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# Prisons, the Profit Motive and Other Challenges to Accountability

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## **Prisons, the Profit Motive and Other Challenges to Accountability**

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## **Prisons, the Profit Motive and Other Challenges to Accountability**

It has been argued that “accountability is the linchpin of the correctional system” (Freiberg, 1999, p 120) and needs to be a central feature of any prison system. It is here that care needs to be taken. Accountability in its modern manifestation has become a largely technical and instrumental process, yet accountability for prison policies and practices has an undeniable moral component that needs to be addressed in order for public accountability to be meaningful within this domain. In Australia, accountability for private prisons has emphasised performance measures, contractual compliance and monitoring, and this has often led to poor outcomes for prisoners and the Australian community more broadly. The rise of the modern private prison brings new questions surrounding appropriate approaches to accountability, some of which will be explored in this paper. In order to consider the affect of private prisons on the Australian prison system, I have drawn on Chomsky’s work on neoliberalism.

## **Prisons, the Profit Motive and Other Challenges to Accountability**

Prisons mean business.

They are large organisations. They consist of many paid staff, bricks and mortar, beds, security devices, professional practitioners of ancillary services. They are expensive to build. They are expensive to operate.

But they are easy to fill (White, 1999, p. 243).

Dostoevsky argued that a society should be judged not by how it treats its outstanding citizens, but by how it treats its criminals. If Dostoevsky is right, and we are to judge society on this basis, information must be made publicly available in order to form a picture of our treatment of citizens we deem to be criminals<sup>1</sup>. This picture is essential to ensure that governments, acting on behalf of society, are held accountable for decisions regarding the treatment of criminals and responses to criminal behaviour. The exchange of information becomes even more important when that information pertains to the closed and isolated environment of the prison. However, information in and of itself is not enough. We need a context in which to place that information and a framework in which to understand and debate the issues surrounding a society's decision to imprison some of its members. In this paper I argue that public accountability is central to a democratic government's ability to exercise its powers of restraint and punishment. A technical or instrumental discharge of such a responsibility is not enough, as the vulnerability of those incarcerated and the invisibility of those who manage that incarceration, inscribe a moral dimension to the accountability relationships that result.

The rise of the private prison, has added to the public accountability issues within the prison sector. Although businesses have been involved in the administration of punishment throughout history, the shift to state administered punishment was heralded as a way to ensure equity, justice and humanity within the penal system (Morris and Rothman, 1995)<sup>2</sup>. Over the last twenty years this has changed significantly with the emergence of a contemporary, private, 'for-profit' prison industry, providing diverse services, including catering, medical care, employment training, court escort services, security, and prisons for

juveniles, people on remand, illegal immigrants, and adult offenders. This contemporary transference of responsibility for prisons, from the public to the private sector, began in the United States twenty years ago and is now commonplace in Britain and Australia, with the latter holding about 17.8% of its incarcerated population in privately owned and/or operated prisons<sup>3</sup> (Private Prison Report International May 2003; Australian Bureau of Statistics, 2004; Roth, 2004). This transformation has also signified changes in accountability relationships between the community, the government and the private prison operator that are only beginning to be investigated.

This paper will consider some of these issues, paying particular attention to the privatisation of prisons in Australia, but first it is important to consider what I mean by accountability within this work.

### **Accountability: Its Technical and Moral Dimensions**

Accountability is notoriously difficult to define (Cousins & Sikka, 1993; Sinclair, 1995). Although few would argue against the proposition that accountability involves the giving and/or receiving of an account of an event (Mulgan, 2000), there are many who argue that this is not all that it entails (Sinclair, 1995; Shearer, 2002). Even though many accounting researchers are recognising that accountability has broader, more nebulous implications and possibilities, the more commonplace expectations do play an important role. The giving and receiving of accounts of events for which we have an interest or a responsibility has a number of important features; the account must be offered to an external source; it enables debate as the giving or receiving of an account should allow for clarification, scrutiny and revision; and it reinforces the idea that a broader social group may have rights to an account of an event for which they are not directly in control (Mulgan, 2000).

One of the problems associated with this interpretation of accountability is that in order to discharge the requirement to be accountable, both the private and public sector have come to rely heavily on approaches that are technical, measurable and procedural - which may have the effect of limiting our expectations of what a public or private enterprise should be accountable for (Nelson, 1993; Shearer, 2002). Nelson (1993) has argued that the technical emphasis that has come to dominate our understanding of accountability, particularly within the public sector, configures it as procedural, rather than dynamic, denying its

ethical influences and dimensions. These are evidenced by the increasing reliance on performance measures (Robinson, 2003), financial reports (Stanton, 1997), limited audit investigations (English, 2003) and political debate that centres on a statistical or numerical discussion of events (Rose, 1991). In regard to accounting, Arrington has argued that “accounting just assumes its sovereignty over the moral, assumes its right to hold all accountable to its ridiculous telos – money” (1999, p.1). Dillard and Ruchala (2005) have taken this argument further, raising the idea that a technical or hierarchical approach to accountability has enabled “administrative evil” in which a social actor is disconnected from the moral community through technical processes. They claim that

(o)vercoming administrative evil can occur only as a reconnection of the instrumental and the moral is undertaken through a reintegration of socializing and hierarchical accountability systems (Dillard and Ruchala, 2005, p.619).

So, although accountability has often been interpreted to be a largely procedural and technical exchange of information between interested parties that fulfils a broader social, political and economic need within societies that make claims to democracy - increasingly, accountability is being recognised as a discourse (Nelson, 1993; Sinclair, 1995). Discourses of accountability play a role in constituting our beliefs about who, what and how accounts of events are to be given and received (Roberts, 1991). It is constantly being renegotiated (often unequally) and it always encompasses the possibility of challenge (Roberts, 1991). The paper represents a contribution to the challenges that are already emerging within the accounting literature to the dominance of technical and procedural dimensions of accountability over its important moral and ethical implications (Broadbent, Dietrich and Laughlin, 1996; Shearer, 2002; Funnell, 2003; Dillard and Ruchala, 2005). Shearer (2002), in particular, emphasises the need to redefine accountability beyond the narrow requirements of economic entities within market economies. She says that it is “moral responsibility that grounds the *accountability* of the entity with respect to this community” (2002, p.543) and she called for

(a) discourse of human identity that is irreducibly distinct from economic man, and it must be capable of infusing our self-understanding as economic subjects with a moral obligation that exceeds our own self-interest (Shearer, 2002, p.569).

Shearer's (2002) call for a deeper appreciation of who we are as ethical (as well as economic) beings is indicative of a growing interest in an expanded understanding of what constitutes accountability. It also suggests ways that we can avoid being trapped by an already present discourse that emphasises accountability in limited, often economic, terms and is supported by Lehman's (2005, pg. 976) call for a framework that "contextualised accountability within a substantive moral framework". This is particularly important within the context of public accountability for privately operated prisons, as ethics and morality should not be divorced from debates about incarceration and the management of such facilities.

The discussion that follows seeks to expose how the Australian government has come to define public accountability for private prisons in limited terms, focusing largely on cost effectiveness rather than service quality. This approach has also emphasised specific performance requirements; it has disengaged debate from the purpose and intent of incarceration; and broader issues of accountability that link a community of citizens to its responses to criminal behaviour have all but disappeared. This is the real purpose of public accountability and the provision of information that narrows this scope to such things as the number of drug tests, or the number of violent incidents within a prison distracts us from examining the deeper issues that arise from a social choice to incarcerate criminals – particularly within the confines of privately operated, profit oriented, prisons. Within the current political climate, the discharge of this responsibility has emphasised the technical and procedural dimensions of accountability. However, even this has been hard to achieve. As will be shown, this effaces the significant moral and ethical aspects of the accountability relationships between the private operator and the government; the government and citizens and ultimately, our society and how it treats people we deem to be 'criminal'.

