
BOOK REVIEWS

Prisons in Private Hands



PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY

by Richard W Harding[†]

(Open University Press 1997 pp 185 \$37.95)

PRIVATIZING PRISONS: RHETORIC AND REALITY

by Adrian L James, A Keith Bottomley, Alison Liebling & Emma Clare^{*}

(Sage Publications 1997 pp 194 £14.99)

TWENTY years ago, few people would have disputed the proposition that building and running prisons should be the undiluted legal and moral responsibility of the State, immune from the trappings of private enterprise. After all, a breach of the criminal law constitutes something so offensive or harmful to the communal well-being that it triggers the involvement of State agencies, including police and public prosecutors. Such behaviour is not merely a matter for compensation between private individuals but invites punishment, pronounced by a criminal court and inflicted in the name of the State. In the 1970s a proposal for privately built and operated prisons would therefore have appeared to be little more than the whimsical pipedream of an ideologue from the 'New Right'.

Both of these books demonstrate how dramatically the situation has changed in many parts of the world. In the United States, the United Kingdom and Australia

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‘prison privatization’ has occurred at an astonishing speed and the State of Victoria leads the world in its proportionate use of private prisons (over 40 per cent of inmates). It is arguable that privatization is the most significant structural development to have occurred in the penal system in Anglophone countries in the twentieth century. It is indisputable that, like the modern tendency to create verbs out of adjectives and nouns, ‘privatization’ is here to stay.

Before the Labour Party came to power in the United Kingdom in 1997, the Shadow Home Secretary, Jack Straw, described prison privatization as ‘morally repugnant’ but, as Harding predicted,¹ pragmatism is the order of the day. Jack Straw is now Home Secretary, new private prisons have opened and there is no indication that the British Labour Party will pursue its promise to return private prisons to the public sector.

The recent announcement that a new prison will be built in Western Australia, and the likelihood that it will be a private prison, has generated considerable media discussion, including discussion about standards and accountability. Interestingly, there was little such debate when the State-funded Casuarina Prison was designed and built in the late 1980s. A fact which is less well known — but which is drawn out in both of these books — is that the spectre of privatization has already had an important impact in this State. In 1994 there was a significant restructuring of the conditions of employment of prison staff. This was aimed at counteracting ‘featherbedding’² of various forms, including massive amounts of overtime worked by many officers at penalty rates, and various other privileges. The threat of privatization was not only a tool for pressurizing unions into long overdue industrial reforms but it also ushered in the catch cries of managerialism — ‘best practice’, ‘strategic planning’, ‘organizational structures’ and ‘performance measurement’.³

WHAT DOES ‘PRISON PRIVATIZATION’ MEAN?

A system in which the State totally divested itself of responsibility for prisons would clearly be unacceptable but, as Harding explains, this is not the issue. Privatization in this context really means delegated service delivery:

The state continues to fund the full agreed costs of incarceration but the private sector is paid to provide management services, both ‘hotel’ (including custodial)

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1. Harding 7-8.
 2. *Ibid*, 138.
 3. James et al 16-18.

and programmatic. Variants of this include arrangements whereby the private sector also provides the physical plant itself.⁴

A popular model nowadays is the Design, Construct, Finance and Manage (DCFM) arrangement, whereby the private sector is contracted to build a new facility and then to run it for a period under terms which are specified in the contract and monitored and enforced. According to Harding, critics who assume that privatization means divestment of responsibility are therefore missing the point; the key question is to ensure effective and accountable service delivery in which he who pays the piper calls the tune.

SCOPE, METHODOLOGY AND GENERAL CONCLUSIONS

James et al start with a detailed discussion of the various ideological, practical and economic factors which have contributed to the process of prison privatization. Although the authors make some international comparisons, they focus primarily on England and the bulk of the book is devoted to a study of two new prisons, Wolds and Woodhill. Wolds, the first private prison in the United Kingdom, opened in May 1992 and was a dedicated remand prison which held no sentenced prisoners. Woodhill opened in July 1992 and was considered to represent best practice in the public prison sector. The authors acknowledge two methodological limitations: first that Woodhill held sentenced as well as remand prisoners, and secondly, that the study of Woodhill started well over a year after it opened with the result that they missed its early 'teething stages'.⁵ They carried out their study by means of observation at the prisons, talking informally to staff and holding a series of semi-structured interviews with staff and prisoners.⁶ This is a valuable book which gives a useful and detailed account of a wide range of matters and provides interesting insights into the dynamics surrounding the establishment of new prisons. The reader also gets an insight into many important problems of modern prison life including drugs, bullying and so-called unit management.

