Private Prisons: Should Crime Pay?

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I. INTRODUCTION

In New Zealand, the most severe punishment the state can impose on a person who breaks the rules governing society is imprisonment – the deprivation of liberty. New Zealand recently embarked on the path of privatising the management of prisons, a task traditionally regarded as a core function of the state. On 13 July 2000, the first privately-managed remand prison began operating in Auckland. The concept and practice of private prisons is not new. Jeremy Bentham first discussed the idea in 1787, and such prisons operated in the United Kingdom, United States and Australia in the nineteenth century. However, due to appalling living conditions and ongoing scandal, these prisons were nationalised towards the end of that century.

Part II of this article considers this historical background, and also discusses the re-emergence of private prisons in the late 1970s and 1980s. The emergence of private sector involvement in prison management in New Zealand, culminating in the signing of a contract for the management of the new Auckland Central Remand Prison in July 1999, is considered in Part III. Given that Maori have long been over-represented in the prison muster, the implications for Maori of contracting out the management of prisons are also considered. Part IV begins with a discussion of the philosophical and ethical questions raised by the contracting out of prison management, before considering more pragmatic issues, in particular those relating to contract, cost and quality of service.

To begin with, a word on definitions. Former Deputy Secretary for Justice Mel Smith argues that the use of the term "privatisation" to describe the changes initiated in corrections in New Zealand is misleading.[1] It is true that reforms in

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1 Smith, "Privatisation of Prisons" in *Re-thinking Criminal Justice Conference* (1995) (unpublished) 1-2.

the prison service do not involve the state selling off a going concern to the private sector, as has been the case in many other sectors in New Zealand during the 1980s and 1990s. Professor Jane Kelsey suggests that the phrase "private prisons" is a pejorative term which brings to mind images of workhouses marked by appalling living conditions, exploitation, bribery and corruption.[2] Perhaps because of these associations, the Department of Corrections has instead adopted the narrower phrase "contract management of prisons" when discussing reforms to prisons in New Zealand.[3] Nevertheless, in the international debate that has emerged, the phrase "private prisons" has also been used to describe those prisons that are managed by a private company under contract with the state, whether or not the prison itself is owned by the state.[4] This is the meaning ascribed to "private prisons" in this article.

II. THE HISTORICAL CONTEXT

1. Early Privatisation

> Those who do not remember the past are condemned to repeat it.
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> - George Santayana

Jeremy Bentham developed his Panopticon theory in 1787.[5] He conceived of a prison – the Panopticon – that could, through the use of financial incentive and competition in the private sector, be operated at a minimal cost to the government, remain accountable to the public, and provide an acceptable standard of care to prisoners.[6] The prison would be run as a capitalist enterprise, with inmates working up to 16 hours a day, and with all profits being appropriated by the private contractor.[7] Bentham believed that government regulation of the facility was unnecessary, as the contractor would have a

2 Kelsey, *Alan Nixon Memorial Lecture* (1993) (unpublished) 1 and 3 ("*Memorial Lecture*").

3 Ibid 3; Department of Corrections, *A New Approach to Prison Management in New Zealand* (1998) 2 ("*A New Approach*"). See also Harding, *Private Prisons and Public Accountability* (1997) 1.

4 Logan, *Private Prisons Cons and Pros* (1990) 13-14 ("*Cons and Pros*"); DiIulio, "The Duty to Govern: A Critical Perspective on Private Management of Prisons and Jails" ("Duty to Govern") in McDonald (ed), *Private Prisons and the Public Interest* (1990) 156 ("*Public Interest*"); Shichor, *Punishment for Profit: Private Prisons/Public Concerns* (1995) 1-2 ("*Punishment*"); Harding, supra note 3, 1-2.

5 The word "panopticon" is derived from the Greek words for "everything" and "a place of sight"; see Bentham, "Panopticon Papers" in Mach (ed), *A Bentham Reader* (1969) 196, quoted in DiPiano, "Private Prisons: Can They Work: Panopticon in the Twenty-First Century" (1995) 21 N E J on Crim & Civ Con 171, n 8. Available <http://www.lexis.com> (last accessed 23 July 2000).

6 Bozovic (ed), *Jeremy Bentham: The Panopticon Writings* (1995) 31.

7 Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750-1850* (1978) 110.

commercial incentive to keep his labour force in a healthy and productive state.[8] Furthermore, he argued, government monitoring of the prison was pointless as an outside inspector would likely be co-opted by the personnel they were required to supervise.[9] Bentham's proposal to manage a Panopticon was rejected by England's House of Commons Committee in 1810, which believed that it placed too great an emphasis on the exploitation of convict labour for profit.[10]

In practice, the United States, the United Kingdom and Australia have all had previous experience with private ownership of prisons or the contracting out of prison management.[11] In the Middle Ages, English jails were run by private entrepreneurs. Private jailers earned their income by charging for services such as the provision of liquor and tobacco and, for those who could afford it, women. Those inmates who could not afford these services worked for their jailers, or were contracted out to work for others. Magistrates also allowed a limited payment to be made to the private jailers for the incarceration of poor prisoners.[12]

This custom led to a great disparity between the privileges and living conditions of prisoners.[13] Prison reformer John Howard highlighted the dire environment of these prisons, which were marked by disease and death,[14] and by a lack of such basic items as clothing and bedding. Howard campaigned for the abolition of private fees in jails, and in the late eighteenth century the fee system was abolished.[15] By 1887, the control of all local and county prisons in England had been transferred to central government.[16]

Private contractors also transported convicts from England to Australia under the Transportation Act 1824 (UK), after which they were free to assign the convicts to other parties for the balance of their sentences.[17] This led to the exploitation of convict labour by Australian companies.[18] Private contractors also heavily influenced correctional policy at this time.[19]

During the nineteenth century, it was common for prisons in the United States to be leased to private entrepreneurs. This practice occurred primarily in

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8 Ibid.

9 Ibid 111.

10 Ibid 112.

11 See generally Williams, *Private Prisons in New Zealand* (1994) (unpublished LLB(Hons) dissertation, University of Auckland).

12 Shichor, "Private Prisons" in McShane and Williams (eds), *Encyclopedia of American Prisons* (1996) 365 ("Private Prisons"); Shichor, *Punishment*, supra note 4, 22.

13 Shichor, *Punishment*, supra note 4, 22.

14 Howard, "Bad Customs in Prisons" in Howard, *The State of the Prisons* (1929) 11-18.

15 Shichor, "Private Prisons", supra note 12.

16 Ryan and Ward, *Privatization and the Penal System: The American Experience and the Debate in Britain* (1989) 5; Newbold and Smith, "The Privatisation of Corrections in New Zealand" in Mays and Gray (eds), *Privatization and the Provision of Correctional Services* (1996) 75, 77, citing Ryan, "Evaluating and Responding to Private Prisons in the United Kingdom" (1993) 21 Int J Soc L 319.

17 Transportation Act 1824 (UK), ss 7-8.

18 Perkins, "Convict Labour and the Australian Agricultural Company" in Nicholas (ed), *Convict Workers Reinterpreting Australia's Past* (1988) 168.

19 Moyle, "Privatisation of Prisons in New South Wales and Queensland: A Review of Some Key Developments in Australia" (1993) 32:3 Howard L J 231, 233.

developing frontier areas which had an increasing prison population, and which were under pressure to expand their economic and institutional frameworks. The practice of leasing prisons spread in the South, following the Civil War, where a cheap labour force was required to rebuild the economy that had formerly been dependent on cheap slave labour. The fact that most convicts were black was perceived by the public to be an added bonus.[20] However, despite detailed contracts, appalling conditions, brutality and escapes were commonplace.[21] Leasing dwindled towards the end of the nineteenth century,[22] following ongoing scandals, complaints of unfair competition and the onset of economic depression across the United States[23] which meant that few manufacturers could afford to lease prisons and their labour.[24]

It could be argued that the greater human rights consciousness that exists today, strengthened by international covenants and domestic Bills of Rights, will mean that the brutality and abject conditions of these earlier private prisons will not be repeated. However, this proposition has been questioned following a number of high-profile breaches of prisoners' rights in private prisons.[25] It is important then to recall previous experience of private prisons and the abuses that develop within them when left unchecked.

