

PRISON PRIVATISATION IN SOUTH AFRICA

ISSUES, CHALLENGES AND OPPORTUNITIES

KC Goyer

ACKNOWLEDGEMENTS

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- Judge J. J. Fagan, Inspecting Judge for prisons.



EUROPEAN UNION

PREFACE

There is little doubt that the most serious problem facing those responsible for South Africa's prison system is overcrowding. South Africa's prisons were designed to accommodate 100,668 inmates. Currently they struggle to house 172,271 prisoners. Overcrowding exacerbates the problems which face prison administrators worldwide: gangs, violence, sexual assault, public health problems and escape attempts. As such it makes managing a prison difficult, and reducing the chances of re-offending almost impossible. To make matters worse, South Africa's prisons are also under-staffed, badly designed and structurally crumbling.

Faced with these challenges and the budgetary limitations in the criminal justice sector, the Department of Correctional Services has identified the privatisation of prisons as one solution. This is a strategy that has been adopted by governments around the world in response to an increasing prison population and the lack of available funds.

As part of the Criminal Justice Monitor which tracks performance and strategy in the criminal justice system, the ISS commissioned this monograph to assist among others the policy makers and practitioners in the Departments of Correctional Services, Public Works and Finance to understand the pros and cons of prison privatisation and the inherent challenges of such a strategy. Privatisation is being practised in several countries and South Africans have the opportunity to learn from these experiences.

The aim of this monograph is to present an overview of the main issues in the privatisation debate and draw lessons for South Africa's privatisation process. It is not difficult to see the benefit of privatisation in this country. As the author, KC Goyer points out, "Private prisons will necessarily be an improvement on public prisons because it would be almost impossible to perform any worse". Nevertheless, there are important considerations of cost and accountability that will need to be carefully monitored by those responsible for imprisonment in South Africa.

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EXECUTIVE SUMMARY

The prison system in South Africa faces many challenges, several of which are associated with a lack of available resources to meet the increasing demand for correctional services. The key challenges identified by the Department of Correctional Services (DCS) are overcrowding and funding.

The Department has turned to the private sector for assistance, and has signed contracts for two prisons to be designed, constructed, financed and managed by a consortium of private companies.

Internationally, private prisons have seen mixed results. Many of the incidents which take place at private prisons are similar to those which occur at state facilities. Often the criticisms levelled at private prisons could equally apply to state operated facilities as well.

Because of problems with comparability, it is extremely difficult to determine whether private prisons save on costs. In South Africa, it is impossible to ascertain whether a private prison will be cheaper than the public prison, because the standard of care offered by private prisons is entirely unmatched in the public sector.

In the United States, private prisons in general have neither outperformed nor under performed their public counterparts. In Australia, many of the private prisons have experienced serious problems, but the flexibility of their contracts has enabled the government to respond appropriately.

The South African prison privatisation programme is closely modelled after that of the United Kingdom, which appears to have most successfully incorporated the private sector into its prison service.

The first private prison in Africa has recently opened in Bloemfontein, and the second will open in Louis Trichardt early next year. Although the financing arrangements have essentially tied the South African government's hands in terms of monitoring the operations of these prisons, the professionalism and reforms offered by private companies appear to have far surpassed the

correctional services offered by the state.

The private sector should not be limited to the provision of correctional services only, but should also be explored as an option for community based corrections as well as other criminal justice system functions. The outsourcing of ancillary services at public prisons should be investigated, as well as partnering with existing NGO's. The cost information gathered by the private prison companies should be shared with DCS in order for the government to appropriately estimate the actual cost of providing conditions of humane detention. Better information on the capital costs involved will assist the department with searching for alternative financing arrangements and thus avoid becoming beholden to the private prison consortium.

DCS should enlist the help of private prison companies to conduct further research on recidivism and issues of public health. The controller assigned to monitor contract compliance should not be a DCS official but should rather be appointed from the government's existing internal audit department, in order to maintain independence. The contracts, as well as the financing arrangements and the cost-comparison analyses, should all be made public in order to provide the appropriate level of transparency and accountability.

Private prisons in South Africa have the potential to be an undemocratic appropriation of the public interest for the sake of corporate profit. However, the facility in Bloemfontein is an enormous improvement on the current prisons in South Africa. Private prisons will necessarily be an improvement on public prisons because it would be almost impossible to perform any worse. Philosophically and theoretically, private prisons could be a frightening and dangerous infiltration of the criminal justice system. In reality, however, they may be the only means of reforming an important and deteriorating government service.

CHAPTER 1 **INTRODUCTION**

This monograph is intended to present the relevant issues in the debate over prison privatisation, examine the international experience, and to present the facts regarding the first private prison in South Africa. The research was conducted using primary documents from the governments involved, information downloaded from the Internet, and secondary materials obtained in South Africa, London, and Washington DC. In South Africa, a great deal of information was available from the University of Natal and the University of Cape Town. In London, valuable insights and materials were gained from the International Centre for Prison Studies at Kings College of Law as well as the Prison Reform Trust. The most authoritative books on the topic of prison privatisation were obtained at the Library of Congress in Washington, DC and assisted in providing the framework for examining the various arguments, taking into account the motivations and biases contained in many of them.

This documentary evidence was supplemented by semi-structured interviews conducted in South Africa. The Department of Correctional Services and the Department of Public Works were very co-operative. The managing directors of Bloemfontein Correctional Contracts and of South African Custodial Services were both gracious and co-operative in their assistance. The management and staff at the Bloemfontein prison gave of their time during a very busy period and afforded the author a full tour of the nearly completed facility. Input was also obtained from various dedicated and helpful academics and prison researchers in South Africa, as well as the tireless Judge J. J. Fagan, Inspecting Judge for prisons.

Chapter two provides an overview of the prison system as it has developed in the modern era,

and a discussion of the current state of South African prisons. Chapter three defines the concept of prison privatisation and traces its development. The major issues of the prison privatisation debate are presented as well as a summary of the arguments both for and against prison privatisation. Chapter four presents the experiences of the three countries which have been most involved with prison privatisation: the United States, Australia, and United Kingdom. Chapter five presents the development of prison privatisation in South Africa and the facts regarding the first private prison ever to be opened in Africa. Chapter six concludes with some recommendations for encouraging the positive development of South Africa's new privatisation projects.

This monograph is important because prison is an important part of criminal justice, and the criminal justice system is a crucial part of preserving democracy in South Africa. The prison system has an under-researched and often misunderstood role in the provision of order in any country, and particularly in South Africa. The South African prison system is in desperate need of reform, as it is currently struggling to cope with a booming prison population and declining standards of care. Prison privatisation is an extremely controversial topic in every country where it has been attempted, yet the South African government has chosen to explore its use. For these reasons, special attention should be focused on any development in the field of correctional services in South Africa.

CHAPTER 2 **IMPRISONMENT IN SOUTH AFRICA**

Prison

The idea that the government has the exclusive right to mete out punishment is a development which coincided with the rise of the nation-state. In ancient times, behaviour which was considered to be in violation of social norms was dealt with by the immediate community and usually took the form of restitution and compensation. These traditional justice systems were thus more concerned with the victim and restoring the original order or harmony prior to the offence than with vengeance or punishment.

The prison is not indigenous to Africa, but is a Western institution. The forerunner of the prison was the workhouse, an institution which developed in line with the labour trends of the Industrial Revolution. When the concept of imprisonment was originally developed in England, prison was intended to accomplish much more than simply house criminals and administer to their basic needs while serving their allotted sentences. Rather than simply warehouse criminals for a specific time, the duty of the prison system was to transform the individuals in its care into respectable, law-abiding citizens.¹ The workhouse concept was evident in the corrections strategy employed in these first prisons, where criminals were instilled with the virtues of good citizenship through solitary confinement and hard labour. It was expected that the shiftless lazy vagrant, once broken by extended isolation, would welcome the diversion of manual labour. The desired result was a healthy appreciation for the rewards of hard work and a permanent memory of the torment of solitary confinement, which would deter future criminal behaviour.²

Prisons were introduced in South Africa by Dutch colonists, but it was after the British occupation that the penal policy, including incarceration, began to take shape. Historically in South Africa, as in England, the duty of the prison administration to reform criminals was interpreted in order to accommodate the economic needs of the age. With the abolition of slavery in 1834, policy began to be shaped by the country's labour demands. During the 1840s and 50s, many public projects were constructed using prison labour.³ Inmates at the Breakwater

Prison, now a historical landmark, were used to construct the breakwater which protects the Cape Town waterfront.

During the late 1800s, labour demands of the mining industry began to impact on policies for imprisonment. The development of the South African prison system thus began to parallel that of another typically South African institution: the mining compound. These compounds were designed to not only house but also control thousands of workers who were migrant labourers, separated from their families and homelands.⁴ The first private prisons in South Africa were operated by the De Beers Mining Company. De Beers constructed prisons and the state provided the prisoners to fill them. The mining company paid the expenses to incarcerate their labourers and also paid the state for the use of their prison labour. By the end of the 19th century, the De Beers Diamond Mining Company was using over 10,000 prison labourers daily.⁵ The first racially segregated prison was constructed in Kimberley, and eventually both prisons and mining compounds were segregated along tribal lines as well.⁶

Many of the prisoners sent to work in the mines were incarcerated for violating pass laws, which had been in effect in one form or another for nearly 100 years before the Nationalist government came to power in 1948. Thus, incarceration of Africans for minor infractions such as pass offences could reliably supply the necessary labour for the growing economy throughout the 1900s. In this way, the state effectively became, "the provider of unskilled black labour for the mines through the penal system."⁷

Local convict labour was integral to the growing South African mining industry until as recently as 1952. In the later 1950s, prisoners were used for farm work, and dozens of special farm prisons were constructed for this purpose. In 1959, an act of Parliament officially abolished prison labour, but replaced the practice with policies that prescribed "useful and healthy outdoor work" for short term prisoners.

Although the practice persisted in South Africa, internationally the use of forced prison labour began to fall out of favour during the 1960s. Without the economic incentive to provide prison labour, many governments began to attempt to reduce prison populations through the introduction of parole and experimenting with alternatives to incarceration. The current trend, however, is towards increasing imprisonment and several industrialised nations have seen an explosion in their prison populations in recent decades.⁸ Arguably, this is because prisons have become a profitable industry, and the economic incentive has thus continued to shape criminal justice policy.

Prisons in the new South Africa

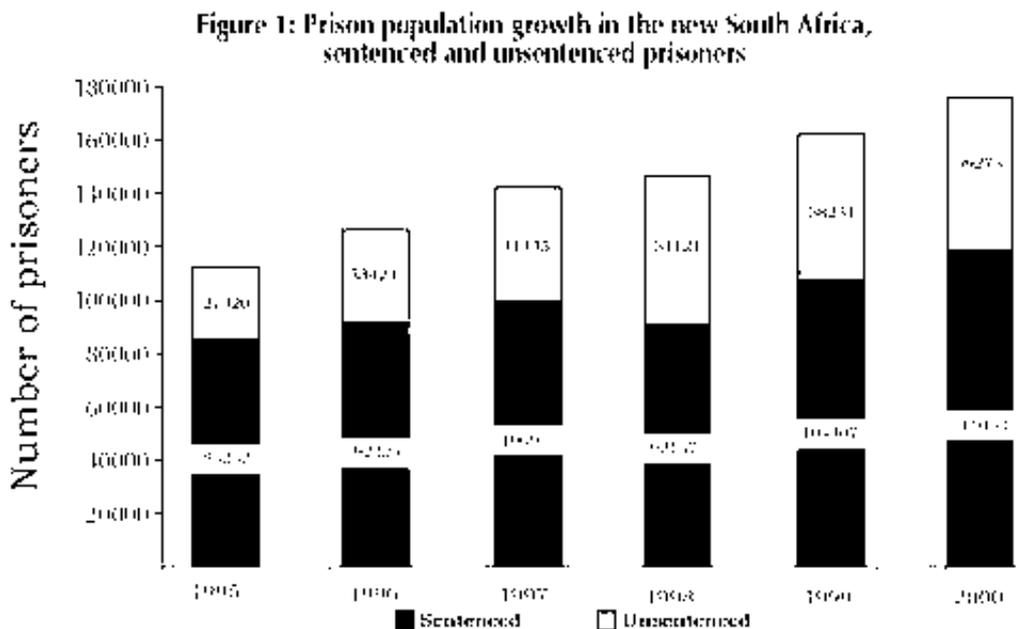
Like the countries of Eastern Europe and the former Soviet Union, South Africa is still considered a transforming democracy. After the fall of the Berlin Wall, imprisonment in the transforming political states exhibited two phases. The prison population decreased at first as political prisoners from the old regime were released and new government structures were organised. The next phase saw the prison populations increase as the uncertainties and difficulties of a new economy, new institutions, and an entirely new government resulted in increased criminal activity. When a fledgling state is struggling to fill the vacuum left by the elimination of the previous system, criminal activity will grow in strength in relation to the weakness of the new government.⁹

South Africa is not an exception to the phenomena experienced by the transformation of the formerly communist states in Europe. Crime increased rapidly from 1992 before eventually

stabilising in 1995. An analysis of crime trends since 1980 provides evidence that crime in South Africa increased during the transition to democracy and levelled off with political stabilisation, which is generally considered to have occurred by 1996. As Oppler points out, this should not be interpreted to mean that crime is a fundamental aspect of democracy but rather that, "dramatic changes in societies which move from authoritarian to democratic governance often weaken state and social controls, generating increased levels of crime."¹⁰

Crime is not only affected by political instability in a country, but is also considered an anticipated consequence of development. As Shaw explains, "Development generates greater opportunities for crime while also causing inequalities which encourage crime."¹¹ Over time, however, the nature of crime changes with sustained development, as more developed nations tend to face crimes against property while the lesser developed countries deal more often with violent crimes. Crimes against property will understandably increase as more economic growth translates into more cars, jewellery or other items of value which are commonly targeted for theft. This should not be interpreted to mean that development brings higher crime, because although rates of the occurrence of crime may increase, the impact of those crimes and the non-violent nature of them makes them less serious.¹²

Since 1997, the crime rate in South Africa has increased, as has the prison population. The increase in prison population is mostly attributed to a higher number of prisoners awaiting trial.¹³ Figure 1 depicts the growth of the prison population from 1995 to 2000. The graph shows the increase in the number of unsentenced prisoners, which has more than doubled in the past five years. Justice system delays in processing awaiting trial prisoners are largely responsible for the increase in the unsentenced prisoner population in South Africa. The current estimated number of criminal cases outstanding is nearly 200,000, and has increased 21% since 1999.¹⁴



Source: Department of Correctional Services Annual Reports

Court backlogs and crackdowns on crime are not exclusively responsible for the continuing rise in the prison population. The implementation of harsher sentencing and the increasing proclivity of politicians to espouse 'tough on crime' rhetoric should be considered cause for alarm. The Criminal Law Amendment Act of 1997 introduced a system of minimum sentencing for certain types of crimes. The minimum sentences are not required, but a judicial officer can only impose

a lesser sentence when justified by "substantial and compelling circumstance."¹⁵

The effect of this minimum sentencing legislation has not necessarily resulted in more prison sentences but rather has resulted in longer prison sentences. The critical mistake which misleads the bulk of the US population seems to be reoccurring here in South Africa: the misconception that increased incarceration alone can reduce crime. The primary challenges for South African prisons are not unlike those overseas, and include issues of overcrowding, awaiting trial prisoners, gang activity, recidivism, and public health. However, importing policies which have failed in other countries is unlikely to be successful. Similarly, policies which have succeeded elsewhere must be adapted for the South African aspects of any given problem or situation.

