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**AUSTRALIAN
LAWYERS
ALLIANCE**

The privatisation of prisons and prison-related services in NSW

Contact:

Tilda Hum, Legal and Policy Officer

Phone: +61 (02) 9258 7700

tilda@lawyersalliance.com.au

Suite 5, Level 7, 189 Kent Street, Sydney NSW 2000 GPO Box 7052 Sydney NSW 2001
DX 10126 Sydney Stock Exchange ABN 96 086 880 499

T + 61 2 9258 7700 F + 61 2 9258 7777 E Henquiries@lawyersalliance.com.au

www.lawyersalliance.com.au



Who we are

Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

Corporate Structure

ALA Ltd, trading as the Australian Lawyers Alliance, is a company limited by guarantee with branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a President-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by twelve paid staff who are based in Sydney.

Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of individuals, especially the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2009. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for educational activities, exchanging information, developing materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine, *Precedent*, is essential reading for keeping lawyers and other professionals up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.

The privatisation of prisons and prison-related services in NSW

Introduction

The Australian Lawyers Alliance would like to thank the NSW General Purpose Standing Committee No. 3 for the opportunity to comment on the issue of privatisation of NSW prisons and prison-related services.

The Lawyers Alliance approaches this submission from the perspective of its mission statement to 'protect and promote freedom, justice and the rights of the individual' and the experiences of members who work within the criminal justice system.

The Lawyers Alliance notes that it is not in a position to comment on some terms of reference that fall outside of the organisation's area of knowledge, experience and expertise. It is hoped that others will comprehensively address those terms of reference in their submissions.

The Australian Lawyers Alliance has serious concerns regarding the further privatisation of prisons, which it believes to be an inherently public function that should not be delegated to the private sector where accountability, consistent scrutiny and access to information will be impeded.

This view should not be taken as an endorsement of the current public prison system, which in itself is problematic and worthy of a systemic review. However, the Alliance believes that a move to further privatisation will compromise the objectives underpinning the public incarceration system, which include protecting community safety, deterrence and 'rehabilitation'. A more privatised, profit-focused model, where higher crimes rates and higher levels of incarceration will mean more profit, and will inevitably have a negative impact not just on prisoners, but also on the community generally.

Executive Summary

The Australian Lawyers Alliance opposes the further privatisation of prisons and prison-related services for the following reasons:

- Incarceration and punitive measures are a fundamentally public role that should not be delegated to the private sector, where accountability, consistency, transparency and access to information will not be as forthcoming.
- There is a fundamental conflict between the aims of government to reduce offending and recidivism rates for the wider benefit of the community and the motivations of private companies in the corrections sector where higher crime rates and incarceration levels translate into better profits.
- There is no clear evidence that privatised prisons are more cost-effective or provide better value for money for governments. There is also no clear evidence that having privatised prisons create competition and innovation that improves public prisons.
- Accountability is greatly diminished, as private companies can rely on commercial confidentiality to justify restricted access to critical information about their prisons and also about their agreements with the government.
- Documented inadequacies and human rights abuses in other privatised prisons, and also in detention centres, run by the same operators in Australia and internationally, are extremely concerning.

Terms of reference

1. The impact of privatisation on:

(a) public safety and rates of escape

The Lawyers Alliance is not in a position to assess the impact of privatisation on rates of prisoner escape.

However, public safety is undoubtedly significantly enhanced by low rates of criminal offending and recidivism. The Lawyers Alliance submits that this is achieved not only through addressing many of the core social issues that can lead to offending, but also by ensuring effective rehabilitation for prisoners and thereby minimising offending and incarceration levels. This should always be the model for state-run facilities.

This, however, is unlikely to be the aim of private corporations that must meet their obligations to shareholders by maximising their profits. Profits for private corrections companies are derived from high inmate levels and high levels of re-offending, and not by sustainable rehabilitation.

(d) overcrowding

Overcrowding in correctional facilities is a significant problem in NSW. Figures from the Department of Corrective Services shows a significant increase in prisoner numbers.