### **Pushing Prison Privatisation**

In state capitalist democracies, the public arena has been extended and enriched by long and bitter popular struggle. Meanwhile concentrated private power has labored to restrict it. The conflicts form a good part of modern history. The most effective way to restrict democracy is to transfer decision making from the public



arena to unaccountable institutions: kings and princes, priestly castes, military juntas, party dictatorships, or modern corporations (Chomsky, 1999, p.132).

Generally, it has been argued that outsourcing and privatisation have benefits that include the ability for the government to shop around for vendors in order to choose the quality and quantity of services required. It has also been suggested that outsourcing will invite competition, giving the government choices between innovative, lean, less expensive service providers (Dixon *et al*, 1996; Shaoul, 1997; Taylor & Warrack, 1998). There are a number of corresponding concerns, including the fact that competition may not be easily stimulated or may not suit the industry in question (for example, defence industry contractors are highly specialised and secretive, two qualities that do not suit a competitive market; and in Australia there had been three companies bidding for private prison contracts in the early stages of privatisation); there have also been many examples of bad contracts (Funnell, 2001)<sup>4</sup>; there is a danger of excessive dependence on a particular service provider; and perhaps most importantly, the full costs of the process are rarely calculated (for example, the cost to the community of eroding job security; the retraction of state obligations to its citizens; and the cost of reversing the decision if it turns out to be a bad one) (Gormley, 1991; Butler, 1991). Although couched in neoliberal terms, the case for private prison cost-effectiveness remains ambiguous and evidence from innumerable studies have revealed contradictory outcomes (Logan, 1990; McDonald, 1990; Kirby et al, 2000; Cooper and Williams, 2005). Most recently NSW Parliament's inquiry into the 'Value for Money for NSW Correctional Centres' (2005) found that no definitive conclusion could be drawn on the cost-effectiveness of private prisons because the uniqueness of each prison (such as size, mixture of prisoners, responsibility, programs, building design, services) doesn't enable a meaningful comparison.

The lack of definitive information about outsourcing decisions would suggest that it cannot be separated from ideological, political, economic or ethical influences (Ryan & Ward, 1989; Chomsky, 1999). Cooper and Williams (2005) argued financial representations of cost savings used to initiate discussions about prison privatization, are in and of themselves hypothetical. This hypothetical data has been used as though it is 'real' in order to legitimise the privatisation agenda and when the assumptions that underpinned the data were explored it became obvious that many alternative conclusions could be drawn. For instance, they point out that the Scottish Executive's proposal to 'cost' prison services

treated the current Scottish incarceration trends as “inexorable and failed to consider alternatives to custody” (Cooper and Williams, 2005, p.499).

Incarceration has a variety of different public policy objectives and justifications (such as deterrence, reform, incapacitation and/or classification) and imprisonment also has unintended consequences and effects a person in more ways than those anticipated by the State. Amongst other things, it means that a member of society is restrained and loses their freedom; their life path is interrupted; their family and social relations become difficult to maintain; there is a reduction in civil liberties such as privacy; they are held in places that are frequently charged with an atmosphere of distrust and violence; they are often surrounded by drugs and drug deals; and their lives often become lonely, idle and unstimulated. In this vein Davis argued that the “prison industrial system materially and morally impoverishes its inhabitants and devours the social wealth needed to address the very problems that have led to spiralling numbers of prisoners” (1998). This places an inescapable moral responsibility on society to ensure that there are clear objectives associated with incarceration; that imprisonment meets these broader social objectives; and that prisons operate in a socially acceptable manner. Fundamentally, a society holds a ‘criminal’ accountable for their actions and that person has a corresponding right to an accountable execution of the objectives of their sentence. This is predicated on the assumption that all of these can be negotiated meaningfully and democratically. It is also complicated by the fact that some private entities can now profit from incarceration and that these entities have a vested interest in the maintenance, if not the expansion of incarceration as a response to criminal behaviour. It has led some to ask whether there are “services that are “inherently governmental” and should thus be quarantined from the process [of contracting out]?” (Schoombee, 1997, p.141). This has raised discussion about how to reconfigure accountability within this context (Funnell, 2003; Dillard and Ruchala, 2005)

Not only are the public policy objectives diverse, but also the level of privatisation vary considerably. As many peripheral services that are integral to the operation of a public prison are now purchased from private contractors, including employment advice/training, garbage collection, energy and water/sewerage services, boundaries between the public and the private sector are blurred. This complicates accountability arrangements and makes it more difficult to justify the place of the public sector within such an environment, a

situation that has been capitalised on by private operators who argue they are just providing cheaper services, whilst distancing themselves from the significance of those services to the community. This is a point presented by many scholars in the field, such as Harding who has argued that

(t)he key point, whatever degree or model of privatisation is adopted, is that the allocation of punishment should remain with the state apparatus, whilst the day to day administration of that punishment is devolved to the contract managers (1992, p.2).

Harding's (1992) point of view would suggest that a clear distinction between sentencing and the administration of that sentence could be drawn. Such a distinction is not necessarily as easy or as desirable as this suggests. As the State has the power to deprive a person of their liberty, it is critical the administration of that sentence is subject to an appropriate standard of care, that human rights are observed and the actions of those vested with the control over the detainees should be closely scrutinised and monitored. The further this task moves away from the State the more difficult it is to monitor and the State has more opportunity to retreat from its responsibility to ensure such conditions. Moyle has argued "(i)t should be emphasised that prison regimes, and the powers exercised by those who manage them, involve a continuation of sovereign power" (1999, p.154) and that there is a need to identify the "the powers that may not be delegatable within a democracy" (1999, p.155).

The delegation of these powers may well be strategic, providing benefits to both the state and the private sector. Chomsky (1996; 1999) has argued that the current capitalist order undermines democracy, and within this context public debate has diminished. This is a view that is supported by Munck (2005, p.65) when he wrote that it "is government intervention in economic life that threatens freedom, according to the neoliberal theorists". As corporations gain control of more and more of the institutions and services traditionally maintained by government (such as prisons), private power has been enhanced. As such, formal electoral democracy helps to maintain the illusion of democracy, and that the "population has been diverted from the information and public forums necessary for meaningful participation in decision making" (McChesney, 1998, p. 9). As McChesney wrote

(neoliberalism<sup>5</sup> is the defining political economic paradigm of our time – it refers to the policies and processes whereby a relative handful of private interests are permitted to control as much as possible of social life in order to maximise their personal profit (McChesney, 1998, p. 7).

This has often been characterized as a logical and appropriate response to governments who have been painted as “incompetent, bureaucratic and parasitic” (McChesney, 1998, p.7). On the other hand the free market is assumed to “encourage private enterprise and consumer choice, reward personal responsibility and entrepreneurial initiative” (McChesney, 1998, p.7) even though there is little empirical evidence to support this claim. Contrary to the rhetoric of neoliberalism, Chomsky (1999) points out that governments have not reduced in size, and there is little evidence to suggest that privatised public assets have increased in efficiency and/or quality. The ideology that underpins neoliberalism has contributed to the rise of private prisons, and with this privatisation a number of questions need to be raised about the nature, appropriateness and maintenance of public accountability within a prison system that is increasingly profit oriented.