Overcrowding

The majority of the prisons which exist in South Africa today were constructed during the Apartheid era, and reflect the significant link between the treatment of prisoners and the labour needs of the economy. The typical prison cell is almost indistinguishable from a typical mining dormitory. Referred to as 'communal cells', each one is intended to house anywhere from 9 to 18 prisoners, containing only beds and a single toilet. The cells were designed with the idea that prisoners would be out working during the day and would only be in them to sleep at night. For this reason, the cells do not include desks, tables, chairs or even much room for simply moving around. Due to overcrowding and staff shortages, prisoners are regularly locked up for the greater portion of the day and in many instances are only afforded an hour outside to exercise.

Overcrowding exacerbates the intrinsic design problems of prison cells, with the number of inmates in most prisons approaching, if not exceeding, double their intended capacity. The South African prison system was designed to accommodate 100,668 and currently struggles to accommodate an actual population of 172,271.¹⁶ The degree of overcrowding varies considerably by prison and also by province. One of the worst prisons in terms of overcrowding is Johannesburg Medium A, with 6,250 prisoners incarcerated in accommodation meant for 2,630.¹⁷

In most severely overcrowded prisons, as many as 60 prisoners are kept in cells intended for 18. Beds are triple bunked and placed directly next to each other, and sometimes there are more prisoners in a cell than there are beds. The most overcrowded prison in South Africa is the awaiting trial prison in Johannesburg which is at 393% occupancy, while the province with the severest overcrowding is the Northern Cape, which is operating at an overall capacity of 231%.¹⁸

The overcrowding problem in South Africa is directly related to the increase in awaiting trial prisoners. The sentenced prisoner population has increased 17% since 1995, while the number of unsentenced prisoners has increased 164%.¹⁹ Approximately one third of South Africa's prison population are unsentenced prisoners awaiting trial.²⁰ Two factors contribute most significantly to the increase of awaiting trial prisoners: inappropriately designed and/or implemented bail laws and inefficiencies in the processing of cases by the judicial system. The Criminal Law Amendment Act of 1997 has made release on bail much more difficult and has toughened sentencing laws. These measures are intended to reduce crime, but the more likely result will be increased overcrowding of the prison system as the number of prisoners awaiting trial increases and those who are eventually sentenced are incarcerated for longer periods of time.²¹

Delays in the processing of cases by the judicial system has resulted in a dramatic increase in the average period of imprisonment for prisoners awaiting trial. The number of awaiting trial prisoners incarcerated for longer than three months has increased nearly seven fold since 1996, and the current average detention time is approaching five months.²² It is not uncommon for unsentenced prisoners to spend up to four years awaiting trial, usually in conditions which are even worse than those of the sentenced prisoner population.

When a person is imprisoned awaiting trial, it is for one of two reasons: bail is denied, or the person cannot pay bail. Bail is denied if the court decides that the person is unsafe for release because they pose a danger to the community, or the court believes that the person is unlikely to attend court to stand trial. If the court determines that the arrested person is not a threat to the community and is likely to appear on his or her court date, then a bail amount is set. These amounts are usually in proportion to the seriousness of the crime, but sometimes even very low bail amounts are too much for an awaiting trial prisoner to afford.²³

Of the 59,275 awaiting trial prisoners on 31 July 2000, 40,315 had been denied bail. Of the remaining 18,960 prisoners who were granted bail, more than 60% had bail amounts fixed at R1,000 or less. Given that the Department of Correctional Services estimates that it costs R88 per day to incarcerate each prisoner, it follows that the state pays more than R1 million every day to incarcerate people as yet not guilty of any crime other than being poor.²⁴

The prisons which are the most severely overcrowded are usually the 'Medium A' prisons, which are designated for awaiting trial prisoners. Although programmes and activities for sentenced inmates are by no means abundantly available for the sentenced prisoners, almost none are provided for the unsentenced prisoners. On the other hand, it is not uncommon for awaiting trial prisoners to be intermingled with convicted prisoners in the same prison.

Gangs

A defining feature of the prison environment in any country is the presence of gangs. The psychology of a prisoner is often one of helplessness and insecurity which gang membership helps to alleviate.²⁵ Also, in overcrowded and understaffed conditions, the loss of order or control by the management creates a power vacuum which gang structures readily fill. In many areas, outside gangs flourish in prison as many outside gangs are involved in criminal activity, resulting in a high proportion of members being in prison. However, not all gang activity in prison is related to gang activity outside of the prison. In South African prisons, the prevalent gangs do not operate outside of prison, and members of the same gang from outside of the prison may join rival gangs inside prison. Once in prison, however, allegiance to the prison gang takes precedence over membership in outside or street gangs.²⁶

Prison gangs in South Africa are unique in that they have been in existence for over 100 years and their organisation is nationwide. The two most powerful prison gangs in South Africa are the 26s and 28s. The original 28 gang existed in the mining compounds as well as the prisons, but by 1920 was permanently entrenched in several prisons while the gang structures outside of prison had all but dissipated. Sometime in the early 1900s, a former lieutenant of the 28s started his own gang, the 27s. One explanation for these names is that at the time of the split, the original leader had 28 fighters to the split-off group's 27, although others claim that the first group had eight officers and the other had seven.²⁷

When the leader of the 27s was imprisoned in Pietermaritzburg, a group of six non-gang members smuggled tobacco and other coveted items for him. In return, the 27 leader gave the

six permission to start their own gang, which became known as the 26s.²⁸ Today, the 27s and 26s are still closely intertwined and the 27s pledge to protect the 26s in exchange for the contraband or other items of value which the 26s specialise in procuring. Other gangs exist, including the 25s and the 29s, but the 26s and 28s remain predominant.²⁹ According to their intricate codes of conduct, the two gangs are able to co-exist although tensions exist between the established and some of the newer, recently formed gangs. Instances of gang violence are not uncommon, although they are usually not random but carefully deliberated within the gang hierarchy. Indeed, a decision to kill a non-member is considered by a judicial panel and resolved by the signing of a death warrant. The gang structures of both the 26s and 28s parallel that of a colonial or paramilitary institution, and the tight organisational systems help extend each gang's power nationally.³⁰

Recidivism

The prevalence and power of gangs may be related to the incidence of prisoners consistently returning to prison. Although the Department of Correctional Services does not maintain recidivism statistics, academic research has estimated that between 85% and 94% of prisoners will re-offend.³¹

Conditions in South African prisons are often traumatic, and will therefore severely undermine any attempts at a positive outcome from imprisonment. Muntingh explains, "When people are living in conditions that are inhumane and are often treated as something other than human, it is unlikely that they will treat other people humanely."³² At least 95% of South African prisoners will return to the community after serving their sentences and a good portion of these will serve sentences of six months or less. Without reintegration services upon their release, it is not surprising that prisoners completing their first sentence will find themselves hardened by their experience and either unable or unwilling to pursue non-criminal endeavours. The conclusion of the British White Paper on Crime, Justice and Protecting the Public seems to hold in South Africa as well: "Prisons can be an expensive way of making bad people worse."³³

Escapes

The department's emphasis on security overshadows programmes aimed at reintegration of offenders, perhaps because escapes from police or correctional services' custody is an issue which is consistently reported in the media. Of the 459 escapes reported by the Department of Correctional Services during 1999, 213 were from prison. The department has focused increasing attention on escapes and has introduced programmes to address the issue as well as set targets for reducing the actual number each year. The department is proud of its achievement in reducing escapes from 1,244 in 1996, to 989 in 1997 and less than 500 for the past three years.³⁴ Many critics argue that this is only minimal progress, and should not be applauded because the expectation is that no one should be able to escape and therefore a goal of zero is the only acceptable target.

The term escape may not be accurate, as it conjures images of diligent tunnelling or well armed convicts overcoming the state's attempts to keep them confined. A better term for the South African situation might be 'self-initiated' or 'extra-judicially approved' release. Most prisons are decades old and in desperate need of repair, and even those which are adequately maintained still have inherent security problems, such as insufficient fencing, lighting, or visibility.³⁵ Staffing shortages and lack of training also contribute to the number of escapes, although the portion of escapes which are staff-assisted are difficult to determine.

Public health

While issues of security gain more media coverage, what should be of greater concern to the public is the lack of sufficient attention to health issues in prison. Many prison conditions have an adverse effect on prisoners' health, and many prison health issues affect the greater community to the extent that they are actually issues of public health. Overcrowding inevitably leads to poor sanitation and hygiene, and the strain it adds to already limited resources impacts on the provision of basic services including adequate nutrition and health care. In South Africa, out of the 74,362 complaints received by representatives of the Judicial Inspectorate, one quarter were related to food and health care. Prisoners cited these two categories of complaints more frequently than any other category.³⁶

Understaffing coupled with overcrowding also limits the amount of time prisoners are able to spend outside of their cells, and the resulting lack of movement, let alone exercise, will also take its toll on prisoner health. The impact of emotional stress and psychological trauma on prisoners' physical health has also been documented in other countries, although similar studies have not yet taken place in South Africa.

Because all but a very small percentage of prisoners will return to the community upon completion of their sentences, many issues related to prisoner health become issues of public health when they are released. Due to poor medical treatment of contagious diseases which thrive in the prison environment, prisoners return to the community sicker than they left and take their sicknesses with them. The cost of missing out on this intervention opportunity, to reduce the incidence of disease both inside and outside the prison, is great. The illnesses that are particularly prevalent in prisons include hepatitis B and C, syphilis, tuberculosis, and HIV/AIDS.³⁷

HIV

While reliable statistics are not available on the number of HIV positive prisoners, the characteristics of the typical prisoner are those of a demographic at high risk for HIV infection. As a result, many prisoners will already be HIV positive upon entering the prison. Given that a typical South African prisoner is a young black man, it is reasonable to expect that the infection rate inside prison is at least as high as it is for this demographic outside of prison. Table 1 shows the actual and projected infection rate for black men aged 20 to 34 in South Africa. Using this data, it can be estimated that the current HIV infection rate in South African prisons is at least 30%.

Table 1: Actual and projected HIV/AIDS infection rate among black men aged 20-34 years in South Africa

Year	HIV	AIDS	Deaths	Total population
1990	12850	72	91	3255922
1991	30211	199	230	3339520
1992	61496	485	515	3423389
1993	111993	1040	1038	3507257
1994	186732	2023	1929	3590827
1995	287594	3647	3347	3673561
1996	409965	6150	5455	3753681
1997	550438	9749	8436	3830120
1998	703113	14719	12474	3903094

1999	860539	21289	17710	3968540
2000	1015344	29594	24201	4028443
2001	1154768	39627	31858	4082041
2002	1272768	51108	40447	4128828
2003	1357546	63623	49559	4168309
2004	1415132	76420	58708	4199688
2005	1455565	88870	67436	4220274
2006	1487198	100469	75356	4221927
2007	1508105	110635	82108	4317582
2008	1529197	118991	87566	4412300
2009	1548607	125586	91776	4506930
2010	1567427	130439	94828	4601932
"MetLife Doyle Model, Scenario 225, published in 2000."				

In addition to the number of prisoners who are HIV positive before they arrive in prison, there is also an as yet undetermined portion of inmates who will contract HIV while incarcerated. The prison environment creates many situations of high risk behaviour for HIV transmission. The incidence of forced, coerced, and consensual sodomy is a reality of prison life, and is considerably increased by overcrowding and gang activity. This type of sexual intercourse carries the highest risk of HIV infection, particularly in cases of rape. Forced anal intercourse is more likely to result in rectal tearing, which increases the likelihood of HIV transmission as the virus has a greater probability of entering the bloodstream.

HIV transmission is also increased by the presence of untreated sexually transmitted infections (STI's). Some STI's, such as herpes and syphilis, result in genital sores. Breaks in the skin in the genital region also increase the likelihood of HIV transmission. The prisoner population has a higher incidence of STI's and is less likely to have access to treatment facilities. Thus, prisoners are more likely to have untreated STI's than the general population and therefore are also at greater risk for transmitting and contracting HIV.

As the infection progresses, an HIV positive person will have a greater concentration of the virus in his or her body fluids, and thus the probability of that person transmitting the virus increases. The conditions in prison cause HIV infection to progress more rapidly, which means that prisoners will have a higher probability of infecting others when they are reintegrated back into the community.

Less than 3% of prisoners are serving sentences of 20 years to life. Nearly 75% serve a sentence of less than seven years.³⁸ Even if prisoners do not contract HIV while in prison, there are a substantial number of HIV positive prisoners released each year. Prisoners usually come from communities which suffer a great deal from poverty, unemployment, and crime. These are also the communities which are hardest hit by HIV/AIDS. This means that areas which already have a higher proportion of HIV positive people also have a higher proportion of people who have been sent to prison. When people are released from prison and return to these struggling areas, the effect will be an even greater increase in HIV infection.

AIDS

AIDS is the leading cause of death in prison, not only in South Africa but in countries such as the United States as well. Of the 1,087 natural deaths in South African prisons last year, at least 90% were from AIDS-related causes.³⁹ The number of deaths in prison has increased more

than five fold since 1995, and continues to climb. The Judicial Inspectorate has projected that in 2010, nearly 45,000 prisoners will die while incarcerated.⁴⁰

When a person becomes infected with HIV, he or she may not develop AIDS for five or even ten years. A person in progressed stages of AIDS is usually bedridden, unable to eat, and extremely weak. In prison, this last stage seems to last less than six months. The amount of time between infection with HIV and the onset of full-blown AIDS is affected by nutrition, stress, and availability of medication. In prison, nutrition is poor, the conditions of overcrowding are stressful, and there is little medication available. There is no information on how long it takes for an HIV positive prisoner to develop AIDS in South Africa. In other countries, the effects of the prison environment cuts in half the life expectancy of an HIV positive prisoner.⁴¹

TB

When a person's immune system is compromised by infection with HIV, they become more susceptible to other illnesses, referred to as opportunistic infections. The most common opportunistic infection in South Africa is tuberculosis (TB). HIV and TB are a deadly combination, as each infection speeds the progress of the other. It is estimated that one third of HIV positive people world-wide are also infected with TB.⁴²

TB is caused by tubercle bacilli, which infects a person's lungs and is a very contagious disease. One of the symptoms of TB is severe coughing, and a person can catch TB by breathing the air contaminated by an infected person's coughing. Unlike HIV, TB can spread by simply sharing a cell with a person who is sick with TB. Not everyone who becomes infected with tubercle bacilli will develop active TB, but a person with HIV is 30 times more likely to develop active TB than a person who does not have HIV.⁴³ Conditions in prisons such as overcrowding and poor ventilation also increase the spread of TB.

