

Assembly Hearing Slip

(Please print plainly)

Date: 10/14/99

Bill No. AB 519

Or

Subject: Jon E. Litscher

(Name)

149 East Wilson St.

(Street Address or Route Number)

Madison

(City & ZIP Code)

Dept of Corrections

(Representing)

Speaking in favor:

Speaking against:

Registering in favor:

Registering against:

Speaking for information only:

Neither for nor against:

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 10/14/99

Bill No. AB 519

Or

Subject: Rep Scott Walker

(Name)

(Street Address or Route Number)

(City & ZIP Code)

Wisc AD

(Representing)

Speaking in favor:

Speaking against:

Registering in favor:

Registering against:

Speaking for information only:

Neither for nor against:

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 8/17/99

Bill No. ARB 519

Or Subject: LRB 2853/P2

Subject: Jon E. Litscher

(Name)

149 East Wilson St.

(Street Address or Route Number)

Madison

(City & ZIP Code)

Dept of Corrections

(Representing)

Speaking in favor:

Speaking against:

Registering in favor:

Registering against:

Speaking for information only:

Neither for nor against:

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

AB519

Assembly Hearing Slip

(Please print plainly)

Date: 8/17/99 AB519

Bill No. LRB 2853/P2

Or Subject Re - Private Prisons

(Name) Katherine WENBRAN

1029 Spruigt St CS
(Street Address or Route Number)

Madison WI 53703
(City & Zip Code)

(Representing) Self this is

not against private prisons
Speaking In favor:

Speaking against: in writing

Registering In favor:

Registering against:

Speaking for information only:

Neither for nor against:

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms:
Room 411 West
State Capitol
Madison, WI 53702

More space and attention should be devoted to alternatives to prisons. Also more education in prisons to reduce recidivism.

Assembly Hearing Slip

(Please print plainly)

Date: Aug. 17, 1999

Bill No. LRB 2-853/P2

Or Subject Constructing private prisons

(Name) Katherine W. Wenbran

1029 Spruigt St CS
(Street Address or Route Number)

Madison WI 53703
(City & Zip Code)

(Representing)

Speaking In favor:

Speaking against:

Registering In favor:

Registering against:

Speaking for information only:

Neither for nor against:

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms:
Room 411 West
State Capitol
Madison, WI 53702

ASSEMBLY COMMITTEE ON CORRECTIONS AND THE COURTS

AGENDA

Thursday, October 14, 1999
10 AM – Room 225 NW

I. Call to Order

II. Roll Call

III. Public Hearing

A. **AB 497** (*Walker/Wasserman/Darling*) time limits for prosecution of certain crimes of sexual assault.

B. **AB 519** (*Walker*) construction and operation of private prisons, requiring the exercise of rule-making authority and making an appropriation.

IV. Executive Session

AB 544— A. Introduction of **LRB 3712/1** (*Committee*) lease and operation of correctional facilities and making an appropriation.

V. Announcements

A. Next meeting – Oct. 20

VI. Adjournment

ASSEMBLY COMMITTEE ON CORRECTIONS AND THE COURTS

AGENDA

Wednesday, October 20, 1999
11 AM – North Hearing Room

- I. Call to Order
- II. Roll Call
- III. Public Hearing
 - A. **AB 544** (*Committee*) the lease and operation of correctional facilities and making an appropriation.
- IV. Executive Session
 - A. **AB 497** (*Walker/Wasserman/Darling*) time limits for prosecution of certain crimes of sexual assault.
 - B. **AB 519** (*Walker*) construction and operation of private prisons, requiring the exercise of rule-making authority and making an appropriation.
- V. Announcements
 - A. Next meeting – Oct. 27
- VI. Adjournment

ASSEMBLY COMMITTEE ON
CORRECTIONS AND THE COURTS

AGENDA

Tuesday, August 17, 1999

10:30 AM -- Assembly Parlor

I. Call to Order

II. Roll Call

III. Public Hearing

A. **AB 95** (*Suder/Darling*) prohibiting or restricting use of or access to the internet by persons who have committed certain crimes and who are on parole, probation or other type of supervised or conditional release.

B. **AB 328** (*Riley*) admitting certain police identification reports at preliminary examinations.

AB 519 - C. **LRB 2853/P2** (*Walker*) construction and operation of private prisons, requiring the exercise of rule-making authority and making an appropriation.

