

Much Obligated: An Assessment of Governmental Accountability for Prisoners' Rights in New Zealand's Private Prisons

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A series of damning incidents and allegations of mismanagement in privately managed prisons in 2015 have triggered an important discussion about the nature of prison management in New Zealand. This article examines the extent to which the New Zealand Government is obligated to safeguard and uphold prisoners' rights under the prison privatisation regime enacted in the Corrections (Contract Management of Prisons) Amendment Act 2009. It proposes that while the ambit of the Government's managerial role is different under this regime, the Government retains complete accountability for prisoners' rights. It further assesses the strengths and weaknesses of New Zealand's prison privatisation regime, concluding it is inadequate for safeguarding prisoners' rights, and recommends ways to address this inadequacy.

I INTRODUCTION

The Corrections (Contract Management of Prisons) Amendment Bill 2009 (the Bill) was introduced on 12 May 2009. It amended the Corrections Act 2004 (the Principal Act) by allowing competitive tendering for the private management of New Zealand prisons on a case-by-case basis.¹ The Bill passed its third reading 68 votes to 53. It received Royal assent on 7 December 2009 and came into force the following day. Currently, only one New Zealand prison is under private management. One other prison had been privately managed, but the Government regained control of it in 2015 following allegations of mismanagement.

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1 (24 March 2009) 653 NZPD 2026.

The purpose of this article is to assess the accountability of the New Zealand Government (the Government) for prisoners' rights in the administration of New Zealand's private prison system. Part II will trace the legal basis for prisoners' rights. Part III will examine the development of private prisons overseas. Part IV will consider New Zealand's prison privatisation regime and will discuss the current state of privatisation in New Zealand. Part V analyses accountability in privatisation to assess the Government's responsibility for prisoners' rights. The analysis will highlight shortcomings in New Zealand's private prison regime and make suggestions to improve the current framework.

II PRISONERS' RIGHTS

Imprisonment and Human Rights

The New Zealand Bill of Rights Act 1990 (BoRA) establishes liberty as a right for everyone in New Zealand.² The Government is under a corresponding obligation not to arbitrarily arrest or detain citizens. The BoRA confirms the Government's role as rights provider and guarantor. The Government is required to uphold the rights Parliament has affirmed in the BoRA. This is particularly pertinent to imprisonment, where the Government is the guardian of prisoners' welfare. Under s 38 of the Principal Act, prisoners are under the legal custody of the chief executive (the Chief Executive) of the Department of Corrections (the Department), who acts on behalf of the Government. The Chief Executive takes guardianship of prisoners' safe custody and welfare under the Principal Act.³

Human rights are at the forefront of imprisonment discourse. Imprisonment is a restriction of liberty and there are risks to other human rights that flow from restrictions of liberty. The Government must be careful that no additional human rights are violated in the corrections process. Human rights concerns must always be at the centre of drafting and maintaining prison privatisation regimes to ensure that prisoner welfare is a constant priority in prison management. As legal custodian, the state is ultimately responsible for safeguarding prisoners' rights and must ensure appropriate management and monitoring frameworks are in place.⁴

² New Zealand Bill of Rights Act 1990, s 22.

³ Corrections Act 2004, s 8(1)(b).

⁴ *Concluding Observations of the Human Rights Committee — Consideration of reports submitted by States parties under Article 40 of the Covenant New Zealand CCPR/C/NZL/CO/5* (2010) at [11].

Human Dignity

The idea of inherent human dignity informs the minimum standards of acceptable treatment in prisons. Human dignity is a means of measuring prisoner treatment and constructing minimum standards from which no deprivation of liberty is justified in departing. In New Zealand, human dignity is referred to only once in the BoRA, in s23(5), in relation to the treatment of prisoners.⁵ Prisoners are not stripped of their right to be treated humanely merely because they are imprisoned.⁶ The Human Rights Committee, in a General Comment from 1992, stated that “treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule”.⁷

Prisoners are particularly vulnerable to human rights violations. This is partly by virtue of their deprivation of liberty per se, partly because they often represent the most disadvantaged social demographic and partly because they are “out of sight and without credibility in the public’s eyes”.⁸ The state administers all aspects of prisoners’ lives while they are in prison. Without proper regulation, there is the potential for the state to violate almost every aspect of prisoners’ rights.⁹

Prisoners’ Rights in International Human Rights Instruments

New Zealand has ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). Article 10(1) of the ICCPR states that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.¹⁰ In light of art 7 of the ICCPR, the CAT establishes state obligations to safeguard against torture and other cruel, degrading or inhuman treatment or punishment. OPCAT supplements the CAT by establishing an

5 New Zealand Bill of Rights Act 1990, s 23(5).

6 *Manual on Human Rights Training for Prison Officials* HR/P/PT/11 (2005) at 4.

7 Human Rights Committee *General Comment 21, Article 10* HRI/GEN/1/Rev 1 (1994) at [5].

8 Ministerial Committee of Inquiry into the Prison System *Prison Review: Te Ara Hou: The New Way* (Crown, Wellington, 1989) at 189 as cited in Elizabeth Stanley *Human Rights and Prisons: A review to the Human Rights Commission* (Human Rights Commission, Auckland, 2011) at 9.

9 Commission on Human Rights *The possible utility, scope and structure of a special study on the issue of privatization in prisons* E/CN4/Sub2/1993/21 (1993) at [39].

10 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

international inspection system for party states' prisons. The United Nations' Standard Minimum Rules for the Treatment of Prisoners (Minimum Rules) are incorporated into the purpose section of the Principal Act.¹¹ The Minimum Rules set out both general and specific rules for the treatment of inmates. Under s 5 of the Principal Act, prisons must be operated in accordance with the Minimum Rules.

Prisoners' Rights in New Zealand

While international instruments inform how prison administrators, including those running privately managed prisons, should treat prisoners, the Principal Act governs the way administrators must treat prisoners. The court may enforce a higher standard of conduct on New Zealand authorities than stipulated in international instruments.¹² The use of coercive powers against prisoners is regulated.¹³ The Principal Act also stipulates minimum entitlements for prisoners, in line with the Minimum Rules.¹⁴

However, the minimum entitlements under the Principal Act are not "rights" ascribed to prisoners, but privileges that may be denied for a reasonable period of time in certain circumstances.¹⁵ Under s 5 of the BoRA, rights may only be subject to limitation that is demonstrably justified in a free and democratic society. There is, therefore, a level of inviolable human dignity from which no treatment will be justified in departing. Because prison contractors are afforded a degree of discretion in applying minimum entitlements, greater scrutiny is required from the Government to ensure prisoners' rights are not unjustifiably denied.

The rights protections for prisoners under the BoRA are consistent with international human rights law. For those who are legally arrested or detained, s 23(5) of the BoRA provides that "everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person". The wording of s 23(5) of the BoRA is identical to that in the ICCPR. Similarly, the right not to be subjected to torture or cruel treatment comes from the ICCPR and CAT. Section 9 of the BoRA states that "everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment". The test for breaching s 9 is much higher than that required in s 23(5). Section 23(5) catches conduct that "lacks humanity, but falls short of cruelty

11 Corrections Act 2004, s 5(1)(b).

12 *Taunoa v Attorney General* [2007] NZSC 70, [2008] 1 NZLR 429 at [179].

13 Corrections Act 2004, pt 2, subpt 4.

14 Corrections Act 2004, s 69.

15 Corrections Act 2004, s 69(2).

... conduct that is clearly excessive in the circumstances but not grossly so".¹⁶

III PRISON PRIVATISATION

The Development of Prison Privatisation

While many contemporary commentators argue that running prisons is an inviolable role of the state that should not be privatised,¹⁷ Anglo-American history has not followed this course.¹⁸ Elements of penal privatisation existed throughout English and American history. In England, private entrepreneurs ran prisons from the medieval period onwards, but this led to disparities in imprisonment conditions.¹⁹ By 1877, English prisons were run entirely by the state.²⁰ In the 19th century, several early prisons in the United States were privately managed.²¹ However, there was little accountability for inhumane prison practices.²² Political pressure and market influences meant privatisation lost its respectability.²³ All United States prisons were under state control by the end of the 1920s.

The "second era" of prison privatisation began in the mid-1970s and continued to expand into the 1980s.²⁴ Jurisdictions shifted towards privatisation to save public money, citing a belief in the efficiency of private enterprise.²⁵ Privatisation has since boomed, becoming an integral part of prison management in the United States, Australia and the United Kingdom, and has spread to a range of other countries, including New Zealand.²⁶

16 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [20.12.5].

17 Richard Harding "Private Prisons" (2001) 28 *Crime & Just* 265 at 273.

18 Malcolm M Feeley "The Unconvincing Case Against Private Prisons" (2014) 89 *Ind LJ* 1401 at 1414.

19 Naomi Cervin "Private Prisons: Should Crime Pay?" (2003) 9 *Auckland U L Rev* 48 at 50.

20 Cervin, above n 19.

21 Greg Newbold *The Problem of Prisons: Corrections Reform in New Zealand Since 1840* (Dunmore Publishing, Wellington, 2007) at 222.

22 Cervin, above n 19, at 50–51; and Richard Harding "State monopoly of 'permitted violations of human rights': The decision of the Supreme Court of Israel prohibiting the private operation and management of prisons" (2012) 14 *Punishment & Society* 131 at 132.

23 Harding, above n 22, at 132; and Newbold, above n 21, at 222.

24 Newbold, above n 21, at 222.

25 Ira P Robbins "Privatisation of Corrections: A Violation of U.S. Domestic Law, International Human Rights and Good Sense" in Koen de Feyter and Felipe Gómez Isa (eds) *Privatisation and Human Rights in the Age of Globalisation* (Intersentia, Antwerp, 2005) 57 at 57; Newbold, above n 21, at 222; Cervin, above n 19, at 51–53; and Will Tanner "Reform Ideas No 2: The case for private prisons" (February 2013) *Reform* <www.reform.uk> at 5.

26 Harding, above n 17, at 268.

Private Prison Performance Overseas

Overseas perceptions of the performance of private prisons have been mixed. Research has generally returned differing findings and even where performance data is available, different interpretations have emerged.²⁷ One explanation for this is that, despite what empirical information tends to show, conclusions about the success (or otherwise) of private prisons tend to be drawn along political lines.²⁸

The most pointed criticisms levelled at private prisons concern their record in upholding prisoners' rights. Reports of mismanagement, prisoner mistreatment and human rights violations are rife across jurisdictions.²⁹ Most human rights critiques focus on the inherent conflict between the objectives of private companies — cutting service costs in order to maximise profits — and one of the objectives of penal administration: administering the state's most coercive power with regard for prisoner welfare. The OECD concluded in 1994 that “the conflict between the profit motives of the companies and the social objectives of government ... are virtually impossible to reconcile in a contract”.³⁰

Cost-cutting measures are an inevitable attraction for contractors who wish to profit from a government service that has hitherto operated on a non-profit basis. This means prisoners' rights are at greater risk in private prisons than in public prisons. Contractors tend to employ fewer, less experienced staff,³¹ which leads to higher rates of violence against prisoners and guards.³² The combination of cost-cutting practices and the limited transparency of privately managed prisons heightens the risk of prisoners' rights being overlooked or violated.³³ However, despite these failures and inconsistencies, the private prison industry has grown to hold a considerable presence in penal administration.³⁴ It is therefore crucial that governments implement adequate mechanisms to identify and rectify breaches of prisoners' rights in private prisons, penalise contractors at fault and provide recourse to harmed prisoners.

