This paper provides an overview of privatisation in the United States. All levels of government have given this issue increasing attention in recent years. This is especially true when it comes to juvenile corrections. With shrinking budgets and ever-increasing numbers in the system, juvenile justice professionals are scrambling to find new ways of doing more with less.

Privatisation's role in American government is not new. Precedent for this delegation of tasks exists in many areas of public service. One of the many areas in which private sector management has found acceptance over the past few decades is juvenile corrections. The debate has recently increased in the area of private sector management and operation of entire secure juvenile residential facilities.

In any jurisdiction, certain issues involved with contracting with the private sector for juvenile justice services will affect the decision-making process. The issues can vary from state to state, but one who has a grasp of the basis of all of the issues will make the most informed decision. This paper briefly discusses some of the most pressing areas of concern when privatising juvenile services and facilities.

Any successful effort to privatise must include certain elements to ensure a comprehensive and effective agreement. The final contract is a direct result of the processes that preceded it. Each step is essential to a productive relationship between the issuing agency and the private provider. The privatisation process includes: a study to determine feasibility of conversion, RFP (request for proposals) development, proposal review, contract development and contract evaluation and monitoring. Another element that, although not necessary, can be quite helpful to directors of state juvenile corrections systems is the advisory group. This group can take the form of a community advisory board or a public/private partnership.

An understanding of the basics of privatisation—its history, significant issues and major elements—is vital to the proper use of the private sector for the provision of public services. This paper provides an overview of these topics to enable state juvenile justice systems to make informed decisions and choices about the private sector and its role in juvenile corrections.
History of Privatisation

Contracting with the private sector for juvenile services and facilities is not new. The private sector has operated private juvenile justice facilities in the United States since the 19th century. Historically there has been minimal controversy about these facilities. At the present time, private contracting for juvenile services and residential facilities is a common and apparently successful option in a number of states.

Early gaols, which also housed juveniles, were operated by citizens who ran them for profit. Private gaolers charged their inmates for food and clothing and were often abusive towards them. Bribery and graft were commonplace. Government's entry into direct operation of correctional facilities was, in part, in response to those abuses.

Government, with the capability to establish standards and closely monitor performance to ensure adequate and humane treatment of confined individuals, seemed the only choice at the time. Today the private sector has greater skills and resources to offer in a cooperative relationship with the state than during the days when inmate labour was exploited.

Citing the need to reduce government spending and streamline operations, recent national administrations have advocated a greater role for the private sector in providing social services traditionally offered by state and local governments. Federal policy, stated in OMB Circular A-76 is to:

- **Achieve economy and enhance productivity.** Competition enhances quality, economy and productivity. According to this circular and its supplement, whenever privatisation is permissible, there will be a comparison of the cost of contracting and the cost of in-house performance to decide who will do the work.

- **Retain governmental function in-house.** Certain responsibilities are so intimately related to the public interest that they mandate federal operation. These functions are not commercial in nature; therefore, they shall be handled by government employees.

- **Rely on the commercial sector.** The Federal Government shall rely on commercially available sources to provide commercial products and services. According to the provisions of this circular, the government shall not provide a commercial product or service if the product or service can be procured more economically from a commercial source.

Some say that privatisation is progress: others regard it as a fad or an attempt to do away with government jobs.

Private providers are again being considered for an increased role in juvenile corrections, but this time the motivation is different. Today they often bring with them management skills, advanced technologies, and information management systems that have the potential to improve correctional functions and reduce government costs. For some time private
enterprise has focused on criminal and juvenile justice agencies as markets for high technology. The private sector has made available advanced word processing equipment, computers, and more recently, innovative electronic monitoring devices. Private entrepreneurs are now successfully providing the administration and management of entire secure juvenile institutions.

The debate that has risen out of the privatisation issue has little or nothing to do with providing supportive services. The controversy centres on issues involved in the total management and operation of secure facilities. The critical points involve constitutional concerns including privacy and personal freedom decisions. People on both sides of the debate have solid agreements to support their opinions. In order to understand the issues and form one's own opinion, one must look more closely at the pros and cons cited by both sides.