Many adults can be TB carriers but will not develop any symptoms until their immune system is compromised, such as by infection with HIV. An asymptomatic TB carrier infected with HIV thus becomes actively contagious, contributing to increased TB infection in the rest of the population.⁴⁴ In this way, HIV causes an increase in the spread of TB, and other infectious diseases, to other HIV-negative people. It is estimated that in sub-Saharan Africa, "one out of every four TB deaths among HIV-negative people would not have occurred in the absence of the HIV epidemic."⁴⁵

Unlike HIV, TB is both highly contagious and curable. The most common form of TB is pulmonary, meaning that the illness infects the lungs. Symptoms usually include violent coughing, involving the dispersion of infected sputum. Inhalation of airborne droplets of infected sputum is the most common means of contracting TB. Thus, contagiousness of TB can be compounded by areas which have a great deal of people crowded into a small, poorly ventilated space.⁴⁶

The Department of Correctional Services and criminal justice

The Department of Correctional Services is only one component of the criminal justice system. A successful criminal justice system will serve to reduce and deter criminal behaviour. However, this goal does not belong to the prisons alone but also to the police, courts and other government departments such as education and welfare. The South African criminal justice system begins with the police who arrest alleged perpetrators of crimes and gather evidence. The accused person is then charged by the prosecution service and required to appear in court

for his or her trial. The outcome of the trial will either be the conviction or acquittal of the person arrested.

In 1999, the police recorded about 2,380,820 crimes, of which 562,821 went to court and 257,391 were prosecuted. Of the cases that were prosecuted, 202,587 resulted in a conviction.⁴⁷ Those who are convicted will also be sentenced, and this sentence could range from a wholly suspended sentence to a prison term. Only after the accused individual is convicted and sentenced to prison does the Department of Correctional Services become involved. The role of DCS is then to incarcerate and rehabilitate the convicted criminal, and to prepare him or her for reintegration into society. If this process is successful, then the person who is arrested, convicted and imprisoned will eventually be released and will not commit another crime.

One aspect of criminal behaviour which is not commonly understood is that a primary deterrent for a would-be criminal is the likelihood that he or she will be caught. The effectiveness of the police force in deterring crime can be seen in its ability to maintain an appropriate presence, respond quickly to crisis situations, efficiently investigate crimes and make timeous and accurate arrests. Car guards in a parking lot do not for example actually apprehend car thieves. Rather, it is their presence that deters the theft from taking place because it increases the likelihood that the car thief will be caught.

Even if the penalty for car theft is death, if the police force is ill-trained, ill-equipped, and understaffed to the point that it is unlikely that any arrest will be made or that sufficient evidence will be gathered to support a conviction, then even the death penalty will not deter crime. Similarly, when a car thief is strolling through an unguarded parking lot, he is more likely to be thinking about the visible signs of alarm systems or gear locks than he is about the minimum sentence for car theft. For this reason, increasingly harsh sentencing laws cannot deter crime without appropriate support from the police department. Laws which call for longer sentences and refusal to grant bail, without increasing the resources available for enforcing them, will result in larger prison populations but not necessarily a reduction in crime.

A common misconception, perpetrated by politicians who exploit the public's fear of crime in order to gain votes, is that building prisons can reduce crime. Research in the field of criminology and penology has consistently found that prisons do not deter crime. Muntingh, from the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), observes

"Throughout the world, people are imprisoned in vast numbers without it having resulted in any significant reduction in crime. The threat of punishment also does not appear to have any significant impact in terms of preventing people from committing offences. The fact that so many current prisoners are in fact recidivists and have been in prison before, clearly shows the deterrence approach does not hold much promise as a crime reduction strategy."⁴⁸

Given that the Department of Correctional Services has no role in the arrest, conviction, or sentencing components of the criminal justice system, it becomes clear that the DCS cannot operate in isolation as a tool for the reduction of crime. The only role that prisons can play in reducing crime is through rehabilitation and reintegration of offenders upon their release.

CHAPTER 3 **PRISON PRIVATISATION**

Prisons in South Africa are over-crowded, under-staffed, ill-designed, and structurally deteriorating. The Department of Correctional Services cannot contribute towards the rehabilitation of criminals without the necessary facilities and resources. The government is already struggling to keep spending down and provide public services, and cannot provide additional funds to the department. Also, the voting public is usually not in favour of spending more money on prisons when other less controversial areas such as schools and health care need attention. In light of increasing prison populations and the lack of funds available, governments around the world are turning to private sector involvement in providing correctional services.

Privatisation

The term 'privatisation' means a number of things. In its simplest form, privatisation refers to the once-off sale of public assets to the private sector. An example would be the sale of a government-owned business such as an airline to a private company who then operates the airline for profit just as any other normal business. Privatisation can also refer to a process of involving the private sector, both profit business entities and non-profit organisations, in the provision of government services. For example, a government department might provide housing and food for homeless people, hire a company to provide job training, and allocate funding to a charity which provides drug rehabilitation and mental health counselling. In this way, a combined involvement of government, business, and non-profit entities ensure that a public need is met.

Privatisation became a common theme for governments during the 1980s when political leaders praised the efficiency of markets over the waste of the public sector. As early as the 1940s, however, US President Woodrow Wilson commented, "...there has been very little serious effort even yet in the direction of making the government of the United States as efficient as a successful business organisation would be."¹ The rationale for privatisation is that the introduction of profit incentives and competition will bring about a better quality service at a lower cost. This reasoning is based on the economic theory that the market system maximises the efficient use of resources.

While private businesses operate in a market system, most governments spend and receive funds through planned collection and allocation. Governments decide how much revenue they will collect from their citizens, and how those funds will be allocated. The laws of supply and demand have little to do with these allocation decisions. While inefficient governments can continue to operate and self-perpetuate, an inefficient or poorly managed company will not survive in a competitive free market. The government system of central planning can magnify and entrench mistakes in spending, whereas competition will serve to isolate and minimise those mistakes. Public service institutions operate on budget incentives, where a department which does not spend its entire budget will then have its budget reduced. On the other hand, if a department spends its entire budget, then its budget is more likely to be increased. In this way, bureaucrats are rewarded for increasing the size of their programs but not the results of their efforts. They are rewarded for simply doing, not accomplishing.

The success of any business depends on its ability to anticipate and respond to shifts in public demand and to meet that demand at a price which the public is willing to pay. A company which consistently fails to respond to demand and wastes resources will not stay in business. The intention of most privatisation programmes is to introduce this same level of responsiveness and cost-efficiency into government service delivery.

Types of prison privatisation

Just as privatisation in general can mean a number of things, prison privatisation is used to refer to varying types and degrees of private sector involvement. In any type of prison privatisation, the general format is that the state pays for the costs of incarceration and the private sector provides various services. The most limited form of privatisation is contracting, where a private entity is hired to perform specific services. The prison system can use contracts with the private sector to provide ancillary services such as catering, health care, laundry and janitorial services. It is not uncommon for many government departments to hire private companies to provide these non-core functions. Private companies can also be hired to provide correctional services, such as drug rehabilitation and job training. Sometimes these services are provided by non-profit or non-government organisations (NGO's).

The next level of privatisation is contracting private entities to provide management services, such as staffing, administration, and security. Just as a bank might hire a security company to guard its assets, the prison service hires a company to staff, train, and manage the personnel who work at the prison. Operational privatisation refers to a private company being contracted to run an entire prison, including both core and non-core functions. The government still makes the policy for the prison, and is expected to monitor the performance of the contractor, but the day to day business of running the prison is left to the private company.

Private companies can also be hired to design and build a prison. Building a prison is a huge undertaking, and the government will normally contract out a great portion of the construction to private companies. Alternatively, the government can simply hire a prison construction company which will design the prison, manage the subcontractors, and completely oversee the entire project. The advantages of this type of privatisation are that private contractors have much less red tape and bureaucracy to deal with when hiring subcontractors, making procurement simpler, faster, easier, and cheaper. The state is only involved with negotiating one fee with the primary contractor, and the rest of the responsibility and co-ordination is left to the private companies involved.

In addition to the construction and design of a new prison, private companies can be involved in the financing of the project. Rather than borrow money to build a new prison, the private company which builds the prison pays for it and then rents the facility to the government. It is often helpful for cash-strapped governments to pay annual rent amounts rather than find the capital to purchase a facility. The state does not own the prison but only pays for its use.

There is no such thing as a fully privatised prison. Unlike an airline, the prison service cannot be entirely turned over to the private sector. The provision of law and order is a basic service provided by government, and cannot be entirely relinquished to the private sector. The prison is part of the justice system, which is how the government protects the rule of law. Prison privatisation does not involve turning the entire prison service over to private companies and selling all of the assets and facilities.

The fullest extent of private sector involvement in the prison system is when the state contracts out the design, construction, finance, and management (DCFM). Proponents of the DCFM prison often use the term 'contract managed prisons' because fully privatised prisons do not exist; the ultimate responsibility for prisons still rests with the state. For the purposes of this monograph, 'private prison' and 'prison privatisation' will refer a DCFM prison.

Ten issues in the privatisation debate

The arguments for and against private prisons are easily distorted by the biases of particular political or business interests. For this reason, some arguments should be discounted entirely while others should be examined in the context of the interests of those who advance them. In his book, "Private Prisons: Cons and Pros", Charles Logan determined that the debate over private prisons centred around ten primary issues:

- Propriety
- Cost
- Quality
- Quantity
- Flexibility
- Security
- Liability
- Accountability
- Corruption
- Dependence

Propriety

The arguments about the propriety of private prisons are founded on philosophical objections to or justifications for the involvement of the private sector in provision of correctional services. The philosophical objection is that only the state has the legitimate authority to punish citizens. The rule of law is considered the core function of government and is the source of its legitimacy and authority, without which the state itself ceases to exist. The counter argument is that the state is mandated to ensure that the rule of law prevails but this does not mean the state must be the sole provider of such services. As then governor of New York, Mario Cuomo explained, "It is not government's obligation to provide services but to see that they are provided."²

Logan points out, "It is one thing to believe that only the state has the right to imprison someone. It is another matter entirely to believe that only the state can run a prison in a fair, humane, effective, and economical fashion. The first belief is a matter of political philosophy. The second is an empirical proposition."³ The government decides to provide a service, and this is a policy decision. The actual production of that service is the implementation of that decision and is simply an administrative action.

Questions of the propriety of private prisons also become more specific when dealing with the issue of discipline and policy making within the prison setting. If a prisoner's sentence can be shortened or lengthened as a result of his or her behaviour during incarceration, and a prison company is paid to incarcerate individuals, then is it proper to allow an employee of the prison company to mete out disciplinary infractions or rewards? In terms of policy making, should members of the parole board be permitted to invest in private prison companies? Would this cause troublesome prisoners to be released, because they are more expensive to deal with? Conversely, would well-behaving prisoners find their parole revoked because they are easier and cheaper for the company to manage?

The propriety of private prisons also extends to the marketing practices which could be expected from such businesses. If a private prison company has a vested interest in the building of new prisons, would that company then seek to distort public perceptions about crime? In South Africa, a company which makes bars and gates for the purposes of home security sponsored a daily radio segment on the instances of crime in specific areas. Is this a gross

manipulation of public perception in order to fuel demand or an intelligent business practice?

One of the criticisms of private prisons is that companies will have a profit motive to fuel a fear of crime and will encourage reliance on prisons as a viable solution. This could then affect policy making and criminal justice legislation in such a way that the profits of the prison company are served rather than the safety and security of the general public. The danger arises when prisons manage only to produce more criminals, and the result is actually an increase in crime. If unchecked, the phenomenon could spiral as voters believe more prisons will decrease crime and the opposite effect continues. In this scenario, the only winner is the prison company which is provided with a constantly expanding market.

Cost

The proponents of prison privatisation, as with the supporters of privatisation in general, maintain that the private sector can provide the same services as the public sector at a lower cost. Privatisation in other sectors has not necessarily led to cost savings, and it remains debatable that it can actually raise costs in the long run. The charge is that contractors, anxious to break into the market, will submit extremely low estimates. Once a dependent relationship is established, the contractor will raise prices in order to make up for the initial loss.

On the other hand, the government does have the option to switch contractors. This option is only available when private contractors are involved; the state cannot opt to switch to a different agency or department. Also, when contractors are involved, some of the costs associated with paying these companies will return to the government in the form of taxes. Many of the contractor's expenses—property taxes, payroll taxes, telephone and utility fees—are actually sources of revenue for the government.

Cost comparisons between public and private facilities are extremely difficult, and not one that has been completed to date has been accepted as being accurate. This is because prisons vary in terms of size, location, and classification of prisoners and these factors all impact on cost. Without the existence of two identical prisons, cost comparisons are all but impossible. Even assuming that two prisons could be considered comparable, assessing the actual costs is extremely difficult. Construction costs are difficult to quantify accurately, because of the changing value of land, and often costs for preparing the land or financing the purchase are excluded.

The usual mechanism for government agencies is the budget, which is an inherently inaccurate medium for assessing costs. The true cost of corrections is difficult to determine, as it is not simply the budgeted amount spent each year by the department. Most government budgets for prisons do not include construction costs, depreciation, debt service, rent, taxes (paid or foregone), overhead, or indirect costs. There are also hidden costs for services provided or paid for by other departments, such as the transportation of prisoners or the involvement of central government accounting or legal services. In South Africa, the Department of Public Works builds prisons and provides some of the maintenance, but these costs are not included in the Department of Correctional Services' budget.

Government budgets are not as detailed or thorough as those of contractors who will carefully track each cost in order to obtain proper reimbursement. One of the advantages of contracting is that it forces the government to determine the costs of a service. When negotiating a contract for a government service, the true costs must be determined and quantified, and can then be analysed, compared and minimised. This process provides valuable information that

government can use to compare and evaluate operations of other prison facilities. Whether a private prison is more or less expensive than one operated by the state, the process of contracting out a prison facility provides an economic benefit to the state that cannot be obtained without the involvement of the private sector.

Quality

The quality of prison services is extremely difficult to quantify, and nearly impossible to compare between privately and publicly managed facilities. Proponents of private prisons believe that contractors will bring better technology and innovation to the provision of correctional services. Joan Mullen of Abt Associates in the United States comments that "one of the major strengths claimed for private prisons is that their greater management flexibility and more rapid speed of response will promote both minor innovations and major program changes, whether through initiation, expansion, contraction, or termination."⁴

Opponents claim that private prisons will be of lesser quality because companies motivated solely by profit will be forced to cut corners and maximise returns by minimising investment. The greatest portion of any prison service's budget is personnel costs, so it follows that this would also be the area for the most significant cost cutting. Critics argue that private prison employees are paid less, poorly trained, and overworked leading to substandard and even unsafe correctional facilities. This argument is difficult to support, because of the difficulty in comparing wages and training programmes for different prisons with different populations in different areas.