2. The Re-Emergence of Private Prisons

(a) United States

In the 1970s, a "war on crime" was declared in the United States, followed by a "war on drugs" in the 1980s. Both of these policies brought about a rapid increase in the prison population throughout the United States,[26] leading to massive overcrowding, and precipitating financial strain on the prison system. Federal courts found a large number of imprisonment facilities to be in breach of the constitutional prohibition on cruel and unusual punishment,[27] creating a need to seek out alternative solutions such as privatisation. David Shichor notes that privatisation was also "supported by the American tradition of distrust of government and the strong belief in the efficiency of private enterprise".[28]

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20 Shichor, *Punishment*, supra note 4, 36.
21 Shichor, "Private Prisons", supra note 12, 366; DiIulio, *No Escape* (1991) 188-189.
22 Shichor, *Punishment*, supra note 4, 36.
23 Newbold and Smith, supra note 16, 77.
24 Shichor, "Private Prisons", supra note 12, 366.
25 See text, infra Part IV.
26 Shichor, "Private Prisons", supra note 12, 364; McDonald, "Public Imprisonment by Private Means: The Emergence of Private Prisons and Jails in the United States, the United Kingdom and Australia" (1994) 34 Brit J of Criminology 29 ("Public Imprisonment"). Available: Expanded Academic (last accessed 16 July 2000).
27 McDonald, "Public Imprisonment", supra note 26. See also Russell, "Private Prisons for Private Profit" (1997) 22 Alt L J 1:7, 8.
28 Shichor, "Private Prisons", supra note 12, 365.

The re-emergence of private prisons began with the contracting out of juvenile facilities and immigrant detention centres.[29] Many of the players who would later dominate the private prison industry first emerged at this time,[30] including the Corrections Corporation of America ("CCAm") and Wackenhut Inc ("Wackenhut"), a private security firm. CCAm, incorporated in 1983 and originally financed with capital from Kentucky Fried Chicken,[31] has become the largest private prison operator in the United States,[32] with subsidiaries in Australia and Britain. The Vice-President of CCAm has stated that "the business of private prisons is just like selling cars, real estate or hamburgers".[33]

A number of organisations have, for differing reasons, opposed private prisons. They include the American Federation of State, County and Municipal Employees ("AFSCME"), the National Sheriffs' Association, the American Civil Liberties Union ("ACLU") and the American Bar Association.[34] The AFSCME has commented that, while the growth of private prisons has increased its membership, its concern lies with the inadequate training and safety of corrections officers.[35] The ACLU opposes private prisons, regarding imprisonment as a function belonging to government.[36] Although in 1996 less than two per cent of the prison population was housed in privately-owned or managed facilities,[37] and despite some controversy and criticism, the United States' private prison industry continues to grow, with the number of private facilities increasing at a rate four times as fast as public facilities.[38]

(b) United Kingdom

The privatisation of custodial centres in the United Kingdom also began in 1970, with the contracting out of immigrant detention services. Unlike the United States, however, where the push to privatise came primarily from business entrepreneurs, the first proposals for private prisons came from policy reformers.[39] In 1986, a recommendation from the Home Affairs Committee of the House of Commons suggested "experimenting" with private sector

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29 Young, *The Prison Cell: The Start of a Better Approach to Prison Management* (1987) 6; Newbold and Smith, supra note 16, 77, citing Press, "The Good, the Bad, and the Ugly: Private Prisons in the 1980s" in McDonald (ed), *Public Interest*, supra note 4.

30 McDonald, "Public Imprisonment", supra note 26.

31 Russell, supra note 27, 8.

32 McDonald, "Public Imprisonment", supra note 26; Press, supra note 29, 19.

33 George, "The State Tries an Escape" (April 1989) 14:2 Legal Services Bulletin 53.

34 Logan, *Cons and Pros*, supra note 4, 10.

35 Smalley, "A Stir over Private Pens" (1999) 31:18 Nat'l J 1168. Available: Expanded Academic (last accessed 16 July 2000).

36 Logan, *Cons and Pros*, supra note 4, 49.

37 Beyens and Snacken, "Prison Privatization: An International Perspective" in Matthews and Francis (eds), *Prisons 2000* (1996) 241.

38 Lippke, "Thinking about Private Prisons" (1997) 16 Criminal Justice Ethics 1:26. Available: Expanded Academic (last accessed 16 July 2000).

39 Such as the Adam Smith Institute, *Omega Justice Report* (1984); McConville and Williams, *Crime and Punishment: A Radical Rethink* (1985), both cited in McDonald, "Public Imprisonment", supra note 26.

involvement in prisons, particularly in the overcrowded remand area. In 1988, a Parliamentary Green Paper arrived at the same conclusion. This paper was followed by a government-commissioned report from private management consultants Deloitte, Haskins and Sells, which found the introduction of private sector contractors to design, construct and manage remand facilities was likely to be cost-effective.[40] The Criminal Justice Bill 1990 was introduced to facilitate the reforms, and the second wave of private prisons began in the United Kingdom with the opening of Wolds Remand Prison ("the Wolds") in 1992.[41]

In contrast to the situation in the United States, the Wolds was built and contracted out to the private sector during a period of falling prison populations.[42] However, between 1992 and 1997 the United Kingdom also experienced a sudden surge in the prison muster, placing considerable pressure on the nation's prison facilities. In 1996, a state of emergency was declared in relation to 46 prisons.[43] Three years earlier, the Conservative Government announced that it would encourage the development of a private correctional industry, by contracting out the management of 10 per cent of prisons to private firms. The design, construction and possibly even financing of the new prisons would be contracted out.[44] In line with this policy, further contracts were entered into for the management of private prisons, and more are planned.[45] Lynette Gill, from the Remands Contracts Unit in the Home Office, has stated that the Government's aim in contracting out prison management is "to achieve a higher level of service, not just in the prisons run under contract, but through the impact of competition, to raise standards across the board".[46] A desire to curb the power of unions was also a motivating factor in allowing private management of United Kingdom prisons.[47]

While the contracting out of prison management was favoured by the Conservative Government, the reforms did not go unopposed. The Prison Reform Trust, the Prison Officers' Association, the Howard League and the National Association for the Care and Resettlement of Offenders all opposed prison privatisation,[48] believing that the administration of corrections ought not be a profit-making exercise, and that the drive to cut costs would be to the detriment of prisoners and staff.[49]

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40 *Report on the Practicality of Private Sector Involvement in the Remand System* [1989] (unpublished) in McDonald, "Public Imprisonment", supra note 26.

41 Ibid.

42 Ansley, "Private Prisons: Crime Does Pay", *Listener*, March 27 1993, 24.

43 Harding, supra note 3, 122.

44 McDonald, "Public Imprisonment", supra note 26.

45 Harding, supra note 3, 6-7.

46 Gill, "Private Sector Involvement in the Prison System of England and Wales" Australian Institute of Criminology Conference Paper: Private Sector and Community Involvement in the Criminal Justice System (1992) 10.

47 Harding, supra note 3, 20.

48 Beyens and Snacken, supra note 37, 244-245.

49 "The Case for Private Prisons", *The Independent*, London, England, 28 December 1992, 12. Available <http://www.lexis.com> (last accessed 18 August 2000).

(c) Australia

Queensland was the first Australian state to contract out prison management to a private company. In 1988, the Liberal-National Party Cabinet commissioned a review of corrective services which produced the Kennedy Report. In an interim report, the Chairperson and Commissioner of Review, Jim Kennedy, rejected private prisons. He had reservations as to the ethics of contracting out prison management, believing that the market for correctional services was not developed, and that there was little evidence that the private sector would be a more efficient operator of custodial institutions.[50] In the final report however, this position was reversed. Kennedy claimed that his position changed after the "benefit of detailed discussions with some major companies with an interest in participating in correctional operations".[51] The Kennedy Report brought into being the Queensland Corrective Services Commission ("QCSC"), and recommended that the QCSC contract out the management of the Borallon Correctional Centre ("Borallon"). The Report stated that, as well as bringing specific benefits to Borallon itself, privatisation would bring generalised improvement across the whole prison system. Such improvement would include increased flexibility, the creation of a market for corrective institutions, competition for correctional officers – which could lead to an increase in their pay, status and conditions – new career prospects for correctional officers and managers, and competition for the QCSC.[52]

Despite opposition from the Labor Party and some Liberal-National Party Ministers, who felt that corrections was a basic function of government which ought not be privatised, the Kennedy Report's recommendation that Borallon be privatised was adopted. In 1988, the Corrective Services (Administration) Bill was passed, allowing the privatisation of any correctional centre. In 1990, "there were 244 prisoners at Borallon Correctional Centre, Australia's first fully private adult prison this century".[53] In June 1992, a second Queensland prison, the maximum security Arthur Gorrie Remand and Reception Centre ("Arthur Gorrie"), became privately managed following the breakdown of negotiations regarding work rules and procedures between the QCSC and the labour union representing staff.[54] Queensland now has plans to privatise all prisons, parole functions, work camps, half-way houses – excluding juvenile centres – and the transportation of prisoners.[55]

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50 Moyle, "Private Prison Research in Queensland, Australia: A Case Study of Borallon Correctional Centre, 1991" in Moyle (ed), *Private Prisons and Police: Recent Australian Trends* (1994) 142 ("*Private Prisons and Police*").

