Submission
No 106

INQUIRY INTO THE PRIVATISATION OF PRISONS AND PRISON-RELATED SERVICES

Organisation: Public Interest Advocacy Centre Ltd

Name: Ms Robyn Banks

Position: Chief Executive Officer

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A Just and Fair Prison System: Principles or Profit?

Submission to NSW Legislative Council General Purpose Standing Committee No 3 – Inquiry into the Privatisation of Prisons and Prison-related Services.

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Peter Dodd, Solicitor – Health Policy and Advocacy
with Brenda Bailey, Senior Policy Officer, and
Chris Hartley, Policy Officer, Homeless Persons' Legal Service

Level 9, 299 Elizabeth Street, Sydney NSW 2000 • DX 643 Sydney
Phone: 61 2 8898 6500 • Fax: 61 2 8898 6555 • www.piac.asn.au

1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's work on Penal Reform

PIAC has a long history of involvement with penal reform. In more recent years, PIAC has represented at Coronial Inquests the families of several prisoners who died in custody. PIAC was significantly involved in the consultations that lead firstly to the Hon Greg James QC's *Review of the Forensic Provisions of the Mental Health Act 1990* and the consequent amendments to the *Mental Health (Criminal Procedure) Act 1990* (NSW) passed by the NSW Parliament in 2008.

PIAC has convened a network on Mental Health and Prisons, is involved with a range of community organisations working with prisoners and former prisoners and is represented on the Department of Corrective Services' Women's Advisory Council.

2. The Terms of Reference of the Inquiry

PIAC welcomes the opportunity to make this submission to the NSW Legislative Council's General Purpose Standing Committee's Inquiry into the Privatisation of Prisons and Prison-related Services.

The terms of reference of the Inquiry covers a broad range of areas that are affected by the privatisation of prisons and prison-related services. Arguments about the issue of privatisation of prisons also cover a broad

range, spanning debates about human rights, criminology, economics, and accounting issues. No doubt all these areas will be covered by the Inquiry and submissions to it.

The terms of reference particularly refer to comparative economic costs of operating public and private facilities. PIAC believes that there are other equally or more important considerations or 'costs' that all governments must consider before the decision is made to privatise corrective services. PIAC has particular concerns about a range of public interest matters that go beyond purely economic arguments about short-term comparative economic costs.

3. Principles for a Just and Fair Prison System

PIAC believes that there are certain public interest principles that should underpin the modern state's policies regarding prisons and imprisonment. These principles are set out below.

PIAC also notes there other organisations and stakeholders will raise concerns that PIAC does not seek to address in detail in this submission. For example, the relevant trade unions will raise concerns about the effect of privatised prisons on the wages and conditions of the existing prison workforce. Others will no doubt be concerned about the economic efficiency of the prison system itself. These concerns are reflected in the terms of reference, such as the mention of issues such as public safety and rates of escape, the incidences of assault, and the effectiveness of private security guards.

PIAC acknowledges the role that corrective services plays in the criminal justice system. PIAC certainly has many concerns about the existing policies regarding corrective services in NSW, and will continue to campaign for greater use of alternatives to imprisonment. PIAC continues to be concerned about the number of NSW prison inmates who have been diagnosed with a mental illness. PIAC is also acutely concerned with the over-representation of Indigenous Australians in all prisons and the increase in imprisonment of Aboriginal Women in NSW.

Because of these broader concerns, PIAC submits that there are certain public interest principles that should underline corrections policy. It is PIAC's fear of a diminution of these principles under privatisation that is the major focus of this submission, not the total question of efficacy of privatisation per se.

PIAC's focus on these principles does not mean that PIAC does not believe that arguments about whether private prisons are more efficient in providing appropriate external and internal security, fewer or more assaults on prison officers and health workers, and the wages and conditions of these workers, are not issues of public importance. The focus of the submission simply reflects PIAC's core interest in redressing disadvantage and ensuring open and transparent government.

The principles set out below, and the concerns that come out of these principles, are based on the experience of PIAC's previous and continuing work, focussing on disadvantaged groups in the community. PIAC makes no apology on seeing the inmates of prisons (including forensic patients) themselves as a disadvantaged group in society. When our prisons are clearly disproportionately populated with members of groups that in our society are already disadvantaged such as Indigenous Australians, the homeless and the mentally ill, then any significant change in prison policy must be carefully considered in light of the precautionary principle. The increasing trend towards privatisation of corrective services in western democracies, reflected in recent NSW budgetary and policy decisions, is such a significant change. Two new privatised prisons in NSW proposed in the November 2008 NSW Mini-budget would significantly change the private/public balance in NSW corrections.

The public interest principles that should guide policy and program development in relation to corrective services are:

- substantive equality in the corrective services system;
- the promotion, protection and fulfilment of human rights;
- equitable standards of health care;
- rehabilitation; and
- public accountability.

These are discussed in brief below and then examined in detail in the following sections of this submission.

PIAC has concerns regarding the impact of further privatisation and outsourcing of prison functioning (as well as related services) in NSW on all these areas.

These concerns derive from the following three perspectives:

- The experience in NSW from the already privatised prison in Junee.
- The experience in other Australian states and territories where various aspects of corrective services have been privatised and outsourced. This includes the private involvement in the management and running of Commonwealth immigration detention centres.
- Overseas experience, especially from the United States of America, where it can be truly said that corrections is a large private industrial complex.