Nonetheless, there is a danger that companies will engage in cost cutting in the interest of profit and to the detriment of service delivery. Private prison companies, unlike the public sector, must respond to economic incentives in order to survive, let alone succeed. Competition in a market environment usually takes place in either cost or quality, but since the companies are not paid extra for providing better quality services it follows that they will compete by lowering costs. The question is whether this competition will lead to better value or less quality.

Quantity

The demand for prison is determined by the sentencing laws and practices of the state. In California, 'Three Strikes and You're Out' legislation requires that any person convicted of a third serious offence is incarcerated for 25 years to life. California now has one of the largest prison systems in the world, with a larger prisoner population than that of France, Great Britain, Germany, Japan, Singapore, and the Netherlands combined.⁵ The new sentencing laws brought about by Three Strikes resulted in a booming prison industry, and the union which represents public prison workers is one of the state's largest political contributors. The danger already exists that those who stand to gain from building more prisons will attempt to influence policy decisions to suit their own interests. When the private sector becomes more involved, this danger may be increased.

Opponents of prison privatisation argue that private prison companies will attempt to influence legislators to pass harsher sentencing laws in order to create business opportunities for themselves. This interference with the democratic process would distort criminal justice policy and place the interests of political power and profitability before the interests of the greater community.

The counter-argument is that this type of political manoeuvring will take place regardless of the extent of involvement of the private sector, as the unions and politicians are equally capable of

disrupting democracy in order to further their own ends. The point remains, however, that private prison companies are more likely to contribute to these distortions of policy than they are to correct them.

Flexibility

In any field, the private sector is much more likely to experiment with new practices and introduce new advances. This is because private companies are rewarded financially for successfully taking risks and innovating, but public entities are motivated only to avoid risk and remain inert. The lack of competition reinforces the status quo and a climate of extreme caution. Also, public officials are concerned with political survival, which means steering clear of bad publicity.

In the field of correctional services, contracting with the private sector provides a degree of flexibility in the provision of public services. A contract allows an agency to experiment with new programs without the long-term commitment of funds or accumulating the vested interests of tenured civil servants. The flexibility allowed by having a choice of contractors and the services they provide is in sharp contrast to the bureaucracy and politics that makes public programs difficult to change, let alone discontinue. This flexibility becomes important for public policies where decision making is centrally concentrated, otherwise bad policy decisions become magnified and entrenched.

Security

To ensure the safety of the prisoners, the personnel, and the greater community, security is a top priority in any prison system. One concern regarding the security of private prisons is that cost cutting will lead to understaffing and poor training. This lack of appropriate supervision will then result in prisoners harming each other, attempting to escape, or a general loss of management control. There is also a concern that strikes or insolvency could result in a disruption of operations. Public sector employees in many prison systems are forbidden by law from going on strike due to the nature of their work, and governments are somewhat insulated from bankruptcy.

The issue of propriety also factors in concerns about security when considering the use of deadly force by a prison employee. Traditionally, only the government is permitted to use force against its citizens, and transferring this licence to a private company is not something which should be considered lightly. The use of deadly force by an entity which operates for profit, as opposed to an organisation which ostensibly draws from the will of the people, is a significant point of discussion in the debate over private prisons.

Liability

Governments can be held liable for their actions through lawsuits, and the same is true for private companies. Proponents of private prisons claim that the prison companies, by bearing the responsibility for the operation of the prison, also bear the liability and thus free the government from expensive lawsuits. Opponents point out that the private prison companies serve only to add another defendant in law suits, and that their substandard service and questionable ethics actually increase the government's liability because of the greater risk that something will go wrong.

The role of private contractors in deflecting or attracting lawsuits cannot be easily determined,

although in at least one case both the state and the private company were listed as co-defendants for misconduct at a private prison in the United States. Private prison contracts typically include a clause which indemnifies the state against reparations for harm caused during the operation of the prison. Also, many contracts will require that private prison companies carry a certain level of liability insurance, which ensures that at the very least the government will not bear the entire cost of a lawsuit. It is also argued that private companies are motivated to perform better because their insurance premiums will increase if too many incidents or disruptions occur.

Law suits are one mechanism for holding prison systems, public or private, accountable. The impact of lawsuits on private companies may be even more effective as a monitoring agent, because of the actual threat of being litigated into bankruptcy. No government agency has gone bankrupt from court costs and legal fees. Instead, the public sector passes these costs on to the taxpayer.

Of course, the private companies are just as capable of passing these costs on to the government, which will then cover them with taxpayer's money anyway. If the creditors who loan money to private prison companies are given government guarantees on repayment, it is just as unlikely that a private contractor would find its loans called in and seek to file for bankruptcy.

Accountability

The administration of punishment is the responsibility of the state, but the implementation of this responsibility may be delegated to a private entity provided that accountability is maintained. The state does not outsource its responsibility to provide correctional services. Instead, the private company is contracted to provide correctional services, but in every case the private company is still held accountable to the state. Harding explains the theory of accountability as it pertains to private prisons:

"The key question [is] whether the contractor is effectively accountable to the state, and whether the state in turn is effectively accessible 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."⁶

Some would argue that a private prison is one more step removed from the monitoring mechanisms of the state and therefore will be able to under perform without being detected. Others point out that the controversy surrounding private prisons necessarily leads to increased public scrutiny and thus better accountability. The prison systems in many countries operate in an environment of secrecy, and many governments have passed legislation which restricts media access to prisoners. The involvement of the private sector may reveal the well-disguised realities of prison life and lead to better accountability for both public and private prisons. The secrecy which surrounds prison services in general goes against the principle of accountability. No structure of accountability measurements or controls can achieve its purpose if the relevant activities are hidden from view.⁷

Effective accountability is always difficult in institutions such as prisons, because of the secrecy and the environment of absolute control. The actions inside the prison, as well as the interactions between the state and the contractor, must be open and transparent in order to achieve any degree of accountability. Harding explains 10 key tenets of accountability, which the state requires of private prison companies and which the public must require of the state:

- There must be a distinction between allocation and administration of punishment. The private sector must be confined to administration.
- Penal policy decisions must not be driven by those who will profit from them. (This requirement transcends the private prison debate, and should take into account the political ‘profits’ which have become part of the prison-industrial complex. This phenomenon will be covered in more detail in Chapter four.)
- The activities of both the public and private sector must be open and publicly accessible. (The right to access such information is included in legislation such as the Freedom of Information Act in the United States, or the Promotion of Access to Information Act in South Africa.)
- The expectations of the private sector must be clearly specified. These expectations are usually included as performance requirements in the contract.
- The public sector should not be allowed to fall into complete disrepair, resulting in a dual system: a vibrant private sector and a run-down public prison system. This could lead to a level of dependence on the private sector that would compromise the amount of control which can be exercised by the government.
- Independent research and evaluation with unrestricted publication rights should be included in the private contracts. Private companies should not be permitted to hide behind claims of ‘commercial confidentiality’ to refuse access to research.
- Custodial regimes, programs, and staff must be ‘culturally appropriate’.
- The state should maintain control over probity of private contracts.
- Financial accountability must not be ignored. The whole contract, including financial details, must be made public.
- The state must be able to reclaim prisons. Contracts should be terminable, both in fact and in writing. Accountability will not mean anything if the decision to contract out services becomes irrevocable in any respect.⁸

Corruption

Closely related to challenges of accountability is the relative propensity for corruption to be found in public versus private institutions. The involvement of additional financial transactions can expose the government to additional risks of fraud.

The awarding of government contracts in general carries with it the risk of kickbacks and political favours. On the one hand, the private prison companies have vested financial interest in covering up misconduct and would therefore be more prone to bribery and other dishonest practices. One could also argue, however, that because more is at stake for private prison companies—the loss of their contract, a decline in stock prices from bad publicity—that they will be less likely to engage in corrupt business practices.

In any institution, public or private, the likelihood for corruption has more to do with the

management environment and the controls in place to prevent such activity than it does with the public or private nature of the enterprise. The greatest control risk is in the actual process of awarding the contract and the financial agreements contained therein. This is the case whenever the government contracts with a private company, and is yet another reason why the procurement process should be as transparent as possible, and the contracts themselves should be made available to the public.

The debate over prison privatisation has been fuelled by antagonism between public employee unions and private corporations. Each side has its own self-interest to protect when it comes to prison privatisation, and this bias is clearly evident in literature on the topic. In the state of Florida the Florida Police Benevolent Association (FPBA), which represents about half of Florida's 18,000 correctional officers, have consistently campaigned against prison privatisation. In 1997, the FPBA filed an ethics complaint against Dr. Charles Thomas, a professor at the University of Florida and a leading expert on prison privatisation. In addition to being the director of the University of Florida's Private Prisons Project, Thomas worked as a consultant for the state's Correctional Privatisation Commission (CPC), the government body which contracts with private prison companies.

Since 1990, private prison companies have donated hundreds of thousands of dollars to the University of Florida Research Foundation. Although an exact amount has not been agreed upon, some estimates are as much as \$400,000 between 1990 and 1996. Thomas' salary was paid by the university, but his expenses and summer salary were covered by corporate gifts and donations. He also owned stock in several of the private prison companies. However, Thomas has never kept his stock ownership a secret, and has explained that he did not participate in the evaluation of proposals submitted to government agencies.

In 1997, the Corrections Corporation of America announced that Thomas would be paid to serve on the board on the company's newly formed Prison Realty Trust. In 1998, he received \$3 million in consulting fees from Prison Realty Trust for his work on the company's merger with parent company CCA. The FPBA argued that Thomas' financial interest in private prison companies compromised his independence and that his consulting with the CPC should be discontinued.

Thomas initially dismissed these charges as politically motivated, but eventually admitted to three violations of the state's ethics laws. He was forced to resign his university post and pay a \$20,000 fine. The commission's report concluded that Thomas' relationship with Prison Realty Trust created a conflict of interest in which he could have altered the findings of his research in order to increase his financial benefits. The Attorney General specifically pointed out that "there is no evidence that [Dr. Thomas] has ever actually disregarded his public duties for a private benefit. However, violations are based upon the fact that a conflict exists, not whether or not [Dr. Thomas] succumbed to the temptation."⁹

Thomas is considered an authority in the prison privatisation debate, and has published numerous articles and books on the topic. Should his academic research be dismissed as biased and unreliable because of the interests served by his funding sources? Or was the FPBA only working to suppress information which is detrimental to their own anti-privatisation campaign? Both CCA and Wackenhut have spent thousands of dollars each year on 'independent research'. Any company that wishes to survive must invest in research and development within their industry. Public sector employee unions in Canada and the US have also paid for research reports,

predictably from avowed 'anti-privatisation researchers'. The prison privatisation debate is shaped to a large extent by the available resources of the interests involved, and it remains critical to bear in mind the interests served by each argument.

Dependence

In countries which have turned to prison privatisation, the decision to contract out prison services was made at least in part because the public sector has been unable to meet or satisfy demand. This is usually because there is a greater demand for prisons than the government is able to supply. The danger with contracting out prisons to the private sector is that if the companies are extremely successful and do a much better job of meeting this demand, the public sector will become entirely dependent on the private sector.

Many prison systems around the world are struggling to provide the appropriate level of service to the prison population they currently serve. With these populations increasing each year, the public prison service is turning to the private sector for help. But if the public prison sector does not also elevate its standards to somehow compete with the private sector, then the private companies will gain a disproportionate amount of leverage in the negotiating process. Private prison companies, as a result of their superior service delivery, will then obtain de facto control of the entire prison system.

Additional issues in the privatisation debate

Logan explores ten issues around which the prison privatisation debate is centred. However there are two additional issues which overlap with several of those mentioned above but are important enough that they deserve separate emphasis. These are the issues of financing and monitoring, which in some ways are part of accountability but still merit additional discussion.

Financing

The manner in which private prisons are financed has a great deal of impact on the public interest. If the state wishes to build a prison, it must first find the capital. One option is to take out a loan, but there are usually legislative restrictions on the amount of debt the government is permitted to carry and constructing a prison is expensive and would require a sizeable loan. Often, the state must receive legislative approval before taking out a large loan even if the state's finances are sufficiently balanced to support the additional debt. Legislators answer to their constituents, and the public is usually not in favour of the government spending more money or getting into debt in order to build a prison. The state could alternatively issue bonds to raise money, but a bond issue is even more reliant on public approval. Usually, the decision to issue bonds is decided upon in a special referendum election. More often than not, the public will vote against issuing bonds to pay for a new prison.

Contracting out to the private sector is one way to get around the legislative requirements which restrict the government's ability to raise capital. The private company can secure financing from the banks and then charge the government an annual fee for the provision of correctional services. The government does not need referendums or legislative approval to pay operational expenses. The private company also wins, in that it usually receives a contract for anywhere from 5-15 years of guaranteed income. Also, the private company can usually get reduced rates from the bank when the government issues a 'certificate of participation' on the company's

behalf. With the government guaranteeing the cash flow of the company, the bank will usually provide the loan at a reduced interest rate.

The certificate of participation is part of what makes prison contracts so attractive to the private sector. The company gets reduced rate financing, thus decreasing their cost of capital and increasing their rate of return. These are the ratios that stockholders like, and successful managers are those that keep their stockholders happy. The government is content because it has avoided additional debt and cut back on long, drawn-out approval processes. The negative side to the use of a certificate of participation is that the government becomes financially linked to the management of the prison. If the prison company should fail or the contract be terminated, what would become of the loan? It would more than likely become due, and if the company could not pay, then there is the possibility that the bank could require the funds from the government. Paying off the loan from a bankrupt private prison company is not likely to be approved by voters.

The question of the public interest also comes into play when examining the finance arrangements for private prison companies. If voters have turned down the bond issue or their representatives have passed legislation restricting debt, then turning to private financing is in effect spending taxpayer money without their approval. In fact, if the voters have explicitly voted against spending on a new prison and a private prison contract is substituted instead, then the government is directly contravening the will of the people. Private sector financing of prison construction could save money and time but it can also be used to circumvent the checks and balances which are intended to ensure that the government remains accountable to the will of the people. In this way, the use of private finance mechanisms becomes un- or even anti-democratic.

The most common means of financing private prisons is through the establishment of a consortium. The consortium is a group of companies which each own a percentage of a trustee company formed expressly for the purpose of a private prison contract. The companies that usually form a consortium are those which represent the design, construction, finance and management of the prison: architecture firms, construction/contractor groups, banks, and private prison companies. The trustee company will own the facility and lease it back to the state, usually over a term of 20 or 25 years. The title for the facility will not transfer to the state until all of the capital and lease payments are made to the trustee company, which then disburses earnings to the various members of the consortium.

The trustee company obtains the certificate of participation and is able to access the benefits afforded to governments in securing finance. This includes not only a lower borrowing rate, but it also means that the interest income to the bank which provides the financing is exempt from taxation. In many constituencies, interest received on a loan offered to the state is not taxed by the state. In this way, the banks win because they receive tax-free income. The construction companies and architecture firms gain a multimillion rand government contract. And the private prison companies get reduced rate capital and guaranteed cash flow.