51 Ibid.

52 Ibid 143.

53 Moyle, "Privatising Prisons: The Underlying Issues" (1992) 17 Alt L J 114 ("Underlying Issues").

54 McDonald, "Public Imprisonment", supra note 26.

55 Davies, "The Effect of Prison Privatisation on the Legal Position of Prisoners" (1998) 6 Aust J of Admin L 34, 35.

The Deputy Director General of the QCSC, Stan Macionis, states that, in contracting out the management of corrective services, the Queensland Government sought to reduce its costs by eliminating restrictive work practices. Macionis argues that ineffective and at times inhumane practices had become entrenched in state prisons, and states that it was believed that the private sector could bring about the necessary cultural and attitudinal changes.[56] Australian prisons also placed pressure on the public purse, as they struggled with a prison population that was increasing, principally as a result of "truth in sentencing" legislation which prohibited early parole for prisoners.[57] Four states (New South Wales, Victoria, South Australia and Western Australia) now have some privatised prisons.[58] At Federal level, four detention centres previously operated by the Department of Immigration and Multicultural Affairs are to be contracted out.[59]

To summarise, private sector involvement in the management of prisons re-emerged in the United States, the United Kingdom and Australia from the 1970s onward. One explanation for the return to privatisation was the surge in prison populations in these countries, and the corresponding strain that this placed on state services and finances. However, this is not a complete explanation, as other countries such as the Netherlands and France also experienced a large growth in prison populations at this time but specifically chose not to contract out prison management to the private sector.[60]

One explanation as to why privatisation of the management of prisons occurred in the United States, United Kingdom and Australia can be drawn from a consideration of the political context in these countries at the time the private corrections industry first developed. In all three, pro-market and pro-privatisation governments held power at the time that private management of custodial centres was first approved. The Thatcher and Major administrations in the United Kingdom and the Reagan and Bush administrations in the United States, initiated the reforms.[61] In Australia, although positions on privatisation have varied from state to state, Queensland – with a reputation for being the most conservative state – was first to instigate the privatisation of prisons. In these countries, the contracting out of corrections management was part of a broader ideology of privatisation that sought to dismantle the Welfare State.[62] This analysis also holds true for New Zealand.

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56 Macionis, "Contract Management in Corrections: The Queensland Experience" in Moyle (ed), *Private Prisons and Police*, supra note 50, 184 and 193.
57 Russell, supra note 27, 7.
58 Harding, supra note 3, 20 and 94; Davies, supra note 55.
59 Davies, ibid.
60 Beyens and Snacken, supra note 37, 245.
61 Ibid 240.
62 McDonald, "Public Imprisonment", supra note 26. See also Harding, supra note 3, 19-20.

III. PRIVATE PRISONS IN NEW ZEALAND

Both private volunteers and charitable organisations have long had an association with corrections in New Zealand. Prisoner aid volunteers have worked in New Zealand prisons since 1877, and a number of private charitable organisations have been involved in running hostels for probationers since 1963.[63] The involvement of private contractors, such as psychiatrists, counsellors and dentists, is also common today.[64] However, the emergence of the private sector in the management of prisons is a relatively recent phenomenon in New Zealand.

1. The Emergence of Private Contract Prison Management

In 1984, the Fourth Labour Government swept into power and set about corporatising and then privatising state assets. Between 1988 and 1992, 26 State-Owned Enterprises were sold.[65] At the same time, New Zealand followed international trends with a significant increase in its prison population. Between 1987 and 1996, the imprisonment rate per 100,000 of the total population increased by 46 per cent.[66] In 1988, a Ministerial Committee of Inquiry into the Prison System was conducted, producing the Roper Report. At this time, the Justice Department was opposed to the idea of privatising prisons. Its report to the Committee stated that, while there could be advantages in some of the more limited forms of privatisation – such as in the financing or construction of prisons, education, catering or staff training services – "[e]ven here the potential pitfalls are such that thorough justification, careful planning, steady implementation and close monitoring would be essential if increased privatisation were to be contemplated".[67] The Roper Committee, however, found that there was a need for a new remand facility, and suggested that there could be some private involvement in the remand centre.[68]

In 1990, the National Party formed a new government and a year later Cabinet approved in principle the contract management of prisons. Initially, it was proposed that only the management of a new remand prison would be contracted out to the private sector. This was considered less objectionable because, in a remand prison, a private company would have less opportunity to influence the length of an inmate's stay to their own benefit.[69] This proposal was broadened, however, and in 1992 it was announced that the management of a 250

63 Newbold and Smith, supra note 16, 78-80.

64 Ibid 78.

65 Ibid 76.

66 Ministry of Justice, *The Use of Imprisonment in New Zealand* (1998). Available <http://www.justice.govt.nz/justicepubs/reports/1998/imprisonment/chapter_3.html> (last accessed 4 August 2000).

67 Department of Justice, *Prisons in Change: The Submission of the Department of Justice to the Ministerial Committee of Inquiry into the Prison System* (1998) Appendix D, 72.

68 *Ministerial Committee of Inquiry into the Prison System* (1989) paras 25.29 and 34.17.

69 Kelsey, *Memorial Lecture*, supra note 2, 4-5.

bed remand centre in Central Auckland and a 350 bed medium security prison in South Auckland would be contracted out.[70] Together, these prisons under contract management would house 12 per cent of New Zealand's prison population.[71]

In order to facilitate the contracting out of the management of prisons, National introduced the Penal Institutions Amendment Bill (No 3) in May 1993. However, following the election of that year, National's agenda to privatise prisons fell by the wayside. A brief reprieve in the prison muster crisis resulting from changes in the parole of violent offenders, coupled with a busy legislative timetable and a slim government majority, slowed up the passage of the Bill.[72] It was eventually passed when, in November 1994, Peter Dunne MP left the Labour Caucus and indicated that he would support its passage.[73]

The Penal Institutions Amendment Act 1994, which is deemed part of the Penal Institutions Act 1954 ("the Act"), is empowering rather than prescriptive, and leaves the regulation of private prisons to the management contracts themselves. Under the Act, the Secretary of Justice may enter a contract on behalf of the Crown with any other person for the management of a penal institution.[74] The contracts may be for a period of up to five years, and may be extended for one further period of not more than two years. The contract must provide for the appointment of a superintendent of the institution, subject to the approval of the Secretary of Justice. There is no requirement that the superintendent have any experience in working in corrections. The position may be viewed as requiring managerial skills over any such experience, as is the case with Chief Executives of Crown Health Enterprises. In England, the manager appointed at Wolds previously managed Granada Television.

Three reasons were given for the contracting out of the management of prisons:[75]

1. To encourage innovative approaches to the treatment of inmates, with a view to reducing reoffending;
2. To save money; and
3. To test the public sector against the competitive private sector, which should encourage a higher standard of performance in both sectors and provide evidence of the relative merits of each in the New Zealand context.

In 1993, prior to the passing of the Act, the government called for expressions of interest in the building and management of the new Auckland

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70 Newbold and Smith, supra note 16, 77-78.

71 Harding, supra note 3, 9.

72 Thompson, "'Double-cross' Behind Labour's Stonewall", *The National Business Review*, Auckland, New Zealand, 24 June 1994, 10; Thompson, "Private Prisons Await Fate", *The National Business Review*, Auckland, New Zealand, 9 September 1994, 18.

73 Speden, "New Dunne Party Lurks in the Wings", *The Independent*, Auckland, New Zealand, 14 October 1994, 12; Thompson, "Private Prisons on Way", *The National Business Review*, Auckland, New Zealand, 25 November 1994, 19.

74 Penal Institutions Act 1954, s 4A(1).

75 Egan, "Private Sector Contracting in Prison Services" (1993) 3 Criminal Justice Quarterly 11.

Central Remand Prison ("ACRP"), and in August 1995 five of the firms who had submitted an expression of interest were invited to submit tenders.[76] However, in May 1996 the process derailed again when National rejected all the submitted bids.[77] Corrections Minister Paul East refused to state why the tenders had been turned down, other than to say that they failed to meet government expectations. The Minister said that the government remained committed to private sector involvement in prison management and would seek new bids for the design and construction of the ACRP. Meanwhile, the signing of a separate contract for the management of the prison was delayed.[78]

In May 1998, the proposed contracting out was extended to include a new prison in Northland,[79] and in October tenders were again called for the management of the ACRP.[80] The contract for the management of the new ACRP was entered into on 28 July 1999 with Australian Correctional Management Limited ("ACM"). ACM is the largest provider of private correctional services in Australia and is a subsidiary of Wackenhut, the largest private security provider in the United States.[81] The new ACRP began operating on 13 July 2000, catering for male remand offenders with various security ratings as well as sentenced inmates, including those awaiting further trials.[82] The management contract with ACM is for five years, with an option to renew for a further two. Overseas, most contracts for the private management of prisons are for a term of between one and three years to avoid binding future governments or forcing the government to commit itself outside the budget year. The shorter contract term also allows the government greater flexibility to change the contract or to change contractors where performance is not meeting the desired standard.[83]

The Labour and Alliance parties, forming the current Coalition Government in New Zealand, have stated that they oppose the contracting out of prison management. Prior to the 1999 election, Labour stated that they would not proceed with plans to privatise prison management, asserting that "[i]mprisonment is a core public function, not a commercial enterprise oriented towards profit making."[84] The Minister of Corrections Matt Robson (Alliance), has also stated that "[t]he ideology-driven belief that just because it's private it's better is not suited to our prisons and this government won't let New Zealanders

76 "Tenders Called for First Private Prison", *The Dominion*, Wellington, New Zealand, 16 August 1995, 3.

