

# THE PROS AND THE CONS

## Public-private partnerships (PPP) in South African prisons

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A decision to introduce new generation prisons, based on the concept of unit management, was aimed at easing overcrowding and promoting the rehabilitation of offenders. The two new privately run prisons in South Africa are based on this concept, and have been in operation for a little over a year. It is too early to say much about their effectiveness and the performance of their staff, but a visit reveals well-run and well-managed facilities which bode well for the Department of Correctional Services (DCS). Nonetheless, within government there seems to be some dissatisfaction with the private prisons.

Prison privatisation in South Africa has been controversial, particularly for government (DCS and members of parliament). The privatisation process was not clearly understood when the first contracts were signed, and this legacy remains. Part of the reason for this misunderstanding is that when PPP prisons were planned, Treasury regulations were not in place, and therefore strict legal criteria designed to ensure affordability, value for money and appropriate risk allocation in public-private partnerships, did not exist.<sup>1</sup>

In addition, the two privately run prisons recruited a number of senior DCS personnel who were originally involved in the negotiations of contracts with these prisons. As a result, there is an inadequate understanding among remaining DCS staff of the terms of the contracts. What this also means is that the ability of DCS to optimally manage partnerships is limited.<sup>2</sup>

What was also clear from the beginning was that there were doubts around privatisation. Initially

11 sites were identified for the building of private prisons. As negotiations proceeded, these were reduced to four sites and eventually to the two current sites. These two sites are seen as pilot projects and will determine whether government will decide to build more private prisons or renegotiate present contracts.<sup>3</sup>

### What is prison privatisation?

Strictly speaking, the term privatisation in this context is a misnomer, since it suggests private sector financing and ownership of infrastructure traditionally financed and owned by the public sector.<sup>4</sup> However, there is no such thing as a fully privatised prison. Given that the provision of law and order is a basic service of any government, it would follow that a prison service cannot be fully turned over to the private sector.<sup>5</sup>

Prison privatisation therefore does not involve turning over the prison service to private companies, but instead involves the state contracting out the design, construction, finance

and management of a prison. Private finance schemes enable government to hand over the finance, design and construction of a new facility as well as related services to a company or consortium in exchange for monthly fees over an agreed period of time (25 years in South Africa). Government has no immediate capital costs, as the company borrows the necessary finances, but the ultimate responsibility for the prison still rests with the state.<sup>6</sup>

In South Africa the contractor is explicitly prohibited from taking disciplinary action against prisoners, or becoming involved in determining the computation of sentences, deciding at which prison prisoners will be detained, deciding on the placement or release of a prisoner, or granting temporary leave. The Correctional Services Act ensures that the responsibility for punishment lies with the state and that only services are delegated to the contractor.<sup>7</sup> The legislation guiding privatisation of prisons is contained in the Correctional Services Act (CSA) 111 of 1998. Chapter XIV, section 103 on joint ventures states:

- 1) The Minister may, subject to any law governing the award of contracts by the State, with the concurrence of the Minister of Finance and the Minister of Public Works, enter into contract with any party to design, construct, finance and operate any prison or part of a prison established or to be established in terms of section 5.
- 2) The contract period in respect of the operation of a prison may not be for more than 25 years.<sup>8</sup>

Despite the fact that the issue of privatisation is recognised by legislation and the fact that the contracts were signed after much consultation and negotiations with various key officials, the issue of PPP prisons remains controversial. In 2002 a multi-departmental task team comprising officials from Correctional Services, Public Works, and the National Treasury, was set up to review public-private partnership prison contracts. The objective of the task team was to understand the existing PPP contracts in order to:

- establish a sound basis for their management;
- identify areas of renegotiation; and

- establish a framework for decision-making processes for future prisons.<sup>9</sup>

Among other things, the task team found that, although private prisons delivered according to DCS specifications, these specifications were too high. They found it difficult to directly compare private prisons and public prisons, due to differences in construction dates, types of prisons, inmates per cell, capacities, overcrowding, available information, and in-house catering and services, to mention but a few.<sup>10</sup>

#### **The challenge of prison accommodation**

DCS has estimated that its prison population will increase to a quarter of a million inmates by 2005. Currently, South African prisons are overpopulated by over 70%. Correctional Services has unveiled a new plan – the new generation prisons – to be built to accommodate an additional 30,000 people over the next three years. However, it is unlikely that the problem of overcrowding will be solved. According to DCS projections, prisoner population will increase to 225,000 inmates in the next three years. If this is the case, then increasing cell accommodation by 30,000 does not seem to be adequate.

It takes three to five years to build a public prison. Therefore the slow pace of building a prison, coupled with a fast increasing prison population, means that DCS will have to either build more prisons, seek faster ways of building prisons or persuade the judiciary to impose non-custodial sentences. Failure to meet the demand for extra accommodation will exert further pressure on already stretched resources. It will also impact on the ability of Correctional Services to meet its core functions.

#### **Why privatise?**

One of the criticisms of private prisons is that they may force government into dependency. Even if this is true, the South African situation is such that government is required to look at other options. One would be to look at alternatives to prison sentences for minor crimes, which might help to reduce overcrowding. But if government moves in the direction of building more prisons, it may well

need assistance in order to keep pace with the growing prison population.