27 Gabrielle Garton Grimwood *Prisons: The role of the private sector* (Home Affairs Section, SN/HA/6811, 30 January 2014) at 9–10.

28 At 8–12.

29 Lana Nassar and Frank C Newman “Human Rights Implications of Private Prisons” (Human Rights Advocates Report, February 2013) at 2–12.

30 Harry Havens “Private Sector Ownership and Operation of Prisons: An overview of United States Experience” (OECD, Paris, 1994) as cited in Human Rights Commission “Submission of the Human Rights Commission on the Corrections (Contract Management of Prisons Amendment) Bill 2009” at [2.2].

31 Stanley, above n 8, at 21.

32 Harding, above n 17, at 288–289.

33 (24 November 2009) 659 NZPD 8141; Byron Eugene Price *Merchandizing Prisoners: Who Really Pays for Prison Privatization?* (Praeger, Westport, 2006) at 148; and Mike Tartaglia “Private Prisons, Private Records” (2014) 94 B U L Rev 1690 at 1693.

34 Mary Turck “Private prisons, public shame” (9 June 2015) Al Jazeera America <america.aljazeera.com>.

In the wake of a critical review of the use of private contractors in federal prisons, the United States Federal Government has announced it intends to phase out privately managed federal prisons.³⁵ Contracts for the 13 contracted federal prisons should be substantially downscaled or not renewed when they expire.³⁶ The Office of the Inspector General's review found evidence that private prisons were less safe and secure than government-managed prisons and that they were improperly managed and inadequately monitored. It recommended improvements to prison monitoring and oversight.³⁷

Constitutionality of Prison Privatisation

1 Constitutionality in Israel

Israel is the only country to have found private prisons to be unconstitutional.³⁸ In 2004, the Knesset (the Israeli Parliament) passed the Prisons Ordinance Amendment Law (Amendment 28) providing for one private prison. The State's motivation was economic efficiency, and a desire to improve prison conditions within the new private prison and (it was hoped) in public prisons.³⁹ The Knesset undertook extensive reviews of other jurisdictions to come up with "the improved English model", a privately run prison with heavy state regulation.⁴⁰ In 2005, petitioners challenged Amendment 28 on the basis that it contravened s 5 of the Basic Law: Human Dignity and Liberty (the Basic Law).⁴¹

The petitioners argued that the Basic Law established a "super-legislative Constitutional right" to human dignity and liberty. Imprisonment, they said, was a *prima facie* violation of this right, meaning its administration had to be vigilantly scrutinised.⁴² They suggested this had not occurred in practice for two reasons. First, the State's purported delegation of imprisonment (a non-delegable power) to a private company would itself amount to a disproportionate violation of the fundamental rights protected under s 5 of the Basic Law.⁴³ Secondly, the profit-making motives of private companies

35 Matt Zapotosky and Chico Harlan "Justice Department says it will end use of private prisons" *The Washington Post* (online ed, Washington, DC, 18 August 2016).

36 Zapotosky and Harlan, above n 35.

37 Office of the Inspector General *Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons* (US Department of Justice, Evaluation and Inspections Division 16-06, August 2016) at 45.

38 Harding, above n 22, at 134.

39 At 135.

40 *Academic Center of Law and Business, Human Rights Division v Minister of Finance* HCJ 2605/05 at 87.

41 Amy Ludlow "Prison Privatisation in Israel: Important Transnational Lessons" (2010) 6 CSLR 326 at 327.

42 Harding, above n 22, at 135.

43 Ludlow, above n 41, at 327.

conflict with the public purpose imperatives of prison administration, undermining prisoners' interests.⁴⁴

In 2009, the Israeli Supreme Court handed down an eight-to-one judgment finding that private prisons were unconstitutional per se. The Court held that, irrespective of empirical evidence, private prison management was an infringement on prisoners' human dignity protected under the Basic Law.⁴⁵ One reason for this, supported by all eight majority judges, was that "an inmate is entitled not to be subject to the use of coercive measures by employees of a private, for-profit corporation".⁴⁶ An additional reason, put forward by Procaccia J, was that contracting out prison management posed (as summarised by Professor Barak Medina):⁴⁷

... an unavoidable risk of an unjustified use of force ... sufficiently high to classify the privatization as an infringement of prisoners' rights not to be subject to an unjustified use of force or otherwise humiliating treatment by the prison guards.

Levy J dissented, criticising the majority's judgment as "dealing with an egg that has not yet been laid".⁴⁸ Amendment 28 provided accountability mechanisms far beyond those applicable to state-run prisons. Oversight of prison management would remain with the State, as a matter entirely of public concern.⁴⁹ Levy J found that, assuming the State carried out its regulatory duties rigorously, a private prison may have produced better prison conditions, and until that outcome failed to eventuate there was no breach of the Basic Law.⁵⁰

2 *Constitutionality Outside Israel*

It is unclear whether the decision of the Israeli Supreme Court will be adopted in other jurisdictions.⁵¹ Without similar "super-legislative" rights protections, it is difficult to imagine a New Zealand court holding prison privatisation contrary to human rights per se. It is unlikely that the mere decision to contract out prison management would amount to treatment lacking in humanity under the BoRA. The Israeli Supreme Court decision appears to suggest there should be no

44 At 327.

45 *Academic Center of Law and Business, Human Rights Division v Minister of Finance*, above n 40 at 142.

46 Barak Medina "Constitutional limits to privatization: The Israeli Supreme Court decision to invalidate prison privatization" (2010) 8 ICON 690 at 691.

47 At 691.

48 *Academic Center of Law and Business, Human Rights Division v Minister of Finance*, above n 40, at 188.

49 At 181.

50 Harding, above n 22, at 139–140.

51 At 143.

involvement of the private sector in the administration of justice.⁵² However, this claim is normatively unfounded.⁵³ Administration of justice does not, and has not in the past, belonged purely to the state — even executioners were private contractors.⁵⁴ Moreover, for jurisdictions with rigorous regulation and monitoring, contractors have proven adequate for managing prisons and privatisation has heightened awareness of, and accountability for, prisoners' rights.⁵⁵

This is not to say that privatisation cannot be contrary to human rights, but that privatisation is not *necessarily* contrary to human rights. Privatising prisons merely increases the risk that prisoners' rights will be violated, because the government is ceding some level of control to a contractor whose motives are not identical to those of the state.⁵⁶ That privatisation reduces the service-providing role of the state does not necessarily lead to greater inequality.⁵⁷ It is clear that “the more authority is devolved, the greater must be the commitment to regulation and accountability”.⁵⁸ Private prisons require different, more extensive standards, regulation and scrutiny than public prisons.

While a host of additional regulatory mechanisms were not enough to convince the Israeli Supreme Court, it is possible that privatisation could have a transformative effect on transparency in the prison system.⁵⁹ For example, the United Kingdom's privatisation system employs various forms of independent monitoring, intense public scrutiny, and allows for the government to step in to ensure adequate standards are maintained.⁶⁰

IV PRISON PRIVATISATION IN NEW ZEALAND

Overview

Private management of prisons was not considered in New Zealand until the 1990s. Political opinion was divided.⁶¹ New Zealand's first private prison, Auckland Central Remand Prison (ACRP) commenced

52 Hila Shamir “The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State” (2014) 15 *Theoretical Inquiries in Law* 1 at 20.

53 At 20–22; Medina, above n 46, at 11.

54 G Larry Mays and Tara Gray (eds) *Privatization and the Provision of Correctional Services: Context and Consequences* (Anderson Publishing Company, Kentucky, 1996) at 83.

55 Medina, above n 46, at 30–31; and Harding, above n 22, at 141–143.

56 Stanley, above n 8, at 21–23.

57 Shamir, above n 52, at 16–17.

58 Harding, above n 22, at 306.

59 Shamir, above n 52, at 20–21; and Harding, above n 22, at 141.

60 Harding, above n 22, at 141.

61 Cervin, above n 19, at 56–58.

in 2000. The law enabling ACRP's privatisation was passed under a National-led Government in 1999, but was repealed in 2004 by the subsequent Labour Government, which came to power in November 1999. Enabling legislation was reintroduced under the National Government in 2009. Serco New Zealand Limited (Serco), of Serco Group, began operating ACRP (now Mount Eden Correctional Facility (MECF)) in 2011. Following a series of assaults on prisoners and guards, and accusations of mismanagement at MECF in 2015, the Department took control of MECF's management.⁶² The Department will continue managing MECF until the contractual break point in March 2017.⁶³ In early 2015, SecureFuture Wiri Limited (SecureFuture), a Serco Group consortium, completed construction of a 960-bed prison, the Auckland South Corrections Facility (ASCF). ASCF began operating in May 2015 under the management of SecureFuture.

Privatisation in New Zealand: The Penal Institutions Amendment Act 1994

Within a year of the National Party coming to power in 1990, Cabinet had approved prison privatisation in principle.⁶⁴ Overcrowding was a major driver and, as in other jurisdictions, prison privatisation suited New Zealand's "move towards state corporatisation and the laissez-faire economics that had commenced in New Zealand in the 1980s".⁶⁵ In March 1995, the Penal Institutions Amendment Act 1994 (the 1994 Act) came into force, empowering the Secretary of Justice, on behalf of the Government, to contract out the management of a prison for a period of up to five years.⁶⁶ ACRP was monitored closely by the successive Labour-led Governments and maintained a low level of serious incidents while under private management.⁶⁷ The Labour Party opposed prison privatisation and, in 2004, passed the Principal Act, repealing the 1994 Act. The Principal Act ensured the Government could not extend ACRP's existing contract.⁶⁸ Under the now-repealed s 198, the Government was also prohibited from

62 Radio New Zealand "Serco to pay \$8m to Corrections" (4 April 2016) <www.radionz.co.nz>; and Newshub "Guards assaulted in Serco-run Auckland prison, lockdown enforced" (5 May 2016) <www.newshub.co.nz>.

63 Prison Management Contract for Mt Eden Correctional Facility, between Her Majesty The Queen in Right of New Zealand acting by and through the Chief Executive of the Department of Corrections and Serco New Zealand Limited [Serco Contract], cl 3.2; and Radio New Zealand "Axing Serco will give Mt Eden Prison a 'fresh start'" (9 December 2015) <www.radionz.co.nz>.