77 "Government Rejects Bids to Run Private Prison", *The Dominion*, Wellington, New Zealand, 27 May 1996, 13.

78 Ibid.

79 Department of Corrections, *Managing Prisons on Contract: Fact Sheet* ("*Fact Sheet*"). Available <http://www.corrections.govt.nz> (last accessed 23 July 1999).

80 "Tenders Called for Remand Prison Management", *The Dominion*, Wellington, New Zealand, 2 October 1998, 2.

81 Logan, *Cons and Pros*, supra note 4, 134.

82 Department of Corrections, *Fact Sheet*, supra note 79.

83 Shichor, *Punishment*, supra note 4, 113.

84 New Zealand Labour Party, *Labour on Justice*, October 1999.

become guinea pigs for an experiment."[85] However, Minister of Justice Phil Goff (Labour) and Mr Robson have already indicated that the Government will honour the contract with ACM, despite having the opportunity to withdraw from the contract, albeit at some cost.[86]

2. Private Prisons and Maori

Maori are heavily over-represented in the New Zealand prison population. Disturbingly, this is a trend which has been occurring for some time.[87] Given the disproportionate number of Maori currently detained in New Zealand's prisons, it is important to consider what impact, if any, privatising prisons may have on them. Critics of private prisons ask what a foreign-owned management company knows of the special problems faced by Maori and Pacific Islanders within our prison system.[88]

United States companies who have expanded their activities internationally, such as CCAm and Wackenhut, are relatively insensitive to differences in the legal and penal culture of other countries.[89] Even Mel Smith, the former Deputy Secretary for Justice and proponent of private contract management of prisons, has conceded that international management companies do not know about many of the special needs of Maori in the prison system.[90] Journalist Bruce Ansley put to the Managing Director of CCAm, Terry Lawson – whose company tendered for the ACRP contract – that he knew little of particular issues concerning Maori in prisons, to which Lawson responded:[91]

> I don't think there are any uniquely New Zealand problems. Maori culture is one of the things we're looking at ... it's got to be addressed. ... We'll employ specialists. Last week I spoke to a Maori organisation ... which one was it ... look, I don't want to sound ignorant here ....

The information brochure the Department of Corrections prepared prior to entering into the management contract for the ACRP states that "bidders for the contract must be prepared to demonstrate an empathy with and understanding for the special needs of Maori and other ethnic groups".[92] However, absent from the amended Act is any obligation on private contractors to recognise the special status or needs of the tangata whenua or any ethnic group. Nor is there any obligation on private contractors to develop culturally appropriate programmes

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85 "More Jails a Sign of Failure says Robson", *The Dominion*, Wellington, New Zealand, 18 January 2000, 2.

86 "Prison Plans on Hold", *The Evening Post*, Wellington, New Zealand, 17 January 2000, 2; "Coalition to Stick with Private Prison Manager", *New Zealand Herald*, Auckland, New Zealand, 18 February 2000, A9.

87 Ministry of Justice, supra note 66.

88 Ansley, supra note 42, 27.

89 Beyens and Snacken, supra note 37, 260.

90 Ansley, supra note 42, 27.

91 Ibid.

92 Department of Corrections, *A New Approach*, supra note 3, 3.

for Maori that endeavour to reduce the number of Maori incarcerated. Also absent is any requirement to even monitor the responsiveness of the private contractor to the needs of Maori inmates and the Maori community. Critics of prison privatisation voice concerns that contracting out the management of prisons will not solve the problem of the over-representation of Maori in prisons. They argue that privatisation diverts attention away from considering why it is that Maori disproportionately fill our prisons, such as the difficulty that Maori have in accessing legal representation. Such a policy also ignores economic problems that impact particularly harshly on Maori, such as poverty and unemployment and racial bias in a legal system designed and run by Pakeha.[93]

IV. ASPECTS OF PRIVATE PRISONS

1. Philosophical and Ethical Concerns

While advocates of prison privatisation tend to focus on the tangible benefits that privatisation is said to bring, critics voice concerns about the propriety and ethics of turning the administration of incarceration into a profit-making exercise. It is a central tenet of this article that greater attention needs to be focused on whether allowing private companies to profit from incarceration is the type of activity that the state ought to condone.

The extent to which the state can legitimately contract out its responsibility for administering punishment varies, depending on which political philosophy is relied upon to justify the state's role. Take, for example, the theory of state legitimacy, which rests on the conception of a social contract. Under this contract, members of society entrust the government to create and enforce rules, in return for the state's protection of the citizen's life, liberty and property. The citizens agree to be bound by these rules, and consent to the state punishing those who violate them. The question then arises: to what extent can the state delegate out the powers invested in it under this contract? If there is no limit to the functions of the state which may be privatised, it is conceivable that the state may contract with private security companies to provide a police force, and may even privatise national security. Critics of privatisation argue that delegating out the power to punish is in breach of the social contract.[94]

It is clear, however, that even under this conception of the legitimacy of the state, not all aspects of punishment must be administered by it, and in some situations the authority to punish may be delegated. For example, the state can and does delegate to parents the right to discipline their children, although even this delegation is subject to limitations as to the extent of the punishment that may be administered. The degree of punishment involved in taking away a

93 See Kelsey, "Submission on the Penal Institutions Amendment Bill (No 3) 1993" (unpublished) 19.

94 Stacy, "Capitalist Punishment: The Wisdom and Propriety of Private Prisons" (1991) 70 Nebraska L Rev 900, 921.

person's liberty by placing them in custody, however, is considered part of the exclusive prerogative of the state and cannot be delegated.[95] Furthermore, a report from the Economic and Social Council of the United Nations has suggested that privatisation of prisons may not be in accordance with international human rights law.[96] The argument rests on the premise that the administration of justice, involving the restriction of personal liberty, is an exclusive prerogative of the state and the sub-delegation of this duty and responsibility is impermissible:[97]

> The conclusion that human rights law does not allow others than the State itself, acting through its functionaries, to restrict personal liberty, and in particular to operate prisons, is reinforced by the policy arguments ... concerning discipline, use of force, liability for harm to prisoners, need for accountability and the necessary symbolism of justice and jurisdiction being administered exclusively by the State.

In both these philosophical positions, the state's function in punishing offenders by depriving them of their liberty is considered a core role of the state. While it may be possible to conceive of a state that does not own the local airport or send the telephone bill, few would argue, at least until recently, that the enforcement of the law including the administration of punishment is anything other than an intrinsic function of the state.[98] The role of the state in coercively depriving a person of their liberty is unique and distinguishable from its other functions, which may be contracted out. In performing this role, the state is held accountable through mechanisms that do not apply to the public sector, such as elections.

It has also been suggested that, symbolically, the significance and moral shame of a prison sentence are reduced when the sentence is administered by a private company pursuing profit.[99] Prisoners in private facilities may wonder whether the penalty is being imposed on them because the state has determined that they deserve it, or whether the imposition of the penalty is simply a means of increasing the bottom line of a private company's balance sheet.[100] John DiIulio argues that contracting out corrections administration undermines the moral writ of the community. He gives the following analogy, stressing that it is to split hairs to suggest that there is a difference in the moral significance of private corrections as opposed to private courts:[101]

> You have worked tirelessly on behalf of your fellow citizens. You have discovered a cure for cancer .... For your good deeds, you are to receive the National Medal of

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95 Palley, *The Possible Utility, Scope and Structure of a Special Study on the Issue of Privatization of Prisons* (1993) 31.

96 Ibid.

97 Ibid 32.

98 Lippke, supra note 38, 1.

99 Davies, supra note 55, 38; DiIulio, "Duty to Govern", supra note 4, 173; Beyens and Snacken, supra note 37, 254, citing Palley, supra note 95.

100 Lippke, supra note 38.

101 DiIulio, "Duty to Govern", supra note 4, 173-174 and 176.

> Honour. The big day arrives. The crowd is assembled on the White House lawn. You gaze into the crowd and notice that the distinguished-looking guests ... have little pins on their lapels that read "MCA" for Medals Corporation of America. The ceremony is grand. The crowd roars as your name is called and the "president" (better-looking than the real commander-in-chief) shakes your hand and embraces you. You know for a fact that by every tangible measure – the physical quality of your medal, the warmth of the presenter, the duration and intensity of the crowd's ovations, the sound of the music, and so forth – MCA gave you a ceremony that was far superior to the one you would have received had the government and its officials presided; moreover, MCA spent only one-third of what the government would have spent. Satisfied? Bothered? Why?

