# Book Reviews

*Private Prisons and Public Accountability* by RICHARD HARDING (Buckingham, Open University Press, 1997), pp viii, 184.

The private sector is rapidly expanding into Australia and overseas correctional jurisdictions therefore attempts to describe the current state of play can quickly become outdated. Since the publication of this book, three more jurisdictions (Western Australia, Tasmania and the Australian Capital Territory) have made moves to introduce private contract management of prisons. Despite these recent developments Richard Harding does a competent job in defining prison privatisation and giving a useful description of the current state of play. The tables found on pages 4, 6 and 7 are particularly helpful in providing an overview of the growth of US, UK and Australian private prisons from the early 1990s until mid-1997.

In chapter one, Harding sets the tone for his evaluation of private sector involvement. Whether the contractor provides management, custodial or programatic services (or builds the facility), the, 'common denominator is that the state remains the ultimate paymaster and the opportunity for private profit is found only in the ability of the contractor to deliver the agreed services at a cost below the negotiated sum'. (p 2)

Accountability, or more precisely the way in which delegation is structured and supervised, are important concerns for this book. Harding proposes ten tenets of accountability (pp 27–30) which the state must require of private contractors and which citizens must require of the state:

1) The distinction between the allocation and the administration of punishment must be strictly maintained, with the private sector's role being confined to administration;
2) Penal policy must not be driven by those who stand to make a profit out of it;
3) The activities of the private sector and their relations with government must be open and publicly accessible;
4) What is expected of the private sector must be clearly specified;
5) A dual system must not be allowed to evolve in which there is a run-down and demoralized public sector and a vibrant private sector;
6) Independent research and evaluation, with untramelled publication rights, must be built into private sector arrangements;
7) Custodial regimes, programmes and personnel must be culturally appropriate;
8) There must be control over the probity of the private contractors;
9) There must be financial accountability; and.
10) The state must in the last resort be able to reclaim private prisons.

These tenets provide a thread for later chapters in which Harding meticulously sets about the task of developing the argument that if organisational and monitoring structures are strongly entrenched along the lines of his

tenets, the private sector can, and most probably will, be a 'catalyst for improvement across the whole prison system'. (p 165)

This book is not concerned with ideological arguments about the appropriateness of privatising contract management. For Harding such arguments became irrelevant when successive Australian state governments began vigorously pursuing the policy in the early 1990s. His position is that arguments covering the essential role of the state in the punishment process, usually degenerate into 'desiccated abstractions and ideological commitment ... which minimises, indeed virtually ignores, prisoner issues in favour of promoting broad ideological positions'. (R Harding 1994, 'Privatising Prisons: Principle and Practice' in *Private Sector and Community Involvement in the Criminal Justice System Conference Proceedings*, (eds) D Biles and J Vernon, no 23, Australian Institute of Criminology, Canberra, p 2)

Questions about the appropriateness of privatising and maintaining the division between the allocation and administration of punishment, are not so neatly separated. Even Harding acknowledges that there is something unique about the role of the state in imprisoning citizens who breach our criminal laws. He refers to the important argument raised by Radzinowicz that, 'in a democracy grounded on the rule of law and public accountability, the enforcement of penal legislation ... should be the undiluted responsibility of the state'. (p 21)

Harding dismisses Radzinowicz's argument. This important principle can not be so easily dismissed as Harding would have the reader believe. Harding's argument that punishment is allocated at the time of sentence and that everything that occurs thereafter involves the administration of punishment, is far from settled (see P Moyle, *Borallon: Australia's First Private Prison — Reform or Regression?*, forthcoming, see especially, Chapter Six).

Part of the reason for this confusion is that Harding relates the issue of separating the allocation and administration of punishment purely to the issue of accountability. He justifies the position that disciplinary and other decisions are not allocating punishment because they are only 'imposed [on a citizen] because of [his/her] status as one who has breached the criminal law and been sentenced to imprisonment in the first place'. (p 89) Such distinctions, whilst theoretically possible, are in practice hard to make and distort the practical approach developed in earlier chapters. One could argue that, if in reality, allocation has spilt over into administration in the post-sentence phase (a situation acknowledged by Harding), this compels a re-assessment of the theoretical model which was blind to the reality in this first place.

