Private prisons are on the agenda, and David Brown is perturbed. An ideological 'public/private' tussle over prisons is the last thing the prison debate needs.

Woken by the phone at 6 am. ABC radio: any comment on the NSW government proposals to invite private tenders to build and run a new jail at Junee in NSW? Blearily rehearse the familiar litany of arguments against private prisons. "Penality sole province of the state...dangers of the development of a penal-industrial complex...potential conflicts of interest...less accountable...cost cutting and undermining of union conditions."

But add that the public penal system in NSW is in such a disastrous state after the punitive and destructive policies of former state minister Michael Yabsley that a private sector operation could hardly be much worse.

The coffee suddenly tastes terrible when the main ABC morning news bulletin oozes a grab of my croaking tones, preceded by the news announcement that a NSW penal reform group, the Campaign for Criminal Justice, supports the government's privatisation plans. Shit. I should stick to the old dichotomies. Either for or against. Anything else is too subtle.

Sure enough the phone starts ringing. What's going on? Thought there was an established left position against penal privatisation? The old "I was robbed/misquoted/that's not exactly what I said" always sounds feeble, even when it's true.

Fortuitously, contacted later by the producer of the John Doyle show on ABC radio and managed to get a spot that day. Roy Slaven's other (non-rampaging) self conducts an informed interview in which the issues do not need to be forced into crude dichotomies, and a range of arguments can be considered. Savage the current directions of penal policy under NSW Inc and call Michael Yabsley a "menace to the citizens of NSW". Pressure eases.
Mulling over these events I am struck by the potential of the privatisation debate to provide a window onto a wide range of aspects of the existing penal system and the exercise of the power to punish. And I am disturbed at the effects of an orthodoxy which so readily invokes the ‘not on/out of the question’ chant rather than seek to open up new political spaces for debate.

For the various issues raised by privatisation are of a fundamentally political nature. They cannot be simply ignored or wished out of existence by either the proponents or opponents of penal privatisation. Nor can they just be redefined as technical issues, to be left to the ‘experts’.

They are issues which can only be resolved through a process of open, democratic debate and discussion. The form of the debate is as important in many respects as the content. A prerequisite then is for the debate to be democratic—in the sense that it must be open to a wide range of interested parties and must take place in a variety of forms. It must also be pluralistic and non-dogmatic—by which I mean that the tendency to argue from entrenched positions of, for example, a championing of ‘market forces’ and ‘competition’ as necessarily delivering better services, or a championing of state control on the basis of tradition, must be replaced by a preparedness to look behind the generalised and taken-for-granted slogans of the contending parties.

An example of the need to scrutinise taken-for-granted assumptions is provided in the advertising and promotion of a conference on penal privatisation scheduled for Sydney in November last year. The conference was promoted by glossy brochures and full-page advertisements in national daily papers. It was organised by “AIC Conferences”, subtitled “A Euromoney Company” and “sponsored by Carter Goble Associates, USA”. The AIC tag invited confusion with the Australian Institute of Criminology, which runs many conferences on criminological topics. The venue was the Sheraton Wentworth and registration was $1095 for two days, the fee covering “lunch, refreshments and documentation”, but not accommodation. The publicity nominated “WHO SHOULD ATTEND” as “Executives from corrective services, community services, security and technology organisations, unions, construction companies, police forces, criminologists, banks and merchant banks plus those involved in administration of the court”.

Needless to say, few representatives of ‘community services’, particularly from the voluntary sector—or indeed anyone without full institutional backing (which these days excludes most academics, save those actually giving papers)—would have been able to afford to attend. And, indeed, the conference was cancelled, which was probably a good thing, given that the structure financially excluded certain participants, infringing one of the basic requirements of democratic debate.

The title of the conference ‘Reform and Privatisation of the Criminal Justice System’ surreptitiously hitches the process of privatisation to the banner of reform. Now, this may or may not turn out to be the case. Certainly, one of the few concrete examples of penal privatisation we have in Australia, Borallon prison in Queensland, has generally received a very favourable press for what could broadly be described as a reform-oriented profile. But the point here is that it is the challenge for those promoting specific forms of penal privatisation to demonstrate their reform potential over existing state provision. Such a challenge is not met simply by the addition of an ‘and’ between ‘Reform’ and ‘Privatisation’. A demonstrated commitment to reform in the criminal justice system is far more than a PR strategy. It involves, among other things, a preparedness to criticise the punitive penal policies pursued by governments such as that in NSW, as indeed senior management at Borallon have done.