IV. Announcements

A. Next meeting

V. Adjournment

1999 Session		LRB Number 2853/2
FISCAL ESTIMATE DOA-2048 N(R06/99)		Bill Number AB 519
<input checked="" type="checkbox"/> ORIGINAL <input type="checkbox"/> UPDATED <input type="checkbox"/> CORRECTED <input type="checkbox"/> SUPPLEMENTAL		Amendment No. if Applicable
Subject Relating to: construction and operation of private prisons, requiring the exercise of rule-making authority and making an appropriation.		Administrative Rule Number
Fiscal Effect State: <input type="checkbox"/> No State Fiscal Effect Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.		
<input type="checkbox"/> Increase Existing Appropriation <input type="checkbox"/> Increase Existing Revenues <input type="checkbox"/> Decrease Existing Appropriation <input type="checkbox"/> Decrease Existing Revenues <input type="checkbox"/> Create New Appropriation		<input checked="" type="checkbox"/> Increase Costs - May be possible to Absorb Within Agency's Budget <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Decrease Costs
Local: <input type="checkbox"/> No local government costs		
1. <input type="checkbox"/> Increase Costs <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory 2. <input type="checkbox"/> Decrease Costs <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	3. <input type="checkbox"/> Increase Revenues <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory 4. <input type="checkbox"/> Decrease Revenues <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	5. Types of Local Governmental Units Affected: <input type="checkbox"/> Towns <input type="checkbox"/> Villages <input type="checkbox"/> Cities <input type="checkbox"/> Counties <input type="checkbox"/> Others _____ <input type="checkbox"/> School Districts <input type="checkbox"/> WTCS Districts
Fund Sources Affected <input checked="" type="checkbox"/> GPR <input type="checkbox"/> FED <input type="checkbox"/> PRO <input type="checkbox"/> PRS <input type="checkbox"/> SEG <input type="checkbox"/> SEG-S		Affected Chapter 20 Appropriations 20.410 (1) (a); (hq); (hv), (kc)
Assumptions Used in Arriving at Fiscal Estimate This bill establishes (1) duties and responsibilities of the Department of Corrections (DOC) with respect to private persons who desire to construct and operate a prison in Wisconsin, and (2) the conditions under which private persons may construct and operate a prison in this state for the confinement of inmates from other states.		
<u>Private Prison Construction and Operation</u> DOC must establish rules, and set license and application fees that reflect the department's approximate costs for regulation of construction and operation of these private facilities. Activity is anticipated from the time construction is planned and a license is applied for through monitoring of institution operations. These activities concerning private prisons and their regulation have not been performed by the department in the past, and will require investigation and research in the rule making process and the establishment of fees sufficient to reimburse the department for its approximate costs.		
<u>Enforcement</u> The bill grants DOC several methods of enforcement in the event that the construction or operation of a private prison is in violation of the terms of its license, including the possibility of taking over the operation of the institution in the case of contract violations. These enforcement activities also represent a new area for DOC and will require staff time and resources.		
<u>One-Time Fiscal Impact on the Department</u> The one-time fiscal impact on the department is in setting up the new program, promulgating rules, determining procedures for licensing and fee structure, and developing policies and procedures to follow in enforcement. It is believed that these initial activities could be accomplished by two half-time GPR funded positions; an attorney and a detention facilities specialist, for a period of one year, at a total one-time cost of \$67,800 for salary, fringe, supplies and services, and start-up costs.		
<u>Ongoing Fiscal Impact on the Department</u> It is not possible to estimate the staff and resources required for the departmental activities included in this bill until the program has been designed, rules have been promulgated and enforcement policies and procedures have been developed. The bill provides that DOC charge the private prison operator for its reasonable costs in carrying out the activities of review, monitoring, inspection and enforcement. Ongoing costs will be funded by the collection of license and application fees.		
Long-Range Fiscal Implications		
Prepared by: Barbara Carlson	Telephone No. 266-9340	Agency: Corrections
Authorized Signature: Robert Margolies <i>Robert Margolies</i>	Telephone No. 266-2931	Date October 12, 1999

FISCAL ESTIMATE WORKSHEET

1999 Session

Detailed Estimate of Annual Fiscal Effect
DOA-2047 (R06/99)

ORIGINAL UPDATED
 CORRECTED SUPPLEMENTAL

LRB Number 2853/2	Amendment No. if Applicable
Bill Number AB 519	Administrative Rule Number

Subject: Relating to construction and operation of private prisons, requiring the exercise of rule-making authority and making an appropriation.