Privatisation Issues

Legal Authority

The state director of juvenile corrections should know if the applicable legislative body has specifically authorised or prohibited such contracting. However, the analysis of the state's legal authority to contract out juvenile correctional services is complex and is better left to the state's legal counsel.

Issues surrounding the legal authority to privatise can be subtle. For example, one jurisdiction has no direct prohibition against a country government contracting out for privately provided juvenile correctional services. The problem is that the country cannot use a juvenile correctional facility until it has been approved by the state agency, but the state agency has no authority to inspect private facilities. As a result, there are no privately operated juvenile correctional facilities in the state, despite the fact that the state has the authority to contract for the services.

Another issue that affects legal authority is whether the law permits contracts with for-profit organisations. One state legislature recently passed a new law authorising the state agency to contract for juvenile correctional services, but limited eligible providers to non-profit agencies. Such a limitation may reduce the number of qualified providers to complete for the contract.

Is private provision of public services proper?

This question is closely linked to the issue of statutory authority. It is raised on the basis of the "propriety" of such action rather than with respect to "legality". It is an ideological question that many people feel strongly about. There are those who argue that some functions are the "raison d'être" of government and cannot or should not be delegated; among these functions are all legislative and judicial activities involved in all stages of the juvenile and criminal justice process. With equal vigour, others argue that there is a legitimate and necessary role for private enterprise in the management of juvenile corrections, which in no way constitutes an abrogation of the essential role of government in formulating policy.
Quality of service

The desire to improve the quality of a service that is currently publicly provided is often a significant reason for contracting that service to the private sector. At times, the private sector has a greater potential for innovation and efficiency due to its ability to be more flexible than government regarding personnel and resources. The private sector is also less burdened with bureaucracy and "red tape".

A significant problem that must be considered is how quality is measured. What is the standard used to measure quality? What are the characteristics of quality programs?

Quality in any juvenile correctional program must begin with the establishment of positive and trusting relationships between juveniles and program staff. Staff in quality programs adhere to the highest levels of professional excellence and are positive, caring, well-trained, competent and humane in their approach to working with the juveniles in the program. Other elements of quality juvenile justice programs include:

- services designed to promote the human dignity, self-esteem, and self-respect of juveniles in the program;
- a group life atmosphere in which juveniles are supportive and helpful with each other;
- the normalisation of living and working environments that are safe and clean; all persons in the program, whether residential or non-residential, must be free from fear in the conduct of their activities;
- opportunities for juvenile decision-making that foster a sense of participation, significance, and competence;
- individualised approaches to meeting treatment and services needs;
- a clear and predictable path of progression for juveniles through the program;
- continuous case management that ensures coordination, service delivery and accountability; and
- a reporting system that measures progress and outcomes.

Using these characteristics, or any others that are relevant to the program or service under review, the existing level of quality can be measured.

It would be wrong to assume that the private sector will always provide a higher quality of service than that of the public sector. The private sector can be as wasteful, inefficient, and corrupt as any government agency. There is nothing uniquely inherent in the private sector that assures it will always do the job better.

Another issue to consider is whether it is possible to improve the present quality of service. What are the obstacles to improving the public operation,
and will those obstacles be obviated or overcome if the service is privately provided? Does it make sense to continue the publicly provided service or to contract out to the private sector?

These are difficult and complex issues. One approach is to assess the quality of the delivery process, as well as the outcome. This approach begins with looking at staff and the potential of staff to improve the quality of services through increased training and program resources. Another component of the process is to look at physical plant and the ability of staff to improve the quality of services in the particular facility. The state's ability to improve staff and the physical plant, as opposed to privatising the service, must be decided.

Another area to consider is the message a decision to privatise sends to staff who will continue to publicly provide other related services. Poorly handled, a precipitous decision to privatise could result in lowered morale and productivity among remaining public employees. On the other hand, a reasoned decision that is understood and shared by other employees could actually increase morale and productivity.