The privatisation of prisons has the following advantages:

- Private companies build prisons faster than government; six months to a year, compared to two to five years by government.
- Private companies are more apt to design for efficient operation.
- Private prisons are highly visible, while public prisons are often ignored. Public suspicion of big business translates into increased vigilance over those who run these prisons.
- Private companies promote the development and use of objective performance measures. Government often spends taxpayers' money without an incentive to measure quality of performance, but private contracts usually specify performance indicators and, to the same extent, broader goals.<sup>11</sup>

The success of any prison system is its ability to rehabilitate offenders and to reduce rates of recidivism. The current state of South African prisons poses a big challenge in terms of meeting these two goals. The two privately run prisons – Mangaung prison in the Free State and Kutama-Sinthumule in the Northern Province – boast impressive rehabilitation programmes. For example, upon admission in Kutama-Sinthumule, inmates are taken through an induction process. During this stage a sentencing plan is designed with the prisoner, a counsellor and a psychologist, to determine suitable programmes to meet the needs of the inmate.<sup>12</sup> Programmes are therefore not random, but specific.

Private prisons are able to do this because they can afford to pay for specialists and cannot afford to provide a poor service. This would be tantamount to a violation of the contract, and could lead to severe criticism. More importantly, it is in the interest of private prisons to provide up-to-standard services in order to avoid heavy fines imposed on poor services. Also, due to the fact that this is a competitive market – motivated by profit – compromising standards could prove disastrous for the future involvement of private companies.<sup>13</sup>

### **Against privatisation**

Opponents of prison privatisation argue that provision of law and order is the key function of any government. This duty should not be delegated to the private sector, because it is motivated by profit. They argue that money that could be allocated to services is creamed off in profits and fees for consultants and advisory schemes; the private sector becomes even more entrenched in criminal justice policy making; and the fuse is lit on a financial time bomb.<sup>14</sup> They further argue that so far private prisons have failed to demonstrate that they are cost-effective, innovative, and have lower recidivism rates.

In the case of South Africa it is difficult to say much since the two private prisons have been in operation for just over a year. But the appointment of the task team to review the public-private partnerships seems to support the above argument.<sup>15</sup> A few of the problem areas identified by the task team are:

- that DCS design and operating specifications were too high;
- additional budgetary pressures for DCS, resulting from the lack of feasibility work that should have established the affordability limits of DCS prior to procurement;
- an inability to increase the holding capacity of PPP prisons, despite severe overcrowding in DCS.

In the United States, the Corrections Corporation of America was found by the grand jury to be using excessive force to control juveniles. Wackenhut Corrections Corporation was ordered by the US Justice Department to end the use of corporal punishment, excessive force, and mechanical restraints.<sup>16</sup>

A frequent complaint is that private companies have a disregard for human rights. Aside from the moral and ethical arguments about prison privatisation, there is ample operational evidence that the policy itself is flawed. The fact that the human rights dimension of private prisons has not been fully examined, is a dereliction of duty.

Some of the concerns raised by the opponents of private prisons can be allayed, at least in the case of

South Africa. The Department of Correctional Services has appointed controllers for each of the prisons; their function being to ensure that contractual obligations are not violated. In addition, the Independent Prison Visitors under the office of the Inspecting Judge will ensure that prison conditions are to the specified standard and that the treatment of prisoners is in accordance with the provisions of the CSA of 1998. DCS also conducts audits of the prisons to ensure compliance. These can be spot-checks.

### Conclusion

The challenge facing South Africa is that private prisons are a new concept, and that these prisons have been running for less than two years. Although it is too early to form any informed and insightful opinions about them, it is imperative that public scrutiny of these institutions is guaranteed. It is necessary that contractual obligations are not violated, nor standards of service compromised.

Continued monitoring will also enable DCS to assess whether privatising prisons is what they need. If they do decide to privatise, they will at least be in a better position to know whether they need a short-term or a long-term contract, and what the benefits of each of these contracts are. They will also be able to provide appropriate specifications. Prisons in general are expensive institutions, but how expensive prisons are, should be less of a consideration. The key consideration is that what government pays for is cost-effective, manageable and productive.

The current state of affairs is that DCS is in the process of building more prisons, and it is during this process that these considerations become important. Any prison that is being built, whether public or private, should contribute to crime prevention by rehabilitating prisoners and reducing repeat incarceration. Finally, the state of South African prisons does require that DCS seek other options to reduce overcrowding and facilitate rehabilitation.

### Endnotes

- 1 Ben Skosana, The Role of Public-Private Partnerships in Expanding the Delivery of Correctional Services in

South Africa, Keynote address during a Third Annual Public Private Partnership Global Summit, Hotels van Oranje, Noordwijk, The Netherlands, 6th-8th November 2002.

- 2 Technical Review of the Public Private Partnership Prisons Contracts for the PPP Prisons Task Team, 8 November 2002, p 8.
- 3 [www.pmg.org.za/docs/2002/viewminute.php?id=2288](http://www.pmg.org.za/docs/2002/viewminute.php?id=2288)
- 4 Interview with Ronald Champion, Wackenhut Corrections Corporation, Louis Trichardt, 28 October 2002.
- 5 KC Goyer, *Prison Privatisation in South Africa*, ISS Monograph no 64, Pretoria, September 2001.
- 6 Ibid, See also Technical Review op cit.
- 7 KC Goyer, op cit.
- 8 Juta's Statutes of South Africa, Correctional Services Act 111 of 1998, 2-162, Creda Communications, Eppindudt, 31 December 2001.
- 9 Technical Review of PPP Contracts, op cit, p 3.
- 10 Ibid, pp 17-19.
- 11 KC Goyer, op cit.
- 12 Interview with Lucky Mthethwa, Deputy Prison Director at Kutama-Sinthumule Private Prison, Louis Trichardt, 28 October 2002.
- 13 See Ronald Champion op cit, also KC Goyer, op cit.
- 14 [www.penalreform.org/english/article-privatisation.htm](http://www.penalreform.org/english/article-privatisation.htm)
- 15 Technical Review of PPP Contracts, op cit.
- 16 KC Goyer, op cit, see also [www.penalreform.org/english/article-privatisation.htm](http://www.penalreform.org/english/article-privatisation.htm)