I. One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):
\$67,800

II. Annualized Costs:		Annualized Fiscal impact on State funds from:	
A. State Costs by Category		Increased Costs	Decreased Costs
State Operations - Salaries and Fringes		\$	\$ -
(FTE Position Changes)		(FTE)	(- FTE)
State Operations - Other Costs			-
Local Assistance			-
Aids to Individuals or Organizations			-
TOTAL State Costs by Category		\$	\$ -
B. State Costs by Source of Funds		Increased Costs	Decreased Costs
GPR		\$	\$ -
FED			-
PRO/PRS		Unable to estimate	-
SEG/SEG-S			-
State Revenues	Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)	Increased Rev.	Decreased Rev.
GPR Taxes		\$	\$ -
GPR Earned			-
FED			-
PRO/PRS		Unable to estimate	-
SEG/SEG-S			-
TOTAL State Revenues		\$	\$ -

NET ANNUALIZED FISCAL IMPACT

STATE

LOCAL

NET CHANGE IN COSTS \$Unable to estimate \$ _____

NET CHANGE IN REVENUES \$Unable to estimate \$ _____

Prepared by: Barbara Carlson	Telephone No. 266-9340	Agency Corrections
Authorized Signature: <i>Robert Margolies</i> Robert Margolies	Telephone No. 266-2931	Date October 12, 1999

Vote Record

Assembly Committee on Corrections and the Courts

Date: 10/20/99
 Moved by: Suder Seconded by: Goetsch
 AB: SIA Clearinghouse Rule: _____
 AB: _____ SB: _____ Appointment: _____
 AJR: _____ SJR: _____ Other: _____
 A: _____ SR: _____

A/S Amdt: _____
 A/S Amdt: _____ to A/S Amdt: _____
 A/S Sub Amdt: _____
 A/S Amdt: _____ to A/S Sub Amdt: _____
 A/S Amdt: _____ to A/S Amdt: _____ to A/S Sub Amdt: _____

- Be recommended for:
- Passage
 - Introduction
 - Adoption
 - Rejection
 - Indefinite Postponement
 - Tabling
 - Concurrence
 - Nonconcurrence
 - Confirmation

Committee Member

	<u>Aye</u>	<u>No</u>	<u>Absent</u>	<u>Not Voting</u>
Rep. Scott Walker, Chair	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Robert Goetsch	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Scott Suder	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Carol Owens	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Tim Hoven	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Rep. Eugene Hahn	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Mark Gundrum	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Rep. Larry Balow	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. G. Spencer Coggs	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Mark Pocan	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Tony Staskunas	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. David Travis	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Totals: 6 4 2 _____

Motion Carried

Motion Failed



Representative Scott Walker

Phone: (414) 771-1938 ~ FAX: (608) 282-3614 ~ E-Mail: Rep.Walker@legis.state.wi.us

TO: All Legislators

FROM: Rep. Scott Walker

DATE: Sept. 2, 1999

RE: Co-sponsorship of LRB 2853/P2 (Regulation of private prisons)

Earlier this year I attended a private prison forum sponsored by the U.S. Department of Justice. The major theme sounded out at that conference was the need to implement regulations **before** deciding to legalize private facilities. Those states that failed to adopt strict standards before allowing speculative prisons to operate expressed great regret. Thus I intend to introduce legislation to ensure any such facilities allowed to house prisoners in Wisconsin will meet or exceed the state's standards of quality.

This bill differs from AB176, which authorizes the Department of Corrections to contract with private prisons in Wisconsin.

If you wish to sign onto LRB 2853/P2, please contact Missy at 6-9180 by Wednesday, Sept. 8.

Note: The bill draft will not be printed here because of its length; however, copies are available in the Walker office.

- requires licensure by DOC
approval of Building Commission
general regulations
capacity
security
etc.

Wanted: A Model Law for Regulating Privatization

by Richard Crane*

Editor's Note: Richard Crane, a frequent contributor to these pages, probably knows more about the legal problems of contracting for correctional services than any other lawyer in the country. He has advised major private providers of correctional services, many jurisdictions contracting for correctional services, and government agencies examining the policy issues around privatization in corrections.

In this ground-breaking article, Mr. Crane offers his views on the need for statutory control over the private prison movement. While readers may take issue with some of what follows, Crane raises some very important points. CLR welcomes letters to the editor commenting on this proposal, and comments may also be sent directly to the author, whose address is given below.

This article and the model statutory provisions it proposes should become the springboard for thoughtful discussion of the issues the author raises. We would like to see (and the lawyer within us would like to participate in) a very focused conference intended to examine these proposals and move them, or modifications of them, toward adoption by state legislatures. B.C.