James et al's overall conclusions are rather tentative, reflecting in part the acknowledged methodological problems:

Whilst fully acknowledging what has been achieved at Wolds — initially in the face of considerable hostility from many different quarters — it must be repeated

4. Harding 1, using the work of J Donahue *The Privatization Decision: Public Ends, Private Means* (New York: Basic Books, 1989).

5. James et al 100-101.

6. Ibid, 65.

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.⁷

Harding believes that comparisons of the type undertaken by James et al are valuable in that they allow both strong and weak aspects of the public and private sectors to be identified.⁸ However, he does not think that such comparisons can resolve the question of whether privatization should proceed:

The hypothesis of this book is that public and private prisons are merely two (and not necessarily the only two) alternative forms of service delivery within a single system, two components of a total system which, if at all, will justify the adoption and retention of the private sector component.⁹

To Harding, the crucial question is how one sector 'cross-fertilizes with the other, to the mutual benefit of each and to the advantage of the system as a whole'.¹⁰ In a comprehensive and thematic survey of trends, issues and research from around the world he concludes that cross-fertilization has occurred to the benefit of the system as a whole. He explores various models of accountability and suggests a model which, he believes, will provide a blueprint for ensuring that the piper can effectively call the tune. He also considers that the focus on accountability which has been generated by private sector involvement can lead, via cross-fertilization, to increased accountability in the public sector and improved prison conditions. He pursues this thesis both persuasively and consistently to the conclusion that

the evidence is clear that private prisons could act as a catalyst for improvement across the whole prison system, but only if they are effectively regulated and properly accountable.¹¹

IDEOLOGY AND CONSUMERS' PERCEPTIONS

Those critics who have forcefully opposed 'contracting out' in principle¹² will, no doubt, be unconvinced by Harding's fairly upbeat conclusions; to them, the

7. Ibid, 137.

8. Harding 111.

9. Ibid.

10. Ibid, 143.

11. Ibid, 165.

12. Eg M Ryan 'Prison Privatization in Europe' (1996) 7 *Overcrowded Times* 16-18; R Sparks 'Can Prisons be Legitimate? Penal Politics, Privatization and the Timeliness of an Old Idea' in R King & M Maguire (eds) *Prisons in Context* (Oxford: Clarendon Press, 1994).

fundamental moral question remains paramount. However, one of the most striking things about these books is their attention to consumer responses; it is clear that to prisoners, the crucial question is not who is running the institution but the conditions in which they live and the way they are treated.¹³ James et al found that prisoners rated Wolds highly 'even in comparison with ... the high standards of new public sector prisons such as Woodhill.'¹⁴ In turn, this meant that there were 'few grounds ... to wish to challenge the "legitimacy" on a practical day-to-day level, of how they were being treated or by whom the prison was managed.'¹⁵ Harding refers to American research to similar effect and to the fact that in Queensland there was a long 'transfer list' of prisoners seeking to move from the public sector prisons to Borallon,¹⁶ the first privately managed prison in Australia. Few would argue that prisoners' perceptions should be a major determinant of penal policy, but the point is that ideological arguments run the risk of ignoring the needs and experiences of those on the receiving end.¹⁷

CROSS-FERTILIZATION, CHURNING AND RAISING STANDARDS

Critics of privatization might, of course, argue that better standards in prisons and prisoners' preferences for some private sector prisons simply reflect the poor state of affairs in a run-down public sector. They would argue that the way forward is not privatization but the re-invigoration of the public sector through enlightened penal policies. However, it is here that Harding's thesis of cross-fertilization and aspects of James et al's analysis become particularly significant. Woodhill is described by James et al as a 'dynamic and forward-looking prison in terms of its architecture, its regime and its management';¹⁸ it also had strong leadership from a charismatic first governor. For those reasons the prison was always likely to