Advocates of private prisons draw a distinction between the allocation of punishment, which must be a function of the state, and the delivery or administration of that punishment, which may be contracted out to a private agency. However, critics observe that such a fine distinction cannot exist.[102] The private company delivering the punishment will have an influence over the environment in which a prisoner serves his or her sentence, for example, through the imposition of solitary confinement or the awarding or withdrawal of privileges.[103] Private contractors will have some influence over how long a prisoner is incarcerated. Parole decisions, for example, are made in reliance on advice obtained from custodial and administrative staff.[104] Civil libertarians and prisoners' rights activists raise concerns about the breadth of power that the state is handing over to the private sector, including:[105]

> [T]he right to inspect and censor correspondence, regulate family visits and freedom of association, issue orders which must be obeyed, punish for breaches of rules, use varying degrees of force, and provide crucial evidence which affects the liberty of other private individuals.

Private prison advocates reply that, as with state prisons, private prisons are subject to the rule of law and the risk of the profit motive taking precedence over justice can be checked by the state monitoring the contractor.[106] However, assuming that such monitoring occurs, it may only identify the most blatant of breaches by the contractor unless there is "exceedingly close and exacting State oversight".[107] Civil libertarians in the United States are also concerned that powerful lobbyists linked to the fast growing "prison-industrial complex" will overwhelm legislators at the expense of prisoners' rights. In California, CCAm is building three new prisons "on spec" – without a contract with either the state

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102 Ibid 176.
103 Beyens and Snacken, supra note 37, 255.
104 Ibid.
105 Klaidman, "Putting Federal Prisons in Private Hands", *Legal Times*, 13 February 1995, 1; Kelsey, *Memorial Lecture*, supra note 2, 23.
106 Difficulties associated with this are discussed infra Part IV.
107 Lippke, supra note 38.

or federal government – and has opened an office in Sacramento to lobby Californian legislators to fill the prisons.

Finally, one of the strongest criticisms made by opponents of private prisons is that by providing a "solution" to the immediate problem of overcrowding in prisons, the state will regard private prisons as a panacea to all its problems. Not only does this ignore the reasons underlying the rapid increase in prison populations, it shifts the focus away from the reform which is needed to address the roots of this problem, for example, recidivism. The argument is made that the public money would be better spent on new initiatives to rehabilitate offenders and on addressing problems closely associated with crime, such as poverty and unemployment.

2. Issues of Contract and Monitoring

(a) Accountability

Where corrections management is provided by the state, there is a clear line of responsibility to the government. Once management has been contracted out, however, it becomes less clear how prisoners, the public or the government can hold the private company accountable. The model established under the amended Penal Institutions Act 1954 provides for accountability to the government rather than the public, in line with the contractual nature of the relationship between private contractors and the Crown.[108] The Act provides for the appointment to each contract penal institution of a monitor, whose role it is to assess, review and report to the Secretary of Justice on the management of the institution, and on the contractor's compliance with the management contract and with the Act. The Act also requires the superintendent of a contract penal institution to report regularly to the Secretary for Justice and to the designated monitor for the institution on a number of issues. Such issues include staff training, inmate complaints, any incidents of violence or self-inflicted injuries within the institution, and the number, nature and outcomes of any disciplinary proceedings.[109] In the case of an escape, attempted escape, or inmate death, the superintendent must provide the Secretary for Justice and the monitor with a separate written report as soon as practicable after the event.[110]

Private operators of penal institutions are also required to comply with the United Nations Standard Minimum Rules for the Treatment of Prisoners, the "good employer" sections of the State Sector Act 1988 and the New Zealand Bill of Rights Act 1990 ("Bill of Rights"). However, Kelsey notes that, in reality, these rights may amount to very little: most inmates lack the resources and credibility to mount a successful case in court against a private prison contractor. Further, even if such a case were to be mounted, the court may apply the "reasonable limits" provision contained in section 5 of the Bill of Rights Act

108 Kelsey, *Memorial Lecture*, supra note 2, 25.
109 Penal Institutions Act 1954, s 4F(2).
110 Penal Institutions Act 1954, s 4F(3).

1990. Kelsey argues that the broad discretionary powers conferred under the Act and regulations may see the courts invoke the section and stymie any attempt at judicial review.[111]

The ability of the public to hold private prison contractors to account is also likely to be very limited. Unlike other public watchdogs – such as the Ombudsman, Auditor-General and the Privacy Commissioner – private prison monitors do not have the power to issue public statements, and under the Act monitors report solely to the Secretary for Justice.[112] Although the Official Information Act 1982 will apply to private prison contractors, if information is "commercially confidential" no greater accountability may be obtained than exists with state prisons – perhaps even less.[113] In Australia, management contracts with private prison operators, including ACM's contract for the management of Junee prison, have been treated as "commercial-in-confidence",[114] and exempted from the freedom of information legislation.[115] ACM also asked the author of this article not to publish any information relating to the financial arrangements made between ACM and the Department of Corrections on the basis of commercial sensitivity.

At the time of writing this article, it was the Department of Corrections' view that the management contract for the new ACRP was a public document, as it had been tabled in Parliament. It therefore agreed to provide a copy of the management contract to the author – for NZ$200.[116] Although hesitant to allow access to "commercially sensitive" information, on the strength of the Department of Corrections' position, ACM allowed the author access to view the management contract and copy some parts of it. It remains to be seen whether this initial leniency in providing access to information will extend to access to information which is not contained in the management contract, such as annual reports.

(b) Monitoring

Monitoring is an important feature of prisons, as they are not generally visible institutions, and rarely come under public scrutiny, except when there is a security breach such as a riot, hostage taking or escape.[117] Most members of the public will never be incarcerated in a prison, and do not have a large amount of interest in or concern for the "undesirables" incarcerated within. Kelsey has noted that in 1992, when the National Government called for expressions of interest in the management of the ACRP, media reports showed that the public

111 Kelsey, *Memorial Lecture*, supra note 2, 28-29.
112 Ibid 27.
113 Ibid 21.
114 Harding, supra note 3, 69-72.
115 Baldry, "USA Prison Privateers: Neo-Colonialists in a Southern Land" in Moyle (ed), *Private Prisons and Police*, supra note 50, 135.
116 Letter to the author from Stuart Jones, Project Manager, Department of Corrections, 1 December 1999.
117 Shichor, "Private Prisons", supra note 12, 367.

was primarily concerned that offenders were not provided with better living and working conditions than the "deserving poor".[118] Even for those who do maintain some interest in the running of prisons, any concerns voiced at the ballot box every three years will have little impact on internal prison policies. It cannot, therefore, be assumed that the public alone will adequately monitor the private contractor.

Critics of privatised prisons highlight four main concerns relating to monitoring. First, it is expensive, usually involving the appointment by the government of a monitor who works on site. Richard Harding notes that in Queensland and Florida, monitors are responsible for the oversight of large numbers of inmates, and that without adequate support and assistance, the ability of the role of monitor to function adequately in these states must be questioned.[119] The second concern is that the monitor, who must work with prison management on a daily basis, may be co-opted by the contractors and will therefore compromise his or her role as monitor. Third, it is likely that the monitor will have been appointed by the same government department that selected the contractor. Failure on the part of the contractor will also be seen to be failure on the part of the government and the department who let the contract. The monitor therefore has a vested interest in seeing that the contractor's performance is successful and may have little commitment to highlighting the contractor's defaults, as this would likely result in bad publicity.[120]

A fourth concern is whether the contracting company is responsive to the monitoring process. Advocates of privatisation argue that private contractors can be encouraged to be responsive to the findings of the monitor by incorporating financial incentives into the contract. Similarly, the prospect of a contract not being renewed or failing to secure subsequent contracts may encourage the private contractor to respond appropriately. The management contract for the ACRP gives the Crown a number of options for remedying any breaches of the contract by ACM, including the withholding of payments due under the contract.[121] However, critics suggest that all this may not be effective, as it assumes that breaches of the contract will be detected by the monitor and that neither the breach, nor the amount of the fine, will be disputed successfully by the contractor. Further, where the state has become dependant on the contractor, such a threat may prove ineffective.[122]

(c) Capture and Dependence

As noted, one concern of critics is that the monitoring of private prisons will prove ineffective where the monitor becomes "captured" by the private facility.

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118 Kelsey, *Rolling Back the State: Privatisation of Power in Aotearoa / New Zealand* (1993) 228.

119 Harding, supra note 3, 42-44.

120 Ibid 48; Shichor, "Private Prisons", supra note 12, 367.

121 Management Contract for Auckland Central Remand Prison with Australasian Correctional Management Pty Limited, 28 July 1999, cl 16.4.