Until recently contracting for private prisons was a relatively straightforward matter. True, there were early concerns about the constitutionality of delegating the authority to incarcerate inmates to private companies. But a comfort level was reached on that issue, often through legislation which simply authorized a corrections department to contract for services. Other issues, while tedious, were not that difficult to resolve.

However, as competition has increased and the market has grown, new issues never before considered have arisen. These include speculative construction, housing of out-of-state inmates, private company/county partnerships, use of force on out-of-state inmates, the cost of apprehending escapees, and more. While these matters are not necessarily of constitutional magnitude, they can be troublesome

*Richard Crane is a Nashville attorney with extensive experience in contracting and privatization in corrections. He can be reached at 2200 Hillsboro Road, Suite 310, Nashville, TN 37212; phone: (615) 298-3719.

and should be addressed legislatively.

In response to the problems I am encountering, I have attempted to develop a single piece of legislation that will address privatization of jail/prison operation from soup to nuts. In all likelihood, I have missed an item or two. However, if what follows provokes examination of the issues I address and suggestions for additional issues, I will have succeeded. I hope readers of this article will point out areas which need to be included. In the meantime, what follows is my proposed statute; each section is preceded by my summary and comments.

Authority to Contract

Section 1.1: Before any contract for correctional services can be entered, the basic authority to contract is needed. This section provides such authority, eliminating the need to argue that such contracting authority is implied. In general, this act deals with contracts for the full range of correctional services. However, I have tried to write it so that it is equally appropriate when contracting for discrete areas such as food service or health care.

SECTION 1. STATE AND LOCAL CORRECTIONAL FACILITIES, PRIVATE CONTRACTS

(1) The Department of Corrections and any County or other political subdivision otherwise authorized to operate a correctional facility is hereby authorized to enter into contracts with each other, a tax exempt entity, another state or county therein, and/or a private entity to finance, acquire, construct, lease, and/or provide full or partial correctional services. As used herein, the term "correctional services" shall mean those services necessary for the operation of a correctional facility, including, but not limited to the provision of food, clothing, security, and health care.

Bond Financing

Section 1.2: This section attempts to satisfy a group rarely satisfied — bond attorneys — by addressing certain areas of bond financing that will help the state or county get a higher bond rating.

(2) The Director of Corrections and the governing bodies of any political subdivision are hereby authorized to contract with tax-exempt entities to provide for the payment of the principal, premium, if any, interest, and trustees'

and paying agents' fees on bonds issued to finance the acquisition and/or construction of correctional facilities authorized under this Act, to be secured by a lien on and pledge of one or more of the following: (1) all revenues derived from payments to be made by the Department for the housing of prisoners; (2) all revenues derived from payments to be made by political subdivisions for the housing of prisoners; (3) any other revenues authorized by the Legislature or the governing body, respectively. It shall not be necessary to the perfection of the lien and pledge for such purposes that the Trustee in connection with such bond issue or the holders of the bonds take possession of the collateral security.

RFP Requirement

Section 1.3: The benefits to be had from privatization come from competition in the marketplace, which is supposed to keep the price of services down and their quality up. A growing phenomenon — companies building speculative prisons in states where they know that a need exists — threatens these benefits. When on-spec facilities are available, political pressure is brought to bear on the department of corrections, pushing them to contract for housing their inmates in this very nice correctional facility which just happens to be located in, for instance, the Speaker of the House's district. Competition is taken out of the process.

America traditionally has had a public monopoly in corrections. There is no sense in trading this for a private monopoly, which has little or no incentive to be any more efficient than its public predecessor. To keep competition in the process, this section requires that requests for proposals (RFPs) be issued before any contract is entered into with a private prison contractor. But, this alone will not solve the problem if the State does not get out in front of the curve. An RFP for 1,200 beds available next week is no better than handing the contract over to the speculative builder.

(3) No contract shall be entered into with a tax-exempt entity or private prison contractor for the provision of correctional services except through the issuance of a request for proposals.

See PRIVATIZATION, next page

Likewise, no contract shall be entered into with a county that has subcontracted with a private prison contractor for operation of the facility except through the issuance of a request for proposals. Contracts entered into under this subsection shall be with the entity submitting the best overall proposal pursuant to the request for proposals.

The prohibition in 1.7B against a contractor's benefiting from inmate labor is not intended to prevent inmates from working in traditional prison housekeeping/maintenance tasks. The statute addresses direct monetary benefits to the contractor. Use of inmates to do work in the prison benefits the state by keeping the cost of the contract down. It also provides for an apples-to-apples cost comparison between the public and private sector since the public sector uses inmates for these jobs.