Investigations such as this one, need to be placed within the context of neoliberalism, in order to shed light on the ways that we organise our societies and to problematise the privatisation of prisons on both technical and moral grounds (see Russell, 1997). This argument hinges on the idea that ‘neoliberal’ governments serve the interests of capital and its impulse to continually accumulate, whilst enabling a retreat from any substantive public accountability.. As Puxty (1997) has argued, when capitalism is in crisis, capital needs to expand into new areas, which may lead to a changed role of the state as it releases areas it has traditionally controlled to the private sector and “capitalism tries to turn all relationships into a commercial exchange” (Hutton and Giddens, 2001, p.17). In this vein, private prisons serve both the interests of government and private enterprise. Private prisons may help disguise the impact of global capitalism on people (through job losses, failure to provide productive work and ‘imprisoning’ the products of political and economic alienation), it appears to shift the responsibility for prisons to the private sector and it enables private interests to profit in a new way. As a result it diminishes the public sphere, and changes the nature of public accountability (Chomsky, 1999; Funnell, 2003). In support of this Chomsky wrote that

(d)emocracy is under attack worldwide, including the leading industrial countries; at least, democracy in a meaningful sense of the term, involving opportunities for people to manage their own collective and individual affairs. Something similar is true of markets. The assaults on democracy and markets are furthermore related. Their roots lie in the power of corporate entities that are increasingly interlinked and reliant on powerful states, and largely unaccountable to the public (1999, p.92).

The changing relationships between the private and the public sector referred to by Chomsky (1999) have impacted significantly on discourses of accountability. The current arrangements for incarceration in Australia testify to this. It is now possible that a private, for profit, company to be accountable to the government for the delivery of prison services and facilities and the government is then accountable to the public (including prisoners) for the delivery of these services – in so doing, distance is placed between the service provider and the community in a way that would present significant challenges to fulfilling any technical, let alone moral, accountability function. In an attempt to address this, or further reinforce it, private prison operators present largely technical accounts of events and are accountable for the delivery of certain services at a certain quality against performance indicators (Robinson, 2003); the government is able to report on these in a relatively objective manner and also distance themselves from direct responsibility; and at the same time, questions about the ethical and moral responsibility of government and society to these citizens is almost entirely eradicated from debate.

Before proceeding, it is important to note that there is a problem with framing the debate within the private/public sector dichotomy, and considering accountability issues within this framework, as it can often fail to investigate the ‘subject’ that is being debated (Cooper and Williams, 2005). This is in itself an emasculated view of accountability, because it does not consider critically what to do in circumstances in which both the private and the public sector have failed to provide a solution to the crisis of the current prison system. This delineates the debate within the parameters of who should provide the prison, rather than whether the prison is a solution to the social issues that our societies face. This may make it easier to ignore and silence debate about the definitions and causes of criminal behaviour, such as social alienation, economic inequity and institutionalised discrimination. As accountability plays an important role in our ability to make decisions, the nature of the information is vital. It should not be limited to information that allows us to compare the

public to the private sector on the basis of cost, but rather it should enable an investigation into the purpose and possibilities of addressing the social issues that lead to crime and not just what we do with ‘the criminal’ afterwards.

### **Private Prisons in Australia**

(A) private corporation is not in the business of being humanitarian. It’s in the business of increasing profit and market share. Doing that typically is extremely harmful to the general population. It may make some number look good (Chomsky, 1996, p. 122).

Since 1988, the private sector has played an expanding role in the operation of Australia’s correctional facilities. This was sparked by the Kennedy Report (1988) for the Queensland Corrective Services Commission into correctional reform recommended that a private operator under contract to the Commission should develop one prison. This was based on its findings that problems within the existing system could be solved through privatisation, including staffing difficulties, creating a market for corrective institutions, increased flexibility in correctional arrangements, and developing competition in order to have something to test performance and costs against. This argument had been presented in other countries previously, and it is widely accepted within the literature on private prisons that the fundamental motivations of prison privatisation have been the belief that private prisons will reduce operating costs (largely through reduced labour costs), provide faster and cheaper prison capacity (limited barriers to financing and construction) and that they should improve the quality of the service (through innovation) (Logan, 1990; Calabrese, 1993; Shichor, 1995). Although these arguments have been presented as neutral representations of the issues, the arguments are not sterile or politically neutral. Ideological assumptions underpinned the Kennedy Report, including the appeal to ‘the market’ to solve persistent failures within the prison sector; the representation of the unionised workforce as ‘difficult’ and ‘problematic’, in part because of their refusal to accept further compromised work conditions; the appeal to ‘flexibility’ as though this will have no affect on quality or performance and that this flexibility does not come at a cost (such as people’s jobs or job security, working hours and so on); and the presumption that competition will enable performance to be measured more accurately on the basis of cost, which may have scaled

back attempts to develop other ways of critiquing and improving punishment and prison services (Chan, 1994; Moyle, 1999).

This would suggest that the decision to privatise prisons was not one based purely on technical information; rather, it was a highly politicised move surrounding a need to disassociate the government from the prevailing problems within prisons. Although these motivations were raised within the media and there was some public debate over the government's approach, the report was accepted. This led the Commission to call for tenders to manage and operate Borallon Correctional Centre, which was a 240-bed medium security prison near Brisbane. Corrections Corporation Australia (CCA) was awarded this contract in 1989, and under this three-year contract, the first private prison in Australia was opened in 1991 at a cost of \$22 million to build, and a contract fee of \$9.7 million for the 1991 financial year (Harding, 1992). This contract was awarded partly as a result of the lobbying efforts of Senior Executives from CCA who travelled around Australia in 1989 'informing' State governments of the benefits of private prisons (Gow and Williamson, 1998).

Subsequently contracts have been awarded to private prison operators throughout the country and today Australia has 7 privately operated adult prisons operating in 5 states. These are run by three companies, all of which are foreign owned – Australian Integrated Management Services (a wholly owned subsidiary of the US company Sodexo Alliance), GEO Group (previously known as Australian Correctional Management), Management and Training Corporation (who's corporate headquarters are in Utah) and GSL Custodial Services (formerly Group 4 Falck). Information about each of these prisons is presented in the following table

**[Table 1: Insert here]**

From the Kennedy Report onwards, the possibility that private companies could play a role in the provision of correctional institutions throughout Australia was firmly entrenched. Running a prison brings with it significant responsibilities. The foremost of these responsibilities is prisoner health, safety and dignity, all of which are prioritised under the *Standard Guidelines for Corrections in Australia 1996* and the *UN Standard Minimum Rules for Treatment of Prisoners*. Public prisons are notoriously bad at providing safe and

dignified conditions for their inmates, which has meant that arguments suggesting that public prisons are more able to meet these qualitative outcomes than private prisons have been difficult to mount. However, there is significant evidence that suggests the pursuit of profit has exaggerated the erosion of the quality of services and conditions being provided to prisoners and the community as a whole. A study conducted by Biles and Dalton found that

Port Phillip prison, Deer Park and Arthur Gorrie all have higher rates for all deaths and suicides than the Australian average (1999, p.4, see table).

Although some of the findings of Biles and Dalton (1999) are alarming, the reports significance does not just lie in what it reveals about the performance of these prisons. Its significance also lies in what it reveals about the inability for a community to affect change, express outrage, demand greater scrutiny and ensure better outcomes for their community and the prison system as a whole. As prison institutions have struggled to maintain legitimacy as a form of punishment that has positive outcomes for the 'punished' and society in general, the introduction of the profit motive into this arena raises further concern (Cavise, 1998). Cavise has argued that

(w)ith private control, there is a danger that prisoners, traditionally among society's most neglected members, will suffer abuse and exploitation for profit (1998, p.22).

It certainly makes the relationship between the community and the service provider one that is dependent on the community's ability to monitor and access information about prisons. In the words of Harding:

The question of effective accountability thus becomes central (Harding, 1992, p.2).