Mapping the contours of this distinction, especially in terms of the quasi-judicial powers exercised by correctional personnel, is a precursor for an effective system of accountability. This point is briefly discussed by Harding (see tenet 1) but the reader would benefit from a more detailed evaluation of this aspect of the policy, especially given that Harding stresses not one Australian jurisdiction has recognised that allowing private employees to contract manage is a problem either in principle or practice.

In chapter three Harding discusses the theory of capture, a situation where regulators serve the interests of the industry rather than the public interest. Case studies of mining, airline travel, north-sea oil rigs and even a brief reference to the 1986 Challenger space shuttle disaster are useful. Applying the theory of capture to private prisons Harding warns 'as regulators become more and more involved with an industry, they come to perceive the dilemmas and share the values and priorities of their regulatees'. (p 37)

The risk of capture has become an important issue, especially in Queensland. Harding's discussion of advantages and disadvantages of statute as opposed to contract based monitoring arrangements, provides useful insights for correctional policy makers. The evaluation of accountability mechanisms in Texas, Florida, Queensland, New South Wales, South Australia, Victoria and England, highlight situations from absolute capture through to an appropriate degree of separation between the service provider and purchaser. The model developed in the UK (under the *Criminal Justice Act* 1991, (UK)) where a Crown servant is appointed to hear and adjudicate disciplinary and oversee management practices, clearly emerges as preferable.

Harding favours external statute-based monitoring approaches primarily because this

> can be seen as indicating some level of governmental faith in the culture of external regulation, some commitment to ongoing accountability according to industry-wide standards, some willingness to confer appropriate status upon the regulatory organization and its employees. (pp 37–38)

Chapter four explores the issue of accountability mechanisms for public and private sector prisons — 'there are only three main possibilities: that public prisons are more accountable; that private and public systems are equally accountable; and that private prisons are more accountable.' (p 51)

As with the previous chapter, a very detailed examination of constitutional, parliamentary, legislative, judicial, administrative and other official mechanisms is provided. Harding concludes that 'in none of the situations considered was the private sector less accountable.' (p 65)

It is at this point that the seeds of contestability/cross-fertilisation theory emerge. For Harding, privatisation brings a new discipline — the discipline of competition — into correctional systems. Whilst this competition may sometimes waiver, as was the case with 'commercial confidentiality' and the secrecy surrounding the first contract to manage Borallon Correctional Centre (Queensland), competition is nevertheless relentless. Harding draws the reader back into his fundamental argument that it is the regulator which sets standards and the regulator who is responsible for ensuring compliance.

In chapter seven, Harding departs from the more common proposition that privatisation is about reducing outlays (cost-saving). He argues that the 'crux is *value for money*, penological and regime accomplishments as well as effective financial accountability being integral to this concept.' (p 99)

Chapter eight pursues the theme of value by exploring what the author describes as comprehensive meta-studies of the two correctional systems.

One of the studies, by Shichor, is not so much comprehensive meta-study but is athorough evaluation of secondary literature. The second, by Thomas and Logan, was a review of other research. (However, Logan's 1992 study of a women's prison in New Mexico comes closer to a comprehensive meta-study, although in this study there is no evidence that semi-structured or open-ended interviews being conducted).

A more critical evaluation by Harding of Logan's 'confinement quality index' and his apparent abandonment of rehabilitation as a penological objective, would have been welcomed. Logan uses the idea of reducing deterioration as a measurement of a regime's success. Some mention of the methodological and ideological reasons behind this move needed further evaluation. If Logan is right, and the 'confinement quality index' is the most 'viable way of approaching comparative studies', (p 114) then the philosophy behind correctional reform will always be damage control. Such abandonment may suit the desires of corporate players (who are keen to negotiate quantifiable performance criteria) but the public interest in pursuing rehabilitation as a general penological goal should not be jettisoned so easily.

The final study referred to in this chapter (Bottomley) was a comprehensive qualitative study. Harding could have made more use of its findings because of the three studies cited it was the most comprehensive, methodologically sound and jurisdictionally relevant.

This chapter is probably the weakest in the book. Although Harding indicates that he did not propose to 'set out ... the findings of these results' (p 110) nevertheless, the selection and emphasis on the studies above, does not show the same ballast as other chapters. This chapter's main strength lies in the development of Harding's thesis on the value of studies. They are not decisive on the issue of whether to privatise, rather:

> they should enable the strong and weak aspects of the two components to emerge and areas for productive cross-fertilisation to be identified. This is so whether the studies relate to cost, programmes, environment or attitudes, and whether they are processual, quantitative or qualitative in their approach. (p 111)

Chapter nine deals with special custodial issues. It does not raise any matters that are unique to the private sector. Overcrowding, riots, disturbances, drug use, control of escapes, suicide prevention, health services, race relations, intimidation and bullying by inmates need further comparative evaluation. The evidence presented in this book is too sketchy to draw firm conclusions about the comparative performance of the two sectors.