Unless legislation addresses the force issue, serious questions exist as to how force (beyond the levels which any person may legally use it) may be legally used by private contractors.

Use of Public Lands

Section 1.4: This section merely provides legal authority for the use of public lands and buildings by a private contractor awarded a contract pursuant to the above section.

(4) Contracts awarded under the provisions of this Act may include the lease or use of public lands or buildings.

Contract Terms

Section 1.5: This section sets minimum and maximum terms for correctional service contracts. A three-year minimum is proposed to allow the private company ample time to "show its stuff." On the other hand, a maximum term of five years is suggested, so that the company doesn't get too comfortable or entrenched.

(5) Contracts awarded under this Act for the full or partial provision of correctional services shall be for a period of not less than three (3), nor more than five (5) years, subject to the requirement of annual appropriation of funds by the State or political subdivision.

Provider Qualifications

Sections 1.6 and 1.7: Section 1.6 provides qualifications where the correctional services to be ordered are either full or partial. Section 1.7 adds additional qualifications where contracts are awarded for all correctional services. In both cases, the standards are intended to be bare minimums: far more specific requirements could be contained in the RFPs. Some could put more specific requirements in the legislation, but I feel this is better handled by the executive branch.

ACA
Amer. Can. Correctional Assoc. &

(6) No contract for full or partial correctional services may be entered into unless the entity providing the services demonstrates, at a minimum, that it has:

- A. Management personnel with the qualifications and experience necessary to carry out the terms of the contract;
- B. Sufficient financial resources to provide indemnification for liability arising from operation of the correctional facility;
- C. The ability to meet applicable court orders, correctional standards, and constitutional requirements; and
- D. Liability insurance adequate to protect the State, the political subdivision(s) wherein the facility is located, and their officers and employees from all claims and losses incurred as a result of the operation of the facility.

(7) No contracts shall be awarded for full correctional services unless the entity offering the services offers, at a minimum:

- A. Adequate internal and perimeter security to protect the public, employees, and inmates;
- B. Work and/or training opportunities for sentenced inmates; provided, however, that the contractor shall not benefit financially from the labor of inmates;
- C. Imposition of inmate discipline only in accordance with applicable rules and procedures; and
- D. Adequate food, clothing, housing, and medical care for inmates.

Use of Force

Sections 2.1 and 2.2: These sections authorize the use of force by private contractors on the grounds of the institution, while transporting inmates, and while pursuing escapees from the facility. Some jurisdictions may not want to allow private prison contractors to pursue escapees once they have left the grounds. In that case, this portion should be left out of the legislation. But unless legislation addresses the force issue, serious questions exist as to how force (beyond the levels which any person may legally use it) may be legally used by private contractors. This concern is particularly significant in situations where the private prison is housing inmates from other states.

SECTION 2. USE OF FORCE; PRIVATE PRISON EMPLOYEES; PERSONS FROM OUT OF STATE; POLICE POWERS

(1) Employees of a private prison contractor shall be allowed to use force and shall exercise their powers and authority only:

- A. While on the grounds of an institution operated in whole or in part by their employer;
- B. While transporting inmates; and
- C. While pursuing escapees from such institutions.

(2) An employee of a private prison contractor shall be allowed to carry firearms provided the company and the employee meet all federal, state, and local requirements regarding the possession and carrying of firearms. Such employee shall be allowed to use a firearm only for the following purposes:

- A. To prevent an inmate's escape from the facility or from custody while being transported to or from the facility. As used in this paragraph, "to prevent escape from the facility" shall mean to prevent an inmate from crossing the secure perimeter of the facility.
- B. To prevent an act by an inmate which would cause death or serious bodily harm.

Section 2.3: This section allows employees of private contractors to use firearms if they meet all the training and licensing requirements of the state. Most states have private security firm acts (originally enacted for rent-a-cop companies) that have specific training and licensing requirements. Those sections of state law should be referenced in the legislation. More demanding requirements could obviously be adopted.

See PRIVATIZATION, next page

I have taken the opportunity to also address the situation where law enforcement or private transportation company employees enter a state to pick up an inmate. Currently, an unwritten policy of professional courtesy permits those people to carry and use firearms. The act would make it clear that such individuals are authorized to use force while transporting or apprehending inmates under the circumstances set forth in the legislation.