3.1 Equality

A prison system, whilst it has objectives of deterrence, rehabilitation and perhaps even punishment, should at the same time not discriminate against members of vulnerable groups in society such as people who are mentally ill, people who have an intellectual disability and Aboriginal and Torres Strait Islander people. Policies should be developed within corrections to counter disadvantage, both in terms of inmates' lives within the prison system, and in the rehabilitation process.

Because women are a much smaller population within prisons in western societies compared to the population of male inmates, there is a greater cost per capita of delivering the same or equivalent targeted programs. This means that to ensure equity for women in accessing appropriate programs, governments need to allocate greater per capita funding.

3.2 Human Rights

Prisons and prison administrators should conform fully to Australia's human rights obligations. Not only do these obligations refer specifically to the rights of prisoners; but also to the fact that the deprivation under law of a person's does not absolve the state from protecting prisoners from any other human rights violations.

3.3 Standards of Health Care

People who are in the prison system deserve the same standard of health care, including treatment for mental illness, as those in the community. Physical deprivation leading to poor health outcomes and/or health standards for prisoners that are inferior to those enjoyed by the general population are not justifiable in the name of security or as forms of punishment.

3.4 Rehabilitation

Rehabilitation should always remain a major, if not the only, objective of prison policy.

Rehabilitation requires adequate provision of counselling, psychological and psychiatric services; education and training services for those who seek them; and health services to the standard found in the general community.

3.5 Accountability

Corrections, like all aspects of the criminal justice system, should at all times remain accountable to the community. This means accountability for the treatment of individual inmates, as well as accountability for financial management, relations with employees and the effectiveness of correctives services measured against stated goals. Lack of accountability inevitably leads to corruption and other abuses.

4. Discrimination and the treatment of disadvantaged groups

It is not a surprise that the prison population in western industrialised countries has an over representation from marginalised groups within those countries. The reason that in Australia the Indigenous population has for decades been vastly over represented in prison populations cannot be simply attributed to bias within the criminal justice system or the failure of Australian prisons to rehabilitate or effectively deter re-offenders. The reasons are far deeper seated than this.

Neither are the prisons directly responsible for the prevalence of mental illness in society. There are multiple factors that lead those with mental illness being imprisoned. It is of no surprise that the behaviour of people who are diagnosed with mental illness often comes to the attention of the police and other law-enforcement bodies.

It is the government that controls the criminal justice system, sets maximum penalties for offences, legislates for and funds alternatives to prison and the treatment of the mentally ill, and it is the courts that sentence convicted persons.

However, this does not mean that administrators of prisons and the governments that operate them should not be aware of the disadvantages faced by people who are homeless and/or Indigenous and/or mentally ill. They should not adopt practices and policies that perpetuate existing discrimination. If an aim of the prison system is rehabilitation, then decision makers and administrators should be adopting non-discriminatory policies that assist and encourage otherwise marginalised people not only to not re-offend, but to also be able to lead a valued and contributing life in the community after release from prison.

PIAC notes that the Department of Corrective Services (DCS) provides a range of programs for inmates and recently released inmates targeted at disadvantaged groups. Reviewing the DCS Annual Report of 2007-2008, PIAC notes that, for example, DCS provides a residential program for female inmates who have mental health as well as substance abuse problems. PIAC notes that there are special educational programs for inmates with intellectual disability to enhance these inmates' chances of obtaining meaningful post-release employment. DCS participates in the NSW Government initiated Two Ways Together project, providing internal programs and funding of Indigenous organisations, targeted to assist the rehabilitation and well-being of Aboriginal and Torres Strait Islander inmates.

PIAC also notes that there are also specific programs at Junee Correctional Centre that are focused on Aboriginal inmates and that these programmes have connections with local Indigenous organisations and individuals.

PIAC is concerned the focus on these targeted programs and policies aimed at disadvantaged members of society may be seen in the short term as an extra cost, rather than as a long-term benefit.

In the long term these programs, even if only partially successful in achieving their aims, save society in terms of future financial benefit to the state through reduced recidivism as well as reductions in welfare and unemployment benefits. These long-term savings from rehabilitation programs and programs targeted to particular disadvantaged groups are harder to quantify than the short-term gains from less expensive, universal and non-targeted services and policies that focus on security rather than rehabilitation. Apart from long-term financial benefits, if we achieve a fairer and more just society, the long-term benefits to the community through assisting people with mental illness who are homeless, or are Aboriginal and Torres Strait Islanders, to find a more meaningful future cannot be quantified in money terms.

PIAC has increased concerns when the corporations in charge of privatised corrective services are making the decisions about expenditure in prisons. Despite arguments that public interest objectives can be preserved in the contractual obligations of private prison operators, the fact is that, even with such contractual obligations to the state, any private corporation still owes a legal obligation to its shareholders.

In this situation, the long-term benefits of targeted programs and general rehabilitation programs do not flow to shareholders but to the state and ultimately the well being of all citizens. As has often been pointed out, it is to the financial benefit of private corrections operators to have greater recidivism not less. It is also to their financial benefit to have a continuation of the existing sources of supply of prisoners. Put bluntly, if the existing rate of incarceration of Indigenous people in Australia was the same as the general population, then several prisons in each state would have to close. This would not be in the financial interest of the shareholders in a private prison industry. If those shareholders were overseas individuals or institutions, then any long-term benefits of targeted programs flowing to the general Australian community would not have any direct beneficial effect on those institutions or individuals.

PIAC is not convinced, on the basis of the experience in NSW and in other Australian and overseas jurisdictions, that the terms of the contractual obligations of private prison providers overcome this problem.