Chapters ten, eleven and twelve are key chapters. If the first phase of the privatisation debate was over theoretical issues about whether it is appropriate to contract manage prisons, the second is very different. Harding will not stand for purely ideological objections or 'purist moral arguments ... [which are] something of an ideological indulgence.' (p 23)

It is now that the original contribution of this book becomes apparent. Specific discussion about the potential impact of private prisons on the total

prison system compels engagement by the reader. Practitioners, policy makers, criminologists and inmates will find it irresistible to reflect upon the nuances of cross-fertilisation theory. Harding asks, '[w]ill private prisons improve the total prison system?' (p 134) The answer for Harding is 'yes'. It is not clear how the author defines reform. Reform is a much over-used and hotly contested word. It would have clarified arguments if Harding had paid more attention to this important definitional question especially given that in parts of this book competition is closely linked with reform. Privatisation provides a much needed catalyst for competition. His previously outlined tenets of accountability are a precursor for an adequate regulatory model. Harding is overwhelmingly optimistic about the impact of corporate interests on the prison system. The cross-fertilisation thesis is not without its problems, both in terms of the evidence Harding rallies to support the idea (that the private sector is operating more efficiently and effectively) and, the impact of privatisation on penological developments.

On the issue of the private sector being more effective and efficient, research into the Queensland prison system for the period 1991–1993 suggests that when comparing Borallon Correctional Centre (a private centre) and Lotus Glen Correctional Centre (a public centre), Lotus Glen developed a more conciliatory management style, had a better quality prison environment from an inmate's perspective, provided more rehabilitative programmes, introduced case management more successfully and had more community involvement in decision making. (See Moyle, P. *Borallon: Australia's First Private Prison — Reform or Regression?*, forthcoming)

On the impact of privatisation on a corrections system, Bottomley and James make the point that separating general penal reforms from those innovations caused by the introduction of the private sector is notoriously complex, if not methodologically impossible. After evaluating system wide changes in the UK prison system covering the early 1990s, they conclude:

> The reality more often resembles the situation in England and Wales, where the early 1990s saw a Prison Service subject to a complex and unique set of external and internal influences .... Consequently, the extent to which privatisation contributed independently to the changes that occurred is very difficult indeed to assess. (Bottomley, K. & James, A. 1997, 'Evaluating Private Prisons: Comparisons, Competition and Cross-fertilization', *The Australian and New Zealand Journal of Criminology*, vol. 30, no. 3, December, pp 259–74)

This brings us back to Harding's thesis that the key question is whether the performance of the total system can be enhanced by the private sector.' Although Harding begins to address this issue, more evidence is required for it to be resolved.

Richard Harding has written a valuable monograph which should be included on the shelf of serious penological scholar. Books which evaluate market testing, privatisation and corporatisation within the criminal justice system, deserve attention especially so when they adopt a comparative approach as is clearly the case here.The issue of private companies' response to public accountability mechanisms is an important subject which will only

increase in significance as private capital expands its role in the criminal justice system.

PAUL MOYLE
Senior Lecturer in Law
The University of Western Australia

*Education and the Law* by IAN M RAMSEY and ANN R SHORTEN (Sydney, Butterworths, 1996) pp xlii, 356

It seems that one cannot pick up a newspaper or listen to the news without learning of yet another problem afflicting the Australian education system. These problems are quite diverse, ranging from, for example, (in early 1997) allegations of seemingly widespread sexual abuse of students by teachers, to the funding of education, particularly the tertiary sector, to the quality of schooling and the standard of teachers. These issues, of course, all give rise to fundamental legal issues. For instance, assuming teaching is considered a profession, should individual teachers be held liable for students who, after completing years of compulsory schooling, do not adequately meet the standard expected of a graduate? As universities move to offer increased numbers of full fee-paying places in their courses, should students be able to claim breach of contract or misrepresentation if the course does not fulfil their requirements?