64 Cervin, above n 19, at 57.

65 Newbold, above n 21, at 223.

66 Penal Institutions Amendment Act 1994, ss 4A and 4B.

67 Newbold, above n 21, at 225.

68 Corrections Act 2004, s 209.

entering into any new management contracts. ACRP reverted back to state control in 2005. All New Zealand prisons remained under governmental control until 2011.

Re-emergence of Privatisation in New Zealand: the Corrections (Contract Management of Prisons) Amendment Act 2009

1 Introduction

The re-emergence of privatisation in New Zealand was economically motivated. As with the 1994 Act, the Corrections (Contract Management of Prisons) Amendment Bill 2009 was introduced to encourage innovation, efficiency and cost savings.⁶⁹ The Government expected privatisation to bring competition to prison management, which would encourage broader improvements within New Zealand's corrections system.⁷⁰ New Zealand's decision to re-privatise prison management was influenced by international trends. The National Government perceived private prison management overseas to be a success, owing to the quality of the contract and the contract management process, and implemented these "lessons from other jurisdictions" in New Zealand's legislative regime.⁷¹ Careful legislative drafting and implementation of privatisation policies would be key for New Zealand to "obtain benefits" from privatisation.⁷² The National Government believed that the Corrections (Contract Management of Prisons) Amendment Act 2009 (the Amendment Act) would provide opportunities for innovation that were consistent with the purpose and guiding principles of the Principal Act.⁷³

The decision to privatise prisons was not universally supported. The primary argument against privatisation was that transferring the state's coercive powers of imprisonment to a private company would lessen governmental accountability in delivering prison services. The Opposition argued that incarceration was a core governmental responsibility that should not be delegated to non-governmental parties.⁷⁴ Contracting out prison management weakened transparency and accountability to the public.⁷⁵ Unlike in

69 Corrections (Contract Management of Prisons) Bill 2009 (20–1) (explanatory note) at 1.

70 (17 November 2009) 659 NZPD 7724–7725.

71 Corrections (Contract Management of Prisons) Bill 2009 (20–1) (explanatory note) at 8–9.

72 At 8–9.

73 (24 March 2009) 653 NZPD 2025.

74 Corrections (Contract Management of Prisons) Amendment Bill 2009 (20–2) (select committee report) at 7 (Labour Party) and 10 (Green Party).

75 At 7.

public prisons, prison management services and prisoner welfare were compromised through the contractor's pursuit of profit.⁷⁶

The Government is accountable to the public where private companies are accountable to shareholders. Public prisons can be held directly accountable to Parliament through select-committee inquiries, the Official Information Act, parliamentary debate and independent offices of inquiry, such as the Auditor-General and the Ombudsman. The Opposition argued that the Bill did not provide adequate independent monitoring and reporting mechanisms and contractual conditions would leave room for "corrupt influence[s]".⁷⁷

The Law and Order Select Committee received 51 submissions on the Bill. Forty-seven submissions either opposed the Bill or had serious concerns about its enactment; 13 referred to potential human rights concerns and 35 referred to the issue of private companies being contracted to provide public services.⁷⁸ The Attorney-General did not issue a report that the Bill was inconsistent with human rights under s 7 of the BoRA.

2 *Legislative Regime*

(a) Key Amendments

Section 5 of the Amendment Act replaced ss 198 to 199K in the Principal Act. The new s 198 allows the Chief Executive, on behalf of the Government and with the prior written consent of the Minister of Corrections, to contract out the management of prisons to any other person.⁷⁹ Section 199 sets out the requirements for all prison management contracts. Objectives and performance standards for contractors must be at least as high as those applicable in publicly managed prisons.⁸⁰ The content of the 1994 Act and the Amendment Act is much the same. The law that had enabled the privatisation of ACRP had proven unproblematic, so the Government favoured consistency with the old regime.⁸¹ Where necessary, some of the terminology was updated.⁸² One of the most significant changes was that the Chief Executive is now required to impose contractual obligations on contractors to comply with international obligations

76 At 7.

77 At 7 and 10.

78 Law and Order Select Committee *Corrections (Contract Management of Prisons) Bill – Summary of Submissions: Themes* (1 July 2009).

79 Corrections Act 2004, ss 198(1) and (2).

80 Section 199(1).

81 Corrections (Contract Management of Prisons) Amendment Bill 2009 (20–2) (select committee report) at 2.

82 Corrections Act 2004, s 199(1).

and standards.⁸³ Therefore, the Government is legally obliged to impose the requirements of international human rights instruments on contractors, and contractors should be contractually obliged to comply with those requirements. Prison management contracts must also impose a duty on the contractor to comply with the BoRA “as if the prison were a prison managed by the department”⁸⁴ and to meet all relevant international obligations and standards.⁸⁵ There should be no difference in treatment between prisoners in privately managed prisons and those in publicly managed prisons.

(b) Accountability Under the Regime

On the Bill’s introduction, the Hon Judith Collins, Minister of Corrections, made an unequivocal statement about the Government’s accountability for prisoners in privately managed prisons:⁸⁶

Another key feature of the Corrections Act is the accountability that it sheets home to the chief executive of the Department of Corrections. Prisoners remain in the legal custody of the chief executive at all times. This will not change when the prisoner is held in a prison managed under contract. The chief executive remains ultimately accountable for the acts or omissions of the contractor. This will drive a rigorous performance management regime. Contractors’ performance will be regulated and monitored through the use of prison monitors and the rigorous reporting requirements imposed by this legislation.

Prisoners are always under the Chief Executive’s charge. The Government, through the Department, is accountable to, and for, prisoners in privately managed prisons. The Chief Executive must also ensure that prison management is conducted in accordance with the corrections system’s purposes and guiding principles.⁸⁷ The Government aims to ensure contractors’ compliance through monitoring and reporting.

(c) Accountability Mechanisms

The regime establishes mechanisms for the Government to oversee contractors’ treatment of prisoners and monitor contractors’ compliance with human rights standards. Section 199D of the Principal Act sets out self-regulated reporting requirements for

⁸³ Sections 199(1) and 199(2)(d).

⁸⁴ Section 199(2)(b).

⁸⁵ Section 199(2)(d).

⁸⁶ (24 March 2009) 653 NZPD 2025.

⁸⁷ Corrections Act 2004, s 8(1)(a).

contractors. Under s 199E(1), the Chief Executive must appoint at least one monitor for each contract prison.⁸⁸ The role of prison monitors is to review and assess the management of private prisons.⁸⁹ Monitors are given free, unfettered access to the prisons at all times in order to carry out their responsibilities.⁹⁰ Under s 199E(2), the Chief Executive may also appoint a specialist monitor to investigate specific issues identified by the Department. Under ss 199E and 199G, monitors are required to report to the Chief Executive and make recommendations on any matters relating to the private prison. Theoretically, the privatisation regime provides overarching accountability for prisoners to the Government. The contractor administers prison management on a day-to-day basis, under a guiding legal framework and the supervision of a government department.

The Hon Richard Barker proposed Supplementary Order Papers to amend s 199 by authorising the offices of the Ombudsman and the Auditor-General to have access to all aspects of private prisons and prisoners as though the Department were running the prisons.⁹¹ The Ombudsmen and Auditor-General perform vital roles as independent scrutinisers of government agencies' conduct. The offices require complete and unrestricted access to information in order to carry out independent assessments.⁹² The Office of the Auditor-General does not have the power to audit private companies, so cannot audit private prisons as it would public prisons. The Office of the Auditor-General only has access to Department employees and information supplied by the contractor or the Department.⁹³ The Office of the Auditor-General can conduct inquiries using information available through the Department, but does not have direct access to information from the contractor. The Select Committee considered that these powers were sufficient because prison monitors would be appointed to report to the Chief Executive.⁹⁴ Since the Department is ultimately accountable for contractors' service delivery, the Select Committee considered that the Department would be responsible for ensuring contractors honestly comply with the terms of the management contract.⁹⁵

88 Sections 199E(1)(a) and (b).

89 Section 199E(3)(a).

90 Section 199F.

91 Supplementary Order Paper 2009 (87) Corrections (Contract Management of Prisons) Bill 2009 (20–2); Supplementary Order Paper 2009 (88) Corrections (Contract Management of Prisons) Bill 2009 (20–2); and (24 November 2009) 659 NZPD 8079–8081.

92 (24 November 2009) 659 NZPD 8117.

93 (24 November 2009) 659 NZPD 8134.

94 Corrections (Contract Management of Prisons) Amendment Bill (20–2) 2009 (select committee report) at 5–6; and (24 November 2009) 659 NZPD 8128.

95 Corrections (Contract Management of Prisons) Amendment Bill (20–2) 2009 (select committee report) at 5.

The Crimes of Torture Act 1989 gives effect to New Zealand's monitoring obligations under the OPCAT. The Office of the Ombudsman is a National Preventive Mechanism (NPM) for prisons under the OPCAT, fulfilling a vital role in safeguarding and championing prisoners' rights. The Office of the Ombudsman has two inspectors who regularly visit prisons and inspect the treatment of prisoners to ensure appropriate protective measures are in place. Under s 175 of the Principal Act, private prisons are to be treated as part of the Department for the purposes of the Ombudsmen Act 1975 and the Official Information Act 1982. The Select Committee concluded that the Office of the Ombudsman would maintain its ability to hear and investigate complaints in privately managed prisons.⁹⁶ Both Supplementary Order Papers were declined.⁹⁷

The Principal Act provides three forms of oversight for private prisons: self-reporting by contractors to the Department, general and specialised monitoring by Department-appointed monitors, and independent monitoring and investigation by non-Departmental bodies. Governmental oversight via contractors' self-reporting is dependent on contractors honestly accounting for prisoner complaints and incidents in their reports. Departmental monitoring is dependent on the continued aptitude and integrity of the appointed monitors and on monitors making recommendations to the Department where necessary. In addition to the Departmental monitors, private prisons are also subject to monitoring by generic Corrections Inspectors, who are appointed by the Chief Executive to regularly inspect prisons, examine prisoner treatment and investigate complaints.⁹⁸ Corrections Inspectors are independent from prison management, but report directly to the Chief Executive.

The contractors and the Department are legally obliged to comply with their respective oversight responsibilities. However, both parties are inherently compromised in providing independent oversight to private prison service delivery because they each have a vested interest in its success and in keeping up the appearance of success. Contractors risk harming their profits and market image through mismanagement, while failures of private prisons risk embarrassing the Government, painting it as compromising the welfare of its own wards for the sake of the public purse strings. For this reason, truly independent monitoring is crucial to ensure thorough quality control. However, the independent monitoring mechanisms under the Principal Act are not particularly robust. The Office of the

96 (24 November 2009) 659 NZPD 8128.

97 (24 November 2009) 659 NZPD 8104–8105.