4.1 Effect of Privatisation of Prisons on Homeless people

In 2003, following an extensive consultation process, the Homeless Persons' Legal Service (HPLS) was established by PIAC and the Public Interest Law Clearing House (PILCH). HPLS is funded by the NSW Public Purpose Fund through the support of the NSW Attorney General. HPLS provides free legal advice and ongoing legal representation to people who are homeless or at risk of homelessness.

There are considerable links between released prisoners, homelessness and recidivism. Recent studies have indicated that over 38% of prisoners across Australia were re-imprisoned within two years of their release[1], and that 60% of the current prisoner population have been in prison on at least one other occasion in their

[1] *Report on Government Services 2005* (2006) Productivity Commission <http://www.pc.gov.au/gsp/reports/rogs/2005/> at 26 February 2009.

lifetime.[2] A study conducted by Dr Eileen Baldry, an academic at the University of New South Wales, tracing the experiences of people exiting prison revealed that 50% of prisoners are homeless within nine months of their release from prison.[3]

In preparation for its submission to the Federal Government's Green Paper on Homelessness, *Which Way Home?*, the Homeless Persons' Legal Service (HPLS) spoke with over 200 people that were currently or had previously experienced homelessness. A consistent theme emerging from these discussions was the need for greater planning for and allocation of resources to individuals being released from prison. One person to whom the Homeless Person's Legal Service (HPLS) spoke told of the need to 'assess the reasons why people have offended and address these issues'; another said, 'the government needs to consider rehabilitation'.

The need for greater government involvement in the post-release process was subsequently recognised in the Australian Government's White Paper on Homelessness, *The Road Home; A National Approach to Reducing Homelessness*. Under the National Partnership on Homelessness that was detailed in the White Paper, Federal, state and territory governments have agreed to implement a policy of 'no exits into homelessness' from statutory, custodial care and hospital, mental health and drug and alcohol services for those at risk of homelessness. The NSW Government's commitment in this area has also been reflected in the drafts of the NSW Homelessness Action Plan. The latest draft Action Plan prioritises the development of discharge plans at point of entry for all clients exiting statutory care and correctional facilities and the provision of training to corrections staff to ensure such plans are effectively implemented.

PIAC is greatly concerned that the commitments the NSW Government has made under the National Partnership of Homelessness and the NSW Homelessness Action Plan could be undermined by the privatisation of more prisons in NSW.

The NSW Homelessness Action Plan requires correctional staff to be trained in post-release action plans. PIAC is concerned that staff at private facilities will not be adequately trained in the development of the plans and that there will be no effective way of monitoring the compliance with the commitments in the NSW Homelessness Action Plan in privatised prisons. Unless specific funding is provided to the private operators to implement the Action Plan, it will almost certainly not be fully implemented or corners will be cut to save costs.

PIAC believes it would be a tragedy if the opportunity we now have, given the national focus on combating homelessness (and the extra resources that come with this focus), to break the cycle of homelessness and recidivism in NSW, were to be derailed by increased privatisation of corrections.

4.2 Discrimination Against Women

Women continue to represent a significantly smaller prison population than men when compared to the general population in all prisons in western societies. However, Indigenous women remain vastly over-represented as against the general female population in or out of prison. This overrepresentation is also found in relation to women with mental illness.

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2 Eileen Baldry et al, 'Ex-Prisoners, homelessness and the state in Australia' (2006) 39(1) *Australian and New Zealand Journal of Criminology* 20.

3 Eileen Baldry, 'Prison boom will prove a social bust', *Sydney Morning Herald* (Sydney) 18 January 2005, <http://www.smh.com.au/news/Opinion/Prison-boom-will-prove-a-social-bust/2005/01/17/1105810839489.html> at 26 February 2009.

As a result of several factors, including simple economies of scale, it costs more to keep a woman prisoner incarcerated than a male prisoner.

Women with special needs then become an even more expensive proposition. Prisoners with high care needs require a greater ratio of staff to inmates and require more costly specialist care and services. For example, the needs of children who remain with their mothers in prison cannot be neglected and add to the cost per capita of imprisoning women.

Again, PIAC is concerned that the profit motive of a privatised corrections company may override public interest concerns and the special needs of women prisoners.

The Inquiry should note that the one prison facility in Australia that has reverted to public administration is the Deer Park Women's Prison in Victoria in October 2000. During the year Deer Park Women's Prison was administered by a private company, the Victorian Government issued three default notices, including one for security lapses. Prisoners also experienced 75 lockdowns as a result of staff shortages. In maximising its financial return, the company was reported to have accepted an increase in inmates leading to overcrowding, eliminated programs and health services and reduced staff training.[4]

PIAC has particular concerns regarding women's health costs in prisons. In relation to health care, the model and cost structure for male prisons such as Junee (with an outsourced health service) are particularly inappropriate for a women's prison. In 2008, the Las Vegas Women's Prison operated by a commercial company was taken over by the Nevada Department of Corrections. The *Las Vegas Review Journal* reported that this was due to health care concerns.[5] The company had reported, as early as 2004, an estimated loss of $1 million in operating the women's prison due to medical costs.

It seems that operating a woman's prison without the cutting of services may not be profitable for the private sector.

5. Human Rights

Dr Bill Jonas AM, the (then) Aboriginal and Torres Strait Islander Social Justice Commissioner said in 2000:

> Privatisation does not necessarily pose a human rights risk. However, it is essential to recognise that governments—and ultimately the Federal Government—remain responsible for the humane detention of prisoners in privately-run prisons. Contracting out their containment and care cannot absolve governments from their ultimate responsibility for ensuring and protecting the human rights of prisoners.[6]

The protection of the rights of prisoners is found at different levels in international human rights law.