Much of the literature concerning the debate over the contracting out of government services suggests that accountability can be ensured through a carefully constructed contract and appropriate monitoring arrangements (Harding, 1992; McDonald, 1994; Steane and Walker, 2000). This presents a very technical face of accountability, which is not unusual within the context of societies that privilege technical approaches to social



negotiations and is closely linked to a neoliberal framework (Bryan, 2000). Although there is a technical dimension to accountability this is often given a disproportionate representation within the literature and may have the affect of constructing rather than representing, notions of accountability “by rendering selectively visible, relations of accountability” (Power, 1991, p.38). Steane and Walker have argued that the dominant discourses in which this view of accountability is placed, “concerns the application of economic logic to issues previously within the domain of political scientists and public policy theorists” (2000, p.248; Chomsky, 1999). This is indicative of the systemic divorce of economic and social policy, as though one can be justified through the other, rather than equally important components of social organisation.

At the least, the accountability process should reveal whether the contracted private operator is fulfilling its contract and providing the service that has been agreed upon, but according to Bates

(a)fter 15 years of privatization, officials still have almost no reliable data to assess whether for profit prisons are doing their job – or living up to their promise to save taxpayers money (1999, p.22).

In order to unravel some of the issues surrounding the public accountability of private prisons, the remainder of this paper will look at both its procedural and ethical manifestations discussed in an earlier section, illustrating how inadequate the current arrangements have been in achieving either. It should be noted that any attempt to deal with the procedural and the ethical dimensions of accountability separately presents problems. The failings of technical accountability enable discussion of the importance the ethical dimensions of accountability. Inevitably, these discussions are intertwined.

### **Procedural Accountability and Prison Profits**

The term ‘accountability’ is used in this context to mean more a ‘technical’ than a ‘moral’ responsibility and it is considered to be an objective and measurable concept rather than a subjective one (Shichor, 1998, p.90).

Although it is increasingly accepted that accountability has a moral and ethical dimension (Burrit & Lehman, 1995; Sinclair, 1995; Shichor, 1998; Hill *et al*, 2001; Shearer, 2002;

English 2003), even its technical components are difficult to ensure. When applied to private prisons, ensuring even the most basic, commonplace forms of accountability has been problematic. There have been difficulties ensuring access to quality information; it has been hard to ensure financial accountability because of the ways that contract fees have been structured; it has been difficult to monitor contract performance; and the processes of contract awarding, renewal and termination have presented difficulties that undermine the ability of the community to ensure public accountability.

## I. Access to Quality Information

If accountability is central to the concept of responsible government and knowledge of the activities of government is central to the exercise of a citizen's control over government then it is clear that the doctrine of commercial confidentiality can operate as a barrier to the availability of information (Freiberg, 1999, p. 121).

For the procedural functions of accountability to be satisfied there must be access to information that facilitates necessary scrutiny. This is essential in order to ensure that social institutions are constantly under review and challenged to improve the quality of their services. Along with the important dimension of access is the need for quality information that gives detailed, accurate, comparable data – a mission that most accountants are fully aware of. Unfortunately, in the case of prison privatisation this access has been hindered by a number of things, namely, the government's ability to deem certain information 'commercial in confidence'; the information has often been technical and hasn't necessarily provided significant insight; often the information has not been reported in a timely manner; and some sources of information (such as prisoners) have been harder to access under privatisation.

In Australia, many core documents relating to prison privatisation have been held back from public scrutiny under the guise of 'commercial confidentiality', stalling many attempts to scrutinise the operations of both state and private prisons because of a "lack of access to what seemed to be key documentation" (Harding, 1998, p.5; Funnell, 2003). This is a position supported by Gow and Williamson (1998) in their analysis of Australia's historical development from a penal colony to what they describe as a 'corporate colony' in

which public access to information is secondary to a corporations desire for secrecy. Although some information about private prisons has been made available through Freedom of Information<sup>6</sup> claims, this is costly, time consuming and often vital information is censored before release. The other main source of public information on privately managed prisons has been provided through audit reports of the prisons, and official investigations into prison operations such as the State Government of Victoria's Audit Review of Government Contracts (2000); the annual Productivity Commissions Report on Government Services; and specially commissioned reports such as the Victorian Correctional Service's Report on the Metropolitan Women's Correctional Centre's Compliance with Contractual Obligations and Prison Services Agreement (Armytage, 2000) and the Report of the Independent Investigation into the Management and Operations of Victoria's Private Prisons (Kirby *et al*, 2000). Although these have value, they are limited and constrained by the framework in which they operate and often reinforce the current arrangements. The scopes of these investigations are often limited and most have focused on efficiency improvements, financial expenditures and performance against set measures. Appraisals that adopt a broader evaluative stance are not commonplace and are more likely the result of investigative journalism than any officially sanctioned system of accountability.

A second issue that inhibits the ability to ensure effective accountability in this environment relates to the quality of that information. Information about the quality of the services has often been limited to that which is easily counted, such as the number of escape attempts, positive drug tests, or 'incidents'. Audit reports and special reports commissioned by State Government's into the activities of private prisons, like those mentioned previously, have also focused on these issues. These have considerable problems because of the ability to manipulate the data. It is also questionable whether this data can shed light on the quality of the service being provided, and whether it provides enough information on which to evaluate and review approaches to justice and punishment. Unfortunately, a strict liberal framework may "perpetuate the status quo by simply providing additional information to stakeholders without critically investigating" (Lehman, 1999, p.218) the issues that are in question. It is here that this technical mutation of accountability becomes problematic because it is

potentially constructing, by virtue of rendering selectively visible, relationship of accountability; an inversion of the traditional view of the sources of accountability (Power, 1991, p.39).

The problems associated with access to information were highlighted in the Correctional Services Commissioner's Report on the Metropolitan Women's Correctional Centre's (MWCC) (Armytage, 2000) compliance with its contractual obligations and prison services agreement. A lot of the issues raised here were not visible in the reports required under the contract and were only made apparent through detailed investigations and not through the standard accountability arrangements. By way of a specific example, the contract requires that the prison operator report drug related incidents to the Commissioner.

The contract also required that no more than 8.26% of Prisoners test positive for non-prescribed drug use, as a result of random testing (Contract for the Management of Metropolitan Women's Correctional Centre, 1995, p. 171). This accounted for 20% of the Corrections Corporation Australia's (CCA) performance related fee (Armytage, 2000). Should this target be breached then the fee would be reduced by the proportion established within the contract. Ideally, the emphasis placed on these kinds of performance outcomes should improve the performance of the service. However, the emphasis can also mean that steps are taken to ensure that the outcomes are met 'technically' without actually improving performance. For instance, the Commissioner's investigation into the MWCC found that

for the last 3 months, prisoner 'E' has been tested on 13 occasions between 4.00am and 5.20am. The MWCC Manager Health Services has advised OCSC there is no medical reason as to why prisoner 'E' has to be tested at these times. The testing of prisoner 'E' at these times is of significant concern as the predictability of testing enables the prisoner to use drugs with a decreased likelihood of being detected (Armytage, 2000, p.16).

This is an example of how the measurement criteria can be manipulated in order to meet contractual requirements. Such distortions of 'success' are inevitable when the criteria for measurement are as limited as the number of positive drug tests, and that these criteria are contingent on the continuity of the contract and the financial viability of the private contractor. Many of the issues that led to default notices being issued to the contractor

related to the management decision not to report required information in a timely manner. As any meaningful system of accountability requires the exchange of information, these breaches undermine the ability of the government to ensure the private contractor is held accountable and also undermines the ability of the public to hold the government accountable for its actions. The Auditor General of Victoria's Report on Ministerial Portfolio's (2001) identified a number of key issues that related to Victoria's private prisons operators failing to report information. They found that significant incidents were not "immediately reported" (2001, s3.4.39) and many incidents were "not declared at the earliest opportunity" (2001, s.3.4.40), undermining the most basic dimension of accountability.