(3) Provided they meet all the training and licensing requirements of the state where they are employed, duly authorized persons who enter this State for the purpose of transporting inmates of other states shall be authorized to use force while transporting or apprehending said inmates and shall be authorized to use deadly force under the circumstances as set forth in Subsection 2 of this Section.

Section 2.4: This section makes it clear that allowing individuals to carry and use firearms does not confer peace officer status on them.

(4) The provision of this Section shall not be construed to confer peace officer status on the private prison contractor or its employees or persons from other states, or to authorize the use of firearms, except in accordance with this Section.

Handling Illegal Inmate Activity

Section 3: A major concern about the private operation of correctional facilities is the handling of illegal actions of inmates housed therein. This is of particular concern when the inmates are from another state. The problem is that the laws dealing with these crimes typically refer to crimes committed in a facility operated by state or local government. This is easily understandable; these laws were typically passed before we had private prisons. Rather than amending every state law which addresses crimes in a correctional facility (e.g., introduction of contraband, assault on correctional officers) Section 3.1 takes the easy way out by stating that any offense that is a crime if committed in a state or local correctional facility is a crime when committed in a *private* facility.

Frankly, I'm not particularly concerned about the application of corrections-specific criminal laws to inmates in privately operated facilities; general criminal laws usually cover the situations adequately.

For instance, say there is a special statute on assault of correctional officers. Even if it were not applicable to inmates in a private facility, the general criminal provisions on assault would apply.

More difficult is the question of escapes from privately operated facilities, so this is addressed specifically. The typical state escape statute refers to escapes from prisons or jails operated by government entities. Where does that leave an escape from a private prison, especially one housing only inmates from other states? I believe it leaves them with no way to prosecute the inmate for escape. See Crane, R., "Escape Laws Haven't Kept Up With Corrections Management Trends," VIII(5) CLR 67 (February/March 1997). I have addressed this problem by proposing an amendment to the state criminal laws on escapes that makes that law broad enough to cover an escape by any person from a place where such person is legally confined or from the lawful custody of any individual having authority to detain or transport the inmate. The reference to transport then covers the transportation situation, including circumstances where an inmate in transit may just be passing through a jurisdiction in the supervision of his public or private guard.

SECTION 3. APPLICATION OF CERTAIN CRIMINAL LAW TO CONTRACTOR-OPERATED FACILITIES

(1) Any offense which would be a crime if committed within a state or local correctional facility shall be a crime

if committed in a facility operated by a private prison contractor.

(2) Section __ of the State Criminal Code is hereby amended to read as follows:

A. Simple Escape shall mean any of the following:

1. The intentional departure, under circumstances wherein human life is not endangered, of a person imprisoned, committed, or detained from a place where such person is legally confined or from the lawful custody of any individual having authority to detain or transport such person.

2. The failure of any legally confined person to return from work release or furlough.

B. Aggravated Escape is the intentional departure, under circumstances wherein human life is endangered, of a person imprisoned, committed, or detained from a place where such person is legally confined or from the lawful custody of any individual having authority to detain or transport such person.

Non-Delegable State Powers

Section 4: This section harks back to the earliest concerns about whether or not the powers and duties of the state are delegable to private contractors. This section lists those areas which may not be delegated. While there is nothing that

See PRIVATIZATION, page 90

definitively holds that these are non-delegable functions, common sense dictates that those functions which relate to an inmate's release from custody ought not be given to an entity which makes money if inmates are not released.

At a minimum, the director would review the location, design, security level, and financing of the facility and the type of inmates to be housed there. Out-of-state inmates could not be housed in these facilities unless the state certified that it did not need them for its own inmates.

SECTION 4. POWERS AND DUTIES NOT DELEGABLE TO PRIVATE PRISON CONTRACTORS.

No contract for correctional services shall authorize, allow, or imply a delegation of authority or responsibility to any private prison contractor to perform any of the following:

- (1) Calculating inmate release and parole eligibility dates;
- (2) Granting, denying, or revoking sentence credits;
- (3) Approving inmates for furloughs, work release, or parole;
- (4) Approving the type of work inmates may perform, and the wages or sentence credits which may be given the inmates engaging in such work.

Contract Monitoring

Section 5: This section provides for the monitoring of correctional facilities. Normally, this is handled in the contract when a state or county has a private company operating a facility incarcerating its inmates. However, with the rise of facilities which exclusively house out-of-state inmates, it is necessary to provide statutorily for this authority, because it is entirely possible that neither the state nor county would have a contractual relationship allowing them to monitor the facility. Without a section like this, a jurisdiction would have no authority to monitor the operation of a private prison, other than through such things as building codes, public health ordinances, etc.