**Accountability**

It is critical to note that, while the state agency relinquishes responsibility for performing a service by contracting it out, it in no way relinquishes responsibility for monitoring the private providers. A clear definition of public/private roles and responsibilities must be documented in the contract. The state remains accountable, through detailed monitoring procedures, for all contracted services.

The level of control that the state exerts over its providers is directly related to how well the agency structured the request for proposals (RFP) and the final contract. If privatisation is to be successful, the modified golden rule must apply—those who have the gold make the rules. These rules must assure that the state maintains its interest in the services for which it is ultimately responsible.

The shift from operating public services to monitoring the provision of public services requires a clear analysis of the state's ability to oversee and evaluate performance. The monitoring agency must be in a position to require and enforce high standards of quality from its contractors. The incorporation of high, but achievable, performance standards into the contract is basic to proper public accountability and clarifies the roles of public and private managers in the contract arrangement.

**Liability**

The ultimate responsibility for the delivery of juvenile correctional services lies with the state. As the Supreme Court made clear in the case of *West v. Atkins* 487 US 42 (1988), contracting does not and cannot completely absolve government of this responsibility. The legal rights of confined juveniles do not diminish simply because they are confined in a privately, rather than publicly, managed facility. Properly drafted contracts, however, oblige private providers of juvenile correctional services to indemnify state agencies.
against the broad range of liability exposure they confront when they deliver juvenile correctional services themselves. These indemnification clauses include, but are not limited to, guarantees that the private firms will be responsible for all costs—including legal defence costs, settlement costs, and damage awards—associated with legal action brought under 42 USC Section 1983.

Privatisation's ability to lessen the state's liability exposure is one of the important reasons that privatisation has proven to be attractive for both juvenile and adult corrections. This is perhaps especially true for local levels of government. Following the decision of the Supreme Court in the case of Monell v. Department of Social Services 436 US 658 (1978), it became possible for local units of government to be held liable for monetary damages in Section 1983 suits. State officials who are sued in their individual capacities can be held liable for monetary damages. However, a combination of the Eleventh Amendment and interpretations of the scope of Section 1983 precludes state and state agencies from the same liability (for example, Will v. Michigan Department of State Police 109 S.Ct 2304 (1989), and Howlett v. Rose 110 S.Ct 2430 (1990)). Despite this limitation, privatisation can significantly reduce the liability exposure of state agencies by, for example, covering the significant legal defence costs associated with Section 1983 suits and the liability that is related to tort law.

Rights and due process

One of the earliest arguments against privatising juvenile corrections was the threat it posed to the constitutional rights of the juveniles in the program. Since private firms are not generally subjected to constitutional restraints, some feared that juveniles placed in privately operated programs would have no recourse to challenge the conditions of their custody.

The courts have consistently held that the rights of juveniles in correctional programs and the due process to which they are entitled are not diminished in any way by virtue of being placed in a program operated by a private provider. A classic example may be found in the Florida system that operates two secure training schools, one state operated and the other privately operated (since 1982).

There has not been one judicial decision that resulted in the juveniles in either training school being treated differently. Both populations are arrested, adjudicated and committed by the state's constitutional judicial authority, and both receive the same protections regardless of where they are held.

Nevertheless, there are practical issues that could infringe on a juvenile's rights. For example, a provider's efforts to reduce costs in the areas of food services, medical services, utilities and clothing can have an unintended impact on a juvenile's rights. Cost reductions that compromise the safety of juveniles and staff can lead to increased liability exposure. Ultimately, it is the state agency's ability to manage, monitor and control these issues that will determine whether privatisation is appropriate.
Security and safety

Effectively operated private correctional programs are as secure and safe as their publicly operated counterparts. There is nothing inherent in a publicly operated program that makes it better in terms of security and safety than one that is privately operated.