	2003/04	2004/05	2005/06	2006/2007
Inmate numbers	8,367	8,927	9,101	9,468

Source: Department of Corrective Services Fact and Figure sheets from 2003-2007, available at http://www.dcs.nsw.gov.au/information/research_and_statistics/index.asp

NSW had a recidivism rate of 43 per cent in 2007-2008, 5.5 per cent higher than the national average rate of 37.5 per cent in 2006-2007.¹ At the public inquiry into prison privatisation, held on Monday 23 February 2009 at NSW Parliament, Commissioner Woodham reported

¹ Prisoner returning to prison rates, Department of Corrective Services annual report 2007-2008.

that there has been a 41 per cent increase in the prison population over the past ten years. This clearly demonstrates that prisons, as they currently operate, are not rehabilitating people effectively, an outcome that has both significant social and financial consequences.

The NSW government has had a strong law and order agenda, often supporting presumptions against bail, longer sentences and opposition to parole for certain offenders. These policies combine to continue the trend of higher incarceration levels.

Rather than creating more correctional facilities, whether public or private, the Lawyers Alliance submits that the government should place a greater emphasis on:

- preventing offending behaviour;
- funding the proper treatment of those with mental illness and substance abuse problems;
- effective rehabilitation programs; and
- diversion to community programs where appropriate.

Success in these areas will more effectively alleviate the physical and financial strain of prisoner overcrowding that the state of NSW is currently experiencing.

f) rehabilitation programs, mental health support services and recidivism rates

Rehabilitation, mental health support and reducing the recidivism rate are all critical factors to achieving better community safety, and come at a far lower economic and social cost for the government than contracting out prison facilities. Therefore, the Lawyers Alliance submits that any plans for prisons should focus primarily on these factors.

Currently, Junee's health services are not provided by Justice Health. Instead, health services are run by the company that operates Junee, the GEO Group Inc. Junee remains bound by Justice Health policies but, as with all other elements of the private operator, the extent and effectiveness of these programs is not easily measured.

As explained under the term of reference relating to the economic cost comparisons between private and public prisons, there is no meaningful way to compare the costs of operating programs between public and private prisons.

g) staffing levels and employee conditions

A Legislative Assembly report² and the Department of Corrective Services have suggested that public funds have been misused in the form of excessive or unnecessary employee overtime expenses. While not of course condoning such a misuse of public funds if that is actually the case, the Alliance believes that it is important to ensure that remuneration and employment conditions for employees in correctional facilities are fair and reasonable, and properly reflect a level of experience and training appropriate for such a role. Inmates are often suffering from a range of social and medical problems and are extremely vulnerable and dependent on staff in prison facilities. Labour costs for privatised staff are often lower than for those in the public sector, as the private sector is less unionised and positions are less stable and more competitive and there is a greater reliance on casual workers.

One of the greatest areas for reducing costs is cutting labour costs and training. At the coronial inquest following the deaths of five inmates at the private Port Phillip prison in Victoria, a prison officer, Richard Judge, admitted that he had no prison experience when hired as a prison officer. Despite this, he was promoted to duty supervisor and was involved with training other staff members.³

The Lawyers Alliance submits that a properly trained and remunerated workforce, which remains accountable, is more likely to effectively manage public safety issues, conflict and violence, and the unique needs of inmates, than a lower paid and expendable workforce that is likely to experience a higher turnover.

² Value for Money in NSW Correctional Centres, Public Accounts Committee, Report No 13/53 (No 156), September 2005.

³ Elisabeth Wynhausen 'Death trail leads to private prisons' *The Australian*, 26 July 1999.

2. The comparative economic costs of operating public and private facilities and the impact of privatisation on publicly managed prisons

The privatisation debate is often dominated by cost-effectiveness and economic comparisons that are always attractive to governments looking to cut costs, particularly in a climate of financial instability. Comparisons continue to be made, despite the fact that data is not effectively comparative. For example, the report on value for money from NSW Correctional Centres compares the average cost of health services⁴. It quotes the average cost of health services for an inmate to be \$20 per day, stating that this is more than double that of GEO's health services in the June. However, the report then says that Long Bay Prison (a maximum security facility) is likely to account for a large component of the public sector figure. This clearly demonstrates that such financial comparisons are fundamentally flawed and inaccurate, and should not be relied upon. Despite this, comparisons continue to be made in favour of private prison operators.