98 Corrections Act 2004, ss 28 and 29.

Auditor-General is only required to undertake audits from time to time,⁹⁹ and the Official Information Act relies on requests by those seeking information.¹⁰⁰ The Office of the Ombudsman fills an important accountability gap. The Office of the Ombudsman may conduct investigations from complaints or of its own motion,¹⁰¹ and the Ombudsman-appointed OPCAT monitors regularly monitor all prisons.¹⁰² However, it is problematic that the Office of the Ombudsman and OPCAT monitors only have the power to issue reports.¹⁰³

(d) Delegation

The Amendment Act did not provide for the Chief Executive's powers and functions to be delegated to contractors. The Corrections Amendment Act 2013 inserted s 199AA into the Principal Act.¹⁰⁴ Under s 199AA, the Chief Executive may delegate his or her responsibilities under the Principal Act, subject to s 10. This enables contractors to "carry out the same custodial responsibilities, with the same lines of accountability to the chief executive, that are given to managers of public prisons".¹⁰⁵

Delegated powers and functions include ensuring the safe custody and welfare of prisoners; inquiring into treatment, conduct, abuses and complaints of prisoners; and exercising the powers and functions of a prison manager.¹⁰⁶ The powers and functions excluded by s 10 include powers relating to the length of prisoners' sentences and the conditions of their imprisonment, the appointment of monitors, and powers to review contractors. Such exclusions restrict contractors' ability to influence the allocation of punishment, limiting contractors' role to managing prison conditions rather than determining the conditions of imprisonment. Section 199AA also ensures that the Department has exclusive jurisdiction to review contractors' performance, as would be expected. No delegation affects the responsibility of the Chief Executive for the actions of contractors.¹⁰⁷ The Chief Executive remains responsible and liable for the contractors' use of the Chief Executive's powers and functions. However, the 2013 Amendment transfers more autonomy to

99 Public Audit Act 2001, s 15.

100 Official Information Act 1982, ss 12 and 13.

101 Ombudsmen Act 1975, s 13(3).

102 Crimes of Torture Act 1989, s 27.

103 Ombudsmen Act 1975, s 22; Crimes of Torture Act 1989, s 27.

104 Corrections Amendment Act 2013, s 42.

105 (26 February 2013) 687 NZPD 8187.

106 Corrections Act 2004, s 8.

107 State Sector Act 1988, s 41(7).

contractors in managing prisoners' treatment, which gives rise to a greater level of responsibility for the contractor and correspondingly a greater need for adequate scrutiny by the Government.

3 *Prison Contracts*

The Chief Executive is a party to two prison management contracts with Serco Group. Serco signed a contract to manage MECF in early 2011.¹⁰⁸ The term of the contract was ten years with an option for termination at six years.¹⁰⁹ SecureFuture signed a public-private partnership contract for the construction and management of ASCF in September 2012.¹¹⁰ The term of the contract is 25 years.¹¹¹

Both contracts comply with the legislative requirements under s 99. Both management contracts impose reporting obligations and requirements for incident reports.¹¹² The management contracts set out mechanisms for service assurance through monitoring and auditing provisions.¹¹³ The contracts establish general performance standards for the delivery of all prison services,¹¹⁴ and key performance indicators (KPIs).¹¹⁵ Failure to meet KPIs results in financial penalties. KPIs are intended to encourage excellence and accurately monitor contractors' performance.¹¹⁶ Performance standards are designed to appeal to private companies' primary motivator: profit. Contractors are encouraged to comply with contractual obligations to avoid financial penalties. However, rather than encouraging compliance with performance standards, financial incentive performance structures may only encourage contractors to downplay the seriousness of incidents or not report them at all.¹¹⁷

The payment schemes differ between management contracts. Serco is paid different fees for different aspects of service: service fees and performance fees.¹¹⁸ The maximum performance fee (linked to KPIs) available each year is only 10 per cent of the maximum possible service fee.¹¹⁹ The remaining 90 per cent of the maximum

108 Judith Collins "Mt Eden/ACRP contract manager announced" (press release, 14 December 2010).

109 Serco Contract, above n 63, cl 3.1.

110 Anne Tolley "Contract signed for new PPP prison at Wiri" (press release, 11 September 2012).

111 Agreement relating to the PPP at Wiri Men's Prison Project, between Her Majesty, The Queen in Right of New Zealand acting by and through the Chief Executive of the Department of Corrections and SecureFuture Wiri Limited Limited [SecureFuture Contract], cl 10.1.

112 Serco Contract, above n 63, cl 22; and SecureFuture Contract, above n 111, sch 15.

113 Serco Contract, above n 63, cl 21; and SecureFuture Contract, above n 111, cls 19 and 20.

114 SecureFuture Contract, above n 111, cl 14.3; and Serco Contract, above n 71, cl 8.1.

115 Serco Contract, above n 63, cl 8; and SecureFuture Contract, above n 111, sch 16.

116 *New Zealand's sixth periodic report under the International Covenant on Civil and Political Rights* CAT/C/NZL/6 (April 2015) at [198].

117 (17 November 2009) 659 NZPD 7732–7733.

118 Serco Contract, above n 71, sch 3, cl 10.1.

119 Schedule 3.

service fee is fixed, so not affected by Serco's performance.¹²⁰ Serco only faces losing 10 per cent of its total fee payment for substandard performance, which is not a strong incentive to strive for excellence.

SecureFuture is paid a monthly unitary fee and additional payments, such as incentive and innovation payments.¹²¹ SecureFuture is eligible for an incentive payment if it can show at least a 10 per cent improvement in recidivism rates compared to the Department's prisons.¹²² SecureFuture submits a monthly performance report stipulating the money owed for the preceding month.¹²³ KPI deductions are deducted from SecureFuture's monthly unitary payment,¹²⁴ but may constitute no more than the total amount of the monthly unitary payment.¹²⁵ Any additional payments, such as a bonus for reducing recidivism, are added on top.¹²⁶ Unlike Serco, SecureFuture's core monthly fee is at risk if there are performance failures. The financial incentive for contractors to meet KPIs is stronger when a higher proportion of the fees is linked to performance. This is either an incentive for strict compliance, or an incentive to hide failures.

The Government may issue performance notices for contract breaches.¹²⁷ The Government may also cancel management agreements following a specified number of performance notices or certain "termination events".¹²⁸ If the Department believes it needs to take action in connection with a contractor's management services, it might in certain circumstances step in to perform some or all of the services it considers necessary to take over from the contractor.¹²⁹

The Performance of Private Prisons in New Zealand

Serco managed MECF exclusively for just over four years. Serco met 80 per cent of its 37 performance targets from the second year of its contract.¹³⁰ The Department issued performance notices for failures on 55 occasions between August 2011 and mid-2015. Serco paid \$1.4 million in fines, but had seven notices withdrawn and some fines cancelled over the course of its management of MECF.¹³¹ Apart from

120 Schedule 3.

121 SecureFuture Contract, above n 111, sch 17.

122 Clause 17.1(b), sch 16, pt 4.

123 Clause 53.2.

124 Schedule 17, cl 1.1.

125 Schedule 17, cl 10.1.

126 Clause 53.2.

127 Serco Contract, above n 63, cl 25; and SecureFuture Contract, above n 111, cl 79.3.

128 Serco Contract, above n 63, cl 29; and SecureFuture Contract, above n 111, cl 77.

129 Serco Contract, above n 63, cl 28; and SecureFuture Contract, above n 111, cl 68.

130 Department of Corrections *Annual Report: 1 July 2014 – 30 June 2015* (2015) at 141.

131 Radio New Zealand, above n 62; Benedict Collins "Serco let off \$270k in fines – Minister" (15 September 2015) Radio New Zealand <www.radionz.co.nz>; and (15 September 2015) 708 NZPD 6592.

the fact that the vast majority of Serco's prison management payment is a fixed fee, the coercive impact of financial penalties is impotent if the penalties are withdrawn or forgiven. In December 2015, the Department announced that Serco's management contract would not be extended after March 2017.

Rates of prisoner escapes, self-harm and death were low under Serco's management.¹³² However, MECF had more assaults on prisoners and guards in its first three years being run by Serco than any other prison in New Zealand.¹³³ The rate of serious assaults also exceeded the acceptable performance standard contractually required in the 2014/15 year.¹³⁴ The UN Committee Against Torture expressed concerns at the rate of violence and assault at MECF.¹³⁵ The Ombudsman received 19 complaints against Serco between January and October 2015.¹³⁶ A series of serious incidents occurred at MECF in 2015, including alleged fight clubs, negligent treatment of a prisoner assaulted while in MECF and drinking and drug use inside the prison.¹³⁷ In July 2015, the Government stepped in to take control of MECF,¹³⁸ following allegations that prisoners were being mistreated.¹³⁹ The Chief Executive took personal responsibility for the alleged problems at MECF, while a Serco official acknowledged that some aspects of Serco's service delivery "did not meet the standards of the contract".¹⁴⁰ Although the Department has resumed control of the prison, some Serco staff remain, providing labour and transitional services at cost.¹⁴¹

Following a mediated settlement, Serco agreed to pay the Department \$8 million.¹⁴² Other details of the settlement are confidential. However, the amount is believed to include the cost of the Department resuming control of MECF after stepping in and Serco's unpaid penalties. There are three potential problems with a mediated settlement. First, the settlement is merely an agreement

132 Department of Corrections *Annual Report: 1 July 2014 – 30 June 2015* (2015), above n 130, at 141; and Department of Corrections *Annual Report: 1 July 2013 – 30 June 2014* (2014) at 130.

133 Anusha Bradley "Mt Eden assaults top prison table" (24 November 2014) Radio New Zealand <www.radionz.co.nz>.

134 Department of Corrections *Annual Report: 1 July 2014 – 30 June 2015*, above n 130, at 141.

135 Committee against Torture *Concluding observations on the sixth periodic report of New Zealand: Advance Unedited Version* CAT/C/NZL/CO/6 (June 2015) at [13].

136 Radio New Zealand "Alleged sexual assault at Serco prison" (3 October 2015) <www.radionz.co.nz>.

137 Radio New Zealand, above n 62.

138 Aimee Gulliver "Government takes over Serco-run Mt Eden prison" (24 July 2015) Stuff <www.stuff.co.nz>; Serco Contract, above n 63, cl 28.1; and Peseta Sam Lotu-liga "Minister Supports Corrections Decision" (press release, 24 July 2015).

139 Serco Contract, above n 63, cl 28.11(b); and Gulliver, above n 138.

140 Sam Sachdeva and Shane Cowlislaw "Serco to pay Government \$8m for costs of Mt Eden prison takeover" (4 April 2016) Stuff <www.stuff.co.nz>.

141 Gulliver, above n 138; and Isaac Davison "Serco slapped with \$8 million bill from Government" *The New Zealand Herald* (online ed, Auckland, 4 April 2016).

142 Radio New Zealand, above n 62.

between the contracting parties, and does not necessarily reflect the true value of loss and harm resulting from Serco's mismanagement. Secondly, because the details of the settlement are confidential, the public can never be sure of the fairness of its result. There is no means of independently reviewing the settlement or determining whether it adequately accounts for the cost of MECF's mismanagement. Finally, while it is appropriate that Serco pay the remainder of its outstanding performance notices now, there may have been no need for the Government to step in if performance notices and fines had been delivered promptly as issues arose.