Problems have arisen, however, regarding the authority of private providers as compared to the public sector. It is important to determine whether the employees of a private provider are authorised by state law to take and hold juveniles in their care. Some state statutes never envisioned private juvenile corrections providers and specifically limit arrest authority to sworn public law enforcement personnel and other public officials.

State officials should consult the appropriate attorney in the state agency of the Attorney-General's Office for an opinion in this regard. If the state statute is not clear, legal counsel should be asked whether a provision in the contract authorising the provider to take and hold in custody would be lawful.

Another area to investigate is whether state law regarding escape includes leaving a privately operated juvenile program. There have been instances where law enforcement refused to arrest juveniles who walked away from private programs because it may not have been clear that any state law had been violated, that is, the law defined escape as an unauthorised leaving from a "public" facility.

Economic efficiency

One could ask why any public service could be performed at less cost by the private sector. After all, are not there two new costs (profits and contract monitoring) being added to the existing costs? These new costs exist—no question about it. But, offsetting them could be other major elements, such as:

Economies of scale: A single provider can serve several counties (or states), thus spreading its overheads among all of them, resulting in significant cost reductions. Overall costs of management and administration, data processing, fiscal activities, and a host of other bureaucratic functions can be centralised and costed out proportionately.

Different incentive structures: an obvious difference between the public and private sectors is their different incentive structures. The delivery of a service by a public agency is essentially a monopolistic activity. A state department of juvenile services, for instance, does not have to worry that another agency will come in and take away its "business". A private sector department, on the other hand, has no guaranteed revenues, and lives with the very real possibility that another business will come in and outbid it.

Different managerial styles: Another difference between the public and the private sectors is the managerial style of its executives. An
administrator in a public agency will perceive his or her priorities as performing a particular range of services within a pre-set budget, while avoiding negative political fallout. The administrator will often spend money just because it is there, knowing that if the department shows unspent money at the close of the fiscal year, cost-cutting legislatures or boards of supervisors will likely reduce the department's succeeding budget by at least that amount. In addition, a government executive will often measure professional status by the size of the agency, measured both in size of budget and numbers of employees. The unspoken driving force of a public sector agency can often be to increase its budget and to add new employees.

An administrator in a private sector company should perceive his or her priorities to be the efficient performance of a particular range of services with as few employees as possible and to generate as large a profit as possible for the company. One should relentlessly seek innovative ways to cut costs and increase employee productivity while delivering the highest quality of services. The more unspent money (profits) the department can accrue at the end of a fiscal year, the more valuable the administrator will be to the company. Professional status is more likely to be measured by the size of the profits, not the size of the corporation. It is up to the state's monitoring and evaluations to make certain the profit motive does not diminish services to the juveniles.

Escalating costs

Critics of privatisation argue that a private firm could offer a lower price the first time around in order to win a contract then raise costs during the ensuing years, particularly if the community has created a point of no return by dismantling its own service delivery capability. This is a reasonable concern. There are safeguards that should be established. For example, the jurisdiction must ensure truly competitive bidding conditions in subsequent years so that other firms have a fair and reasonable chance to seek the contract.

Job security for public employees

It is a reality that correctional services, as currently practised, are labour intensive functions. Obviously, there are savings if four or five workers can accomplish what six workers are currently doing by introducing more efficient management and technology. The principal decision for policy makers and guardians of the public purse is whether more efficient and cost-effective correctional services can be achieved through privatisation, thereby serving the public good.

There are practical ways of mitigating the threat felt by public employees. Experience has shown that where private corporations have replaced services that were previously performed by the federal government, their executives have been well versed in the "right of first refusal", which gives employees of a current operation the right to first choice—or refusal—of employment with
the new provider. This "right" was proclaimed for federal conversions as a requirement of OMB Circular A-76. It gives the "right of first refusal" to federal employees displaced as a result of conversion. Similar administrative provisions are also frequently used at the state and local level. Experience from the field indicates that corporations do, in fact, routinely draw the majority of their project employees from displaced civil service workers. Regardless of what is done to help safeguard the jobs of current public employees, this issue is a difficult one to resolve, and organised labour can be expected to take a strong position on it.