Article 10 of the *International Covenant on Civil and Political Rights* (ICCPR)[7] states that:

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4 ABC, 'Interview with The Hon Andre Haermeyer, Victorian Corrections Minister', *7.30 Report*, 3 October 2000.

5 *Private prison proposal* (2009) Las Vegas Review Journal <http://www.lvrj.com/opinion/37406534.html> at 2 March 2009.

6 Dr William Jonas, 'Citizens Inside' (Keynote paper presented at the Human Rights and Equal Opportunity Commission's Prisoners as Citizens Workshop, Sydney, 27 November 2000) 1.

7 Australia is a State Party to the *International Covenant on Civil and Political Rights* having ratified it on 13 August 1980.

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

The UN has also adopted a *Body of Principles for the Protection of all Persons Under any Form of Detention or Imprisonment.*[8]

Another significant international standard is the *UN Standard Minimum Rules for the Treatment of Prisoners* (Standard Minimum Rules).[9] These rules, though they are not legally binding in Australian domestic law, provide international best-practice guidelines for compliance by nation states with international human rights law. The Standard Minimum Rules are intended to be relied upon to interpret and apply Article 10 of the ICCPR.

Australia has produced the *Standard guidelines for corrections in Australia*[10] (the Standard Guidelines) based on the UN Standard Minimum Rules. These were first adopted in 1996 and modified in 2004.

These guidelines are not currently intended to be to an enforceable document setting out rights and obligations. The guidelines are said to represent a statement of national intent, around which each Australian state and territory jurisdiction must continue to develop its own range of relevant legislative, policy and performance standards.

PIAC submits that in an environment of increased privatisation of corrective services, these Standard Guidelines should become enforceable statements of rights, either as part of a broader national human rights framework or as part of state and territory corrections legislation.

The NSW Government should promote, protect and fulfil, consistent with Australia's international human rights obligations and preferably through legislative change, the rights of prisoners. PIAC's preferred model for ensuring compliance by corporations, individuals, organisations and government, is a Charter of Human Rights. PIAC notes that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) specifically mentions the rights of prisoners. Section 47 of the *Corrections Act 1986* (Vic) also sets out 15 basic rights of prisoners in that state.

New Zealand's *Penal Institutions Act 1954* requires both private and public prison operators to comply with the UN Standard Minimum Rules as well as the New Zealand *Bill of Rights Act 1990.*

If the NSW Government does not choose to enact legislative protection of human rights, and at the same time goes ahead and considerably increases the number of prisoners in NSW in private prisons, then PIAC strongly urges the Government to amend the *Crimes (Administration of Sentences) Act 1999* (NSW) to include the principles set out in the Standard Guidelines as an enforceable schedule to the Act, applying to both public and private prisons.

There needs to be an enforceable legislative commitment from Government to counter any claim that the privatisation of prisons is a vehicle for Government to avoid its human rights obligations to those citizens

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8 GA Res 43/173, UN GAOR, 43rd sess, 76th plen mtg, UN Doc A/RES/43/173 (1988).

9 First UN Congress on the Prevention of Crime and Treatment of Offenders, UN ESCOR, 24th sess, UN Doc E/3048, 663 C (1957) and UN ESCOR, 63rd sess, UN Doc E/5988, 2076 (1977).

10 Conference of Correctional Administrators, *Standard guidelines for corrections in Australia* (1996) <http://www.aic.gov.au/research/corrections/standards/aust-stand_1996.html> and Corrective Services Ministers' Conference; Conference of Correctional Administrators, *Standard guidelines for corrections in Australia* (2004) <http://www.aic.gov.au/research/corrections/standards/aust-stand.html> at 2 March 2009.

who have their liberty deprived under the law. If private corporations are to run prisons, there must be clear statements of the rights as well as obligations of prisoners that act as the 'bottom line' in the regulation of prisons. Any contractual obligations about prison operation must start with a legislative commitment to at least the Australian Standard Guidelines.

If this means that a particular privatisation is not financially viable for the proposed operator, then it should not go ahead.

5.1 Prison industries and International Labour Organisation Convention 29

Another important source of the rights of prisoners is found in the International Labour Organisation (ILO) *Forced Labour Convention No 29* (ILO Convention 29) as well as the *Slavery Convention* (Article 5: forced labour not to become slavery).[11]

ILO Convention 29 calls for the cessation of forced labour in all its forms. There is an exemption to ILO Convention 29:

> ... any work or service exacted from a person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and the said person is not hired or placed at the disposal of private individuals, companies or associations.[12]

Australia's compliance with ILO Convention 29 was tested after a complaint by the Australian Council of Trade Unions (ACTU) in 1998 concerning private prisons in Victoria. The Australian Government provided responses to questions posed to the ILO's Committee of Experts.

The Australian Government argued that prisoners held in privately operated prisons work under public supervision and control based on the existence of the performance contracts between the States and the private operators and the enabling legislation. It argued that no prisoners in Australia are hired or placed at the disposal of the private sector because prisoners are not directly employed by the private sector. The Government also contended that no profit derives to private prison operators from prison labour because of legislative and contractual provisions that quarantine the profits of prison labour.[13]

The Committee of Experts did not accept most of Australia's arguments. The Committee observed that:

> If the supervision and control are restricted to a general authority to inspect the premises periodically, this by itself would not appear to meet the requirement of the convention for supervision and control...[14]

Private industries have used prison labour at Junee Correctional Centre for various industries, including power cord assembly and manufacture of moccasins. Fenwick maintains that this work is not publicly supervised.[15]

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11 *Slavery Convention* (1927) 60 LNTS 253.