Although some audit reports and special investigations into private prisons have provided insight into the management of the private prisons, this has been limited by a number of factors that are unique to the new private arrangements. For instance, traditionally, prisoners have been a good source of information about what is actually occurring within a prison and their access to people outside the prison has played an important accountability function (Maguire *et al*, 1985). According to Gow and Williamson (1998), in Victoria private prison regulation has ensured the censoring and silencing of prisoners, wherein prisoners have to pre-record eight phone numbers, calling the media is banned and all phone calls are recorded. This has meant that there has been a decrease in the amount of information about what happens inside prisons from the point of view of the actual prisoners. The report into MWCC (Armytage, 2000) found similar problems, with inadequate staffing leading to long lock-down periods, which make it impossible for prisoners to access telephones or meet with family and friends. This draws into question the argument that more flexible staffing arrangements made possible through private prison operators are actually lead to more successful prisons.

In order for basic accountability this to be satisfied access to information needs to be ensured, and in a profit-oriented environment, this may be even harder to guarantee. Rather than ensuring that private contractors perform well, these examples suggest that there is a large incentive to ensure that the private contractor *appears* to be performing well. As Shichor has argued, evaluating private prison performance is hard because "of the paucity of benchmark data to forecast future developments", the "problems of access to the records of private companies" and the difficulty of providing an evaluation of private operators

when “there is already an assumption that they are doing a better job than state run prisons” (1998, p. 89). There is significant evidence to suggest that private prison operators are not providing the government with even the most basic, contractually required information within the defined time frames. As such, access to quality information that enables scrutiny of private prisons by the government becomes very difficult and just as importantly, the lack of publicly available information makes it almost impossible for member of the broader community to scrutinise the activities of the prison operators. A corresponding problem arises, in that the energies of the interested parties become focused narrowly on achieving basic information exchanges, and questions about what constitutes that information, and who has a right to it become marginalised by the pressing need to ensure the basic requirements (as defined by the contract) are met. In light of this, even this procedural element of the accountability arrangements between the prison contractor and the government has been hard to ensure.

## II. Contractual Fees: How to Make a Profit, Prison Style

What has happened is the privatisation of profit and the socialisation of risk (Scott, 1996, p.101)

As a result of the commercial confidentiality powers of governments, very little contract information has been released. By mid 2004, contracts for private prisons in Victoria and Western Australian were publicly available, however, all other states have not released the contracts to the public. Importantly, the financial information within these contracts has not been made publicly available, so public scrutiny of the financial arrangements has only been possible through secondary sources.

Fees awarded for private prison management contracts differ from state to state and prison to prison. There are obvious reasons for the differences in payment, including the different mix of inmates in the prison, the different level of services provided, or the agreed differences in efficiency, running costs and profit margins for the operators. When analysing these costs, the Auditor-General (1999) could not release the benchmarks for government operating costs, but could say that all contracts were less than the government’s benchmarks and that even so, he was unsure about the cost savings because of the inability to factor in things like long-term social costs, societal risks and monitoring

cost 'realities'. In terms of accountability, the contracts provide little information about how much the fee will be reduced in the case of breaches, which is essential in order to understand how the firm is encouraged financially to comply with the contract. There is also little information about how the corporation can make a profit and what actions they can take in order to pursue this aim.

Generally the fees associated with a prison contract have been divided into three parts. There is an accommodation service charge, which is for the provision of physical facilities; a correctional services fee, which is for the day-to-day operations of the prison; and a performance-linked fee, representing the investment reward or profit. It is the latter that distinguishes the private operator from the government. It is a fee that should encourage quality service delivery because it enables the operator to make a profit. However, this fee has often led to an erosion of reporting quality rather than an increase in service. The following section will offer some examples of how this fee structure has not enhanced the accountability framework, financially or in terms of service quality.

Firstly, the accommodation service charge appears to be a simple fee for service payment, but has proven to be quite controversial. For example, the Australian Broadcasting Commission (Mares, 2000) reported that charities may have inadvertently contributed to ACM's bottom line. ACM's contract requires it to ensure that there is adequate clothing for the detainees and prisoners, but it puts no limits on how they can source and finance these needs. According to the Australian Broadcasting Corporation's report, ACM initially sourced clothes from St Vincent de Paul, who agreed to provide them at \$5 per kilogram (their normal rate was \$8). Eventually it was discovered that ACM managed to source the clothes from another section of St Vincent de Paul for free. When ACM was confronted by St Vincent de Paul, they ended up paying \$2,100 for 2,000 kilograms of clothes for which they originally had negotiated a rate of \$5 per kilogram. When this information came to light, the commercial relations between St Vincent de Paul and ACM broke down, so ACM went to the Uniting Church and asked for clothes and basic housing items to be provided (such as curtains). According to the Uniting Church, there was no suggestion that they would pay for these items. When the Uniting Church realised that "the government is actually, on behalf of the Australian people, paying ACM to provide those things and we decided then not to go ahead with it" (Mares, 22/11/2000). The situation exposed the fact that the government had no way of holding the private operator accountable for how they

provided the service. The outcome proved controversial as it allowed the private operator the opportunity to exploit charitable organisations to fulfil its contractual requirements in an attempt to maximise its profits. In this situation the use of private operators and the claims that these operators can provide the services more cost effectively, has meant the provider under the private system can be held less accountable than a government provider.

Secondly, the correctional services fee also appeared to be a straightforward payment, but instead, it has proven quite controversial. For example, in January 2003, prison guards at Arthur Gorrie Correctional Centre were in dispute with ACM over a plan to use prison labour to increase prison profits (Private Prison Report International, May 2003). The proposal involved replacing prison staff with inmates in areas such as the kitchen. Although ACM was paid a fee to provide for the day-to-day management of the centre, this proposal didn't appear to contravene the contract as the contract had not defined how the services should be provided. After protracted negotiations with unions, the proposal was dropped. This presented a similar dilemma to that outlined previously, the mode of delivery was left out of the contract to enable 'flexibility' but instead could be interpreted as allowing the company access to exploitative practices to maximise returns. There was no formal process that allowed the government and the community to hold the provider accountable for how the service was to be delivered.

And finally, the performance linked fee was designed to enable the company to be paid a fee that was above the costs of the operation based on them meeting certain specified standards. Unfortunately, the performance incentive has often led to under reporting of incidents, rather than excellence in service quality. For example the Woomera detention centre provides graphic examples of the extent that corrections corporations will go to in order to be 'cost effective' and ultimately generate a profit. In the case of Woomera, it appeared that Australasian Correctional Management (ACM) failed to report 'incidents' that related to its performance evaluation. Such an incident received considerable media attention when it was reported in 2000 that ACM failed to report an alleged rape of a 12-year-old boy in their Woomera facility. It was also widely reported that they were reluctant to disclose this information because it would lead to a financial penalty of around \$20,000 (Nolan, 2000).



This would suggest that the presence of a financial penalty and the corresponding effect this would have on the profitability of the centre, meant that the accountability arrangements written into the contract weren't sufficient and may well have led to opposing outcomes. For ACM to be held accountable if they breach their responsibilities to care for refugees and keep them free from physical and sexual abuse, the government relies on them to report incidents accurately. Conversely, to ensure a profit, the company has an interest in ensuring reports do not expose them to a financial penalty.

Detailed information is important in order to understand how the profit motive is affecting the provision of prison services and how 'cost effectiveness' is actually achieved. Without this type of information financial accountability becomes emasculated and technical, lacking any substantial information on which to assess performance. As few contracts are available, and the costing remains secret in many cases, it forces the public to rely on secondary sources. It becomes hard to scrutinise costs, let alone form a picture as to whether the cost savings (if there are any) are morally defensible or are the result of practices that are unacceptable to the community.