13. James et al 139.

14. Ibid.

15. Ibid, 141.

16. Harding 114-117.

17. This point is made effectively in Harding's scathing attack (p 24) on Ryan's view that in the UK those on the political Left should seek to exploit the Prison Officers' Association's 'unmistakable shift to the Left' in opposition to privatization. As Harding says: 'Prisoners may not be particularly cheered by the knowledge that grandiose strategies about political realignment can so readily be constructed out of their predicament. They are left stranded as irrelevant symbols of supposedly greater issues. Their own identities and preferences are of no interest. This is their ultimate disempowerment. A debate which par excellence possesses profound human connotations is reduced simply to moral or ideological abstractions.'

18. James et al 104.

emerge well from the research. However, it seems clear that the new competitive era played a significant role both in the planning of the prison and ‘at the coalface’. For example, staff continually asked the researchers, ‘How are we doing compared to Wolds, then?’¹⁹

Harding also provides a number of other examples of cross-fertilization. One of these — the use of the threat of privatization to break union power — appears somewhat overstated. As he himself acknowledges it might equally well be described as ‘industrial blackmail’.²⁰ However, his examples of cross-fertilization leading to improved standards of confinement are convincing and hard to rebut. The contractual requirements which were imposed on the operators of Wolds far exceeded the standards which applied in public prisons at the time in terms of measures such as out-of-cell time, showering, clothing, education, visits and access to legal advice, telephones and letters. Subsequently, similar requirements were imposed on new public sector prisons. Whilst James et al simply note this fact,²¹ Harding convincingly argues that these improvements reflected the process of cross-fertilization and not simply general changes in penal practice.

Related to this, and central to his model of accountability, Harding also contends that ‘neither part of the system should be able to take the extent of its participation for granted’.²² There should be the potential for ‘turnover’ or ‘churning’ as prisons move, over time, from private to public sector management and vice versa. For this reason he is highly critical of the very long-term management arrangements which have been entered into in some jurisdictions (25 and 40 years in recent United Kingdom and Victorian instances).

EXPANSIONISM AND PRIVATE SECTOR LOBBYING

Some critics of privatization have argued that the introduction of private prisons has a net-widening effect in that the new prisons simply supplement existing institutions. Harding raises this issue in general terms in chapter two²³ and subsequently posits the thesis that penal policy determines expansionism and not vice versa.²⁴ In support of this he refers to several examples. The exponential increase in imprisonment in the United States over the past 15 years pre-dated

19. Ibid, 103.

20. Harding 138.

21. James et al ch 4.

22. Ibid, 163.

23. Ibid, 24-27.

24. Ibid, 71-72, 94-96. It would have been helpful if, in chapter 2, there had been reference to the subsequent sections of the book in which the issue is discussed more fully.

privatization. California leads the market in terms of increasing imprisonment rates but has not moved down the privatization route. In New South Wales, he says, privatization only came onto the agenda because of the increased rate of imprisonment which resulted from a policy of truth-in-sentencing.

It is true that changes in government policy pre-date privatization and clearly there is no necessary or uni-dimensional link between privatization and increased prison populations. However, it seems to this reviewer that the capacity to privatize, especially through DCFM contracts, may mean that there are fewer structural constraints, in terms of public expenditure, on the pursuit of expansionist penal policies. I suspect that it would have been less easy for the former UK Home Secretary to coin the spurious general catch phrase that 'Prison Works!'²⁵ and then to instigate a massive prison building program if prison construction and management had remained solely within the public sector.