The Corrections Inspectorate, with oversight from the Ombudsman, undertook an investigation into prisoner violence and mismanagement at MECF. There was a high volume of complaints from prisoners and their families.¹⁴³ Serco challenged the report in the High Court, claiming that the Corrections Inspectorate was not an independent investigator and that Serco had not been provided with all notes from interviews with prisoners.¹⁴⁴ Clark J held that the "investigation was fair and the report is without error".¹⁴⁵ The Department has released the 92 page report, which contains 35 findings in relation to prisoner fighting and management processes and 21 recommendations, most of which have been accepted by Serco.¹⁴⁶ One MECF inmate has brought a private action against Serco for mistreatment while under Serco's supervision. The prisoner is seeking punitive damages for gross negligence against Serco and bringing a claim under ss 9 and 23(5) of the BoRA.¹⁴⁷ This litigation is the first of its kind in New Zealand.

Serco was required to report regularly on prison matters, including the number and nature of prisoner complaints and incidents of violence, pursuant to s 199D(2) of the Principal Act, and to comply fully with the incident notification system.¹⁴⁸ However, the company did so less than 90 per cent of the time.¹⁴⁹ This is indicative of non-compliance — at least sometimes — winning out over compliance. Serco filed only seven serious harm reports, only one of

143 Radio New Zealand "Serco challenges Mt Eden fight report" (26 November 2015) <www.radionz.co.nz>.

144 Max Towle "Serco takes court action over Mt Eden fight report" (15 February 2016) Radio New Zealand <www.radionz.co.nz>.

145 *Serco New Zealand Ltd v Chief Inspector of Corrections* [2016] NZHC 1859, [2016] NZAR 1280 at [122].

146 At [40]–[41]; and Andrea Vance "Fight clubs an 'ordinary part of life' at Mt Eden prison, report says" (12 August 2016) One News Now <www.tvnz.co.nz>; and Simon Wong and Lisa Owen "Fight club reort shows Serco lacked control of Mt Eden prison" (6 October 2016) Newshub <newshub.co.nz>.

147 Amy Maas "Prisoner suing Serco-run Mt Eden prison" *The New Zealand Herald* (online ed, Auckland, 26 July 2015).

148 Serco Contract, above n 63, sch 5, app 1, cl 22.1; and SecureFuture Contract, above n 111, sch 15.

149 Department of Corrections *Contract Management of Prisons: Contracted Reporting Requirements — End of Quarter 3 Results: 01 July 2014 – 31 March 2015*, Performance Measure No 14.

which was filed during 2015.¹⁵⁰ The Department claims to have an informal agreement with WorkSafe New Zealand, New Zealand's workplace health and safety regulator, to report only injuries related to education and employment.¹⁵¹ In light of this agreement, the Department considers that neither it nor Serco is required to report serious harm arising from most prisoner-related incidents.¹⁵² Mechanisms designed to enforce reporting on issues of prisoner welfare have been sidestepped by informal agreements with a Government agency.

SecureFuture is providing monthly performance reports to the Department.¹⁵³ There have been allegations of unreported beatings,¹⁵⁴ and the sexual assault of a transgender inmate.¹⁵⁵ Management also placed an entire wing in lockdown following a drunken attack on staff by two inmates.¹⁵⁶ Although the Minister of Corrections was unconcerned about SecureFuture's performance, ASCF was included in Serco's investigation.¹⁵⁷ In June 2016, two additional special monitors were posted in ASCF to assist SecureFuture's "offender management approaches".¹⁵⁸

Accountability: Prisoners' Rights and Prison Privatisation

It is important to assess whether it is the Government or contractor that is accountable when prisoners' rights are violated and against whom affected prisoners can seek redress. Although a private company is managing the prison, the Government cannot divest itself of ultimate responsibility for prisoners' rights.¹⁵⁹ At no point did the National Government purport that contractors would be solely responsible for prisoners' rights. The Government maintained that accountability would remain with the Chief Executive under the Amendment Act. However, privatisation creates ambiguity in the relationship between the Government and contractors in upholding prisoners' rights. While broad declarations of ultimate governmental responsibility are attractive in the House of Representatives, some

150 Lisa Owen "Serco fails to report workplace accidents" (12 August 2015) Newshub <www.newshub.co.nz>.

151 Owen, above n 150.

152 Owen, above n 150.

153 Department of Corrections, above n 130, at 141.

154 Newshub "Serco denies Wiri prison problems" (1 October 2015) <www.newshub.co.nz>.

155 Paul Purcell "Sexual assault claim at Wiri Prison" (3 October 2015) Newshub <www.newshub.co.nz>.

156 Morgan Tait "'Drunk' prisoners attacked guards at Wiri prison, wing in lockdown" *The New Zealand Herald* (online ed, Auckland, 5 May 2016).

157 Radio New Zealand "Serco review to include Wiri Prison management" (28 July 2015) <www.radionz.co.nz>.

158 Craig Hoyle "Corrections deploys extra monitors to Serco-run prison" Newshub (20 June 2016) <www.newshub.co.nz>.

159 August Reimisch "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston (ed) *Non-State Actors and Human Rights* (Oxford University Press, Oxford, 2005) 37 at 82.

degree of responsibility will be lost to the contractor, and the nature of governmental responsibility will be altered, where the Government is no longer managing the prison. This raises the question of what being accountable for upholding prisoners' rights actually involves. The inquiry is not whether the state is accountable, but what accountability means for the state. There is also the issue of how to ensure that the accountable party is actually held to account, not just in recourse for rights violations, but in ensuring prisoners' rights are at the forefront of every aspect of service delivery on an ongoing basis.

The Government claims that the Amendment Act provided five safeguards for prisoners' rights in private prisons. First, according to the principles and purpose of the Principal Act, humane imprisonment is paramount to prison management. Secondly, offenders remain under legal custody of the Chief Executive at all times.¹⁶⁰ Thirdly, the contractor must report regularly on prison matters and prison monitors were established as overseers to report to the Chief Executive.¹⁶¹ Fourthly, prisoners have guaranteed access to the Ombudsman, who has independent oversight of all prisons, including private prisons.¹⁶² Finally, management contracts must include clauses about compliance with international and domestic human rights standards, and failures enable the Chief Executive to cancel the contract.¹⁶³ However, the Human Rights Committee repeatedly raised concern as to whether:¹⁶⁴

... privatization in an area where the State party is responsible for the protection of human rights of persons deprived of their liberty effectively meets the obligations of the State party under [ICCPR] and its accountability for any violations, irrespective of the safeguards in place.

The United Nations Committee against Torture recommended that the Government go further than legislating and contracting compliance obligations for contractors, urging the Government to *ensure* privately managed prisons comply with human rights laws, standards and obligations.¹⁶⁵ The committee found that the Government must ensure private prisons are closely monitored so that the Government's responsibility of upholding prisoners' rights is never impeded.¹⁶⁶ This supports the assertion that the Government's role as the guardian of

160 *Replies to the list of issues to be taken up in connection with the consideration of the fifth periodic report of New Zealand CCPR/C/NZL/5* at 17.

161 At 18.

162 At 18.

163 At 17.

164 *Concluding Observations of the Human Rights Committee*, above n 4, at [11].

165 Committee against Torture, above n 135, at [13].

166 *Concluding Observations of the Human Rights Committee*, above n 4, at [11].

prisoners' rights requires active protection above and beyond implementing compliance obligations on the contractor. Prison management is inherently linked with the need to safeguard prisoners' rights, so accountability is not just procedural; it has a social and moral dynamic. Governmental accountability serves a broader function in maintaining democracy.¹⁶⁷

V ANALYSING ACCOUNTABILITY IN NEW ZEALAND'S PRIVATE PRISON REGIME

Privatisation Defined

Since prison privatisation is merely the transfer of prison management (as opposed to prison ownership), proponents of privatisation have often drawn on the semantic distinction between "contract management" and "privatisation" of prisons to justify privatisation. "Privatisation" is a misnomer because, on a strict interpretation, privatisation is the transfer of ownership or control, not just administration.¹⁶⁸ The argument is designed to placate opponents by reassuring them that the state will always retain ultimate accountability for private prisons. Governments enacting privatisation law rely upon this argument.¹⁶⁹ Even the Amendment Act labelled privatisation as "contract management". The distinction is merely semantic. It has no bearing on the practical realities of private prison management. Using the term "contract management" over "privatisation" will not change the respective roles of the state and the contractor in prison service delivery. However, the distinction is useful insofar as it recognises the importance of governmental accountability in private prison discourse. Accountability is shown to be the pivotal factor in assessing prison privatisation, and moral standpoints inform the application of an accountability analysis. Both those for and those against privatisation rely on governmental accountability as a means of strengthening their stance. Those against prison privatisation argue that the Government must always retain full accountability for administering the corrections system, while those for privatisation argue that the Government never divests itself of

167 Jane Andrew "Prisons, the Profit Motive and Other Challenges to Accountability" (Working Paper 06/18, University of Wollongong, 2006) at 5.

168 Richard Harding "Private Prisons in Australia" (1992) 36 *Trends & Issues in Crime & Criminal Justice* 1 at 2 as cited in Lenny Roth *Privatisation of Prisons* (New South Wales Parliamentary Library Research Service, Background Paper No 3/04, July 2004) at 3.

169 Commission on Human Rights, above n 9, at [23].

accountability for the corrections system, regardless of who is administering it.¹⁷⁰ Paradoxically, the fact that responsibility ultimately remains with the state then becomes a reason to privatise, “because it emphasizes that accountability and protection of prisoners’ rights will not be compromised”.¹⁷¹ Government accountability is then, in many ways, a “nonissue”.¹⁷² The state may lessen its managerial role in prison administration, but it cannot lessen or avoid its responsibility for that prison administration.¹⁷³ The state must always maintain some level of involvement because “the state can contract out duties, but it cannot contract away responsibility”.¹⁷⁴ Generally, the state’s role continues as custodian.

Public Powers and Private Actors

1 Shifting Responsibilities

The fact that prison privatisation has taken hold across so many jurisdictions can be attributed, in part at least, to globalisation.¹⁷⁵ Yet privatisation is not entirely a result of globalisation — private involvement in penal administration predates economic liberalisation.¹⁷⁶ However, the re-emergence of prison privatisation took place in an era where globalisation was influencing the international market, domestic politics and the relationship between the public and private sectors.¹⁷⁷ In order to engage in the global economy, states had to introduce new mechanisms to encourage private management in all economic sectors.¹⁷⁸ Instead of the state operating as provider and protector, it became the domestic and global market’s facilitator.¹⁷⁹ Not only does economic globalisation thus encourage privatisation, it also changes the role of government in both providing for its citizens and protecting their interests. Privatisation

170 Elizabeth Chan “Prisons for Profit: The Corrections (Contract Management of Prisons) Amendment Act 2009” (2010) 16 *Auckland U L Rev* 303 at 304–306; and David Shichor *Punishment for Profit: Private Prisons/Public Concerns* (Sage Publications, California, 1995) at 88.