**Political environment**

In an era of decreasing confidence in and increasing suspicion of government institutions at all levels, some believe in privatisation as both a solution and a panacea. Managers of government programs have sometimes looked at privatisation less for its cost savings than for its impact on reducing the power of public employee unions. Motive plays a major role in the decision whether to privatise.

Privatisation can also be very symbolic. The public's disenchantment with government in general and its traditionally high regard for the values of private enterprise may make the decision to privatise, for whatever legitimate reason, a popular one politically.

Privatisation causes change, and change affects people. Contracting out a service that has been traditionally provided by government means that public employees will be impacted in some, often threatening, way. Resistance to privatisation, not surprisingly, generally comes from public employees and their representatives.

These fears and resistance by public employees are compounded by the fact that corrections has become an important career path for minorities in this country. Some States report that the proportion of minorities in their overall corrections systems is twice that of the general business community. In an economy that is offering fewer opportunities for economic security, the potential loss of jobs to a private provider is a significant event with equally significant political implications. Although recent studies indicate that the hiring practices of public and private agencies regarding minorities are virtually the same, the fact that private providers generally pay lower wages and benefits for comparable public employment causes many to continue to resist privatisation.

Sensitivity to these types of political issues may be more important in the long run than making a factual case in favour of privatisation. The analysis of whether to privatise should include considerations of whether appropriate accommodations can be made to protect affected public employees. For example, a provider could be directed to first consider affected staff in hiring for the new program. This approach has been successful in several instances. Another approach is to provide affected staff sufficient lead time and assistance in seeking other government positions.

Consideration must also be given to how contracting out a particular program or service may affect the influence a provider may have over the nature and provision of the contracted service. It is only natural that private
providers, especially those that are for profit, have a vested financial interest in continuing and even expanding the need for their services. Having a contract with a public agency often places the provider in a position to engage in various activities, such as meeting with key government officials, to promote public policy decisions that favour the provider's interests.

Community attitudes

Whenever, or wherever, the juvenile correctional program or service to be privatised involves a community or neighbourhood, it is important to assess how key members of the community view the issue. This is especially important whenever a community based program is considered. The neighbourhood may have developed considerable confidence in the ability of the publicly operated program to assure safety in the community. The program administration may be very responsive to community involvement. Contracting such a program to a private provider unknown to the community may cause anxiety and opposition.

Civic and business organisations, neighbourhood groups and influential citizens in the affected community should be contacted. They should be told of the state agency's plans and asked for their opinions. Local and state politicians who represent the area should be contacted for their opinions as well.

Elements of privatisation

The first task for any state juvenile corrections agency considering private sector contracting is to decide if privatisation is the most appropriate course of action. If the decision is to initiate a procurement effort, the agency can then go on to preparing a Request for Proposals (RFP).

The agency will receive proposals up to the last minute of the deadline. All eligible proposals must be reviewed and objectively rated in order to choose a contractor. This presupposes that at least one proposal meets the agency's requirements.

The agency must then draw up a contract with the successful bidder for the work detailed in the RFP. Once the contract has been signed, service should begin on a mutually acceptable date.

Since the state agency still retains ultimate responsibility for juvenile corrections, it must monitor and evaluate the contractor's performance of the tasks and services according to the contract. This aspect of privatisation is crucial since it is the best opportunity to guard the interests of the juveniles, the public and the agency itself.

One last element of privatisation is the role of advisory groups throughout the process. Community Advisory Boards and Public/Private Partnership can contribute a great deal of advice and assistance at any point in the process. They can be a great asset to the efforts of the agency and its director.
Feasibility of conversion

The decision to convert publicly operated juvenile residential facilities and/or community services to the private sector must be reasoned and deliberate. It is important that the decision is not driven by a narrow consideration of cost savings alone. The state's responsibility to its juvenile offenders requires that a decision be based on a balanced, comprehensive feasibility assessment.