12 *Convention concerning Forced or Compulsory Labour* (ILO No 29) 39 UNTS 55 (1932) Article 2 (2)(c).

13 Colin Fenwick, *Private Benefit from Forced Prison Labour: Case Studies on the Application of ILO Convention 29* (2001) Chapter 2, 27-29, <http://www.icftu.org/displaydocument.asp?Index=991212919&Language=EN> at 26 February 2009.

14 Ibid, Chapter 2, 29.

15 Ibid, Chapter 2, 4.

As for the argument that prisoners are not directly 'hired or placed at the disposal of the private sector' in Australia in private prisons, Fenwick notes that the Committee of Experts has stated that the legal form of the work relationship is irrelevant. The question in issue is whether or not prisoners are working for the benefit of the private sector.[16]

The quarantining of wages also does not get around the ILO Convention 29. The key for the Committee of Experts is that the working conditions of prisoners should resemble those in the free market.[17] That is, it is not the absence or presence of profit from the prison labour relationship that is important, but the nature of the working conditions of the prisoners (including remuneration).

It is clear that the way that Australia has structured prison industries in privatised prisons is at odds with the ILO Committee of Experts' interpretation of ILO Convention 29.

ILO Convention 29 refers to 'forced labour'. If performance of prison labour is voluntary, then the Convention is not applicable. There is no statutory requirement of NSW prisoners to work, unlike other Australian states. Nevertheless it would be hard to argue that prisoners in NSW are free to choose whether to work or not. Monitoring of compulsion and more generally in a privatised environment remains problematic. In a private prison environment it would be almost impossible to ascertain both the incentives and disincentives to perform work, and then with any safety say that a prisoner freely agreed to perform labour, particularly if the conditions and remuneration for that labour were inferior to that found in the free labour market.

PIAC supports appropriate prison industries as a vital cog in the rehabilitation wheel for prisoners. However, PIAC cannot support the continuation of prison labour that breaches one of Australia's international human rights obligations. If prison industries provide any sort of benefit for private prisons or other private enterprises and the voluntary nature of the labour remains difficult (or close to impossible) to monitor in a private prison setting, this creates a conundrum for policy makers. It may mean that the operation of privatised prisons cannot comply with international labour standards unless there are no prison labour programs in those prisons. And if there are no prison industries, this limits the opportunity for meaningful training/rehabilitation programs. PIAC submits this may be such a conundrum that extensive privatisation of corrections cannot be supported on these grounds alone.

6. Standards of Health Care

NSW Justice Health is a statutory corporation under the *Health Services Act 1997* (NSW). Under subsection 12(c) of that Act, Justice Health has the function of achieving and maintaining an adequate standard in the provision of a health service. Area Health Services have the same function under subsection 10(d) of the *Health Services Act 1997* (NSW).

The Justice Health website states that '[c]ommitment to providing the best possible health care to our clients is our key focus'.[18] Therefore, both in principle and based on NSW statute, Justice Health is committed to providing the standard of health care to inmates equivalent to the standard of care provided to other NSW citizens. This principle is also reflected in UN Standard Minimum Rules (see above).

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16 Ibid, Chapter 2, 28.

17 Ibid, Chapter 1, 16.

18 Julie Barbineau, *Justice Health: Message from the Chief Executive* (2008) Justice Health <http://www.justicehealth.nsw.gov.au> at 2 March 2009.

PIAC is concerned that standards of health care within a privatised prison will be not at the same level provided in the NSW public health system. PIAC is also concerned that standards of health care may decline over time if costs pressures rise.

PIAC would certainly strongly support the approach of Justice Health providing health care in otherwise privatised NSW prisons. There are strong arguments for Justice Health to continue to do this to maintain continuity of care to prisoners, who regularly transfer between NSW prisons for medical and other reasons, for efficiency and confidentiality of medical record keeping and for accountability reasons (for the latter see below).

PIAC is concerned that, if NSW Health does not provide the health care in all NSW prisons, then the maintenance of standards becomes highly problematic. A private provider may agree to maintain standards—indeed this obligation may be included in contractual obligations of the prison operator—but without adequate monitoring and compliance control, such undertakings and agreements may in fact be undermined by the profit motive and on the ground corner-cutting in standards.

Realistically, without Justice Health having a physical presence in every facility—whether public or private—with no opportunity for public access to and oversight of prison facilities as members of the public do with both private and public health facilities outside the prison system, there could be no guarantee that health standards are maintained.

Private health facilities in the prison system face competition in maintaining health standards from both not only an economic viewpoint but also from security considerations. Economic pressures could come from pressures to reduce overall costs or from alternative expenditure areas competing for limited funds, eg, education, employee wages and salaries, building maintenance, etc. Security pressures in a prison environment can also affect the standard of care. Recent policy changes in NSW Corrections led to increased hours of lockdown of patients at the Long Bay Prison Hospital, which many experts suggested represented a decline in the standard of care for patients, particularly those with mental illnesses. These changes were justified on the basis of enhancing security in the hospital. Whatever the merits of the argument about patient care and security, in the short run at least, the security concerns won out.