Economic costs should not be analysed in a vacuum. The fact that a prison may have lower operating costs does not reflect the costs that could be saved by the government by reducing offending behaviour in the first place, lowering recidivism through effective rehabilitation and, where appropriate, conducting community-based programs that are far less expensive. For example, the average daily expenditure on a prisoner in NSW was \$210.48 in the 2007-2008 period, while the cost of community-based correctional services was \$12.40 per day.⁵

While tempting, the Lawyers Alliance submits that comparisons between operating costs are ineffective. Not only because the data cannot be accurately compared because of the high number of variables that inevitably impact on the figures, but also because these comparisons are not a holistic assessment of the cost to government in the longer term.

⁴ Value for Money in NSW Correctional Centres, Public Accounts Committee, Report No 13/53 (No 156), September 2005.

⁵ Department of Corrective Services annual report 2007-2008.

3. Accountability mechanisms available in private prisons

The accountability of prisons, both public and private, is a key area of concern for the Australian Lawyers Alliance.

Prisoner enforcement of legal rights

There are already significant barriers to prisoners seeking to enforce their legal rights. Some of these issues include the risk of victimisation by other prisoners or prison staff, the difficulty and expense of contacting lawyers, lack of confidentiality of mail, lack of resources and funding for litigation surrounding inmate conditions (as opposed to criminal cases themselves) and the general reluctance of the judiciary to rule against prison administrators.⁶

While access to legal actions in tort law under the law of negligence may not necessarily change (although such actions are difficult to establish in any case), a prisoner may face difficulty in challenging failures by a private operator on the basis of contract due to the doctrine of privity of contract, whereby third parties cannot enforce their rights under a contract that they are not a party to.

Accessibility of information

Information regarding prisons is obtained through annual reports, statistics provided by the Department of Corrective Services (DCS) and through freedom of information applications.

In the 2007-2008 Annual Report at Appendix 21, there is a section relating to Junee's Performance Assessment Report. This two page summary explains that Junee receives financial incentives (a Performance Linked Fee (PLF) of up to 2.5% of the operational service fee. GEO Management (operators of Junee) must meet Key Performance Indicators (KPIs) in order to receive these financial incentives. These KPIs are not readily available to the public in any detailed form, as they form part of the contractual arrangement between the

⁶ These issues are highlighted in Hugh de Kretser, 'Prison Litigation: Barriers to Justice', *Precedent*, Issue 81, July/August 2007, pp29-33.

government and GEO. This information is not available on the basis that it is 'commercially classified', and after speaking to Junee, the Lawyers Alliance was informed that while an application could be made, it is unlikely that any of this information would be released on the basis of that exception.

Therefore, the public's only real access to information relating to Junee is through the two page appendix in the DCS . The Performance Review Panel recommended to the Commissioner of the Department of Corrective Services that the GEO group receive the maximum payment. This is despite the two issues that arose in relation to meeting the indicator 'Sentenced inmates transferred to June CC have their case plan and classification reviewed'. The appendix also reveals a spike in positive urine samples for drug use (jumping from 10.26 per cent positive in July 2007 to 34.21 per cent in September 2007) and the failure to have 102 disciplinary matters (out of 220) between 1 January 2007 and 17 April 2007 heard within the 24 hours following the offence occurring, as required. The report says that, after follow-up, Junee was found to be complying with these minimum standards.

The circumstances surrounding the failure at Junee to meet minimum standards are not explained in anything but the vaguest of terms, and it is unlikely that the GEO group would be forthcoming about the context or details of such incidents as such incidents can have a negative effect on investor confidence.

Accountability of private companies to the government

It is unclear exactly what happens if a private prison fails to meet the minimum requirements, and at what point such a failure will lead to consequences for the operator. For example, how many suicides can occur in a private prison before the government considers this to be unsatisfactory? Is the private prison operator fined? How much? Again, these details form part of the confidential commercial agreement between the government and the operator, and this secrecy also creates a further barrier to accountability.

These issues come in the light of recent comments by three former 'official visitors' to the state's prisons who say that their roles are being watered down by the NSW government. Ray Jackson, an official visitor of the Metropolitan Remand and Reception Centre at Silverwater for 10 years, said: 'By the end, we couldn't be autonomous from the department in trying to solve issues.'⁷ In the face of declining confidence in the ability of official visitors for both public and private prisons to ensure the proper management of correctional facilities, it is critical that such facilities, where there is such potential for grave human rights infringements, are subject to the clearest and highest level of scrutiny.