Everyone involved in private prison contracts seem to win, except the public interest. These transactions are kept notoriously secret, and it is almost impossible to legally find out exactly how much is being paid to whom for what purpose and whether, in the long run, there is any cost savings to the taxpayer at all. That is not to say that such consortium arrangements will necessarily act against the public interest, but the avoidance of any restraints and a lack of transparency in the entire process certainly does not provide any guarantees that the parties involved will prioritise the protection of the public interest.

The intertwining of management issues with the financing deal affects accountability and flexibility between the state and the consortium. The long term lease for the actual prison facility is a separate transaction from the management contract for that prison, and is usually for a much longer period of time. In spite of any monitoring or evaluation standard which may be included in the management contract, the existence of a long-term lease as part of the financing arrangements will compromise the ability of the state to terminate the contract. The accountability mechanism which requires the private prison company to re-bid and compete for the management contract is relegated to an automatic option to renew. As Harding points out, "Deferred ownership of real estate and physical plant and long term financial commitments by way of certificates of participation together constitute real if not insuperable barriers to state policy reversal in this area."¹⁰

Monitoring

Accountability and the protection of the public interest are both contained in the challenge of appropriate monitoring mechanisms. If prison systems can be effectively monitored then many of the more contentious issues surrounding prison privatisation will fall away.

The key question for monitoring is to define the successful operation of a prison and to devise standards for measuring that success. One might expect a successful prison to be one which achieves the rehabilitation of offenders and the reduction of recidivism. However these are goals which are difficult to quantify and benchmark. Instead of successful rehabilitation, private prison contracts tend to list performance objectives which minimise harm or wrongdoing in the prison. As one author observed:

"The era of the development of private prisons has coincided with the decline of the 'rehabilitation ideal' within prisons. In such a penal climate, private firms can hardly be expected to achieve overall rehabilitation objectives that have been largely discarded by the public sector."¹¹

It is much easier to quantify and measure the number of incidents of assault and the amount of contraband which has been confiscated. It is much more difficult to measure the likelihood that a prisoner will become a productive member of society upon his or her release. Because the performance standards applied to private prison companies are included in the contract, they are also subject to the same negotiating process as other aspects such as fee structures and termination clauses. This leads the performance standards to represent more of a deal or compromise between the two parties than a representation of the public interest.

The private prison companies are usually financially penalised for failing to meet the performance objectives in their contracts. Thus, there is an added incentive to make sure the prison is run as smoothly as possible with minimal interruption or risk. Programs such as job training and education, in some respects, could make the management task more complicated and difficult as prisoners must be supervised and transported to different locations.

Sometimes the private prison contract will attempt to encourage rehabilitation by requiring that a certain number of hours of job training or other programs are available. However, the companies are neither measured nor rewarded for the success of the rehabilitation programs. In this way, the private prison companies are motivated to concentrate on security and detention and simply go through the motions with regards to the actual rehabilitation of the inmates. As a result, the evaluation criteria used in private prison contracts are serving to accelerate the trend

towards the warehousing of criminals.

While valid and reliable standards for measuring prison performance have not been developed for either public or private facilities, the advent of prison privatisation has resulted in increasing discussion about the need for such standards. Perhaps one contribution of private prison contractors will be that they have served as a catalyst for further research in the area of public sector performance measurement.

Assuming that appropriate standards could be developed to measure prison performance, the enforcement of those standards also poses unique challenges. Most private prison contracts include the implementation of a monitoring mechanism, usually in the form of a representative of the state who is responsible for ensuring compliance with performance standards. A common problem in any regulatory situation is the incidence of 'capture', in which the regulator becomes more concerned with serving the interests of the industry than the more abstract public interest.

Capture occurs when the person responsible for monitoring the actions of an organisation becomes co-opted into sympathising with the organisation and thus relinquishes his or her authority as an overseer. An example is an inspector of gas pipelines who notices a small repair which must be done according to the guidelines of the regulating authority which he or she represents. However, performing this repair would require the pipeline to be shut down and the inspector, having worked with the company on routine inspections in the past, knows that shutting down the pipeline for even a half day results in significant loss of revenue to the company. The inspector most likely has a background in oil pipeline management and sympathises with the business. This understanding combined with the constant contact he or she has with the employees of the company results in a greater degree of sympathy for the interests of the company than the safety requirements of a distant and faceless regulatory agency.

There are several factors which can predispose a regulator to capture. Often the person appointed to regulate an industry will have a professional background in that industry. The regulatory agency may be dealing with personnel shortages and a lack of resources, as is characteristic of the operations of many government departments. For the already overworked regulator, citing a company for a violation will result in additional work as the necessary paperwork and follow-up must be completed. On the other hand, if a regulator has only a few locations or companies which he or she monitors on frequent visits, it is more likely that a less formal and more familiar relationship will develop. Rather than write up a report and citation for a violation, the regulator may simply verbally inform the management of the problem and ask that it be fixed at some point. This leads to sloppiness and weakened authority, which erodes the state's power and ability to protect the public.

In the case of private prisons, the additional challenge for monitors is that they represent the prison system, which is not a regulatory body but an agency which is performing the same function as the private company. A failure by the contractor becomes a reflection of the entire department, and so it is in the interest of both regulator and contractor to ensure that mistakes and incidents are not reported. Also, the work of a regulating agency is very different from one which operates in that industry and so the prison service often finds that its personnel are neither trained nor experienced in the importance of independence for those appointed as monitors. In many cases, both the monitor and the prison company ultimately report to the same management hierarchy within the government agency responsible for prison administration. This arrangement is much more likely to lead to collusion and informal or inconsistent application of standards than if the prison were monitored by an external agent.

External regulation and accountability which is not contract based but is rather the result of a separate statute and enforced by an independent regulatory body is more likely to be effective at monitoring prison performance. Such an entity should be charged with regulating both public and private prisons and hold to the same standards for both.

For prison privatisation

The proponents of prison privatisation make several strong arguments. Logan, a prominent supporter of prison privatisation, points out that contracting does not deny the government's responsibility to provide prison services. Rather, contracting out prison services simply rejects the government's monopoly over the provision of those services. Logan explains that, "Imprisonment has all of the characteristics of a monopoly; quality is low, prices are high, and supply has not kept up with demand."¹² If the state builds a prison and there are not enough prisoners to fill it, then that mistake and all its costs will be passed on to taxpayers. If competition is introduced, then both government and contractor will be forced to predict and meet demand better in order to stay in operation.

Logan summarises his argument for prison privatisation by making ten points:

1. As a result of contracting out prison services, the true costs become highly visible, and can be analysed, compared, and minimised. This provides competitive price and product information.
2. Private companies can construct prisons more quickly and cheaply. Whereas the government takes two to five years, a private company can do it in six months to one year. Also, the private company is more apt to design for efficient operation.
3. Private contractors have greater speed and freedom in matters from personnel to purchasing. This flexibility promotes innovation and experimentation, because it allows for risk-taking. It becomes easier to undo mistakes, and creates an environment which is ideal for change.
4. Involving the private sector adds expertise, skills, and experience of a multinational company's 'head office', which will exceed that of smaller jurisdictions.
5. Contracting out reduces a tendency towards bureaucratic self perpetuation and helps limit the size of government. It's easier to control business interests in encouraging greater spending than government's 'insatiable craving for internal expansion'.
6. Private prison contracts increase accountability because market mechanisms of control are added to the political process.
7. Private prisons are highly visible, while state prisons are ignored by the public. Greater public suspicion towards 'Big Business' translates into increased vigilance over those who run prisons.
8. Private prison contracts promote the development and use of objective performance measures. The government spends taxpayer money without incentive to measure quality of performance, but contracts usually specify performance indicators and to the same extent broader goals as well.

9. By creating an alternative, private prison contracts encourage competitive evaluation, thus raising standards for government as well as for private contractors.
10. Private prison contracts provide a surgical solution. If reform is needed, public management is entrenched and inert, whereas a contractor is easier to replace than a government agency.¹³

Against prison privatisation

One of the arguments against prison privatisation is that privatisation in general is "a concept already partially discredited in the western world because of its association with inflated profiteering and the abandonment of the public interest."¹⁴ Even the proponents of prison privatisation acknowledge that "...private operation of prisons and jails can be seen as an extreme test of limits of privatisation, because the administration of criminal justice, and especially of punishment, is widely regarded as a core function of government and the exclusive prerogative of the state. The lament of the opponents of prison privatisation thus becomes, "If the penal function can be privately performed, what function cannot be?"¹⁵

The claims for cost savings are difficult to support and all but impossible to prove. Other arguments that the private sector brings increased flexibility, innovation, and technology are weakened by the reality that companies are not rewarded for performing beyond the specifications of their contracts. The performance standards in the private prison contracts serve more to limit the efforts of the private prison companies than to ensure minimum performance. The company is penalised for failing to meet them, but is not rewarded for exceeding them.

In addition, these contracts often stretch for up to 25 years. Even though the management portion may expire in less time, the lease-purchase arrangements tie the government and contractor together in such a way that it becomes both difficult and expensive to terminate. It does not seem plausible that flexibility and innovation will be found in the management style of a company with 25 years of specifically determined and guaranteed income.

Some of the arguments against private prisons are not specific to private prisons but are actually criticisms of prisons in general. The problems encountered by private prisons are similar to those faced by public prisons. Overcrowding, prisoner suicide, smuggling of contraband, drug use, violence, and poor health are in no way unique to private prisons. Providing correctional services is a difficult, and sometimes dangerous, business regardless of whether those services are provided by public or private entities.

Particularly in the United States, the criminal justice system is increasingly relying on incarceration and building more prisons. People who are opposed to the policy of mass incarceration fear that cheaper and more efficient prisons will only increase the use of prisons in criminal justice, when other community based correctional programs are more effective. These people are not opposed to private involvement in community based programs, however, and so their opposition to private prisons is actually misguided. The criticisms they raise have more to do with prisons in general than with private prisons.

Private sector involvement in the prison industry may lead to increasing use of imprisonment, but excluding the private sector is not likely to reverse this trend. Vested interests can be found in any kind of organisation, public or private. The public interest is not necessarily allied with the

interests of government agencies, just as it is not necessarily served by profit-seeking corporations. Just as corporations seek market opportunities, politicians look for union support, and bureaucrats work to increase their budgets. These activities are not intrinsically evil but simple facts of incentives which motivate behaviour. As Logan explains:

"All prisons, both public and private, face challenges in the areas of authority, legitimacy, procedural justice, accountability, liability, cost, security, safety, corruptibility and so on. They face these challenges because of the nature of their mission, not because of their incorporation as public or private entities."¹⁶

CHAPTER 4 **INTERNATIONAL EXPERIENCES**

Private involvement in the prison system is not a recent development. During the 18th century, most jails were operated by private individuals who managed the sale of prison labour and debited each inmate for the costs of his incarceration. Modern prison privatisation is very different from these earlier forms of contracting out prison services, but it has developed differently in the three countries which have pioneered the use of the private sector in their prison systems. The United States, the United Kingdom, and Australia have implemented prison privatisation programmes in different manners with varying degrees of success.

United States

In the US in the 1800s prison was a combination of labour and punishment. Inmates earned their keep through trades such as shoemaking, weaving, tailoring, and chopping wood. Entrepreneurs owned and operated prisons where labour was sold and prisoners charged for their subsistence costs. The practice of solitary confinement was eventually discarded as the production needs of the age brought about the assembly line. In California, the Prison Act of 1851 outlined a system in which private contractors would clothe, feed, and detain prisoners in exchange for their labour. Prisons in many states were self-sufficient private enterprises, and some even became profitable.

The Civil War hurt the prison-labour industry and most men were away fighting and there was no market for the goods manufactured by prisoners. During the Reconstruction era in the South, Jim Crow laws allowed the police to arrest able bodied men for 'vagrancy', or the crime of being unemployed. Land-owners would then pay the fine or bail involved and the prisoner would be 'freed' but required to work off his debt. In 1871 the Virginia Supreme Court ruled that the use of prison labour was essentially equivalent to slave labour, and declared the practice illegal. In New Jersey in 1877, unions recognized the threat which cheap prison labour posed to the prospects of 'free' labour and rallied to outlaw prison labour. In 1887, Congress restricted the interstate movement of prison-made goods and effectively put an end to the use of prison labour.

During the 1900s, the involvement of non-profit agencies increased and eventually the rehabilitation ideal became the standard mode of operation for prisons. By the 1970s, however, the declaration that 'nothing works' started the movement away from rehabilitation programmes as wasteful and ineffective. The development of contracting with private prison companies coincided with the rise to power of the conservative Republican Party in the 1980s. The emphasis in the Reagan era was on smaller government and less spending, which was translated into less federal involvement and increased use of the private sector to provide public

services. The call was for the government to function as an agency of oversight rather than provider of services in order to harness the efficiency of the private sector.

Privatisation in general gained popularity during the 1980s, when the prevailing mood was that, "Society has come to depend upon private industry to advance this country's economic position by relying on competition to induce innovation, research, technological changes, and managerial and entrepreneurial advances."¹

The criminal justice system turned to the private sector at first by contracting for programs and services, and then later for the provision of cell space and general prison management services. In particular, the growing public disdain for government spending resulted in considerable restrictions on the ability of state governments to raise capital. Some believe that it was the ability to obtain capital funds that contributed most to the emergence of the 'design, construction, finance and management' (DCFM) contract.

Ohio wished to build its own prisons, but was struggling to raise the necessary funds because of statutory limits on the extent of the bond indebtedness permitted. The state government did not seek a fully privatised prison but turned to private financing mechanisms to build public-operated prisons. Through lease purchase financing, the state was able to circumvent voter-approved spending limits. A similar mechanism was used in New York, where a \$7 billion bond referendum to build prisons failed and the governor turned to private financing arrangements to see that the desired prison facilities were built. These instances illustrate the point made by Harding when he notes that:

"A primary factor during the initial development of privatisation had been the political reluctance or the constitutional or statutory inability of state government to raise capital to build new prisons at a rate sufficient to keep pace with the exponentially increasing inmate populations held in state or federal prisons and local or county jails."²

The need for additional prisons to accommodate burgeoning prison populations has been central to the development of private prisons. In the United States the number of citizens behind bars has increased eightfold in the last 30 years.³ Today, the United States has more than 2 million prisoners and has just surpassed Russia as the most highly incarcerated country in the world. According to *The Economist*, "The scale of imprisonment in America is now unmatched in any democracy, and is greater than even most totalitarian governments have ever attempted."⁴ Mauer, writing for *The Sentencing Project* in Washington, DC, observes, "No other society in human history has ever imprisoned so many of its own citizens for the purpose of crime control."⁵

The increase in the prison population is not, however, directly related to crime levels. There are myriad factors which impact on the amount of crime which occurs in a society, in addition to many variables in the criminal justice system as to how many of those crimes result in a sentence of incarceration. The boom in the US prison population has continued steadily since the mid-1970s, yet crime levels have consistently dropped for the past ten years. Arrests for violent crimes, such as murder, rape and robbery, declined sharply from 1990 to 1996, yet the prison population still doubled by the end of 1999.⁶ Prison populations have not swelled because of increasing crime or because more criminals are being caught, but because of longer and harsher sentences and a reduced use of probation and other prison alternatives.⁷ Most of these stricter sentencing laws have been directed at non-violent offenders, particularly those convicted of drug-related offences.