### III. Contractual Monitoring

Richard Harding: To give an example, in Junee Prison, which is in New South Wales, there was at one stage a riot, and this riot wasn't even mentioned in the annual report of the monitors about the prison. It was quite a major riot, and obviously they didn't quite conceive, or their superiors did not quite conceive their role as dealing with the feel of what's happening in the prison, the ethos, they were more concerned with tick-a-box kind of monitoring (Haultain, 1997).

From a purely technical point of view, the contract with the private prison needs to ensure access for official visitors, Ombudsmen's right to oversee the operations, parliamentary scrutiny and freedom of information. Notably, these things would be almost identical to the monitoring rights of the community if the facilities were being managed by the public sector, but in addition to these the contracts must ensure that an independent monitor is appointed to check contract compliance and compliance with general standards. In order to perform a monitoring task, the contracts that are being monitored need to be available, however in many cases the "final contracts themselves are treated as being 'commercial in confidence'" (Harding, 1992, p.5). As noted earlier, the controversy surrounding public

sector secrecy and a protracted legal battles using Freedom of Information legislation has led the Western Australian and Victorian government to make available private prison contracts to the public. Although this kind of openness is an essential part of accountability, it is not enough in itself.

Monitoring the contract is essential to ensure that the service that has been defined and paid for is actually being provided. Harding (1998) suggested that the monitoring of contracts under the stated arrangements and within the organisational cultural contexts provides a situation that is open to regulatory capture. This sections opening statement by Richard Harding (Haultain, 1997) on the Junee Prison riots provides an example of regulatory failure, as the Correction Service Commission of New South Wales had not persisted with the on-site full-time monitor provided for in the contract. Instead they had withdrawn that person from the system, leaving Junee prison without a person equipped to monitor the operations properly. There are a number of examples of this 'capture' within contractual arrangements. One such example is the Borallon prison in Queensland, which was supposed to have a monitor on site five days per week. This person was directly responsible to the Queensland Corrective Services Commission (QCSC). When interviewed a year after the opening of the prison, the monitor was spending one day per week at the site as the person had become responsible for the monitoring of five sites (Moyle, 1994). Harding (1998) suggested that this process was the result of resource constraints and neither a corporate or government organisational culture that was supportive of the need for monitoring, making it difficult for the monitor to access the information and resources to fulfil the obligations of the role. In this way, the contracting out decision may service the needs of both the private operator and the government, as neither have had to maintain the monitoring standard required previously – and both have been able to blame each other for the inadequacies.

Although the accountability mechanisms may appear sound within the contract, the practicalities are never as clearly represented (Funnell, 2001). This is a point that has been clearly made by Cavise, when he argued that

(i)f the interests of society and the rights of the individual are to be safeguarded, the "government of the people" is under an obligation to ensure that the goals of incarceration are met by the constant control and monitoring exercised by a state

agency that is not motivated by profit but by societal and individual concerns (1998, p.20).

It has been suggested that if the contract is sound, it can provide strict safeguards in terms of specification of standards, default, penalty, termination and step-in clauses. According to Harding, “(a) loose contract will tend to have loose accountability; a tighter one should facilitate accountability” (1998, p.80). However, as the Borallon and June example suggest, contracted and actual accountability may be significantly different. All this may enable us to forget that we are talking about accountability in and for prisons, which has a moral and social responsibility beyond the technical (in)accuracies of a contract. As Shearer has argued “any theory of moral responsibility must ultimately rest on ethical considerations regarding the nature of the economic entity, including its relationship to the human community within which it operates” (Shearer, 2002, p.543).

#### IV. Contract Awarding, Renewal and Termination

The process of awarding, renewing and terminating contracts must enable the government to hold the contractor accountable for their actions and also should allow the community to have input as to the acceptability of the contractual arrangement (Scott, 1996; Schoombee, 1997). Unfortunately, this has proven difficult in Australia as the tendering and renewal process has not encouraged the kind of competition that is supposed to lead to better outcomes. This is particularly true in the case of contract renewal, wherein many of the contracts allow the current operating company the right to the contract over other operators in the industry.

There are a variety of possible contractual arrangements between government and the private contractor, from purely outsourcing the administration of prisons, to contracting out design and construction of the prisons, to full ownership and financing of the complete prison arrangement. There have been considerable investigations into the mixture that is the most cost effective, whilst maintaining the minimum quality required (Logan, 1990). According to Harding (1998) there has been considerable take up of the model that ensures private contractors, or their financiers, have paid for and own the prison structure itself, with the government repaying the capital and borrowing costs over time. At the expiry of this, the private contractor continues to own the structure and has a further twenty-year

lease of the land. These contracts also come with initial five-year management contracts with three-year renewal periods. This arrangement has been adopted heavily in Victoria, leading Harding to question how accountability can be maintained within these contractual arrangements as it “gives the owner/operator a powerful position in bidding for the continuance of the initial contract” (1998, p. 2). As the “loss of a management contract to a competitor” is an “important element in effective accountability” this is “unlikely” (Harding, 1998, p.2). Currently in Australia, Borallon, Arthur Gorrie and Mt Gambier are ‘management only’ contracts; Woodford and Junee are ‘design, construct and management’ contracts; with Victoria’s Deer Park, Fulham and Port Phillip being the only fully privatised prisons.

The private ownership of prison buildings and land may present a serious issue to governments if they choose to take back the administration of prison services. As the ability to reclaim the administration of the prison is an integral part of the accountability process, these ownership and control issues could erode the ‘actual’ existence of appropriate accountability mechanisms. Harding has argued that

(d)fferred ownership of real estate and physical plant and long-term financial commitment by way of certificates of participation together constitute real if not insuperable barriers to state policy reversal in this area (1997, p.13).

There are many examples of State governments failing to step in when companies have breached their contracts. For instance, the Prison Privatisation Report International (PPRI) reported in May 2003, that the Inspector General of Corrective Services for NSW commented on ACM’s management of the Junee Correctional Centre, stating that “there appear to be a number of ongoing areas where the contractor and the department (of corrective services) have disagreed in terms of service delivery, but these matters never seem to be resolved. Nevertheless the department continues to find the contractor satisfactorily meets its contractual obligations” (PPRI, May 2003).

During a lockdown in Port Phillip prison operated by Group 4 in May 2003, a pistol, ammunition, drugs, mobile phones and a digital camera were found in prison cells. As the government did not step in, there was considerable community concern surrounding the “imbalance of power in the contracts between the government and Victoria’s two private

prison operators” (PPRI, June 2003). PPRI drew attention to an interview with Andre Haermeyer on ABC Radio in which he said “we have contractual obligations and it is only when there is a serious and repeated material default against the contract that we can actually step in” and when asked whether a loaded gun constituted such a breach he replied “well, no, it isn’t, under the contract, no...” (PPRI, June 2003). In fact, the contracts for this prison and Fulham (run by Group 4) was renewed in October 2002 with what the government described as ‘tighter performance measures’, however, this was not part of a competitive retendering process because the initial contract gave these operators first rights to new contracts.

The difficulties faced by governments when they decide to reverse the decision to privatise or contract out has been evidenced in the case of the Metropolitan Women’s Correctional Centre in Victoria, where the government has faced community concern about the cost of the reversal. Even though the situation at the MWCC was revealed to be in breach of the contract, the decision to terminate the contract was not easy. With the return of MWCC to public control in 2000, this situation arose after 4 years of repeated breaches of contract and failure to meet the service delivery outcomes required.