In theory, the sending jurisdiction should be monitoring how its inmates are being handled and to assure the private

provider is meeting the terms of the contract. Realistically, when hundreds if not thousands of miles separate the jurisdiction from its inmates, this sort of monitoring is apt to be weak.

In a bow to those who are concerned about the additional cost of this monitoring, the legislation provides that the monitoring

agency will be reimbursed by the operating entity for the salary and expenses of the monitor. However, given the benefits to the economy of those jurisdictions with facilities housing out-of-state inmates, this may be somewhat shortsighted.

SECTION 5. MONITORING OF CONTRACTS

- (1) The Director of Corrections or his/her designee shall monitor the performance of all correctional facilities incarcerating inmates under the jurisdiction of the Department of Corrections.
- (2) The Sheriff or his designee shall monitor the performance of all correctional facilities incarcerating that County's inmates.
- (3) All contracts for the housing of State or County inmates shall contain a provision granting the Director of Corrections, the Sheriff, or their designees unlimited access to the facility for monitoring purposes.
- (4) The Director of Corrections shall have the right to appoint a monitor to inspect any in-State facility housing out-of-state inmates and the monitor shall have unlimited access to the facility. The State shall be reimbursed by the operating entity for that portion of the salary and expenses of the monitor attributable to monitoring the particular facility.
- (5) In all cases, monitoring shall consist of ensuring that all State laws and contractual obligations applicable to the correctional facility are being met.

Emergency Contracting

Section 6: This would allow the director of corrections or the sheriff to enter into contracts on an emergency basis

without going through the RFP process when an overcrowding situation exists. However, such contracts would be limited to a maximum of two years so as not to promote the speculative construction of facilities meant to subvert the bidding process.

SECTION 6. CONTRACTS WITH OTHER JURISDICTIONS

If the Director of Corrections or Sheriff, as the case may be, determines that an overcrowding situation exists which presents a danger to the operation of the facility under his/her jurisdiction and that suitable State or County correctional facilities are not available, he/she may enter into an agreement with the proper authorities of the United States, this or another state, a political subdivision of this or another state, or a private prison contractor to provide for the safe-keeping, care, subsistence, proper government, discipline, and treatment of State inmates. Such contracts may be let without formal bid or requests for proposals provided that the beds are available immediately or will be available within ninety (90) days of entering the contract and, further, that the term of the contract is for no more than one (1) year, with an option to renew for one (1) additional one-year term, and provided further, that all other requirements of this Act are met.

State Review and Approval of Construction

Section 7: This section is the heart of my attempt to prevent the building of speculative facilities for the purpose of either subverting the competitive process or for the housing of out-of-state inmates. In either case, the department of corrections would have some say in the construction of such facilities.

This section provides that no correctional institution can be constructed without review and comment by the director of corrections. I have stopped short of requiring a certificate of need, as is often required in the hospital industry. But, at a minimum, the director would review the location, design, security level, and financing of the facility and the type of inmates to be housed there. Out-of-state inmates could not be housed in these facilities unless the state certified that it did not need them for its own inmates. The director of corrections would also be required to certify the custody levels of facilities housing these inmates.

PRIVATIZATION, from page 90

SECTION 7. FACILITY CONSTRUCTION; HOUSING OF FEDERAL OR OUT-OF-STATE INMATES WITHIN THE STATE

(1) No correctional facility shall be constructed, nor shall any facility be renovated for the purpose of creating a correctional facility within the State without review and comment by the Director of Corrections. Review of requests for construction shall, at a minimum, include:

A Consideration of the location, design, security level, and financing of the Facility, and

B. The nature of the inmates to be housed in the facility.

(2) Counties and private prison contractors may incarcerate federal or out-of-state inmates in a correctional facility located within the State; provided that the Director of Corrections has certified that the State does not need some or all of the capacity of the facility for State inmates. Such certification shall be obtained bi-annually. The Director shall also certify the custody level(s) of any facility housing federal or out-of-state inmates.

Reimbursement to Law Enforcement Agencies

Section 7.3: This section provides for reimbursement by the operator of the correctional facility for expenses incurred by law enforcement agencies as a result of an escape by an out-of-state inmate. It has been suggested that the expense of prosecution and incarceration also be included. However, I believe this would be going too far. We don't charge General Motors for the prosecution and incarceration of employees it brings to our state when it opens a plant and I don't think that we ought to it for other industries.