The combination of sentencing trends, increasing prison populations, and generally flawed criminal justice policies has been attributed to a collection of political and economic interests referred to as the prison industrial complex. In psychology, the term complex refers to an overreaction to a perceived threat. The prison industrial complex describes the misguided and ineffective reaction of using imprisonment in response to crime. The plain truth is that American voters are easily misled to believe that prisons are the answer to crime, and politicians at both ends of the spectrum have used, or even falsely generated, a fear of crime to gain votes.⁸

The motivation for the perpetuation and propagation of the prison industrial complex is both political and economic. A political candidate can win an entire election simply by providing evidence that portrays an opponent as 'soft on crime'. Few politicians will risk speaking out on the behalf of drug addicts and criminals, preferring a Clint Eastwood image to the challenge of explaining basic tenets of penology to the voting public. Equally important to politicians is the provision of jobs and economic growth, and the provision of correctional services is an attractive growth industry. Prisons are labor intensive, and are often located in rural areas where they provide jobs in otherwise depressed economies.

Building a prison is expensive, and private contractors are not unaware of the US\$35 billion spent each year on prison construction.⁹ Prisons are big business, and at least two private prison companies are listed on the stock exchange in the United States. It is not hard to imagine that the convergence of interests which benefit from increased spending on imprisonment can be powerful enough to have an immeasurable, if not overt, impact on criminal justice policy.

Just as powerful business and political interests are in favor of prison privatisation, there are equally powerful groups who are opposed to it, most notably the labour unions. Unions were a major force behind legislation in Pennsylvania which imposed a one year moratorium on new privatisation of prisons or jails. The American Federal, State, County, and Municipal Employees union (AFSCME) got involved and provided support to two candidates for county commission who ran on a 'take back the jail' platform. The result was a non-renewal of a jail management contract in the state.

Public employee unions and organisations have consistently supported the campaigns of those who promise to halt prison privatisation, and often accuse the private companies involved of greedily promoting their own self-interest. However it should be noted that public employee unions are also promoting their self-interest in opposing prison privatisation in that increasing privatisation results in a loss of membership dues and bargaining power. There have even been charges that correctional employee organizations in several states have blocked any attempt at penal reform, including the use of prison alternatives or community based corrections. Clearly the interests of those employed by the public prison sector are just as much aligned with the increasing use of prison sentences in criminal justice policy—an accusation often aimed at private prison companies. The unions have charged that private prison companies seek out profit by cost cutting and exploitation of labour, including lower wages, lower pensions, and less employee benefits.

Unions are not the only powerful organisations which are opposed to prison privatisation. The American Bar Association (ABA) is also against prison privatisation. In February 1986, the House of Delegates of the ABA passed a resolution recommending that "jurisdictions that are considering the privatisation of prisons and jails not proceed... until the complex constitutional, statutory and contractual issues are satisfactorily developed and resolved."¹⁰

The American Civil Liberties Union (ACLU) has gained a reputation for championing the rights of individuals against encroachment by the state. The concern of the ACLU is that prisoners' due process rights are more likely to be jeopardized in privately-run prisons than in public-sector prisons. A substantial part of the ACLU's position against private prisons, however, is based on its position against prisons in general. The ACLU has long charged that there is too much incarceration and the fear is that privatisation will only lead to more.

The United States remains at the forefront of prison privatisation. As of 2000, at least 223,000 adult inmates are in private prisons: more than 10% of the prison population. The number of prisoners in private prisons is increasing at four times the rate of the increase in inmates in public sector prisons.¹¹ The two largest private prison companies in the world are based in the US: Corrections Corporation of America (CCA) and Wackenhut Corrections Corporation (WCC). CCA is the largest provider of prison services in the world, and currently holds 42,000 prisoners in 52 prisons.

One of the first advantages cited in favour of prison privatisation is cost savings. However, the General Accounting Office (GAO) examined five studies which compared cost savings at public and private prisons in the United States. The GAO report, "could not draw any conclusions about cost savings or quality of service, since the four studies that assessed operations costs indicated little difference or mixed results, and the two studies that addressed quality of life reported either equivocal findings or no differences between private and public facilities."¹²

A faster and more decisive response to mistreatment and maladministration in private than in public prisons?

In March 2000, The US Justice Department filed a lawsuit against both the State of Louisiana and Wackenhut Corrections Corporation after reports of excessive force and appalling conditions in the Jena Juvenile Justice Centre. After negotiations and a court injunction were unsuccessful, the US District Judge ordered that the state assume control of the facility. When the contract was officially terminated on 30 June 2000, the facility remained the property of Wackenhut and the state relocated the juveniles to other state-owned facilities. Understandably, State Corrections Secretary Richard Stalder commented that contracting with Wackenhut, "was an experiment that I will not characterise as a success".

This incident could be construed as evidence of the poor quality of private prisons. However, this is not simply about a private prison which failed so dismally that it had to be seized by the state. When newspapers covered the story, they invariably failed to mention that the lawsuit filed in March 2000 was not a new case. In 1998, the Justice Department filed a lawsuit against four state juvenile facilities in Louisiana for failure to provide adequate care. When the Jena facility opened shortly afterwards, it was immediately subjected to close scrutiny from the Justice Department. As a result of a monitoring visit in January 2000, the Justice Department submitted a report which found that conditions at Jena were equally appalling and recommended that the original 1998 complaint be amended to include the Jena facility as well.

Within three months of the amendment to the suit, the management of Jena was terminated and the state assumed control. Nearly three years after the original suit was filed against the public facilities, very little has changed. Thus, the Jena incident should read as an example of the viability of private prison contracts rather than an indictment of them. The Jena facility could

be reverted back to the state, but such an option does not exist for the state-run facilities. The juvenile justice system in Louisiana is in need of reform. However, this problem would exist regardless of its decision to contract out a private prison with the Wackenhut Corrections Corporation.

While it is difficult to determine the cost savings, if any, to be had from contracting out prison services, it is almost impossible to make comparisons of the quality of those services. In Louisiana, a juvenile facility run by WCC was seized by the state at the order of a Federal judge because of the mistreatment of the inmates. However, each of the publicly run facilities were also under Federal review as juvenile justice in the state of Louisiana in general was known to be in a deplorable condition. Only the private facility could be sued and turned over to the state because the other facilities were already run by the state. This could be used as proof that private facilities offer sub-standard services but it also proves that the government has more recourse to correct the situation with a private contractor than with a public agency.

Incidents of mistreatment and maladministration can be found in both public and private prisons and as yet there is no reliable evidence that private prisons are any better or worse than their public counterparts. The interests of the inmates are equally failed by private as well as public prisons in the United States where recidivism rates have remained shameful since long before the private contracting experiment began. The growth of the prison-industrial complex is the greatest threat to the public interest in terms of US criminal justice policy but this again is not the product of the private sector involvement in the field of correctional services.

Australia

Although the United States has the highest number of prisoners in private prisons, Australia has the highest proportion of its inmates in private prisons with 28% in contract-managed facilities. The development of private prisons in Australia was similar to that of the United States in that the prison population was increasing while the public sector willingness or ability to pay for prison expansion was decreasing.

The first private prisons in Australia were operated by American-based companies which formed consortia with Australian companies. In 1990, Queensland embarked on the first private prison in the country. The contract was with a consortium that included CCA, which would provide management, administration, instructors and health care staff. Stan Macionis, Deputy Director General of the Queensland Corrective Services Commission (QCSC), gave four reasons for the introduction of private management in Queensland's prison service:

- The benefits of competition and the stimulus for improved performance by the public sector.
- Perceived cost savings and improved efficiency.
- The need for cultural and attitudinal change in the management and operation of prisons, including a greater emphasis on rehabilitation and offender programmes.
- The need for comparative information with which to make future decisions.¹³

Queensland had been operating the cheapest prison service in Australia but wished to involve the private sector in order to undermine the power of the Prison Officers Union, which had been

blocking attempts to change working practices. Harding observes that, "The various unions representing uniformed staff had, in all states, progressively throttled management control over budgets through restrictive employment conditions and work practices."¹⁴ The prison service was struggling to cope with inflated rosters, abuse of sick leave, and unnecessary use of overtime. In an attempt to reduce wage bills, the state turned to privatisation. In other territories, senior management began to explore privatisation options but then backed away when the unions conceded staffing and employment conditions which saved money and also had an impact on the programmes which could then be offered.¹⁵

The first private prison in Queensland, Borallon, became a pilot project and it was obvious that the government wished to see the project succeed. Although Borallon was designed and designated as a medium/maximum security facility the QCSC sent inmates who were classified as medium/minimum security. In fact, the operators were permitted to refuse to accept certain classifications of prisoners which might be higher risk or more difficult or expensive to incarcerate. The contract allowed the management to refuse to accept HIV positive, special protection, or suicidal prisoners.

In order to ensure proper competition, the QCSC has become responsible only for the regulation, policy-making, and purchasing of correctional services. The public prisons in Queensland are now operated by a separate government corporation, which now competes with the private companies for management contracts of correctional facilities. Since the involvement of private contractors, Queensland has achieved a substantial reduction in its incarceration rate. This has been cited as proof that discredits the prediction of private companies further building the prison-industrial complex. It should be noted, however, that the Queensland privatisation model does not involve private financing. The government financed the building of the prisons and contracted out the management services only.

The state with the highest percentage of inmates in private facilities in Australia is Victoria. Victoria has 13 prisons with a total capacity of 2,875, although the prison population currently stands at more than 3,000. The Department of Justice is responsible for correctional services, but the actual public provider is set up as a separate government corporation – the Public Correctional Enterprise (CORE). CORE manages ten prisons which house 55% of the prisoner population; the other three prisons are run by private consortia and contain the remaining 45% of the prisoner population.

The Port Phillip prison in Melbourne, contracted to Group 4 Services (a UK company), experienced a number of problems, which led the government to threaten with termination of the contract. In the first ten months that the facility was open, there were four suicides, ten attempted suicides, at least 40 self-mutilations, and two riots. The prison was locked down after one incident where two prison officers were attacked and beaten by prisoners. After a letter of warning was sent by the government, the company responded with a 'cure plan' and promises to address the problems. A few months later the prison was locked down again as a result of fights amongst prisoners and the incidents of assaults seemed to be increasing. From the time that it was opened in September 1997, several riots, assaults, deaths, and suicides characterised the poor performance of the prison.

The Port Phillip Prison attracted the attention of the Brunswick Community Legal Service who filed a suit to gain access to the three private prison contracts under the Australian Freedom of Information Act. After several years, the case was won, and the contracts were eventually made available on the government website. In addition, a management audit of the private prisons in Victoria was published in October 2000, referred to as the Kirby report after the investigation's

chairperson, Mr. Peter Kirby. One of the most important points to note from examining the contracts and the audit report is the hidden inflexibility of the arrangements. The state owns the land, but the buildings are leased for as long as 40 years. The legal and financial complexities involved with terminating a contract in this form make it extremely inflexible. The independent auditor's report concluded, "In the case of private prisons, the contractual model can actually impede resolution because the operator and the Government can become locked in contractual enforcement mechanisms, rather than the Government simply directing that the problem be resolved."¹⁶

The management audit found that the contracts actually negated many of the purported benefits of prison privatisation. In addition to the lack of flexibility which defines any contract, the Kirby report found that the government was restricted in its ability to respond to poor performance by the contractors because, "the contracts effectively require the Government to tolerate significant shortfalls in performance."¹⁷ The report goes on to note, "It is difficult if not impractical to enforce adherence to qualitative outcomes in a contractual agreement. This is a major problem inherent in using contracts as the preferred method of service delivery."¹⁸

United Kingdom

In the United Kingdom, the juvenile justice system has a long tradition of involvement with the private sector. Reform schools were inspired and created by the private sector in the mid-1800s, and the role of the voluntary sector has remained. In the UK, much like the US, it was the pragmatic appeal of private sector contracting which gained popularity. In the mid-1980s, the Thatcher era saw an almost pathological aversion to public sector spending and programmes. This was accompanied by a belief that the market system brought better efficiency in any field. Attracted by the ideology and faced with overcrowding, the UK followed Australia into the privatisation field with the opening of The Wolds prison in Yorkshire. Management of the 320-bed medium security remand prison was contracted to Group 4 Services.

Wolds was designed by Her Majesty's Prison Service (HMPS) with the original intention that it would be managed by the prison service. It was contracted to Group 4 in the hope that the private sector could improve prison conditions, as the prison service had seen its share of bad publicity in recent years. The tender documents for the contract reflect this optimistic faith in the superior service delivery capabilities of the private sector:

"The contracting out of the remand prison offers a unique opportunity to establish this fresh look and approach to the way in which prisoners on remand are treated."¹⁹

The performance standards for Wolds were much higher than those expected of the public sector, including a provision that prisoners have 15 hours out of cell time. As a result, the staff at Wolds were presented with both an opportunity and a challenge in that they were asked to provide a level of service which had never been offered in the prison service before.

When Wolds opened on April 6, 1992, it was thought of as the "penal experiment of the century."²⁰ The pressure for the great experiment of Wolds to succeed was intense, as then Prisons Minister Angela Rumbold declared, "If, and only if, the contracted remand centre proves a success might we move towards privatisation of other parts of the Prison Service."²¹ This led to intense scrutiny and monitoring by both the public and private sector.

The research team which studied Wolds throughout its early stages noted that none of the anticipated 'punishment for profit' ideology permeated the management structure. Rather, the

senior management team was united behind a vision of providing high quality correctional services. The Wolds' regime was guided by five principles:

- The legal presumption of innocence in relation to remand prisoners meant that only those restrictions, the imposition of which were essential in order to hold remand prisoners securely, were justified.
- Since Wolds' prisoners were presumed to be innocent, prisoners should be provided with an environment which was as normal as possible.
- Control grounded in constructive relationships between staff and prisoners was more efficient and effective than control by coercion, a principle which they hoped to achieve partly through the recruitment of staff who had no previous prison experience.
- The frustrations of prison life should be reduced through the development of administrative procedures, of which both staff and prisoners need to be aware, which facilitated the smooth daily running of the prison.
- Wherever possible, the regime provided would exceed the minimum standards specified in the contract below which Group 4 could not operate without incurring financial penalties, particularly in relation to areas such as the provision of visits, which was regarded as a key component in reflecting the first four principles.²²

The existence of 'guiding principles' is an encouraging development in the management of prisons. In particular, the specific mention of exceeding the requirements of the contract indicates that the private sector is committed to providing quality and not simply through cost cutting.