122 Shichor, *Punishment*, supra note 4, 124.

This concern also raises an important contradiction: generally, prison management is contracted out to the private sector because the public sector is perceived as being lazy, inefficient, ineffective, inept and lacking any interest in their work. Advocates of privatisation assume, however, that this same government agency will be a capable and vigilant overseer.[123]

Monitor capture has occurred at Borallon and at ACM-managed Arthur Gorrie Remand Centre in Queensland.[124] At Arthur Gorrie, five deaths in custody occurred in a short period of time, several of which were avoidable. However, as the QCSC took a "hands-off" monitoring role, no external control was exercised over the prison.[125] In New South Wales, as with Queensland, "capture by the operators was painless and almost effortless".[126] One example of an "accountability slippage" on the part of the monitor at Junee – which is also managed by ACM – occurred in 1994, when a riot led to the Corrective Services Emergency Response Team being called in, and gas being used to suppress the uprising. The monitor's report for the period in which this riot occurred made no mention of the riot – its sole concern was whether the "serious incident reporting procedures" had been followed. As they had, that was the end of the matter: no mention was made of the causes of the riot.[127]

In the United Kingdom, the monitor (known as the "controller") has been involved more fully in disciplinary and adjudicatory functions. Two controllers have been appointed for each private prison, and are provided with secretarial support and administrative assistance. Despite the greater amount of resources provided, however, a type of capture has nevertheless emerged, and a "degree of over-identification with the regulatee's problems"[128] has resulted in insufficient monitoring of compliance with the contract.

In New Zealand, it is possible that the monitor may be captured by the private contractor, as there is no requirement that the task of monitoring be alternated amongst different employees in the department, and as the monitor is not appointed for a fixed period of time. Further, there is nothing to restrain the monitor from leaving to work for the private contractor. For monitoring to be worthwhile, it is also necessary that there is a choice of private providers able to manage the prison. Where there is not a large enough market of private providers and the government becomes dependant on a particular provider, the role of the monitoring process becomes redundant.

In the United States, critics of private prisons have expressed concern that the limited pool of private contractors may make it difficult for the government to switch from one contractor to another.[129] This problem can only be exacerbated by the smaller New Zealand economy. Critics also argue that private contractors

123 Ibid 132.
124 Harding, supra note 3, 42-43.
125 Ibid 47 and 129-130.
126 Ibid 45.
127 Ibid 125-126.
128 Ibid 46.
129 Shichor, *Punishment*, supra note 4, 126.

are often aware from the beginning of negotiations that they will be unable to provide the services contracted for at the price they tendered. They rely on the prospect of the government agency involved becoming increasingly dependant on them, making it difficult, if not impossible, for the government agency to subsequently terminate the contract.[130]

(d) Conflicts of Interest

A further concern that has emerged overseas is the number of incidents where key government members or public servants involved in implementing changes to privatise corrections shortly thereafter become employees of companies tendering for the new business. In 1993, private prison companies in England maintained "a network of connections between former senior civil servants, including prison and army staff, Conservative MPs and donors to the Tory party, and those attempting to enter the market created by legislation two years ago".[131] Faced with this problem, the Treasury drafted rules to stymie the "revolving door syndrome".[132] This does not appear to have resolved matters, however. In 1996, the problem of overlapping commercial and political interests in the corrections industry arose. John Mowlem & Co and Sir Robert McAlpine & Son, two companies involved in a consortium with UK Detention Security, the contractor for Blakenhurst prison, contributed to Conservative Party funds. Lord McAlpine was a former Conservative Party Treasurer.[133] It is not only in England that scandal has emerged relating to conflicts of interest in the corrections industry. In the United States, an extensive overlap exists between business, political and private interests, and a number of private businesses have exerted influence over the development of criminal justice policy.[134]

Section 4B(f) of the amended Penal Institutions Act 1954 requires that every management contract provide for the avoidance of conflicts of interest that may arise in the performance of any power, duty or function conferred by the management contract or by the Act. This limited restraint will not stop the conflicts of interest that have arisen in England and the United States, where previously interested government members or officials have been seconded to work for companies who are attempting to enter the private prison market.

A further concern raised by critics is that the management company operating the facility will automatically face a conflict of interest. While the company's role is to administer a custodial sentence imposed by the courts, it also has a vested interest in maintaining a full facility. The concern is that the

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130 Ibid 128.

131 Kelsey, *Memorial Lecture*, supra note 2, 14, citing *The Guardian*, 12 April 1993.

132 Ibid.

133 Beyens and Snacken, supra note 37, 258.

134 Ibid, citing Lilly and Kneeper, "An International Perspective on Privatisation of Corrections" (1992) 31:3 How J Crim Just 171; Lilly and Kneeper, "The Corrections-Commercial Complex" (1993) 39:2 Crime & Delinq 150.

management company may have some ability to influence the length of an inmate's sentence. The Department of Justice has noted that:[135]

> In both the United States and New Zealand, the usual practice is for the release date of prisoners to be determined by a parole or prisons board which will be influenced by, amongst other things, behaviour while in custody. A profit-oriented prison could have the incentive to make unduly adverse reports to parole boards in order to delay release dates, thus grossly interfering with the rights of prisoners.

3. Economic Issues

As with most decisions to privatise, the most persistent argument given in justification of privatising prisons is that it will save the taxpayer money. It is therefore important to consider the claim that private prisons operate at a lower cost.

(a) Construction

As prison populations grew rapidly in the United States, England and Australia in the 1980s and early 1990s, pressure mounted for new prisons to be built faster and at a lower cost to the public purse. Private firms claim that, by avoiding bureaucratic procedures, they are able to build and renovate correctional facilities faster than the government. CCAm claims that it can build a private prison at 80 per cent of the government's cost by building faster, and because construction contractors charge the government more.[136] Critics warn, however, against the possibility of private companies purchasing off-the-shelf designs in a bid to save money and minimise administration costs. Further, while contracting out prison construction may provide a short-term solution to cash-strapped governments, the long-term cost to the state of operating these prisons may outweigh any initial saving realised in contracting out their construction.[137] This "solution", it is argued, diverts attention away from addressing the cause of the growing prison muster, and from introducing initiatives which might alleviate it.

The construction of the new ACRP was tendered out to the private sector, with Mainzeal Property and Construction Limited winning the tender. The building itself is owned by the Crown and is on Crown land, thus avoiding the awkward possibility that, following the expiry of the current management contract, a competitor of ACM might win the right to manage an ACM-owned facility. In this situation, the government might be forced to purchase the facility outright or enter into a lease-back agreement with ACM. This could prove difficult if the government was under financial pressure, and was forced to offer the second contract to ACM as well.

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135 Department of Justice, supra note 67, 66.
136 Logan, *Cons and Pros*, supra note 4, 79.
137 Kelsey, *Memorial Lecture*, supra note 2, 17.

(b) Management Costs

Private sector contractors also argue that they can operate prisons at a lower cost than the public sector, claiming savings can be realised through greater flexibility and the avoidance of "red tape". Private companies are neither restricted to following the usual bureaucratic channels, nor limited to government suppliers. Also, whereas government departments have an incentive to spend all of their budget each year so that it is not cut the following year, every saving made by private operators results in a greater profit.[138]

In New Zealand, however, it cannot be assumed that private prison operators will operate more economically than their public counterparts by avoiding costs associated with set bureaucratic channels. Government departments are not restricted to purchasing supplies from particular providers, and reforms that occurred in the late 1980s have meant that the public sector is now structured similarly to the private sector. The Public Finance Act 1989 shifted the emphasis in financial management from input controls to output and outcome measures.[139] Where government departments once operated on programme-based budgets, Ministers now contract with government agencies for the provision of specified outputs, which are priced on a foundation that is as competitively-neutral as possible.[140]

Labour costs constitute between 60 and 80 per cent of the cost of operating a prison.[141] Thus, in order to operate at a lower cost than their public sector counterparts, private operators must realise a saving in labour costs. Private contractors claim that this can be achieved through more flexible hiring and firing of staff, and increased use of electronic surveillance. Cheaper labour costs are also achieved through lower salaries, limitations on promotion, fewer staff, less training and fewer fringe benefits.[142] Critics warn that cutting costs in these areas will impact on the quality of service provided, resulting in reduced safety and security in prison, and add that the increased use of electronic surveillance "dehumanises" the prison environment for both prisoners and staff.[143]

Although there have been a number of studies comparing the operating costs of private and public prisons, such studies are problematic and their results are inconclusive.[144] While some in the United States, the United Kingdom and Australia have found that private prisons are more cost-effective,[145] others have

138 See Shichor, "Private Prisons", supra note 12, 368.

139 Boston, Martin, Pallot and Walsh (eds), *Public Management: The New Zealand Model* (1996) 58. See generally 264-267.

140 Ibid 80.

141 Shichor, "Private Prisons", supra note 12, 368.

142 Ibid 369; Beyens and Snacken, supra note 37, 252.

143 Shichor, "Private Prisons", supra note 12, 367; Beyens and Snacken, supra note 37, 252; Smalley, supra note 35.

144 Beyens and Snacken, supra note 37, 249-250.

145 Ibid 249-250, citing Hopkins, "The Formation of UK Detention Services" (1993) paper presented at "Private Gevangenissen in Nederland" seminar, Utrecht, The Netherlands 1 December; but see Moyle, "Underlying Issues", supra note 53, 116, who criticises the studies as superficial.

found the costs to be similar[146] or the difference in cost to be minimal.[147] The majority, comparing private prisons with broadly-comparable public sector prisons, have found that, at least in the early years, the private facilities operated at a lower cost than those in the public sector.[148] This is a generalisation, however, and there are exceptions.[149] Arguably, savings could be made in the public sector if facilities were managed more economically.[150]

Moreover, it cannot be assumed that, even where a private prison operates at a lower cost than a public prison, this will necessarily mean a saving for the state. For savings to be passed on to the government, there must be a vital and competitive market in the corrections industry. In the absence of such competition, any saving made will become increased profit for the private contracting company.[151] It is also possible that, in countries or states where privatisation of prisons is just beginning, the private company that wins a management contract will, at least initially, operate the prison at a loss in order to undercut the cost of public prisons. This loss-leading is all the more possible where facilities are contracted out to multinational companies seeking to establish a foothold in a new region.