3) The State and/or local governing body shall be reimbursed by the operator of the correctional facility for any expenses incurred, other than the expense of prosecution or incarceration, as a result of an escape by a federal or out-of-state inmate incarcerated within the State.

(4) Employees of facilities housing federal or out-of-state inmates shall meet such training requirements as are set forth by law or regulations for employees of State or County correctional facilities. Should no such requirements exist, the Director may by rule establish the training requirements for employees of these facilities.

(5) Use of force at facilities housing federal or out-of-state inmates shall be governed by the provisions of Section 2, above.

Liability Insurance

Section 7.6: Private contractors routinely carry insurance to protect themselves and the entity whose inmates they are housing. This section requires private prison contractors to add coverage to protect the state and the political subdivision where the facility is located. While the exposure to liability is small, it is a risk which would not be there, but for the privately operated facility.

(6) If operated by a private prison contractor, the contractor shall, at all times, have a policy of liability insurance ade-

quiring inmates be returned to their state of origin.

Probably of more impact is the migration of families to the area where out-of-state inmates are housed. I am beginning to see jurisdictions whose social service agencies are stretched very thin because of this additional burden. It would be hoped that the economic impact of the facility would provide sufficient additional revenues for the jurisdiction to provide these services. However, no study of this has yet been undertaken.

(8) No federal or out-of-state inmate shall be released in this State, unless the State has a detainer on the inmate or has accepted custody of the inmate pursuant to an interstate compact. In every other case, federal or out-of-state

Today, almost all contracts for out-of-state inmates provide that the inmates must be returned to the sending state before their release, but a desire to save a few bucks could change this practice in the future.

quate to protect the State, the political subdivision(s) wherein the facility is located, and their officers and employees from all claims and losses incurred as a result of the operation of the facility.

Emergency Plans

Section 7.7: This section deals with an area that is of grave concern to many. Specifically, how will the private company housing out-of-state inmates handle escapes, riots, and other emergency situations. This section requires that they have a written plan approved by the department for dealing with these situations.

(7) A facility housing federal or out-of-state inmates shall have in place a written plan approved by the Department of Corrections regarding the handling of escapes, riots, and other emergency situations.

Release of Out-of-State Inmates

Section 7.8: This section deals with another area of concern and that is the release of out-of-state inmates within the state upon completion of their sentences. Today, almost all contracts for out-of-state inmates provide that the inmates must be returned to the sending state before their release, but a desire to save a few bucks could change this practice in the future. This section prevents this from happening by

inmates shall be returned to the custody of the sending jurisdiction, or such other jurisdiction as has agreed to accept custody of the inmate, prior to the inmate's release from custody.

Section 7.9 and 7.10: These sections deal with allowing out-of-state inmates to leave the grounds of the facility temporarily. The statute makes it clear that they may not be allowed to do so, except under certain enumerated circumstances. On the other hand, the statute provides the flexibility to use out-of-state inmates on public works projects approved by the county where the facility is located. There have been situations where inmates were housed in a jurisdiction that needed their assistance in dealing with a natural disaster (e.g. flooding), but the inmates were prevented from helping, because they could not be allowed beyond the facility perimeter. This would remedy such situations.

(9) A facility housing federal or out-of-state inmates shall not allow any such inmate to leave the premises of the facility, except to comply with an order to appear in a court of competent jurisdiction, to receive medical care not available at the facility, to comply with the provisions of Section 8 of this Act, or to work as provided in Section 10 of this Act.

See PRIVATIZATION, next page

(10) A private prison contractor may allow federal or out-of-state inmates to work on public works projects outside the facility provided all of the following conditions are satisfied:

A. The public works project must be in and for the county where the prison is located or in a county adjacent to the county where the prison is located, or in and for a municipality in the county where the prison is located or an adjacent county;

B. The public works project has been

Corrections and the County of Municipal authorities where the public works project is located.

Exception for Federal Prisons; Interstate Transfers

Sections 7.11 and 7.12: Finally, the act provides that it is inapplicable to facilities operated within the state by the Federal Bureau of Prisons and that the act may be used as authority for the interstate transfer of inmates in lieu of the Interstate Compact on Corrections. The latter has been a prob-

which has taken the position that inmates may only be brought in from out of state pursuant to the Compact. While I do not read the Compact as being that restrictive, this ensures that this act may be used as an alternative means of incarcerating out-of-state inmates within the state.

(11) The provisions of this Act shall not apply to facilities operated within the State by the Federal Bureau of Prisons.

(12) The provisions of this Act may be used in lieu of the provisions of the Interstate Compact on Corrections. ■