171 Charles H Logan *Private Prisons: Cons and Pros* (Oxford University Press, Oxford, 1990) at 184 as cited in Shichor, above n 170, at 90.

172 Charles H Logan *Private Prisons: Cons and Pros* (Oxford University Press, Oxford, 1990) at 184 as cited in Shichor, above n 170, at 88.

173 Harding, above n 17, at 266.

174 Shichor, above n 170, at 88.

175 Colin Fenwick “Private Use of Prisoners’ Labour: Paradoxes of International Human Rights Law” (2005) 27 *Hum Rts Q* 249 at 250–251.

176 At 251.

177 Alfred C Aman “Privatisation, Prisons, Democracy, and Human Rights: The Need to Extend the Province of Administrative Law” (2005) 12 *Ind J Global Legal Studies* 511 at 514–515.

178 Koen de Feyter and Felipe Gómez Isa “Privatisation and Human Rights: An Overview” in Koen de Feyter and Felipe Gómez Isa (eds) *Privatisation and Human Rights in the Age of Globalisation* (Intersentia, Antwerp, 2005) at 7.

179 At 7.

reduces the role of the state.¹⁸⁰ If the state is no longer the sole (or even primary) provider of services, its ability to, and means of, monitoring those services becomes muddled. The role of governments shifts from producing and delivering services to enabling and regulating them.¹⁸¹

The shift towards endowing private companies with public functions creates a new understanding of the public sphere, at odds with mutually exclusive public and private domains.¹⁸² In the context of prison privatisation, governmental accountability manifests itself differently because the contractor fills the management role usually held by the Government. The role of the Government is different. So too are the obligations for upholding prisoners' rights. Under ICESCR, the state is obliged to respect, protect and fulfil citizens' human rights, which is analogous to the purpose of the BoRA — affirming, protecting and promoting human rights.¹⁸³ In delegating its functions, the Government maintains its obligation to protect human rights, while contractors take on the role of respecting and affirming.¹⁸⁴ The contractor is required to comply with human rights obligations in delivering prison services. For example, contractors must provide the minimum standards stipulated in s 69 of the Principal Act. The Government's role as enabler and regulator, however, entails implementing and maintaining appropriate accountability mechanisms to ensure that rights violations do not occur (and that redress is available where they do).¹⁸⁵ Instead of resisting the fluid, evolving relationship between public and private sector positions, as the Israeli Supreme Court has done, it is more productive "to admit this dynamism and try to assess it on its own terms".¹⁸⁶ This assessment involves examining the facilitative mechanisms designed to ensure that, while the nature of the state's responsibilities may have changed, its level of responsibility has not.

180 At 13.

181 At 1.

182 Catherine M Donnelly *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (Oxford University Press, Oxford, 2007) at 227.

183 *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights* E/C.12/2011/1 (2011) at [3]; and New Zealand Bill of Rights Act 1990, long title, (a).

184 Philip Alston and Ryan Goodman *International Human Rights* (Oxford University Press, Oxford, 2013) at 1479.

185 Richard Harding *Private Prisons and Public Accountability* (Open University Press, Buckingham, 1997) as cited in Roth, above n 168, at 61–62.

186 Shamir, above n 52, at 23.

2 Recourse in New Zealand's Private Prisons

(a) Recourse under the BoRA

Only conduct that falls within the public domain can be assessed for rights consistency under the BoRA. The legislation applies to acts done by the three branches of Government under s 3(a) and acts done by “any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body pursuant to law” under s 3(b). Private companies are not excluded from the BoRA simply because they are private in nature. The circumstances, function exercised and nature of the conduct will determine whether private companies fall under s 3.¹⁸⁷

Contractors are deemed part of the executive branch under the Principal Act. Under s 176(1) of the Principal Act, for the purposes of s 3 of the BoRA, “acts done by staff members of a contract prison are to be treated as acts done by the executive branch”. This section makes the executive branch accountable for rights violations committed by contractors under s 3(a) of the BoRA. The contractors must at all times comply with the BoRA as if the private prisons were prisons managed by the Department and prison staff were employees of the Chief Executive.¹⁸⁸

It is appropriate that contractors are deemed part of the executive because their role is contracted with, and powers delegated from, the Chief Executive. Contractors are carrying out functions in lieu of the Department. A contractor who violates a prisoner's BoRA-protected rights may not only trigger a breach of contract by the contractor, but also a breach of law by the executive branch. This framework should operate so that prisoners always have recourse for rights violations against the Government under the BoRA. This is in keeping with the contractor's human rights compliance obligations and with governmental accountability for prisoners' rights.

It is unclear whether poor monitoring by the Government would amount to a breach of the BoRA. Section 23(5) imposes positive obligations on the state to safeguard the rights of prisoners.¹⁸⁹ Inadequate provision of minimum standards in prisons has amounted to a breach of s 23(5).¹⁹⁰ Given that the Government remains accountable for prisoners' rights and prisoners remain under the legal custody of the Chief Executive, it is likely that a Government that

187 Butler and Butler, above n 16, at [5.7.7]–[5.7.8] and [5.8.2].

188 Serco Contract, above n 63, cl 6.3(a)(iii); and SecureFuture Contract, above n 111, cl 31.2(a)(i)(B).

189 *B v Waitemata District Health Board* [2013] NZHC 1702, [2013] NZAR 937 at [73].

190 Butler and Butler, above n 16, at [20.12.7].

provides inadequate oversight could be in breach of s 23(5). Alternatively, prisoners could seek redress in tort, for negligent monitoring.

(b) Other Avenues of Redress

International instruments are notoriously ineffective for providing redress for rights violations, which is why a domestic remedy framework is crucially important.¹⁹¹ The inclusion of international standards in the BoRA and the Principal Act ensures that the treatment of prisoners should always align with international standards. However, the ability to treat actions of the contractor as acts done by the executive branch is deliberately limited to the “purposes of section 3” of the BoRA under s 176. Under s 199B(2) of the Principal Act, for the purposes of determining governmental liability for acts or omissions of contractors, neither the contractor nor the contractor’s employees or agents are to be treated as Government agents. Under s 179(b), contractors are not deemed to be employed in the service of the Government for the purposes of the State Sector Act 1988 merely because they have entered into a prison management contract with the Government. The contractors are independent contractors and no part of their contracted role constitutes either party as the partner, agent, employee, or officer of the other party.¹⁹²

The National Government has claimed that the Amendment Act “establishes clear rules around Crown liability”.¹⁹³ In the case of the BoRA, this is true. However, the Amendment Act did not state how prisoners, in instances of contractor mismanagement or rights violations, could access other forms of recourse, such as claims in negligence. There is no reason to expect that these actions would not be available for privately held prisoners, but it is left to assumption that prisoners would be able to seek redress against the contractor, and that the Government’s liability would be vicarious at best. The Government is not the principal for the contractors, and contractors are not employed in public service merely because they are party to a management contract, so prisoners must select their claimant carefully to ensure adequate standing. Wronged prisoners would likely bring an action against the contractor for negligent management; the Department for negligent monitoring or for breaches by the contractor in exercising the Chief Executive’s delegated powers and functions; and the Government for BoRA breaches, either by the Government or

191 de Feyter and Gómez Isa, above n 178, at 6.

192 Serco Contract, above n 63, cl 1.2(b) and (d); and SecureFuture Contract, above n 111, cl 7.3.

193 (24 March 2009) 653 NZPD 2026.

a contractor. However, claiming against the contractor for negligent mistreatment is not the same — in either principle or practice — as holding the Government to account for substandard prison management. A provision for holding the Government vicariously liable in certain instances would increase the Government's accountability for the contractors' conduct and would likely encourage the Government to monitor contractors more closely. Neither the Principal Act nor the Amendment Act provides recourse against the Department for its role in private prison mismanagement. This cannot be described as "sheeting home" accountability to the Department. Such assurances are hollow if there are limited means of actually holding the Government to account for prisoner treatment.

The same level of recourse should be available to both publicly held and privately held prisoners. It should not be more difficult for privately held prisoners to seek redress, even if that difficulty is merely selecting the right defendant. Breaches of prisoners' rights amount to a breach of contract. However, only the Government can claim against contractors for breach of contract, because prisoners are not party to the management contracts. The Government may claim against the contractor for breaches of the contract due to a violation of the prisoners' rights, but is not obliged to do so under the management contracts. Prisoners are often unable to advocate for themselves because they lack the resources or credibility to make a successful claim when their rights are violated.¹⁹⁴ If the Government were obliged to claim against contractors for prisoners' rights violations, prisoners would have a far greater means of recourse. Some remedies can only be claimed against public offices, such as judicial review or the tort of public misfeasance. The Government should not be able to evade public law mechanisms of accountability by delegating prison management to a private company. The Principal Act should stipulate which forms of recourse are available to privately held prisoners against the Government.¹⁹⁵ If public law mechanisms are not appropriate, the Principal Act should provide for comparable alternatives.

(c) Indemnification

The Government is indemnified under the management contracts against any claims arising from the contractors' conduct for which the

¹⁹⁴ Cervin, above n 19, at 63; and Tartaglia, above n 33, at 1707.

¹⁹⁵ Michael Regan and Mohsen al Attar "Submission to the Law and Order Committee on the Corrections (Contract Management of Prisons) Bill 2009" at 2.

Government is held wholly or partially liable,¹⁹⁶ and any conduct resulting in damage to Government property.¹⁹⁷ The Government is also indemnified against any liability, loss, damages, costs or expenses it suffers as a result of a breach of contract or negligence by the contractor.¹⁹⁸ The management contracts indicate that the contractors indemnify the Government against BoRA claims, and against any liability, damages, costs or expenses incurred by the Government as a result of claims arising from prisoners' rights violations.¹⁹⁹ That the Government is indemnified against any claims or liability arising from the actions of the contractor indicates that the Government considers itself *prima facie* liable for contractors' actions — or that it may be held as such.

There is logic to Government indemnification against acts and omissions on the part of the contractor. Taxpayers should not be liable for the acts and omissions of contractors. However, if the Government remains liable for claims against contractors, there is a greater incentive for the Government to maintain comprehensive monitoring mechanisms.²⁰⁰ There is a risk that in being indemnified by contractors, the Government may be less incentivised to take responsibility for contractor mismanagement or rights violations and take a less rigorous approach to preventing such occurrences.