Finally, any saving made by the private sector must be measured against the quality of service provided. A reduction in cost by the private sector will be cold comfort if it comes at the expense of service. It is only where the quality of service is the same or exceeds that provided by the public prison service, that any reduction in cost in the private sphere will be meaningful.[152]

(c) Difficulties in Comparing Costs

Drawing an accurate comparison between public and private institutions is fraught with difficulty as both contain hidden costs. In the case of private prisons, monitoring expenses, legal costs associated with the contract which are not met by the government, and the cost of the government "safety net" services that are maintained in the case of an emergency in the prison may all be hidden.[153] Under section 4(v) of the amended Penal Institutions Act 1954, where the Secretary of Justice believes, on reasonable grounds that there is, or is an imminent threat of, an emergency affecting the safety or health of the inmates and the contractor is unable or unwilling to respond to the emergency, the

146 James, Bottomley, Liebling and Clare, *Privatizing Prisons: Rhetoric and Reality* (1997) 24.

147 Chan, "The Privatisation of Punishment: A Review of the Key Issues" in Moyle (ed), *Private Prisons and Police*, supra note 50, 48, citing Curran, "Destructuring, Privatization, and the Promise of Juvenile Diversion: Compromising Community-Based Corrections" (1988) 34:4 Crime and Delinq 363 and citing Donahue, *The Privatisation Decision: Public Ends, Private Means* (1989).

148 Bottomley and James, *Evaluating Private Prisons: Comparisons, Competition and Cross-Fertilisation* (1997) 259. See also James et al, supra note 146, 24.

149 Ibid 25. See also Logan, *Cons and Pros*, supra note 4, 117, who comes to the same conclusion.

150 Bottomley and James, supra note 148, 13-14.

151 Chan, supra note 147, 49.

152 See text infra Part IV.

153 Shichor, "Private Prisons", supra note 12, 368.

Secretary may take over the management of the institution. Conversely, public prisons often benefit from services provided by other government departments such as education and medical services. In New Zealand these costs are not hidden, as government agencies charge each other for the provision of services.[154]

While private companies' accounts are designed for the purpose of cost-analysis, those of public facilities are aimed at accounting for appropriated public funds, ensuring that no unauthorised expenditures are made.[155] However, this too is less of a problem in New Zealand following the introduction of the Public Finance Act 1989 which requires financial reporting in accordance with generally-accepted accounting practices.[156]

A further difficulty associated with drawing an accurate comparison between the cost of operating public and private prisons is that not all prisons are alike. One criticism frequently levelled at private prison operators is that they engage in "cream-skimming", taking only the "easiest" of the state's prisoners and leaving the most hardened and intractable for the state to handle.[157] In the United States, private operators have shown a preference for bidding for those prisons that do not have a history of violence, racial tension or staff corruption.[158] Similarly corrections administrators, who may wish to see private facilities succeed, sometimes avoid allocating troublesome inmates to private prisons. In Kentucky, inmates are screened for behavioural or medical problems before they are sent to the private Marion Adjustment Center.[159] Queensland's Borallon prison has also actively rejected inmates who carry a higher additional incarceration cost.[160] It is understandable that private facilities will want to avoid the extra cost and bad publicity associated with security breaches by troublesome inmates. However, this can lead to an "apples and oranges" situation when comparing the running costs of private and public facilities.

A comparison of the operating costs is further hampered by difficulties in gaining the necessary financial information. In the United Kingdom, the government and private firms have hindered efforts at drawing such a comparison by denying access to financial information.[161] In Australia, freedom of information legislation has proved inadequate as a means of accessing audit reports, financial information, tender documents and contracts.[162] As discussed, similar difficulties are likely to emerge in New Zealand.

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154 Boston et al, supra note 139, 261.
155 McDonald, "Public Imprisonment", supra note 26.
156 Boston et al, supra note 139, 260.
157 Davies, supra note 55, 37.
158 Ibid.
159 Chan, supra note 147, 50.
160 Moyle, "Underlying Issues", supra note 53, 116.
161 McDonald, "Public Imprisonment", supra note 26.
162 Moyle, "Introduction" in Moyle (ed), *Private Prisons and Police*, supra note 50, 16; Moyle, "Underlying Issues", supra note 53, 114; Davis, supra note 55, 34.

4. Quality of Service

(a) Innovation Versus Cutting Corners

While private prison operators claim that, through flexibility and innovation, they can provide a better quality of service than their public counterparts, critics voice a concern that the drive to increase profits will mean that private operators may cut corners in the service that they provide. In Texas, CCAm has fielded criticism for failing to provide job training, education programmes and medical services to inmates, as required in contracts with the state.[163] It again came under attack in 1997 when inmates at the Northeast Ohio Correctional Center reported that, after arguing with guards about their treatment, canisters of tear gas designed for outdoor use were dropped outside their cells. While hundreds of prisoners choked for breath, a team of officers in full riot gear handcuffed and beat the prisoners and sprayed them with mace. Following the filing by inmates of a lawsuit alleging that the guards were abusive and that inadequate medical care was provided at the prison, the riot squad was again ordered by CCAm into the cellblocks. A Justice Department report found that on this occasion, unnecessarily harsh and humiliating strip searches of male inmates were conducted by staff – sometimes performed in the presence of non-correctional female staff. The same report noted there had been six inmate escapes in 1998 – four of whom were convicted murderers – and two stabbing deaths since 1997.[164] In 1999, CCAm settled the class action lawsuit brought by the inmates for US$1.65 million.[165]

Concerns have also been raised in relation to the rights accorded to inmates in some Australian private prisons where, for example, women prisoners have been provided with inadequate or inappropriate clothing and have had visits severely restricted and childrens' visits denied as a disciplinary measure.[166] In 1993 Paul Moyle stated that, at the ACM-managed Arthur Gorrie, inmates reported spending "up to 20 hours in their cells, [had] nominal exercise regimes, poor quality programs, delays in getting access to books from the library, inadequate basic facilities and a high incidence of assaults within the centre". The Prisoners Legal Service indicated that it was very difficult to gain access to the prison in order to gain instructions from clients.[167]

In England, the substandard operation of Wolds by Group 4 has frequently been criticised by the media. The Prison Reform Trust has expressed concerns relating to inadequate staffing levels, the widespread availability of drugs, the level of incidents and disturbances and the high incidence of stress and sickness amongst the staff. In the United Kingdom however, a reduction in the operating

163 Moyle, "Underlying Issues", supra note 53, 117, citing "CCA's Performance Angers Authorities" (1991) 87:5 Queensl St Services J, 1.

164 Smalley, supra note 35.

165 Ibid; see also Bates, "CCA, the Sequel" *The Nation*, vol 268, no 21, 22.

166 Russell, supra note 27, 8.

167 Moyle, "Private Contract Management of Corrections in Victoria: Some Pressing Issues that Will Challenge Policy Makers" in Moyle (ed), *Private Prisons and Police*, supra note 50, 31.

costs of private prisons appears to have been made without a decrease in the quality of facilities.[168] Nevertheless, private contractors are not solely capable of providing innovation:[169]

> Whilst fully acknowledging what has been achieved at Wolds ... it must be repeated that similar and, some might argue, better achievements are to be found in some new public sector local prisons, showing that the private sector has no exclusive claim on innovation or ability to deliver high-quality regimes to prisoners. There is therefore, little evidence that the Wolds' achievements were directly or exclusively related to its contracted-out status.