However, there was little precedence for such a situation and the conditions of that return were complicated and negotiations were protracted. In the end, the state of Victoria was forced to purchase the building from the contractor. Acknowledging the breaches the contractor requested a negotiated settlement of the contractual arrangements, which meant that the state of Victoria was not exposed to extended litigation. In November 2000, the Government took back ownership and management of the prison for \$20.2 million, \$17.8 million of which was for the building, infrastructure and chattels and \$2.4 covered the costs of terminating the loan on the facility that had been taken out by the private operator (Auditor General – Victoria, 2001). The Auditor General – Victoria (2001) identified that \$1.2 million of these costs were specifically related to the step-in and administration of the facility.

These indicate the costs that are not considered when a contracting out or privatisation decision is made and is indicative of the ideologically driven cost data that is produced in order to justify privatisation decisions. As a result of the complexities of the contracting process, it is hard to hold the government or the private operator accountable for their

actions. As Robinson (2003, p.184) pointed out “reports generated through performance measurement initiatives were supposed to give the voting public a way to see how responsible and accountable their government had become. But the presence of such unintended consequences might inspire us to consider the following idea: scientific knowledge can be used as a weapon”. Perhaps an extension of this would be to say that in light of neoliberal ideology, these consequences may benefit both the government and the private prison operator as they produce the appearance of accountability whilst distorting its meaning in fundamental ways that enable a retreat from responsibility (Funnell, 2001).

### **Ethical Accountability and Prison Profits**

Frank Vincent: The State creates the offences, imposes the sanctions, enforces the law, and then either incarcerates individuals or subjects them to community-based orders of one kind or another. The whole process is an activity of the State, and for the purposes of the State, and it makes no sense then that the State would not be central to it. It must be realised that at the end of the day that what is being exercised is a considerable amount of power in relation to individuals (Haultain, 1997).

In the previous section it has been established that even a procedural view of accountability is difficult to ensure, but even if it was easy, it is still insufficient as it fails to ground our ideas of accountability within a “substantive moral framework” (Lehman, 2005, p.976). As Lehman (2005, p.985) has argued “(i)t remains problematic whether procedural conceptions of accountability expand our understanding of citizenship” instead, it is possible that “people the atoms that make a market system work”.

Along with this, it is important to acknowledge that accountability within the prison sector has important ethical dimensions, the removal of a persons right to participate in society is a significant State power and public support because of its moral intent. This intent can’t be discharged by a ‘check the box’ style accountability arrangement, as the State, the community, the ‘prison provider’ and the ‘criminals’ moral responsibility is more substantive than immediate, measurable outcomes would lead us to believe. In this section, two issues will be explored in order to illustrate the centrality of ethics, when discussing public accountability for prisons. Firstly, the quasi-judicial powers of prisons mean that corporations could have a substantial affect on the length and type of punishment that a

person may endure; and secondly, there are considerable socio-political and ethical questions surrounding the future of a society that sanctions a connection between profit and punishment. As Shichor argued “instrumental goals are usually clear, consistent and easily quantifiable, on the other hand, the goals of human service organisations are harder to quantify, their level of performance does not lend itself to easy evaluation” (1998, p.89).

## I. The Quasi-Judicial Powers of Prisons

When addressing issues of moral responsibility and prison management, the outsourcing of prisons has been justified on claims that the sentence and the administration of that sentence can be clearly separated (Harding, 1992). However there are a number of problems with this, particularly in regard to ‘quasi-legal’ decisions that are made within prisons themselves. These are made with little outside arbitration or scrutiny and in some cases there is no outside arbitration at all. This means that prison management does have the ability to affect the way that the sentence is administered, and has some ability to significantly change the experience of that sentence as a result of internal decisions, particularly in the case of alleged breaches of prison discipline. In these cases, the hearing and review process often occurs entirely within a correctional centre (Moyle, 1999), drawing into question the ability for private sector management to make credible, uninterested decisions, about the treatment of prisoners. Moyle (1994) attended a number of hearings at Borallon and Lotus Glen in Queensland, and some of the transcripts illustrate the lack of scrutiny within internal hearings. He outlined the position of Manager of Operations (MO) at the Borallon prison saying

it was acceptable to breach inmates because they were a “problem at the centre”.  
The MO clarified the meaning of “problem at the centre” as “protecting CCA’s  
business name” (Moyle, 1999, p.166).

This is not an isolated incident. In Queensland, the private company ACM runs the reception centre at Arthur Gorrie. At this facility, all the decisions about the prisoner’s classification as a maximum/medium/minimum security inmate are made. It goes without saying that these will seriously affect the movement of a prisoner through the correctional system, and although there are regulations that guide this decision making process there is,

in practice, extensive discretion to be exercised on behalf of the classification staff. When Moyle interviewed a sentence classification officer at ACM in 1997, they gave an example:

“Here is an inmate who is a serious sex offender. We have to look at presentation, appearance, behaviour, mood, what he is thinking and his employment history. We should get a psychologist to do this but because of a shortage we have a teacher doing it. I shouldn’t tell you that. The recommendation should not be made by a teacher...We know it’s not their place” (Moyle, 1999, p. 169).

This decision making process has serious consequences for the person about to enter the correctional system as it will affect the ‘type’ of sentence they will have to undergo. Moyle’s (1999) paper argued that the fact that a private facility was able to make these decisions meant that they might have the opportunity to choose ‘profitable’ or ‘cheap’ prisoners (Harding, 1998 also outlines this possibility). Private management can also exercise quasi-judicial powers by placing a prisoner in solitary confinement, which is a practice that amounts to punishment and it does not have to be sanctioned directly by the State. At the Acacia prison in Western Australia, AIMS corporation came under criticism from the Inspector General, Richard Harding when he discovered that there was evidence that “some inmates had been locked in their cell, with the electricity off as a form of punishment” (PPRI, May 2003).

According to Moyle, these internal “disciplinary regimes involve an extension of state authority” (1999, p. 172). Russell voiced concern over these arrangements when he wrote

(p)ivate prisons can directly affect remission, parole, disciplinary decisions and a number of other issues which potentially increase the length of sentence of an inmate and some these matters are not subject to review or appeal (1997, p.8).

The fact that private companies, primarily answerable to their shareholders, can make decisions about prisoners that go beyond administration, undermines the government’s argument that a prison sentence can be managed by a private entity. It is obvious that the quasi judicial powers of prison management impinge on the government’s ultimate responsibility to determine the punishment of the person. It also complicates the public accountability process as the punisher is further removed from the society in whose name



the punishment is being carried out. The affect of profiting from punishment on public accountability will be considered in the following section.

## II. Profiting From Punishment

As punishment is complex social, ideological and cultural terrain, it will never be an entirely rational execution of orders with clear objectives and controllable outcomes. It has multiple and competing aims and innumerable intended and unintended consequences. In accordance with this Garland has argued “(t)he failure of modern punishment is in part the inevitable outcome of an over rationalized conception of its functions” (1991, p.12). As prisons enable a society to separate and classify those that it deems to be ‘criminal’, the introduction of privately operated prisons further separates criminals from society because of the shifts this enables in terms of public accountability. In light of this, the ability for a private corporation to profit from nuanced state and social objectives acted out on the body of a citizen could be considered unreasonable and morally repugnant. By no means is it surprising that corporations will act to minimise costs, and cost is an obvious consideration in the delivery of any public sector function but the centrality of cost and the possibility of profit are problematic. Prisons and penal policy should be focused on broader social objectives and questions that lead to better outcomes for all members of a society, including prisoners, as has been shown, these questions are not enabled within the current accountability arrangements. This is a view supported by Shearer (2002, p.546) who argued that “when economic entities render accounts of themselves in economic terms, the identity so portrayed and the obligations of the entity with respect to the broader community are both dependent upon the specific conceptions of subjectivity and intersubjectivity that are instantiated by economic discourse”