Related to the fear of expansion is the question of lobbying by private prison companies. It is inevitable that the private sector will lobby to be allowed into the existing market but there is general agreement that it should not become a penal policy pressure group. Clearly, this dividing line will be somewhat fuzzy but Harding again is optimistic, concluding that the private prison sector is likely to have only a peripheral impact on penal policy.²⁶ As a safeguard, he proposes that a standing parliamentary committee should decide whether a new prison needs to be built at all.²⁷ However, even with such a safeguard, great vigilance is needed; James et al point to some striking links between senior Conservative politicians (including those with influence in the penal policy area) and the private prison sector.²⁸

THE SEPARATION OF POWERS: ALLOCATION VERSUS ADMINISTRATION OF PUNISHMENT

Harding argues that whilst the private sector can legitimately be involved in the *administration* of punishment, it must never be involved in its *allocation*.²⁹ Allocation should remain the responsibility of an independent court system. The problem, of course, is that although courts impose the initial sentence, the actual length of time a person spends in prison is dramatically affected by post-sentence

25. James et al 163-164.

26. Harding 96.

27. Ibid, 71-72.

28. James et al, esp 43-44.

29. Harding 27, 88-94.

considerations such as discipline (eg, loss of remission) and access to early release mechanisms such as parole. Harding's evaluation reveals that the allocation/administration distinction has not always been fully grasped. In Australia, for example, prison discipline is a matter for the contractors, whereas in the United Kingdom an independent public official (the 'controller') is appointed to each private prison. The controller has a pivotal role which includes responsibility for adjudications, dealing with allegations against prison staff and a general overview function, including a duty to report to the Home Secretary. On the question of adjudications, James et al's survey was inconclusive³⁰ but the United Kingdom model does seem preferable, not least because of the old adage that justice must be seen to be done.

At least in Western Australia, negative prison reports will not, in themselves, be conclusive on the question of release on parole but they do form part of the relevant material upon which the Parole Board will base its decision. It therefore becomes important to monitor reports from staff in private prisons. However, I suspect that rather than being a problem, there may be some benefit from cross-fertilization here too; the quality of prison reports which currently come before the Parole Board from the public sector is very variable.

CAN THE PIPER CALL THE TUNE? ACCOUNTABILITY AND CAPTURE

Generally, private prison systems are subject to some degree of external monitoring. However, Harding charts some appalling examples of systems in which there is either no proper independent monitor or where the monitors have 'surrendered' to or have been 'captured' by the system they are supposed to oversee.³¹ This is an incisive and disturbing part of the book which documents the lack of proper accountability in the United States and Australia.³²

The position in the United Kingdom appears rather better. For a start, the controller's status derives from statute rather than contract and the positions have been well funded and supported. Nevertheless, as James et al point out, there can be a tension between the statutory obligation to keep out of the day-to-day running of the institution and the inclination or temptation to offer advice and help to

30. James et al 93-94.

31. Harding ch 3.

32. Eg in New South Wales the monitor's second performance review report on Junee Prison extraordinarily contained no reference to a riot which had occurred during the review period: see Harding 45, 125.

staff.³³ Harding is generally supportive of the controller's role but, drawing on the reports of the Chief Inspector of Prisons, he expresses particular concern about aspects of contract compliance and sees the danger of capture.

Harding's concerns about capture feed directly into his final chapter, which is entitled 'A Model for Public Accountability of Private Prisons'. A central feature of this model is a strong independent 'Prisons Authority' which would take over the responsibility of calling for tenders, letting contracts, monitoring all prisons and supervising the re-bidding process at the end of the agreed option period.³⁴

It remains to be seen whether this model would work and would itself be immune from capture, but in principle it has many attractions. Perhaps the most important of these is that despite the more modest chapter heading, but consistent with the overall thrust of the book and the theory of cross-fertilization, Harding has actually provided a model of accountability for the *total* system, both public and private.

CONCLUSION

Both of these books help to take the privatization debate beyond the ideological level and ask what practical benefits, if any, can ensue from some degree of privatization. They are, however, quite different in their methodology, scope, objectives and conclusions. For that reason, they are, in some respects, complementary. They are both well written and accessible to a wide readership. Of the two, Harding's is less descriptive and more thematic, evaluative and prescriptive. It therefore has particular and immediate practical value at a crucial stage in the history of imprisonment, particularly in its explanation of the hazards of privatization and its articulation of possible models for standard setting and accountability in the system as a whole.

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33. Ibid.

34. Ibid, 162-165.