Another requirement of the debate is that the proponents of privatisation tackle head on the criticisms of penal privatisation put forward by the opponents. So far in the debate, there has been a tendency for the opposed parties to talk past each other: this must be overcome. One way to overcome it is for a clear exposition of the arguments against privatisation to be undertaken and then seriously addressed by the proponents. Without this joining of argument any initiatives in privatisation will be built on inadequate foundations, subject to continual challenge and destabilisation. It is in the interests of all parties that such a process occurs.

The key arguments against penal privatisation that have emerged are that penal privatisation should remain primarily the responsibility of the state; that there are dangers in the development of a strong penal-industrial lobby group which may develop significant political power and seek to wield it in the direction of maintaining high imprisonment rates; that there are potential conflicts of interest; that accountability is a worry, as is the possibility of attacks on unions’ wages and conditions; that cost savings are illusory; that there is the real danger of the development of a two-tier system in which privatised prisons would be offered better conditions and reserved for middle class fraud and white collar offenders, while the public system became increasingly impoverished and violent.

Many of these arguments carry considerable force. Some of the problems sketched in these objections can be seen in the US experience, and they may well emerge here if we see an acceleration of penal privatisation in Australia. The point I wish to make is that these arguments are either right or wrong, but that asserting or denying them as taken-for-granted propositions can close off opportunities for opening up penal issues to new surfaces of debate, new ways of thinking about penalty and new social forces taking part in those debates.

I want to investigate briefly a couple of these arguments in order to illustrate the dangers of treating them as conclusive.

First, the assertion that the power to punish is inherently a state function, has two particular difficulties. One is the very limited historical understanding this view involves. Certainly, in the Australian context where the initial white colonial settlement was in the form of penal colonies, the state was more deeply involved in penalty than in Britain.
or the USA—where a range of private, philanthropic and voluntary agencies played a significant part in the penal system (for example, in initiating systems of probation). Even in the Australian context ticket of leave systems, although sponsored by the state, were highly dependent on private supervision by free settlers. And contemporary Australian social historians are in the process of rediscovering the importance of the networks of philanthropic and voluntary agencies, staffed particularly by women, which operated forms of aftercare programs (arguably precursors to a formal parole system) in the latter half of the 19th century and the first two decades of the 20th century. The point is that state hegemony over the penal system is, clearly in Britain and the USA, and to a lesser extent in Australia, a phenomenon of the 20th century. It simply was not 'ever thus', as the claim that imprisonment is "inherently a state function" tends to suggest.

A second problem relates to the initiatives of ex-prisoner and prisoner action groups in community corrections in the 60s and 70s. The arguments at the time were that self-help and activist groups should have a significant role in the provision of prisoner and ex-prisoner housing and welfare/political services. Having spent considerable time theorising, arguing for and being involved in such forms of radical private initiative, it is a little difficult suddenly to elevate the principle of state monopoly over corrections to taken-for-granted status. Of course, there is a world of difference between a prison built and run by a multinational company and a prisoner movement halfway house. But that is precisely the point. In order to evaluate the appropriateness and abilities of particular agencies to operate, administer or service various penal institutions or programs, we need some more specific criteria than a crude public/private distinction.

The same difficulty arises in relation to the argument that private prisons will be necessarily less accountable. Having spent much time showing how unaccountable the public prison system is, and how the limited forms of accountability have been eroded, for instance, under the current NSW government, it is a little difficult suddenly to trumpet its virtues against an untried challenger. Again, there are many reasons why a private prison is likely to be even less accountable than what we have at present—but they relate to the specific conditions under which a private prison would operate. In particular, claims of commercial confidentiality in contracts of performance between governments and private operators may well prevent the most basic public scrutiny of the terms in which a private prison is to be operated, paid for, receive its prisoners, and so on. In short, the analysis must be pitched at the institutional, technical and discursive conditions under which different penal regimes are likely to operate, rather than assuming that certain effects are necessarily embedded in either public or private operation.

In short, both the standard hostile and defensive reaction to penal privatisation per se, and the uncritical promotion of penal privatisation as self-evidently amounting to 'reform' tend to operate as forms of closure on the debate—a debate which might otherwise be used precisely to highlight the inadequacy of current forms of accountability in relation to public prisons. Moreover, such a debate might open up fresh opportunities to raise questions about the many problems in our penal system, not the least being its frequent failure to provide sufficient educational and training programs and initiatives for prisoners.

DAVID BROWN teaches in Law at the University of NSW.