PIAC is concerned that cut backs in any vital program in prisons, particularly health, will lead to further discontent among prisoners and increased risk of harm to prisoners. This in itself may lead to an increased emphasis on security measures such as increased lock downs and segregation of prisoners, creating a negative downward spiral. PIAC fears that this result is more likely to recur in a privatised prison environment where security is likely to be seen as the 'main game' and health a secondary consideration.

7. Rehabilitation

Subsection 2A(1) of the *Crimes (Administration of Sentences) Act 1999* (NSW) provides that the objects of imprisonment in NSW are:

a) to ensure that those offenders who are required to be held in custody are removed from the general community and placed in a safe, secure and humane environment,

(b) to ensure that other offenders are kept under supervision in a safe, secure and humane manner,

(c) to ensure that the safety of persons having the custody or supervision of offenders is not endangered,

(d) to provide for the rehabilitation of offenders with a view to their reintegration into the general community.

Rehabilitation therefore remains a primary objective of prison policy.

The question for the Committee must be whether the public of NSW can be confident that these objectives will be maintained in a prison system that includes private prisons and in which many of the services related to prisons, such as education and health services, are outsourced to the private sector.

Many factors affect the ability of a corrections system to maintain rehabilitation as its primary objective. Rehabilitation requires the provision of programs and activities beyond the maintenance of security. If a correctional facility is overcrowded, there will be an inevitable decrease in the opportunity for rehabilitation programs to be provided and the ability of inmates to access them. If prisoners are locked in their cells for much of the day, there is less time for activities other than eating, maintenance of hygiene and exercise. If there is a culture of 'us and them', there is little opportunity to build the trust that makes programs and activities with rehabilitative aims effective.

PIAC is concerned that in the history of privatised prisons on other states, and overseas, these negative factors recur frequently in accounts of the operation of a privatised corrections environment.

A vital factor in rehabilitation is the role that prisons can play in training to ensure that prisoners have an opportunity to find meaningful work and therefore stability after their release. Paul Moyle, in his work on private prisons in Queensland, highlights how the profit motive in Borallan (private) Prison dictated the nature of the work performed by inmates. Moyle interviewed management, employees and inmates. The conclusion that Moyle reached was that at Borallan profit-making enterprises requiring low skills in menial work was given precedence over vocational training in higher skilled occupations. The reason for this was both the emphasis on profit generation for the company from their labour-intensive enterprises as well as the higher costs of setting up and running of apprenticeship-level training.[19]

Quoting from the latest DCS Annual Report:

> In 2007/08, Corrective Services Industries (CSI) continued to support the Department's objective of reducing recidivism by providing real work opportunities in 108 commercial business units and 53 service industries within 29 correctional centres. CSI also focused on increasing the number of inmate traineeships and began sourcing work opportunities in the community for inmates upon their release.
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> Research shows that, when inmates combine vocational education and training with real work opportunities linked to a job in the community, the likelihood of offenders returning to a correctional centre decreases significantly.
>
> By world standards, CSI engages a high proportion of inmates in meaningful work programs. In 2007/08, CSI provided employment to about 80 percent of the total available inmate population up from 74 percent in 2005/06. In the UK and US prison industries, only 30 percent and 10 percent of their inmate populations respectively are employed.[20]

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19 Paul Moyle, *Profiting from Punishment* (2000) 264-274 and 294-301.

20 *Department of Corrective Services Annual Report 2007/08* (2008) NSW Department of Corrective Services [22] <http://www.dcs.nsw.gov.au/About_Us/publications/Annual_Reports/Annual-Report-2007-2008/annual-report-07-08.pdf> at 2 March 2009.

It is worth noting that both the UK and the USA have a high proportion of privatised prisons. PIAC, in examining these statistics and the example of Borallan cited above, has grave fears that rehabilitation services will, in the long term, be undermined by further prison privatisation in NSW.

8. Accountability

PIAC has several concerns about the potential diminution of public accountability for corrective services under increased privatisation.

PIAC begins with the premise articulated in an article written ten years ago by Arie Freiberg:

> ... the provision of corrective services carries with it greater responsibilities and unusual requirements of accountability than most 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.[21]

8.1 Legislative oversight and contractual obligations of operators

Arguments are often made that private prisons can have the same level of accountability as publicly owned and managed prisons if legislative measures are put in place to provide oversight by bodies such as the Ombudsman and that if other safeguards are included in the contractual arrangements with providers.

The immediate difficulty with this argument is that the contractual arrangements are not disclosed to the public because of 'commercial in confidence' principles. This effectively prevents scrutiny by:

- non-executive Members of Parliament;
- the media;
- bodies with public interest objectives such as PIAC; and
- members of the public including families of inmates.

It also potentially hampers bodies such as the Ombudsman, the Health Care Complaints Commission and the Coroner who have otherwise extensive inquisitorial powers. However, if they are not granted access to contractual obligations between Government and private prison operators they are always only dealing with part of the relevant information.

In Victoria, the details of the contracts for private prisons were made public after legal action. However, the law cannot always be relied upon to encourage openness and accountability. A report about Kilmarock private prison by Scotland's Chief Inspector had to be stopped and copies were destroyed because the private operator threatened legal action, on the basis of 'commercial in confidence', if staffing levels, which were 30-50% lower than public sector prisons, were made public.[22]

NSW, unlike other States, has not made public the details of contractual arrangements about Junee Correctional Centre. Valerie Sands described the ways in which the NSW Public Accounts Committee examined how knowledge sharing about the development and operation of Public Private Partnerships

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21 Arie Freiberg, 'Commercial Confidentiality and Public Accountability for the Provision of Corrective Services' (1999) 122 *Current Issues in Criminal Justice* 11.