5. The use and effectiveness of private security guards in perimeter security of prisons

The Lawyers Alliance is not in a position to address this term of reference in significant detail. However, it should be noted that following the privatisation of perimeter security at Long Bay prison to ATMAAC International, a low-security inmate escaped on 26 November 2008.

There is significant dispute between the government and unions regarding the circumstances surrounding the escape, with the former alleging that the inmate scaled two fences with barbed wire, while the unions say the inmate walked through the front gate. The Department of Corrective Services refused to release CCTV footage of the escape to confirm its version of events, leading to the Opposition party in NSW calling for the matter to be investigated by the Independent Commission Against Corruption.

⁷ Edmund Tadros, 'Prison watchdogs lose their teeth', *The Sydney Morning Herald*, 9 December 2008.

6. The experience of privatisation of prisons and prison services in other Australian and overseas jurisdictions

The Australian Lawyers Alliance wishes to note some examples of problems at other privately operated prisons in Australia. These examples do not even begin to cover all the documented problems in Australia and overseas, but illustrate important examples of failings within the private prison system.

Port Phillip Gaol

Following the deaths of five inmates at Port Phillip Gaol, four from suicide and one from a suspected drug overdose, the coroner held that both the Department of Justice and Group Four (the private prison operator) contributed to the deaths by failing to provide a safe environment for inmates.

Metropolitan Women's Correctional Centre

The Victorian government was forced to terminate its contract with the Australian subsidiary of Corrections Corporation of America (CCA) after a series of problems within the Metropolitan Women's Correctional Centre. Problems included attempts to reduce children's visitation rights, high levels of electronic surveillance, excessive medication of inmates, poor staff training and retention.⁸

Arthur Gorrie

Numerous problems in Arthur Gorrie Prison in Brisbane have also been documented. When the prison opened, there were five suicides within 18 months. Professor Paul Moyle also documented some of the conditions: 'Inmates have reported they have spent up to 20 hours in their cells, have nominal exercise regimes, poor quality programs, delays in getting access to books from the library, inadequate basic facilities and a high incidence of assaults within the centre.'⁹

⁸ Amanda George, 'Crime pays: well, it does if you run the prison', *New Internationalist*, 1 April 2003.

⁹ Paul Moyle, 'Private Prison Research in Queensland, Australia: A Case Study of Borallon Correctional Centre', 1991.

Last week, in the United States, a former judge pleaded guilty to fraud after taking more than \$2.6 million in kickbacks for sending young offenders to two privately run detention centres. A young offender was sentenced to three months in detention for setting up a hoax profile on a social networking site. She had no criminal record and the page was clearly labelled as a joke. Another young man was sentenced to 90 days in detention for a minor assault charge that his mother was assured would result only in probation.¹⁰ While this can be discounted as an isolated example of corruption, it is indicative of some of the problems that can occur from the commercialisation of corrective facilities.

Conclusion

The protection of the community should always be the key priority for any government with respect to correctional facilities decision-making. Our communities are best protected in a climate where offending behaviour is low, social problems within society are mitigated as far as possible and those who do engage in criminal behaviour are effectively rehabilitated to facilitate their re-integration into the community.

Commissioner Woodham told the public inquiry held at NSW Parliament¹¹ that the Department was not contracting out of its responsibilities and will retain ultimate responsibility over the private prisons. This may be the case, but the plans involve contracting out of the responsibility of the day-to-day care and management of inmates. This should not be taken lightly and has the potential to enormously impact on the lives of inmates that become controlled by a corporation that is far less publicly accountable than a government department. It should also be noted that in the absence of a *Human Rights Act* in NSW, private operators conducting public functions are under no obligation to consider how their policies and procedures can impact on the human rights of prisoners.

The Lawyers Alliance submits that it is critical that the government retains full control and

¹⁰ Ian Urbina, 'Judges Plead Guilty in Scheme to Jail Youths for Profit', *New York Times*, 12 February 2009.

¹¹ 23 February 2009

responsibility over the punitive functions of the state, rather than contracting out their responsibilities to the detriment of public accountability, transparency and the welfare and rehabilitation of prisoners.