(d) Corporate Responsibility

An offshoot of the shifting public sphere is the increasingly powerful, influential role private companies have in providing for, and protecting the interests of, individuals.²⁰¹ When state powers are delegated to private companies — particularly core state powers, such as prison management — such companies become primary guarantors of human rights.²⁰² As a matter of reputation, contractors should have a financial interest, as well as moral and legal interests, in upholding prisoners' rights. A failure to account for prisoners' rights can prove costly. The MECF “fiasco” cost Serco \$10.1 million, and Serco Group's Asia-Pacific earnings have fallen two-thirds because of recent scandals in New Zealand and Australia.²⁰³ Although not a

196 Serco Contract, above n 63, cl 23.1(a).

197 Clause 23.1(b); and SecureFuture Contract, above n 111, cl 62.1(b).

198 Serco Contract, above n 63, cl 23.1(c); SecureFuture Contract, above n 111, cl 62.1.

199 Serco Contract, above n 63, cl 23.1(a) and (c); SecureFuture Contract, above n 111, cl 62.1.

200 Regan and al Attar, above n 195, at 2.

201 Felipe Gómez Isa “Globalisation, Privatisation and Human Rights” in Koen de Feyter and Felipe Gómez Isa (eds) *Privatisation and Human Rights in the Age of Globalisation* (Intersentia, Antwerp, 2005) 9 at 23.

202 Reinisch, above n 159, at 75.

203 Anusha Bradley “Serco lost \$10m after Mt Eden fiasco” (12 June 2016) Radio New Zealand <www.radionz.co.nz>; and NZCity News “Serco profit takes a beating” (26 February 2016) <chart.nzcity.co.nz>.

safeguarding mechanism on which the Government should rely, increased public scrutiny, politicisation and debate about prison privatisation has triggered greater social recognition of prisoners' rights.²⁰⁴ Heightened scrutiny of contractors is a way to review the supervising authority and can incentivise both contractors and the state to improve their performances.²⁰⁵ In Israel's prisons, torture, squalid facilities and overcrowding are well known. These conditions would not have been allowed under the extensive regulatory framework proposed for the private facility.²⁰⁶ Across-the-board improvements in prisoner welfare were genuinely possible as a result of privatisation in Israel. The Government believed New Zealand could benefit from the heightened scrutiny and tighter regulation of privatisation. After the incidents at MECF in 2015, public and parliamentary scrutiny of contractors and the Department were exceptionally high. Tighter regulation of contractors is inevitable, at least in the short term, and the Department stepping in was evidence of that. There is a fine line between teething problems and systemic failures, and the difficulty lies in ensuring tighter regulation of contractors' conduct continues to be implemented in a consistent fashion. At the very least, this level of scrutiny has made evading accountability an undesirable avenue for the Government.

Governmental Accountability

1 Accountability Mechanisms

Prisons are distinct from other public services, because they are about the performance of justice.²⁰⁷ Every exercise of a duty or discretion, every ordinary action by the prison manager, affects the welfare of the prisoners. Practical failures have ethical implications. The further prison management service delivery moves from the Government's ambit, the harder it becomes to monitor and control. A robust oversight regime is required to accommodate the Government ceding control, different from that applied to public prisons. The efficacy of the private prison regime is dependent on the quality of the oversight.²⁰⁸ The Government's failure to ensure that contractors uphold prisoners' rights is indicative of an accountability gap in the

204 Noel Whitty "Rights as Risk: Managing Human Rights and Risk in the UK Prison Sector" (Centre for Analysis of Risk and Regulation, Discussion Paper No 57, January 2010) at 8.

205 Medina, above n 46, at 712.

206 Harding, above n 22, at 141.

207 Robbins, above n 25, at 71.

208 John Rynne "Protection of Prisoners Rights in Australian Private Prisons" in David Brown and Meredith Wilkie (eds) *Prisoners as citizens: Human Rights in Australian Prisons* (Federation Press, Annandale, 2002) 131 at 151.

privatisation regime. Innovation and efficiency must extend to regulatory mechanisms in order to account for the innovation and efficiency anticipated from contractors.

Accountability must be approached holistically.²⁰⁹ There is no cure-all solution by which the Government can discharge its obligations, nor can the Government rely on the contractors acting appropriately or even being honest about their performance. Accountability cannot be achieved through a single mechanism or on a single instance; achieving accountability is an ongoing struggle and “depends upon numerous systems, processes and values”.²¹⁰

There are three forms of regulation available to the Government for safeguarding prisoners’ rights: constitutional and parliamentary mechanisms such as parliamentary debate; legislative and judicial mechanisms such as a detailed privatisation regime, legislative rights protections, and management contracts; and inquisitorial and administrative mechanisms including monitoring, reporting, independent investigation and performance standards.²¹¹ A model privatisation regime incorporates a range of accountability mechanisms geared towards ensuring routine compliance. New Zealand’s privatisation regime contains a range of different accountability mechanisms. However, a combination of factors — including inept supervision, deficient disclosures by contractors, repeated undermining of accountability mechanisms and a lack of independent regulation — means adequate accountability is eluding the public. It is an unfortunate contradiction that the Department deemed too inefficient and ineffective to administer prison management is now in charge of its oversight.²¹²

2 *Public Participation*

Public participation is an important element of prison privatisation. Contractors receive a large sum of taxpayer money and taxpayers are entitled to know whether any of their money is being misappropriated.²¹³ Transparency in the privatisation process is the only way to have meaningful public participation. It is also necessary for the Government to retain legitimate accountability.²¹⁴ There must be transparency in the tender process and management contracts, prison management must be transparent, and all relevant information

209 Chan, above n 170, at 305.

210 Harding, above n 17, at 309.

211 Rynne, above n 208, at 132.

212 Cervin, above n 19, at 66.

213 Tartaglia, above n 33, at 1708.

214 de Feyter and Gómez Isa, above n 178, at 2–3.

must be accessible to allow for independent, objective monitoring of prisons. Privatisation must not make oversight more difficult, because oversight is the means of holding the Government to account for prison management. Access to information allows the Government to hold contractors to account for their actions and it allows the public to hold the Government to account for the contractors' actions. Moreover, transparency goes some way to lessening the Government's accountability burden because it makes monitoring easier.²¹⁵

In New Zealand, the prison management tender process is confidential but, apart from those segments withheld for security reasons, management contracts are publicly accessible. The Government has stated that "[the] procurement processes need to concentrate on quality as well as price".²¹⁶ Management contracts must be presented to the House of Representatives within 12 days of being entered into, under s 199I(1) of the Principal Act.

Although many of the important contractual requirements are legislated, prisoners' rights are at risk and both the tender process and management contract negotiations might benefit from greater public participation.²¹⁷ There needs to be clearer procurement benchmarks around probity and price for contractors to ensure that service delivery will not be compromised in the name of economic efficiency.²¹⁸ Mediated financial settlements between the Government and contractors are not appropriate for settling performance notices. The primary contractual accountability mechanism should not be a matter for negotiation and should be a matter of public concern. Settlements undercut the transparency and rigour required for efficacy.

3 *Monitoring*

Monitoring plays one of the most meaningful roles in quality assurance for private prisons. Any benefits of private sector involvement are negated if contractors' conduct is not monitored and regulated.²¹⁹ In the United States, the Federal Government took the Inspector General's review, coupled with a decreasing federal prisoner population, as an opportunity to reclaim managerial responsibility for federal prisons.²²⁰ This is a reasonable and encouraging step, though not the only outcome for improved prison management. The review

215 Tartaglia, above n 33, at 1692.

216 Corrections (Contract Management of Prisons) Bill 2009 (20–1) (regulatory impact statement) at 8.

217 de Feyter and Gómez Isa, above n 178, at 2.

218 Harding, above n 17, at 295.

219 Rynne, above n 208, at 151.

220 Zapotosky and Harlan, above n 35.

itself recommended improvements to monitoring and oversight “to ensure that the contract prisons are, and remain, a safe and secure place for housing federal inmates”.²²¹ While the Government may choose to revert MECF back to state management in 2017, improvements to the current monitoring framework — apart from being imperative for ensuring compliance at ASCF for the duration of the management contract — could prevent further such mismanagement at MECF in the future. Diligent monitoring results in transparency and public participation, a regulatory regime that prevents abuse, and penalties for non-compliance.²²² However, monitoring is expensive and often unreliable, so diligence is not easily achieved.²²³ Contractors’ reporting requirements must be monitored to ensure contractors are fully disclosing information. All auditing and monitoring mechanisms available to the Government should be utilised. The Office of the Auditor-General should have complete, unfettered access to private prisons. Private prisons’ internal complaints systems should be monitored and audited as part of this process to ensure prisoners’ complaints are being dealt with appropriately under s 152(2) of the Principal Act.

(a) The Issue of Capture

Although Departmental monitoring is integral to supervising contractors’ performance, it does not necessarily ensure contract compliance. The Department is itself regulating its own contracted responsibility, which gives rise to a high risk of what Harding refers to as “capture”, or co-operation between contractors and Departmental monitors.²²⁴ Capturing occurs when monitors are co-opted by contractors to serve the interest of the industry over the welfare of prisoners. Capture is a failure of governmental accountability. Monitors are more likely to be captured if they are recruited from the same professional background as contractors, and when the Department to whom they report appoints them. The monitors’ goals and interest in seeing private prisons succeed aligns with the contractor and the Government, as opposed to prisoners or the public interest, so their objectivity is compromised.²²⁵ Captured monitors cannot be relied upon to honestly report on prisoner welfare. New Zealand’s regime is susceptible to capture because the executive appoints monitors. However, the Chief Executive is required to ensure

221 Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons, above n 34.

222 Gómez Isa, above n 201, at 22.

223 Cervin, above n 19, at 65.

224 Harding, above n 17, at 307.

225 Cervin, above n 19, at 65; and Roth, above n 168, at 62.

monitors are regularly changed, which the Government believed would prevent the possibility of capture.²²⁶ The Department's general attitude to compliance affects how monitors operate. The risk of capture would be decreased if the Department took a firmer stance on regulation.²²⁷ Stricter regulation policies would encourage greater accountability.

(b) Independent Monitoring

Departmental monitoring is not the same as independent auditing and should not be expected to serve such a purpose. The United Kingdom is renowned for having the premier monitoring and audit system, which can be attributed to two distinct mechanisms: autonomous inspectors and a specialist ombudsman.²²⁸ The United Kingdom established a non-statutory specialist ombudsman, the Prison and Probation Ombudsman (PPO), solely to investigate prisoners' complaints, because the standard ombudsman lacked the time and skill to effectively deal with prisoner complaints.²²⁹ The PPO investigates decisions and actions relating to the management, supervision, care and treatment of prisoners, and fatal incidents. The PPO reports on each investigation and the relevant authority must respond with the resulting action to be taken.