It has been argued throughout this paper that imprisonment has an undeniable moral component, as punishment imposes deprivation and suffering on a citizen as a result of them breaking the law. According to Ryan and Ward, it should be remembered that punishment represents “organized use of force in liberal democratic states” (1989, p. 70) which means there is a huge scope for abuse in this process by both private and public agencies. They argued that it is morally repugnant to punish people for profit because it creates a link between pain and suffering, and profits. For them it is not punishment that is the problem, but the socio-political message sent via “the rewards that accrue to penal

entrepreneurs” (1989, p.70). It is also possible that these rewards may create a prison industrial complex, in which there is a vested interest in prison expansion (Stern, 1998). This would suggest that there are profound ethical and ideological issues surrounding the privatisation of prisons, yet these have been ignored largely in favour of discussions regarding cost-effectiveness, comparative costs and value for money – all strong indicators of a government driven by neoliberal ideology (both Logan, 1990 and Calabrese, 1993 discuss this in detail). It is difficult to accept the argument that problems associated with the private/public sector split of responsibilities can be overcome with effective accountability, because the accountability proposed is highly technical, rational and objective, disconnected from the moral and ethical dimensions present within accountability relationship. As has been argued by Freiberg

(t)he provision of correctional services carries with it greater responsibilities and unusual requirements of accountability than most other areas of government services. Because prisons are concerned with the liberty of individuals, issues of authority, legitimacy, procedural justice, liability and corruptibility must play a major role in their management (1999, p.122).

Questions about the quality and purpose of corrections services must be central to the debate, which has led Russell to argue that

private prisons should be opposed fundamentally because of the inferior quality of services prisoners receive as a result of the insatiable drive to increase the profit margin in such institutions (1997, p.7).

As has been suggested, the boundaries between the allocation and administration of punishment are also complicated within a private prison system as the prison operator does have many discretionary powers that can affect the length and type of incarceration that the prisoner experiences (Ryan and Ward, 1989; Moyle, 1999). This is also true of public prisons, but when a corporation who is ultimately bound by corporation law to maximise returns to shareholders is responsible for such decision making, keeping prison beds filled and the industry growing is essential to the growth potential of the company. This may lead to a situation in which “doing well beats doing good” (Smith, 1993) in the corrections industry. There is substantial evidence of this within the industry, for instance the Inspector General’s report on the Acacia prison in Western Australia highlighted this when he

discovered that “quantities of food seemed to have diminished as population increased, as if the same sized cake were being divided more times” (PPRI, May 2003).

This is a view supported by Hallet who claimed that combining privatising aspects of the corrections system has enabled a solution to over-crowded and costly prisons that leaves the root cause of crime unaddressed, and “in this case, the fountain of all profits – large populations of disenfranchised surplus population trapped in the inner city to be incarcerated for non-violent drug crime – conveniently intact” (2002, p. 389). Instead of communities demanding a form of accountability that highlights their elected officials efforts to address root causes of crime, and information about a government’s efforts to reduce behaviour that is deemed to be socially inappropriate, we are left with accounts of how governments are reducing the costs of crime through privatisation. This is obviously in the interests of those that profit from imprisonment, because if we were to begin to address root causes, it is imaginable that the number of people going to jail would decrease and this would have a corresponding negative impact on shareholder wealth of private corrections companies. Overall, connecting profits to punishment means that there will be less incentive to reduce rates of incarceration and enormous private resources will be mobilised to ensure that prison policy does not deviate from a policy that continues to enrich private interests (Chomsky, 1999). For Shichor even the potential “for conflict between the social interests to reduce prison population, and the financial interests of private correctional corporations to increase it” (1998, p.84) is too much and he argued that

(t)he logic and nature of corporations further the consistent drive toward expansion and they will build a growth factor into the correctional system (Shichor, 1998, p.86).

## **Conclusions**

The dominance of neo-liberal ideology in post-industrial societies has meant that the prison has not been left untouched by decision-making models founded on ‘economic rationalism’. Chomsky (1999) has argued that this is part of a systematic effort to erode democracy, which in his view benefits corporations and governments. Both are able to distance themselves from the will of the people and act in ways that are mutually beneficial to ensure expanding profits for corporations and a diminished citizenry for governments to

have to respond to. The privatisation of prison management and prison building connects punishment with profit, and although many argue that the sentence and the administration of that sentence can be separated, this paper indicates that there are significant areas of overlap. The expeditions of private capital into areas that have been off limits are indicative of the crises that face the expansionist imperative of capitalism in economies that are no longer industrially oriented. As capital looks for places to grow, public sector services are a logical focus and prisons have not been left out of this process. Within the context of private prison operations, effective accountability plays a vital role in order to provide the conditions that enable the private provider, the state and citizens to scrutinise penal policy and operations. Unfortunately, as this paper has shown, the technical mutations of accountability have dominated these processes and it has also been argued that the emphasis placed on procedural accountability has helped obfuscate the ethical and moral components of accountability relationships.

The idea that profits can be derived from punishment presents our society with a considerable ethical dilemma, and those opposed to such a relationship have often couched this opposition in terms of the superiority of the state over the private sector. The difficulty with this argument is that public prison systems are also riddled with problems, and a debate that centres on the provider can fail to analyse the role of prisons and punishment within society. Raising ethical accountability issues creates a level of complexity that can be confusing and messy, but such issues can lead to deeper considerations of the inequities that operate within our societies and the impact these have on criminality; the prejudices that are institutionalised and the affect this has on the ways we define deviance and illegality; the alienation experienced within post-industrial society and the corresponding need to act out; and the ways that power operates to define the parameters of the acceptable and unacceptable. It is in this way that punishment is both a social expression and an instrument of social control, wherein discussions about the role of the state in sentence administration can be a distraction from the deeper issues of economic, political and social influence. Unfortunately, the technical mutations of accountability appear to have provided a vehicle for such distraction.

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Table1: Private Prisons in Australia, 2003.

(Data provided by the Australian Institute for Criminology)

<b>State</b>	<b>Name</b>	<b>Security Level</b>	<b>Size</b>	<b>Private Operator</b>
Western Australia	Acacia	Medium(Male)	750	AIMS
Queensland	Arthur Gorrie	Max/Med/Min (reception and remand)	710	ACM
Queensland	Borallon	Max/Med	492	MTC
Victoria	Fulham	Med/Min	777	ACM (GEO Group Australia)
Victoria	Port Phillip	Max	710	Group 4 (GSL Custodial Services)
NSW	Junee	Med/Min	600	ACM
South Australia	Mt Gambier	Med/Min	110	Group 4
Victoria	Metro Women's	Max/Med/Min	125	CCA (1996-2000)

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<sup>1</sup> Although it may appear that I accept the idea of the ‘criminal’ unproblematically, this is not the case. Criminality and its connection to race, socio-economic opportunity and gender are acknowledged, but cannot be explored in detail within this paper.

<sup>2</sup> There is considerable historical debate about the role of private contractors in the penal system, with the period between 1840 and 1960 providing many examples of private contractors involved in a variety of correctional activities (Garland, 1990). Although this is true, ‘public sector’ services dominated the period. It should also be noted that the shift to public management of prisons has not necessarily led to the outcomes mentioned here.

<sup>3</sup> This is the highest in the world on a percentage basis (Roth, 2004).

<sup>4</sup> Funnell (2001) outlines an example in the United States where attempts to specify the requirements of a loaf of bread led to the production of a 20 page document.

<sup>5</sup> However, according to Chomsky (1999) it is “not new” and it is “not liberal”.

<sup>6</sup> Under the Freedom of Information Act, you may be denied right of access to information where, there is a legitimate need for confidentiality or where another person's privacy may be invaded. Under the legislation the business affairs of another person or business are often exempt from claims under the Act.