However, it is clear that the quality of service provided by public prisons is by no means exemplary. In New Zealand, a ministerial inquiry was ordered in 1993 after 17 prison officers at Mangaroa Prison were suspended and later sacked for a prolonged series of assaults and the abuse of two inmates.[170] Studies of the quality of service provided by private prisons cut both ways: some have suggested that the quality of service in private prisons is superior, while others have highlighted the appalling conditions.[171]

(b) Staff Levels and Training

As mentioned, staffing is the main area in which private prison operators cut costs. Advocates of private prisons argue that by creating a better work environment, productivity and morale increase and absenteeism declines. However, this is easier to achieve when staff are placed in sparkling new facilities. It remains to be seen whether staff morale remains positive when the new facilities in which most private prisons operate also become tired and old. Moreover, antagonism exists in some public prisons amongst staff who are unwilling to abandon outdated retributive beliefs in favour of a new culture of habilitation.[172] However, this same cynicism and resistance to change may well develop amongst long-term staff in private prisons when, given time, the "new recruits" hired by private companies, who do not have experience working in corrections, also become jaded.

Opponents of private prisons argue that many private prison staff are not unionised, are paid a lower hourly wage, have fewer fringe benefits and are on fixed-term contracts. Staff at private prisons generally have fewer professional qualifications and less experience working in corrections than their public sector counterparts. It is claimed that private prisons also have a shortage of staff and a higher staff turnover. At the Junee prison, staff must sign an agreement stating

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168 Bottomley and James, supra note 148, 25.

169 James et al, supra note 146, 137.

170 Murphy, "Justice Head Takes Some Blame", *The New Zealand Herald*, Auckland, New Zealand, 23 July 1993, 3.

171 See for example, Logan, "Well Kept: Comparing Quality of Confinement in a Public and a Private Prison" (1992) 83:3 J Crim L & Criminology 577.

172 Harding, supra note 3, 135, citing Logan, *Ministerial Inquiry into Management Practices at Mangaroa Prison* (1993).

that they will not take industrial action regarding staff levels.[173] All this, it is argued, leads to lower staff morale in private facilities[174] and impacts on the quality and cost of the service offered by the private sector.[175]

(c) Recidivism

Recidivism is perhaps the single greatest problem currently facing the prison system. In 1995, prison census data revealed that 57 per cent of the prison population in New Zealand had more than ten previous convictions, while only 14 per cent of offenders in prison had no previous convictions.[176] Critics of privatisation argue that private prison operators are likely to cut the educational programmes that ought to be provided in prisons, and which have been shown to reduce the rate of recidivism.[177] A further difficulty with privatisation is that private companies do not have an incentive to rehabilitate inmates. Rehabilitation programmes may lead to the early release of prisoners, equating to an economic loss for the prison operator. Recidivism also brings about a good economic result for the private prison operator, as it is repeat custom. Wolds prison in the United Kingdom is an example of one private prison where the duty to rehabilitate prisoners has been subordinated to the profit motive – prisoners at Wolds are allowed out of their cells for 14 hours a day, but no activities are provided.[178]

Research showing a comparative analysis of the recidivism rate of inmates released from public prisons and inmates released from private prisons is scant.[179] A University of Florida study compared short-term recidivism rates for minimum-to-medium security prisoners from two private prisons with inmates released from similar public facilities. The research, conducted 12 months following release, found evidence of reduced recidivism amongst those released from private facilities.[180] However, such research should be approached with caution. First, it assumes that there has been no pre-selection of inmates in the private facilities. Secondly, the information required for a thorough comparison of recidivism is difficult to collate, as most private prisons are recently established, and recidivism research requires a period of time to pass between the inmate's release and the conduct of the survey.

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173 Russell, supra note 27, 8.

174 Shichor, *Punishment*, supra note 4, 194-197.

175 See Shichor, "Private Prisons", supra note 12, 370; Russell, supra note 27, 8.

176 Ministry of Justice, supra note 66.

177 Columbia University Graduate School of Journalism, "Prisoners/Corrections" (15 February 1999) 1 Colum Journalism Rev 19. Available: Expanded Academic (Last accessed 26 July 2000). This point was also raised by the then opposition MP Hon Phil Goff in the third reading of the Penal Institutions Amendment Bill (No 3) (29 November 1994) 545 NZPD 5129.

178 Beyens and Snacken, supra note 37, 259.

179 Bottomley and James, supra note 148, 15.

180 Lanza-Kaduce, Parker and Thomas, *A Comparative Recidivism Analysis of Releases from Private and Public Prisons in Florida* (1999).

(d) Cross-Fertilisation

One of the arguments put forward by private prison advocates is that private prisons will lead to an increase in the standard of prison facilities across the whole prison system. Initially, it is argued, public facilities will improve their standard of service when faced with competition from the private sector. With time however, innovations in the public sector may also spearhead improvements in privately-managed prisons.[181] Cross-fertilisation may be hindered in practice if public prison staff, managers and head office are apprehensive of change. Richard Harding contends, however, that barriers to change are not insurmountable, and examples of cross-fertilisation already exist. Harding cites the Wolds as an example of a private prison which has "cross-fertilised" the public sector.[182] He also notes that, in the United States, many states have provided, as a term of their contracts, that private prisons are obliged to seek accreditation with the American Correctional Association ("ACA"). This requirement was not imposed on the State Department of Corrections. In Louisiana, however, a new Chief Executive of the Department of Corrections found it unconscionable that a higher standard was imposed on the private sector than the public,[183] and the obligation to apply for accreditation with ACA also fell onto the public prisons. In some public prisons in Australia, staff cuts were agreed to when staff were faced with the threat of having the public facility contracted out to the private sector. It is a matter of taste as to whether one describes this as "cross-fertilisation" or "industrial blackmail".[184]

However, not all commentators agree with this assessment. John DiIulio argues that the public sector already provides examples of competent correctional management to managers of incompetent public prisons.[185] Others maintain that changes in the public prison service in England and Wales in the early 1990s were the result of complex and unique external and internal influences. Such influences include the riot at Strangeways Prison and disturbances at 20 other establishments during April 1990, the thorough public investigation that ensued, the embarrassing series of escapes by top-security prisoners in September 1994 and January 1995, and the sudden increase in the prison population. In this environment, there can be no empirical certainty as to which changes would have taken place in any event and which changes occurred as a result of the perceived threat of privatisation.[186] Finally, Bottomley and James note that, in such an essentially competitive environment, "it may be somewhat naive and unrealistic to expect that 'cross-fertilisation' will lead to the sharing of 'good-practice' in a spirit of disinterested co-operation".[187]

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181 Harding, supra note 3, 134-149.
182 Ibid 139-142.
183 Ibid 139.
184 Ibid 138.
185 DiIulio, "Duty to Govern", supra note 4, 170-172.
186 Bottomley and James, supra note 148, 32-33.
187 Ibid 39.

V. WHERE TO FROM HERE?

As with public prisons, it appears that some private prisons will provide a high quality of service, while others will lurch from one crisis to the next. Historical anecdotes of appalling cases of inhumane treatment in private prisons abound. Just as plentiful, however, are the horror stories that emerge from public prisons. Similarly, overseas studies have shown that some private prisons can operate at a lower cost than their public counterparts, while others cannot. The fact that overseas experience has shown that some private prisons will operate well, while others will fall below an acceptable standard, is not surprising: to expect that all private prisons will be uniformly good or uniformly bad would be to assume that there is something magical about the private sector.[188]

On balance it appears that, at least in the initial years, private prisons are likely to operate at a slightly lower cost than prisons managed by the state. However, as staff costs account for up to 80 per cent of a prison's expenses, any drop in cost is likely to come about either from paying staff lower wages, employing fewer staff, employing staff with less experience or by providing fewer staff-training programmes. Further, it cannot be assumed that the initial savings found in some private prisons overseas will be replicated in New Zealand. Changes brought about under the Public Finance Act 1989 have increased the financial accountability of government agencies and introduced standard financial accounting practices used by the private sector. Moreover, changes to state sector employment, and the introduction of the Employment Contracts Act 1991, have meant that staff are able to be employed on similar terms in public and private prisons.

With regard to monitoring, the concern remains that when private prisons perform poorly, it may be difficult for the government or public to hold private operators accountable. Prisons are generally not very public places. This is even more so in the case of private prisons, whose operators have shown an unwillingness to divulge information – especially financial information – about their operations. In Australia and the United Kingdom, the problem of monitor-capture has further hindered attempts to scrutinise the operations of private prisons.

Finally, rather than falling back on the temporary "solution" to prison overcrowding offered by private companies eager to turn a profit from administering incarceration, a greater good would be achieved by focusing efforts on addressing the root causes of such problems within the prison system as recidivism and the over-representation of Maori. Moreover, in the international debate on private prisons, an overemphasis has been placed on pragmatic matters such as cost to the neglect of any discussion of moral or philosophical considerations.[189] Punishment, involving the enforced deprivation of a person's liberty, is unique and distinguishable from other functions performed by the state.

188 DiIulio, "Duty to Govern", supra note 4, 171.
189 See Shichor, "Private Prisons", supra note 12, 372.

The state alone plays a core role in allocating and administering punishment, one that should not be contracted out to the private sector for profiteering.