Unlike in Victoria, the interpretation of the contract was taken as a positive tool in the monitoring of the private prison's operations. Researchers at Wolds commented:

"By providing an outline of the regime intended for Wolds, the contract provided management at Wolds with a clear foundation on which to base their efforts to achieve their goals, as well as a degree of protection. Because of the contract, it was argued, it would be more difficult to erode any aspect of the regime at Wolds than at a non-contract-out prison, putting the management in a stronger position to resist the vagaries of the criminal justice system, such as sudden increases in the numbers of prisoners being remanded to custody, since any changes would require the Home Office to renegotiate the contract."²³

A critical element of the management approach at Wolds was the employment of personnel who had not previously worked for HMPS. Some may argue this is to avoid the hiring of anyone previously involved with the public employee's union, as union antagonisms towards prison privatisation has been clearly displayed. The rationale offered by Wolds' management was that hiring of 'external' staff meant that the new approach could be more easily conveyed. One member of senior management explained that their hiring practices were employed in an effort to avoid the, "negative bits of the prison service, the negative attitudes of staff to prisoners, negative attitudes of staff to management and negative attitudes of management to staff."²⁴

The experience of this first private prison in the UK was determined a success and shortly afterwards several other existing prisons were privatised and additional private prisons were

planned. The private prisons in the UK have not been without problems, and the conditions in many prisons remain substandard. Recently, HMPS won a contract in competition with the private prison companies. The increasing use of the system, such as with CORE and QCORR in Australia, where the public actually competes with the private sector for the contracts will hopefully allow for better understanding of the challenges of providing prison services and ultimately, better service delivery.

CHAPTER 5

PRIVATE PRISONS IN SOUTH AFRICA

Prisons in South Africa were constructed in an era which did not embrace the rehabilitation ideal but were intended instead to warehouse prisoners as labour commodities. The shortage of prison space is severe, and many of the existing prisons require significant repair even without the added strain of overcrowding. The African National Congress (ANC) government, however, has adopted an economic strategy which emphasizes reduced government spending. The Minister of Finance is encouraged by foreign governments and international lending agencies which often attach conditions of government deficit reduction to loans or aid packages. Thus, private prisons were first considered as an option in South Africa in 1994, although the first contract was not signed until more than five years later.

Prison policy and the development of private prisons

The average prison in South Africa is forced to accommodate up to twice its intended capacity. In the larger prisons, many of the cells intended for 18 are crowded with 50 to 60 inmates. Often, there are not enough beds or blankets and new arrivals must soon learn to align themselves with powerful gang members in order to obtain the basic necessities.

The food provided is also substandard. Usually, a prisoner in South Africa is given breakfast of mielie pap and then dinner and lunch are combined into an afternoon meal at 15h00. This meal usually consists of ground fish meal and several slices of bread. Meat, fruit, and vegetables are scarce, and the food that does arrive at the prison is often smuggled and stolen so that it can be sold to the highest bidder. Most prisoners are poor and so the medium of exchange becomes sexual favours. This results in victimisation, if not outright assaults, between prisoners and the situation is only made worse by increasing overcrowding and decreasing availability of basic provisions.

The Department of Correctional Services is aware of the problems and challenges faced by the prison system. The department has recognized that the rehabilitation of offenders should be a primary function, but also remains aware that this goal is difficult, if not impossible, to attain given the current situation of overcrowding. The department has adopted several strategies to attempt to deal with overcrowding, including the construction of more prisons. However, the government is also aware that it is impossible to build itself out of the overcrowding problem. In addition to providing more and better facilities, DCS is exploring options such as electronic monitoring and early release of those sentenced for petty offences.

Given the enormous demand for public services, most notably health and education, it is understandable that the Department of Correctional Services is not likely to receive the necessary infusion of capital to reform and refurbish its operations and facilities. For these reasons, DCS began to explore the option of involving the private sector. In 1997, then Minister of Correctional Services, Dr. Siphon Mzimela visited the United States and the United Kingdom in order to learn more about their prison systems. After his trip, Mzimela concluded that "wherever

the private sector got involved, they have delivered a better service, and have done it at less cost to the taxpayer."¹

The criminal justice budget has grown in proportion to overall government expenditure, from just over 9% in 1994 to 13% in 2001. The proportion of the criminal justice budget allocated to the Department of Correctional Services has increased slightly over the last five years, and currently stands at about 23%.

Particularly in the case of DCS spending, the most significant growth has been in capital expenditure, as opposed to personnel. A great deal of this increased spending on capital projects is due to prison construction. The Department of Correctional Services' expenditure priorities listed in the 2001 Budget Review are the financing of operational costs and the provision of more prison space over the medium-term. These priorities are reflected in the budget allocations. Over the next three years, budgeted amounts for prison construction are set to grow at nearly 27% each year. This increase does not include the budgets for private prison construction, which is planned to be almost R500 million in 2003/04.² DCS' planned spending seems to be designed specifically for additional contracting with the private sector, as the budget aims to pay operating costs (fees per prisoner place) and aims for additional space in the medium term (shorter construction times). Fees per prisoner place and shorter construction times are the exclusive characteristics of private prisons.

The Correctional Services Act of 1998

The Correctional Services Act of 1998 (CSA 1998) contained a section which specifically authorized the government to contract out prison services to the private sector. Chapter XIV, "Joint Venture Prisons", Section 103(1) provides that:

"The Minister may, subject to any law governing the award of contracts by the State, with the concurrence of the Minister of Finance and the Minister of Public Works, enter into a contract with any party to design, construct, finance and operate any prison or part of a prison established or to be established..."

The CSA 1998 goes on to list very specific conditions and requirements for private prison contracts. The legislation states that:

- Contracts cannot exceed 25 years.
- The contractor must "contribute to maintaining and protecting a just, peaceful, and safe society".
- The contractor is responsible for enforcing the sentences of the courts, detaining prisoners in safe custody, ensuring the prisoners' human dignity, and promoting the human development of all prisoners.
- The contractor is explicitly prohibited from taking disciplinary action against prisoners or from involvement in determining the computation of sentences, deciding at which prison any prisoner will be detained, deciding on the placement or release of a prisoner, or grant temporary leave.

The latter safeguards are important to include in legislation, and not just in a prison contract, because this adds an authority and independence which assists in enforcement and monitoring.

Also, the CSA 1998 does a great deal to ensure that the responsibility for punishment rests with the state and that only the services are delegated to the contractor.

One interesting component of the CSA 1998 is that it explicitly forbids private contractors from becoming "involved in the implementation of community corrections."³ Community-based corrections refers to an effort to build or rebuild social ties and a connection to the community in order to prevent future violations. This usually includes obtaining employment or education and assisting the offender with adapting to the routine functioning of society. In the United States, prison researchers contend that the criminal justice system needs to incorporate more prison alternatives offered by community corrections, such as halfway houses, parole, probation, and work-release programs.

The private sector has been a significant part of community corrections in other countries, so it is unclear why this area which is most likely to provide innovation and reform benefits from the private sector would be specifically labelled off-limits in South Africa.

Various monitoring programmes have been tried in the countries which have introduced prison privatisation, and none of them have proven to be immune to the phenomenon of capture. However, the monitoring mechanisms which have been most successful at protecting the public interest are those which are designated by statute rather than by a section in a contract.

The CSA 1998 states that a controller must be appointed by the Commissioner of Correctional Services for each private prison, and then goes on to list the duties of the controller. However, the controller still reports to the Commissioner, rather than to a separate regulatory body. It should be noted that the CSA 1998 also requires all prisons, public or private, to be monitored by the Judicial Inspectorate which is an independent agency. The prison visitor from the Judicial Inspectorate for the private prisons will perform his or her normal monitoring duties, in addition to that provided by the appointed controller. Thus, it seems probable that appropriate monitoring, at least as it is designed in the legislation, will be in place for private prisons in South Africa.

Ikhwezi Bloemfontein Correctional Contracts

Once the enabling legislation was passed, DCS was able to begin negotiations for the first private prison contracts. The office which handled the contracts was the Asset Procurement and Operating Partnership System (APOPS). This government agency was set up in 1996 to oversee public-private partnerships.

The first private prison opened in Bloemfontein in July 2001, and the second will open in Louis Trichardt in early 2002. The first contract, with Ikhwezi Bloemfontein Correctional Contracts (BCC) is to design, finance, build, and manage a 3,024 bed facility in Grootvlei, Bloemfontein. The second contract is with South African Custodial Services (SACS), a consortium which includes Wackenhut Corrections Corporation. The sites were chosen because DCS already owned sufficient land in these two areas, as both are adjacent to existing prisons.

Because only the BCC prison was nearing completion at the time of the writing of this monograph, it is the one which will be examined in depth. BCC is a consortium made up of Fikile Projects cc, Ten Alliance Holdings, Group 4 Correctional Services, Murray and Roberts Construction and Bloemfontein Community Trust. Fikile Projects, Ten Alliance, and Bloemfontein Community Trust are black empowerment companies. Each company owns 20%

of BCC, which is providing 10% of the funding required for the project. The remaining 90% is financed by Investec and ABSA banks.

Costs

The total cost of the BCC contract is R1,764,644,196 and the expected cost per 'bed' is R66.04 per day.⁴ The government claims that the BCC costs represent a saving of 5% on the DCS cost per prisoner per day. In truth, these cost comparisons are meaningless. Firstly, DCS determines its cost per prison per day by taking its annual budget and dividing it by the number of prisoners in custody. The annual DCS budget does not contain all the costs associated with running a prison. Most significantly, the cost of the facilities is included in the budget of the Department of Public Works. Also, the prison service is increasingly charged with incarceration of awaiting trial prisoners, who would more appropriately be included as responsibilities of the Department of Justice. Finally, the great majority of costs incurred by the DCS is for fixed overhead both in terms of personnel salaries and general sunk costs. These are costs which do not vary with the size of the prison population, and as such should be treated differently when making cost comparisons.

For example, the head of a prison will be paid a salary regardless of whether his prison has the designated 1,000 prisoners it was intended to accommodate or if it is at 200% capacity and crowded with 2,000 prisoners. The cost per prisoner for the head of prison's salary will be cut in half when there are 2,000 prisoners as compared to when there are 1,000 prisoners. This does not represent an actual cost savings. The same holds true with all fixed costs in the DCS budget. They will be considerably less when divided by the number of prisoners because they are not increased by an increase in the prison population.

A better means of comparison can be found when one compares the variable costs. A variable cost is one which changes with volume. For example, the cost of issuing each prisoner a blanket will increase as more prisoners enter the prison system. If a blanket costs R10, then DCS will have to spend R10,000 on blankets at a prison with 1,000 prisoners. If the prison finds itself with 2,000 prisoners, then it will need 2,000 blankets and the costs increase to R20,000. This of course assumes that the prison is actually able to pay for and obtain sufficient blankets for the additional prisoners, but the concept remains true.

Assuming the total costs for providing correctional services could be captured, and not just the DCS annual budget, and that these costs could be divided into categories of fixed and variable costs, it is still unlikely that an appropriate cost comparison could be made. The BCC prison is designed for 3,024 prisoners. Westville Medium B has approximately 2,700 prisoners. The prisoners at BCC will be in cells designed for either two or four prisoners. The prisoners at Westville Medium B have an average of 48 prisoners per cell, most of which were designed for 18 inmates. At BCC, the prisoners will be unlocked from 7h30 each morning until 19h30 each night and will be fed three times a day. At Westville, the prisoners will be unlocked from 7h30 until 15h30, and are fed twice a day. Clearly, standard of care is not comparable between the two facilities and so cost comparisons become difficult.

It is impossible to ascertain whether private prisons in South Africa are cheaper than publicly run prisons because the standard of care offered by private prisons is entirely unmatched in the public sector. Perhaps the greatest contribution the BCC prison will make to correctional services in South Africa is that for the first time the government will learn exactly how

Quality

The presence of a single employee at BCC makes South Africa's first private prison an instant improvement on the public sector prisons: the Director of Inmate Development. Most of the prisons in South Africa have a staff of social workers and psychologists on hand to attend to the needs of inmates. And some prisons have explored constructive relationships with the National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO) so that rehabilitation and development programs can be introduced. But only the BCC prison has a full time management position created expressly for the purpose of inmate development. The inmate development program at BCC consists of four components:

- Psychological/mental well being: services to be provided include counselling and support groups.
- Social services: the services will include social workers who have been trained in therapy skills.
- Religious care: the program has already recognized the need for 31 different denominations and will link and organise with other religious leaders in the community.
- Education: the services to be provided at BCC make it truly exceptional, as it is registered as an adult education centre with a private adult training services provider. High school courses will be offered through to matric, and other courses offered will range from basic skills to financial management and entrepreneurial training. The vocational skills programs are all geared towards a goal of encouraging self-sufficiency so that upon release the former prisoner will not need to search for a job but will have the knowledge and ability to start his own enterprise.

Private prisons will necessarily be an improvement on public prisons because it would be almost impossible to perform any worse. It should be pointed out that many of the officials and employees of DCS are hardworking and devoted civil servants who deserve to be commended for their efforts in strenuous and stressful conditions. The impact of backlogs in the Department of Justice and a lack of resources have significantly contributed to the current state of the public prison system and these are factors which are beyond the control of even the most senior DCS official. That being said, the fact remains that conditions in South African prisons are deplorable and the private sector cannot help but be an improvement.

There is a risk that because the public sector cannot, at the moment, compete with the private in terms of provision of correctional services, the government will become dependent on private prison companies. This scenario is still a long way off, however, because private prisons are just beginning in South Africa. The possibility exists that eventually the number of private prisons will outnumber the public ones, and DCS will find itself at the mercy of private companies operating in facilities which the state neither owns nor can afford to purchase.

Monitoring

The CSA 1998 provides that a controller must be appointed and enumerates some of the general duties of the controller. The contract lists the specific performance standards required of

BCC in a section entitled "Schedule D". The performance standards in Schedule D assist the controller with his monitoring duties but they are also used by an audit review team which will periodically visit the prison. Schedule D was adapted from the contracts used in the United Kingdom with moderate variation. It includes seven basic goals which the prison is expected to attain:

- Keep prisoners in custody.
- Maintain order, control, discipline, and a safe environment.
- Provide decent conditions and meet prisoner needs.
- Provide a structured day programme.
- Prepare prisoners for their return to the community.
- Delivery of prison services.
- Community involvement.

It is difficult to ascertain whether these goals will be achieved and whether the monitoring mechanisms will be effective because the prison has only recently opened. However, the specificity of the contract is encouraging. Under each of the goals, as many as 30 separate points were listed as necessary activities. Some examples include the requirement that the contractor will provide postage for one letter per week for each prisoner, each prisoner will receive a free haircut every three weeks, and that there should be one newspaper per 15 prisoners. Some of these seem too specific to be effectively monitored, but their inclusion is encouraging proof that the government and the contractor are serious about taking the provision of correctional services to a level unseen in South Africa.

The security at the BCC prison is very specifically outlined in the contract, and is also necessarily improved from the public sector given the modern design of the prison itself. All the gates can be opened electronically, whereas most public prisons operate entirely with keys. The design of smaller cells with few prisoners in each one allows for much more effective monitoring of harmful situations, including bullying. Each cell at the BCC prison has a panic button which the prisoner can press if he is in need of assistance from the guard. This button turns on a red light which cannot be switched off without the guard actually venturing over to the cell to check out the problem. A computer automatically records the date and time when the button is pushed, and so incidents can be more easily verified. The BCC prison is designed and organized in such a way that it holds much promise for being considerably safer and more secure than the public prisons in South Africa.