*Education and the Law*, therefore, falls from the presses at an opportune time. Most of the text is by Ian Ramsey and Ann Shorten, with chapters written by Ken Dare, Drew Hopkins, Katherine Lindsay and Caitlin Barrah.

The text is divided into two parts — the first provides the reader with an overview of the legislative framework of primary, secondary and tertiary education in Australia. The approach adopted by the authors in Part One is to proceed through the legislative treatment of various topics, such as compulsory education and the qualification and registration requirements of teachers, jurisdiction by jurisdiction. The authors' treatment is detailed and comprehensive. However, this approach gives rise to a number of problems. First, as the authors acknowledge, legislation in this area is undergoing rapid change. Since *Education and the Law* was published, for example, the Queensland *Public Service Management and Employment Act* 1988 has been repealed, and the *Public Service Act* 1996 enacted. Given that Part 1 is such a detailed discussion of the legislation in each jurisdiction it is likely to date quickly.

More importantly, however, this focus on the legislation in each jurisdiction seems to be at the expense of elucidating and explaining what that legislation means. For example, Chapter Three contains a quite comprehensive overview of the legislative provisions relating to the discipline of

teachers. The various grounds for taking disciplinary action against teachers in each jurisdiction are set out. For example, in New South Wales and in Victoria a teacher may be disciplined for misconduct. In South Australia, a teacher may be disciplined if 'guilty of any disgraceful or improper conduct'.[1] The authors, however, discuss only very briefly what these terms mean. Is the test different in South Australia to that in New South Wales or Victoria? It may be that there is very little case law on these matters. It would have been useful, however, if there had been some further discussion of what these concepts involve, perhaps by reference to other professions or cases from overseas.

Part Two of *Education and the Law* deals with specific issues, such as the liability of teachers and schools for injuries suffered by students, educational negligence, and the application of anti-discrimination, employment and family law in the education context. This part of the book should prove more useful, particularly as a general reference work for teachers.

Chapter Six examines the liability of teachers and educational authorities for injuries suffered by students and is perhaps the highlight of the book. The chapter is clearly written and easy to read. It addresses those questions one most often hears teachers ask in relation to their liability for a student's injuries. For example, what is the relevance of the timing of the injury, the location (ie., at school or on an excursion) of the incident, and injuries resulting from unruly behaviour of students?

Employment law in the education context is discussed in Chapter Nine. This chapter is a competent introduction to the general principles of employment law. Although it is somewhat unnecessary to explain the concept of the common law at this stage of the text.[1] The author carefully takes the reader through the contract of employment. He discusses, for example, when terms will be implied into the employment contract, and the distinction between an employee and an independent contractor at common law. Unfortunately, there is very little illustration of these general principles from cases in the education field.

The final chapter examines the interesting and controversial issue of whether teachers should be held liable 'when a student suffers harm as the result of incompetent or negligent teaching'; educational negligence.[2] The author raises the possibility of teachers 'being held accountable to their clients for negligence', as in other professions. But who is the client in the education context? Take a university Law Faculty for example. Does the Faculty owe a duty merely to its 'client' students, or does it owe a duty more widely to the taxpayer (who substantially funds the university) and the community more generally? Is a legal education a common good, or merely a product to be purchased by an individual? The chapter also refers to problems associated with issues such as causation and contributory negligence. Should teachers be liable for failing to educate someone who may not possess any motivation or is simply intellectually not capable of completing a particular course?

[1] IM Ramsey and AR Shorten, *Education and the Law* (1996) 265 and 270.
[2] Id 292.

The issues raised in this last chapter are intriguing. However, the chapter draws heavily on an article published by one of the authors in the *University of New South Wales Law Journal* in 1988, and is somewhat dated.[3]

This reviewer trained (albeit briefly) as a primary school teacher and has taught law at tertiary level. *Education and the Law* was therefore eagerly awaited. Unfortunately, however, this text, particularly Part One, is somewhat disappointing. The book also suffers from a small number of typographical errors and careless mistakes.[4] Teachers and others directly involved in education will benefit, however, with some acquaintance with the issues covered in Part Two.

Dr Max Spry*
Parliamentary Information and Research Service
CANBERRA ACT 2600

[3] See: I Ramsey, 'Educational negligence and the Legalisation of Education' (1988) 11 *University of New South Wales Law Journal* 184.

[4] IM Ramsey and AR Shorten, op cit (fn 1) compare 7 and 68.

* The views expressed above are those of the reviewer and should not be attributed to the PIRS.