cost* as *value*. In other words, outlays may not always reduce dramatically (cf Wacol) but returns should. Aspects of value include: (i) diversity within the total system; (ii) consequently, competitiveness not only as to cost-effectiveness but more significantly as to service delivery across the public and private sectors of the system; (iii) better utilisation of expensively-trained personnel for specialist tasks, so that for example public correctional staff may increasingly be expected to be program specialists whilst private sector ones will be generalists; (iv) enhanced flexibility and capacity to deliver in different situations or for different groups than the public sector possesses; and (v) an increased sense of community involvement in this most difficult of social responsibilities.

As a small but growing component of the total prison system, privately-managed prisons may well stimulate improvement across the whole system. As we move towards the 21st century, it would be imprudent to reject on ideological grounds any development that holds out promise of improvement in the penal system. That is not to say that privatisation proposals should be uncritically accepted, and as the Alice Springs experience shows this is not in fact occurring. Nor is it to concede that public accountability should be eroded by characterising performance standards as "commercial-in-confidence". However, properly monitored and regularly evaluated as to their performance, private prisons have a place in future Australian corrections.