22 Cited in Warrick Funnel, Robert Jupe and Jane Andrew, *In Government We Trust: Market Failures and the Delusions of Privatisation* (2009) 242.

(PPPs) like Junee Correctional Centre could be improved.[23] One of the Committee's recommendations 'supports accounting treatment that promotes public knowledge about the Government's liability for ... projects. There should certainly be efforts to clarify public understanding of the issue of off-balance sheet accounting'.[24] Sands maintains this should be extended to include opportunities for scrutiny of all contract clauses and conditions as well as performance specifications and financial data. PIAC supports this proposition generally and in particular when dealing with privatised prisons.

8.2 Commercialised culture

A second, less easy to quantify concern about accountability of private operators, is the culture of private enterprise as compared to the public sector. The reality is public sector organisations have had a longer history of working within a framework of openness and public scrutiny. Public authorities are subject to scrutiny by the Auditor General, report to Ministers, Parliament and Parliamentary Committees, are subject to disclosure obligations under freedom of information (FOI) laws and to statutory complaints and investigative bodies such as the Ombudsman and the HCCC. Whole sections of public bodies are now dedicated to deal with 'ministerials', complaints, FOI requests, etc.

In contrast, the private sector does not normally have to deal with external complaint bodies, is not responsible to elected bodies or the executive and whilst participants in the private sector have to comply with some disclosure under the Corporations Law and are certainly subject to financial audits, they are not focused on external scrutiny and monitoring by the media in the way that public authorities quite properly are. Undoubtedly, Australian corporations have in recent years been required to comply with more requirements of openness and fairness, notably in the areas of personal information privacy and discrimination. However, there has been considerable resistance even in these areas, both at management level and at the level of engagement with consumers.

Therefore, it can be said that there remains a culture in the private sector that is either slow to change or resistant to change in this area. PIAC submits that in the area of corrections policy, accountability must be a major consideration in formulating public policy. NSW simply cannot allow a situation where what is happening in corrections facilities is conducted behind an opaque screen, where even those authorities we rely on to maintain standards and deal with complaints are only allowed to partly see what is behind the screen. If part of the regulatory regime remains 'commercial in confidence' and the corporations involved are not imbued with a culture of openness, then this will inevitably occur.

8.3 Corruption

A further concern about privatised correctional services is that the very commercialisation of the operation provides opportunities for corruption such as bribes and kickbacks. Certainly there has been little evidence of this occurring in the parts of the Australian corrections industry that has already been privatised. However, the experience of privatisation in the USA has shown that as more of corrections are privatised, more corruption creeps in. The recent example in the USA of judges being found to be receiving bribes to increase the supply of inmates to a private juvenile correctional facility is only one example of this potential.[25]

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23 Valerie Sands, 'The Right to Know and the Obligation to Provide: Public Private Partnerships, Public Knowledge , Public Accountability, Public Disenfranchisement and Prison Cases' (2006) 12 *UNSW Law Journal*.

24 Public Accounts Committee, Parliament of New South Wales, *Inquiry into Public Private Partnerships* (2006) vii.

25 Ian Urbina and Sean D Hamill, *Judges Plead Guilty in Scheme to Jail Youths for Profit* (2009) New York Times <http://www.nytimes.com/2009/02/13/us/13judge.html?_r=2&hp=&pagewanted=all> at 2 March 2009.

Over ten years ago, Eric Schlosser wrote an article in the *Atlantic Monthly* about the development in the United States of America of a prison-industrial complex. He described not only the massive increase in private prisons in the USA in the previous decade, but also the decline in standards and overcrowding in state-run prisons at the same time as the development of an industrial complex to service both. He described this complex as not only a set of interest groups and institutions, but also a state of mind, which he said had a corrupting effect on the criminal justice system.[26]

This complex, Schlosser said includes 'Wall Street investment banks ... plumbing-supply companies, food-service-companies, health care companies, companies that sell everything from bullet-resistant security cameras to padded cells...' It also includes 'bed brokers' who sell or rent cell space in one state to accommodate the overflow of prisoners from another state.[27] This creates another business opportunity for those who transport prisoners interstate. Schlosser says in the article, '[p]risoners may spend as long as a month on the road, visiting dozens of states, sitting for days in the backs of old station wagons and vans, locked up alongside defendants awaiting trial and offenders on their way to prison'.[28]

The article relates the corruption that this privatised system inevitably generates both from cost-cutting, lower staffing levels, lower wages for employees, exploitation of prison labour and the cross over between those who run the private prisons and former government employees, including regulators. Schlosser tells of government regulators who are the same time on the payroll of private operators as consultants.[29]

PIAC cannot suggest that anything like this currently occurs in Australia in 2009. However, all of the current operators of private prisons in Australia are USA-based companies and come from the culture described by Schlosser in the article. The USA experience is clear evidence that in corrections, reduced accountability together with unrestrained profit seeking leads to corruption.

8.4 How to increase accountability

It is worth noting that the NSW Ombudsman has, in Annual Reports over recent years, commented that the number of complaints received in relation to Junee Correctional Centre is significantly higher than from other similar sized centres. There have been recent changes regarding the accessibility of prison staff to inmates at Junee Correctional Centre flowing from discussions with the Ombudsman's office. The 2007-8 Annual Report notes that the number of calls from Junee Correctional Centre to the Ombudsman's Office has 'decreased slightly'.[30] It is vital that the Ombudsman has continuing access to Junee and any future privatised prison.