The number one complaint amongst prisoners in South Africa is that the food is terrible. Not just the lack of nutritional content, but also the timing of meals is unsatisfactory as prisoners are fed only twice each day. In one prison, the management claimed that the prisoners are fed three meals, but two are served simultaneously.

In the BCC contract, the contractor is specifically required to serve three meals each day, one of which must be hot, and the time between each meal is not to be less than four and a half hours or more than six hours. The time between dinner and breakfast is not to exceed 14 hours, and 30 minutes will be provided to eat breakfast while 60 minutes will be provided for lunch and dinner. Food is never to be withheld as a disciplinary measure, and appropriate utensils and condiments must also be provided. This is an obvious improvement on the food service standards in public sector prisons, although the existence of the standards on paper is not as convincing as observing such standards in practice. Still, the fact that these standards are written down and signed by both parties in a binding legal document is extremely encouraging.

The enforcement of these performance standards will depend on the monitoring environment. If the controller appointed by DCS becomes co-opted into the prison management structure and total capture occurs then it is possible that none of the laudable standards in the contract will be implemented. Many of the factors which lead to capture are present:

- The controller who has been appointed for the BCC prison was hired from the DCS, as was the director and his deputies.
- The controller is given an office and a small support staff on the actual premises of the BCC prison. This may seem like a good way to ensure consistent compliance, however, it is also likely to lead to an informal and overly sympathetic relationship with BCC management and staff.
- The controller will be in daily contact with BCC and will become extremely sensitive to the interests and operational challenges faced by the prison.

It remains to be seen, however, if the controller will place the interests of BCC management above his duty to ensure appropriate contract compliance and performance.

The contract

The contract between BCC and the South African government has not been made accessible to the public. The reasons given by government officials ranged from a claim that it was necessary to protect the commercially sensitive nature of the contract to the need to protect security information. One government official explained that it may become public information eventually but that would be decided in a committee meeting which had not yet taken place. Lengthy discussions and informal examination of Schedule D was permitted, but the remainder of the contract has still been kept secret. The South African Constitution, Article 32 (1) guarantees access to any information held by the state which is required for the protection of rights. The Promotion of Access to Information Act was passed in 2000 in order to give effect to this constitutional right. In the preamble, the Act recognises that:

"the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations."⁵

The preamble concludes with a statement regarding the intentions of the Act, which includes a desire to "foster a culture of transparency and accountability in public and private bodies."⁶ In light of the constitutional rights of South African citizens and the intentions of the recently passed Act, the contracts with private prison companies should be released to the public without further delay.

Financing

The BCC contract is a lease-purchase arrangement, wherein the government pays rent for the use of the facilities. Once all the payments are completed, title for the facility will be turned over to the Department of Public Works. Most 'design, construction, finance and management' (DCFM) projects involve a separate financing arrangement which extends for anywhere from 20 to 30 years. The management contract however is usually limited to five years. This is intended to give the government the often praised 'flexibility' of having the option to change contractors or discontinue private sector involvement entirely. However, this alleged benefit is entirely negated by the presence of long-term financing arrangements which involve the government almost

inextricably with the private prison company. The contract with BCC does not even attempt the facade of flexibility as both the financing and management services are contracted for a full 25 years—the maximum allowed by the CSA 1998.

The problem with contracts which stretch out for this length of time is the loss of flexibility and leverage. The introduction of competition is intended to keep the private contractor on its toes and striving to innovate and provide better services at a better value. However, if the company is already guaranteed the customer for 25 years, there is no looming date that the contractor must compete with for renewal or re-bidding for the contract. Termination of the contract is also difficult, which reduces the leverage of the government should the contractor fail dismally to perform its requirements as outlined in the contract. If the government terminates the management portion of the contract, it will also terminate the financing. The full capital cost would then come due immediately, which clearly the DCS does not have the resources to meet. The only recourse open to DCS would be to take all its prisoners out of the facility and walk away, losing the costs already sunk into lease payments and stuck trying to find prison beds for 3,024 inmates.

Mr. T. E. Manchide, Director of APOPS at the Department of Public Works, pointed out that the private prisons are in fact public-private partnerships and not a privatisation of the prison service. "The government is not abandoning responsibility in terms of executing correctional services. We are not selling off government assets either," Manchide explained, "the contracts do not exist in perpetuity". This is true, but 25 years is sufficiently long that it carries with it many of the disadvantages of a full scale handover of the prison to the private sector. It is entirely up to the consortium whether it decides to meet its stated performance goals, as a failure to do so can only result in very limited government action. In effect, BCC can hold the Department of Correctional Services ransom for the full capital cost of the new prison in Bloemfontein. Since the South African government does not have sufficient funds to pay that ransom, the government—and the South African public—is at the mercy of BCC.

The public interest

There is no reason to suspect that BCC does not have the public interest in mind in carrying out its duties and fulfilling its contractual obligations. The BCC prison is already having a positive impact on the surrounding community through the employment opportunities it has created. The company was inundated with 26,000 applications for 400 job openings. The contract required that at least 5%, and eventually 10%, of employees must be recruited from historically disadvantaged groups. BCC not only met but exceeded this requirement as 94% of staff and 60% of management were drawn from these designated populations. The staff were deliberately not recruited from the prison service although a significant portion of management positions were filled by former DCS employees.

The management approach of BCC is very similar to that of Wolds in the UK. The philosophy is that each prisoner should be treated with respect and dignity, and this is considered the most effective means of maintaining an environment of respect and security. As each prisoner arrives at the prison, he is greeted individually in a reception room which resembles a doctor's office more than a penitentiary. While his paperwork is completed, he is invited to be seated on a couch and offered coffee or tea. If a prisoner does not behave appropriately in this environment then he is detained in a solitary confinement cell.

One of the primary objectives of this entirely different approach is to build better morale amongst both prisoners and staff. This is another reason why the staff have not been recruited from DCS,

because it is believed that it will be more difficult to make this attitude change among those who have already developed an attitude towards this kind of work. It could be argued that management is also hoping to hire staff who are not already affiliated with the Police and Prison Officers Civil Rights Union (POPCRU). However, both management and staff at BCC affirmed that any employee is permitted to join POPCRU or whatever union they may choose as this is their constitutional right.

Public health

The private prison companies who are pioneering the South African market are all from wealthy nations and will have to learn a great deal to adapt to the realities of South Africa. Group 4 has operated in many countries, including the UK, Canada, Australia, as well as several European countries. Although Group 4 is a publicly traded multinational enterprise, there are several aspects about doing business in South Africa which are unlike anything the company has faced before. The company appears to have anticipated and/or adapted well to many of the variations which are specific to the South African business environment. For example, BCC has successfully met or exceeded empowerment clauses and affirmative action requirements. But there remains one particular aspect of South African life, particularly prison life, which will pose special challenges to the BCC prison. This is the issue of public health in the prison system.

Public health is prison health, and this maxim is particularly true in South Africa. There are three illnesses which are rampant in South African prisons: tuberculosis (TB), syphilis, and HIV. Approximately 98% of prisoners will return to the community at some point, and anywhere from one third to one half of them will suffer from one of the illnesses listed above.

Any efforts to train and educate prisoners for their return to the community will be in vain if that prisoner is not diagnosed and treated for TB, and is not educated on the health risks of high risk sexual behaviour. TB is highly contagious and both cheaply and easily treated. The contract does not contain appropriate provisions for public health issues, save for one section which requires that communicable diseases are monitored and that HIV tests are only performed when ordered by a doctor. The prison environment affords an unparalleled intervention opportunity to reach those sections of the population which are both at highest risk and the most difficult to access. The costs of releasing prisoners who are sicker and at higher risk of transmitting HIV and/or TB are not borne by the consortium but by the impoverished communities to which prisoners return. Thus, it is not likely that a private prison company will emphasize public health issues unless specifically required to do so in the contract.

CHAPTER 6 **CONCLUSION AND RECOMMENDATIONS**

Recommendations

The introduction of private prisons in South Africa raises many issues, challenges and opportunities. Although the first private prison has great promise for high quality service delivery, there are several recommendations which could ensure that the involvement of the private sector in the functions of Department of Correctional Services can be considered a success.

1. Shorter financing agreements with private contractors

To ensure the 'flexibility' that privatisation can offer government, future contracts should not be based on long-term financing arrangements as is the case with the Ikhwezi Bloemfontein

Correctional Contracts (BCC) in which both the financing and management services are contracted for a full 25 years—the maximum allowed by the CSA 1998.

2. Private sector involvement in community corrections

The Correctional Services Act of 1998 forbids private contractors from becoming involved with community corrections. Prior to the current form of prison privatisation, private sector involvement has been an established and accepted component of many programs used as alternatives to incarceration. This is particularly true in the UK, where charities play a critical role in the juvenile justice system.

The South African criminal justice system should turn to the private sector for assistance. The resulting benefit would necessarily improve conditions in the prisons and assist with community corrections.

The easiest and quickest means of increasing private sector involvement in the South African prison system would be to outsource more services in the existing prisons to the private sector. The provision of food, for example, could quite easily be turned over to the private sector with considerably less controversy than the outsourcing of other core functions. The use of NGOs should be further explored, and both public and private prisons should turn to organisations such as NICRO to provide reintegration services.

3. Private prison contracts should refer to standards of care for prisoners with HIV and/or TB

The contract should include specific reference to standards of care for prisoners with HIV and/or TB. Condoms and lubrication should be made discreetly available, and Directly Observed Therapy programs should be required for the monitoring of prisoners with TB. The contract should specifically state that HIV tests be made available to prisoners on request, accompanied with the requisite counselling and education.

4. Private prison monitors should report to an independent regulatory agency

An effective monitoring agent must be independent, not a part of the same department that is being monitored. Furthermore, monitoring is a separate function from operations; DCS is not a regulatory agency but a provider of correctional services. Because of these conditions, the DCS monitor assigned to BCC is at high risk to become co-opted into the management structure. In order to avoid this, a monitor should be appointed who does not report to DCS but to a separate regulatory agency within the government. The monitoring of prison conditions and prisoner complaints is the role of the Judicial Inspectorate, both for public and private prisons. The additional monitoring required for private prison contracts is that of contract compliance, which the current position of DCS Controller is not in a position to provide. Contract compliance, for any government contract, should not be monitored by any of the departments immediately party to the contract as this compromises independence. The contract compliance officer for private prison contracts should come from the government's existing internal audit agency, and those expected to fulfill this role should be experienced in performing operational audits of various kinds. Either rotation or sufficient reporting requirements and visits by auditors of varying seniority would also help ensure that capture does not take place.

5. Strengthen accountability to the public of the privatisation process

Given the importance of accountability in the process of privatising prisons, and in light of the constitutional rights of South African citizens and the intentions of the recently passed Act, the

contracts with private prison companies should be released to the public without further delay.

6. Better costing for the building of prisons

The private prisons projects can provide information to the Department of Correctional Services on the total cost of building a modern prison. The government, if given reliable data on the amount of capital necessary, would be better equipped to make sound financing decisions. DCS could then perhaps investigate alternative arrangements that would not compromise the state's leverage while monitoring performance of the private prison companies.

7. Investigate the impact of a prison's size and location on the reintegration of offenders

The size and location of a prison has important implications for recidivism rates. The locations for the two private prisons were chosen because the government already owned land there, and not because they were actually within the communities from which many prisoners are drawn. The BCC prison is the largest prison in South Africa, and the largest private prison in the world. While this size will provide savings due to economies of scale, it is not clear what the impact will be on recidivism rates. The DCS should encourage studies to be undertaken on the impact of size and location of prisons on the rehabilitation of offenders. Ideally, the private prison companies could demonstrate their commitment to the goals of DCS by providing funding for such research.

Conclusion

Logan charges that "the goal of running prisons that are safe, secure, humane, efficient, and just is too important to reserve to government."¹ This could also be rewritten to claim that the goal of running prisons is too important to leave open to the volatility and questionable motives of the free market. The arguments for and against privatisation are usually motivated by various forms of self-interest, and some are more concerned with a general distrust of government or a general distaste for prisons than they are with private prisons.

In the United States, criminal justice policy decisions are influenced by a variety of special interests which are not necessarily in line with the overall public interest. The introduction of private prisons probably adds another tug in an already complicated and multi-directional tug of war contest. The empirical evidence is not entirely convincing and the anecdotal evidence is not entirely reliable, but the general consensus of those who are genuinely unbiased is that private prisons are no worse or better than public prisons in the United States.

In Australia, the over-reaching power of the unions has been tempered and service delivery has been improved in the public sector through the introduction of a system of competition for management contracts. Australia has enjoyed the flexibility which is afforded by contracting for management services only. This benefit has been protected by the fact that many Australian private prisons avoided the trap of long-term public-private financing commitments. However, the anecdotal evidence from Australia leads one to believe that the private prisons there have failed to live up to their own standards. This may have more to do with the size and location of private prisons. In Victoria, where some of the major problems occurred, the public prisons were much smaller and more likely to be located in the inmates' 'hometown' communities. The private prisons were as much as ten times bigger than some of the public prisons, and were in more remote isolated locations. Prison privatisation in Australia can be said to have had mixed results, but at the very least it is focusing attention on an often overlooked and ignored public service.

The United Kingdom appears to have experienced the greatest degree of success with prison privatisation. There are also reports of incidents and failure to perform but they do not exceed similar occurrences at public prisons. The South African prison privatisation programme followed the UK model, but has made the critical mistake of getting entangled in long term financing contracts. The South African programme has also followed the UK model for monitoring, which has proved a moderate success although no country has developed an entirely successful monitoring system.

The introduction of prison privatisation programmes in the US, Australia, and UK has been controversial because of conflicting interest with unions and other political factors. In some respects, it can be argued that private prisons have only been a waste of time and money because they did not prove to be the panacea as anticipated for the prison service. The debate over private prisons in South Africa comes from an entirely different perspective. The unions have not voiced opposition to prison privatisation, and the private prison consortia have not yet encountered antagonism from the public employee's unions. The Police and Prison Officers Civil Rights Union (POPCRU) has not taken an anti-privatisation position, and interviews with both BCC and SACS revealed that employees are not prohibited from joining POPCRU or forming their own union. The advent of private prisons in South Africa has not been prompted by a desire to break down union power, an attempt to garner political capital, or a need to circumvent voter approval on capital outlays.

Rather, the development of private prisons in South Africa has come in response to the main purpose for which privatisation was intended: the government needs help. The prisons in South Africa are full of hard working and dedicated staff, but their morale is crumbling along with the buildings in which they work. The prisoners are kept in substandard conditions which violate every right which is guaranteed to them by the constitution. Nothing could be worse than the current state of the prison system, and there is not enough money to fix it. The demand for private sector involvement is real and not fabricated by any special interest lobby or prison-industrial complex. Because the problems are so real, it can only be hoped that the private sector can offer a real solution.

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