PIAC submits that, with or without increased privatisation of NSW prisons, accountability of NSW Corrections could be greatly improved. Specific measures to maintain existing accountability mechanisms and to increase accountability are a must if there is to be increased private sector involvement.

Suggested measures could include the following:

- Increased Parliamentary scrutiny through a NSW Joint Parliamentary Committee on Corrective Services.
- Legislative amendments that give the *Standard guidelines for corrections* enforceability and/or legislative provision for rights of prisoners such as found in section 47 of the *Corrections Act 1986* (Vic).

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26 Eric Schlosser, *The Prison-Industrial Complex* (1998) The Atlantic [2] <http://www.theatlantic.com/doc/print/199812/prisons> at 2 March 2009.

27 Ibid, 8.

28 Ibid, 11.

29 Ibid, 12.

30 NSW Ombudsman, *Annual Report 2007-08* (2008) 128.

- Public access to all terms of contracts between government and private prison operators with only the most minimal exceptions for truly confidential financial information. This should include the present and any future Junee contract.
- Providing the Health Care Complaints Commission with broader powers to monitor the provision of health care in NSW prisons to the appropriate standard, including the power to initiate its own complaint in serious or urgent matters.

Finally, PIAC submits that private prison operators should not have any control over the formal internal discipline that is set out in Division 6 of the *Crimes (Administration of Sentences) Act 1999* (NSW). Private operators also should have no control or even partial say in the decisions to classify or reclassify prisoners. With regard to re-classification, private operators could provide DCS with reports on, for example, the conduct, progress towards rehabilitation, etc, of prisoners, but not have any input in the decision itself. Otherwise, both in terms of discipline and classification, the private operator will have a conflict of interest between the potential of longer sentences increasing their return on investment and the principles of rehabilitation and general fairness.

9. Conclusion

PIAC has significant concerns about a greater private involvement in corrections in NSW.

The principles set out above are often compromised in NSW prisons today. All too often cost cutting and security priorities in different ways undermine efforts to deal with mental illness and Indigenous disadvantage. S ecurity concerns often override the timely provision of health care, and sometimes even prevent access to health care in particular cases. Increased emphasis is only now being given to post-release programs because they are seen as part the solution to public concerns over homelessness.

Yet there are some positive signs emerging. The Ombudsman notes in his recent Annual Report that the number of complaints about the use of segregation has decreased.[31] The opening of the new Long Bay Prison and Forensic Hospitals should improve the standard of health care provided by Justice Health, particularly in the area of mental health. The draft NSW Homelessness Action Plan and its commitments to post-release programs represent positive policy initiatives. PIAC referred above to positive DCS programmes aimed at disadvantaged groups.

Yet the addition of two large privatised prisons in NSW will mean that in three large NSW prisons these positive policies will be more difficult to co-ordinate. Even if there is a contractual obligation for private prison operators to co-operate with NSW and Commonwealth programs, monitoring of the operation of specialised government programs in a private setting will remain problematic.

PIAC sets out the principles for a fair and just prison system. It sets out the risks that PIAC sees in privatisation that are likely to make the system less fair and just.

Some believe that the privatisation of prisons is not appropriate for philosophical and conceptual reasons. PIAC is greatly persuaded towards that position, not just for a philosophical viewpoint, but also because of the concerns set out in this submission.

In terms of the criminal justice system, we as a society would not tolerate private judges, are very wary of giving bodies other than the police force law-enforcement powers, and describe it as corrupt when other transactions within that system are commercialised. Yet NSW and other governments appear to be now

[31] Ibid, 123.

happy to countenance a private body being the primary organisation to maintain the deprivation of the liberty of someone who has been convicted on behalf of the 'Crown' or the 'people', and for this to be done on the basis of profit.

PIAC submits that the experiences overseas and in other states of Australia do nothing but reinforce the suspicion that the more a corrections service becomes privatised, the more it loses accountability, neglects rehabilitation and ignores disadvantaged inmates. A decline in services seems to occur initially just for cost-cutting reasons. To date, this seems to be the main reason for a decline in services in Australian privatised corrections services.

However, the experience in the USA seems to suggest that the relative lack of accountability in private prisons is the more corrosive factor in the long run. This leads to excessive economic power for the 'corrections industry' and often simply outright corruption both at a local and organisational level.

Historically, many thought this lesson was already learnt. In a recent Australian book on privatisation, the authors comment:

> Three hundred years ago, all English prisons were self financing endeavours limited only by the entrepreneurial skills of the gaoler. Then in the nineteenth century, there was a move away from for-profit prisons. This was seen as a civilising initiate in which the state would provide gaols and prison guards to meet broader policy objectives, thereby removing profiteering as a motive for incarceration. It was also hoped that universal standards of service could be developed throughout prisons and that programs would produce the kinds of socially acceptable outcomes required by government policy.[32]

In the Australia of the 21st century, although the public sector is certainly not now totally incorruptible, safeguards have for a long time been in place to make organisations such as the public corrections system relatively transparent. Accountability mechanisms and a more accountable culture are already in place (although more yet could and should be done). We know and understand the limits of the system and where corrupt dealings can arise. There are institutions like the Ombudsman and the Independent Commission Against Corruption (ICAC) set up to deal with public corruption when it arises. Yet it seems the more a corrections system is privatised, the more the effects of established accountability mechanisms are diminished.

To greatly increase the private component in NSW prisons would be a step back in time, undermining the principles for a fair and just prison system that have been put in place and enhanced since the nineteenth century.

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32 Funnell, Jupe and Andrew, above n22, 225-226.