England, Scotland and Wales also have an independent Inspectorate of Prisons, who is independent from the prison service and reports to the Secretary of State for Justice. The Inspectorate has free, unfettered access to any prison. He or she is able to demand prison management documentation, has the right to bring recording equipment to prison visits, and may speak to prisoners, prison staff and management. The Inspectorate has "functional independence; and budgetary autonomy and control".²³⁰ Prison Inspectors visit prisons at least once every five years. Their reports are sent to the Prison Service and released publicly, increasing public accountability. After the Prison Service responds to the report, an action plan is established, to be implemented by prison managers. United Kingdom prisons have a high uptake rate for recommendations and an above-average implementation of recommendations.²³¹

226 Corrections Act 2004, s 199E(7); and (24 November) 659 NZPD 8109–8110.

227 Richard Harding *Private Prisons and Public Accountability* (Open University Press, Buckingham, 1997) as cited in Roth, above n 168, at 62.

228 Richard Harding "Regulating Prison Conditions: Some International Comparisons" in Joan Petersilia and Kevin R Reitz (eds) *The Oxford Handbook of Sentencing and Corrections* (online ed, Oxford, September 2012) at 11–12.

229 At 16–17.

230 At 12.

231 At 13.

Western Australia and New South Wales also have independent Inspectors of Custodial Services — similar to the Inspectorate of Prisons — who review, audit and comment on prison service delivery. These Inspectors maintain independence by reporting directly to Parliament. In Western Australia, prisons must be fully inspected at least once every three years and the Inspector makes unannounced and follow-up inspections as desired.²³² In New South Wales, prisons must be fully inspected at least once every five years.²³³

United Kingdom prisons have continued oversight from individual, independent monitoring boards (IMBs). IMBs must inform the Secretary of State about any concerns they have about the humane and just treatment of prisoners, and must report annually on how well prisons have met the requisite standards and requirements.²³⁴ IMBs are made up of independent volunteers, appointed by the Secretary of State, who have unrestricted access to monitor the daily operations of prisons two to three days per month. Prisoners may make confidential requests to members for resolving issues that have not been solved through conventional procedures. Members may be requested to oversee the management of acute incidents at the prison. Because it runs on a volunteer basis, the system is cost efficient and there is a lower risk of capture because reports are delivered to a cabinet official. In September 2015, Scotland also commenced an independent prison monitoring system, seeking volunteers to independently observe management practices and speak to prisoners on at least a weekly basis.²³⁵

New Zealand's independent monitoring mechanisms for private prisons are the offices of the Ombudsman and the Auditor-General, the OPCAT Subcommittee Against Torture, and the NPM. The Human Rights Commission is New Zealand's central NPM, but does not have inspection responsibilities. The model accountability regime is one where the public and private sectors are both "equally accountable to an independent body".²³⁶ This is not currently the case under New Zealand's privatisation regime. New Zealand's regulatory regime requires greater independent oversight.

The Ombudsman performs perhaps the most vital independent monitoring role under the current regime. However, prisoners' welfare

232 Inspector of Custodial Services Act 2003 (WA), ss 19 and 22; and Harding "Private Prisons", above n 17, at 319.

233 Inspector of Custodial Services Act 2012 (NSW), s 6.

234 The Prisons Act 1952 (UK), s 6.

235 David Strang "New Structure for Prison Monitoring in Scotland" (1 September 2015) Scottish Government Justice & Safety Blogs <<https://blogs.gov.scot>>.

236 Richard Harding *Private Prisons and Public Accountability* (Open University Press, Buckingham, 1997) as cited in Roth, above n 168, at 66.

is not the sole concern of the Office of the Ombudsman. The Government should consider instating a specialist ombudsman. If prison privatisation is to be a continuing feature of the New Zealand penal system, it is appropriate that there be an independent investigative body, whose sole interest is the welfare of prisoners and the safeguarding of prisoners' rights.

The Government should also consider implementing an independent monitor, modelled on other jurisdictions' prison inspectors. Prison inspectors have proven highly effective for auditing prisoner treatment. Inspectors should be appointed by, and directly accountable to, the Minister of Corrections. Inspectors should be entirely autonomous, and charged with undertaking announced, unannounced and cabinet-initiated inspections. At least initially, full inspections of private prisons may need to be undertaken more regularly than every three or five years. Independent monitors could be incorporated into the existing monitoring provisions in the Principal Act.

Finally, the Government should also consider establishing an IMB under the Principal Act. Because IMBs run on a volunteer basis, a robust mandate and training programme would be required for the board and its members if IMB reports are to be relied upon.

Implementing one of these independent monitoring mechanisms would go some way to improving accountability under the current regime. However, no single mechanism is a panacea: a combination of mechanisms is required for a thorough accountability regime. This will require the financial and administrative backing of the Government. But independent monitoring not only encourages contractors' compliance; it also lessens the Government's long-term administrative duties. Independent monitoring mechanisms are only effective with Governmental follow-through. If the Government is to implement additional monitoring mechanisms, it needs also to be committed to taking any necessary actions to rectify contractors' shortcomings. Although independent monitoring should encourage compliance, Government-imposed penalties and modifications must accompany non-compliance.

4 Management Contracts

Management contracts are the most comprehensive document in any private prison regime. They are the "conduit for ensuring prisoners' wellbeing", and the blueprint for enforcing compliance against both

contractors and the Government.²³⁷ Anything capable of being articulated in the contract should be specified in great detail.²³⁸

New Zealand's management contracts with Serco and SecureFuture are certainly both tomes. The contracts canvas the requisite areas but lack some mechanical clarity. Apart from referencing the Principal Act, the management contracts do not stipulate how recourse works in the event of a legislative or contractual breach, or detail the nature of the Government's role.

Vagueness makes it harder to deal with legislative and contractual breaches, and makes it harder to pin down governmental accountability. The management contracts have a largely quantitative focus for contractors' duties, focusing on contractors meeting KPIs and requisite standards of service provision. It is appropriate that the contracts are "output based"; it is important to enable contractors' innovative management.²³⁹

However, contracts should be prescriptive in expected outcomes, so that contractors' performance can be tangibly measured.²⁴⁰ If expectations are not explicit, there is less incentive for contractors to deliver on promised innovation or provide exceptional prison management services. Not only is it difficult for contractors to achieve that which is unknown, it is difficult for the Government to assess its efficacy.²⁴¹

The incentive payment structure under the SecureFuture contract sets out a formula for calculating SecureFuture's recidivism targets.²⁴² Service requirements are dealt with similarly under both management contracts. Under the SecureFuture contract, for each service category — such as assaults, bullying and intimidation; self-harm and suicide prevention; complaints; and staff misconduct — the contract outlines the processes by which SecureFuture must achieve certain ultimate aims.²⁴³ Under the Serco contract, each service outcome is outlined with detailed service obligations.²⁴⁴ The combination of service requirements (setting out principled objectives for each service category) and KPI targets (setting out numerical targets) should make outcomes clear for contractors.

237 Rynne, above n 208, at 135; and Tartaglia, above n 33, at 1741.

238 Richard Harding "Prison Privatisation in Australia: A Glimpse of the Future" 4 *Current Issues in Criminal Justice* 9 at 23 as cited in Paul Moyle, "Private Prison Research in Queensland, Australia: A Case Study of Borallon Correctional Centre" (1995) 35 *Brit J Criminol* 34 at 55.

239 Harding, above n 17, at 303.

240 At 304; and Richard Harding *Private Prisons and Public Accountability* (Open University Press, Buckingham, 1997) as cited in Roth, above n 168, at 63.

241 Harding, above n 17, at 302–303.

242 SecureFuture Contract, above n 111, sch 16, cls 16 and 17.

243 Schedule 14.

244 Serco Contract, above n 63, sch 2.

However, there could be better congruity between service outcomes and KPI targets. Under both contracts, contractors are obliged to submit a variety of reports, including monthly performance reports that relate to KPI targets, and statutory reports.²⁴⁵ Although the statutory reports require detail about some aspects of service provision, the prescribed reporting forms do not adequately account for all service outcomes.²⁴⁶ If reports required contractors to outline KPI incident levels as well as service requirement processes, there would be greater transparency in contractors' management processes, and service processes may be more tangibly aligned with service outcomes. For example, as well as listing the number of self-harm incidents or assaults each month, contractors could be required to detail the management processes implemented to address the issues.

Although management contracts are the most precise record of private prison management standards, they do not accommodate changing prison management needs or acute criminal justice issues — for example, the growing prison population and recognition of minority prisoners' interests. Given that management contracts extend over years or decades, prison management standards need to be dynamic enough to reflect changing Departmental concerns. Perhaps a “legislative override” provision could be inserted into the Principal Act, so that legal or policy changes necessary for the continued efficacy of private prison management can be overlaid into management contracts. This may help to counter the oft-vague, static nature of management contracts by creating more dynamism in both the statutory and contractual privatisation mechanisms and in the relationship between the Government and contractors. If management contracts were linked to overarching Department policies and goals, this may also lend greater clarity to contractors' service outcomes. It might also mean that management contracts' outputs could be more definitively expressed without becoming inflexible.

Contractual discipline mechanisms are important facets of governmental accountability. In the case of contractors not adequately discharging their management duties, the Government has the right to issue notices and fines, temporarily take over management, and cancel the contract. Cancellation is often unrealistic because it is expensive and would leave the Government without a service provider.²⁴⁷ Similarly, taking back control of the prison is generally only used in times of crisis. The experience with MECF suggests that awarding

245 *SecureFuture Contract*, above n 111, sch 15; and *Serco Contract*, above n 63, sch 5.

246 *SecureFuture Contract*, above n 111, sch 15, cl 5 and appendix E; and *Serco Contract*, above n 63, sch 5, cl 3 and appendix 3.

247 *Cervin*, above n 19, at 65.

bonuses and forgiving fines encourages and rewards non-compliance by the contractor. Withdrawing or forgiving fines undermines the severity of contractors' actions and weakens the Government's accountability for those actions.

Performance-related bonuses and deductions should always be made on a "pay-as-you-go" basis. Even a generous settlement cannot accurately reflect the fact that prisoners' welfare is at stake with contractors' mismanagement. The Department needs to take a firmer stance on regulation. Notices and fines should always be issued where required by the contract. Fines are the primary means of punishing contractors and incentivising compliance; they should seldom be withdrawn or forgiven. Performance-related remuneration should make up the significant portion of contractors' payment. The monthly remuneration model under the SecureFuture contract is preferable for allocating bonuses and deductions, because it requires regular consideration of contractors' performance. When combined with regular independent monitoring, for example through an IMB, contractors are hopefully encouraged to strive for excellence and deterred from deceit.

The Minister of Corrections has not commented on whether MECF will remain a privately run prison come April 2017 or if it will revert to state control. The Prime Minister, the Rt Hon John Key, has not ruled out Serco being able to tender for MECF's contract again.²⁴⁸ The Government has the opportunity to change the fate of prison privatisation in New Zealand. MECF would not have to remain under Departmental management in order to be managed correctly. However, if MECF (and ASCF) are to remain privately managed, there must be legislative and contractual changes made to the current privatisation regime. It is too late to remodel ASCF's contract, but a new MECF contract should be prescriptive in service outcomes. While flexibility of service processes is necessary to foster innovative management, service processes should be able to be monitored and have a tangible link to service outcomes. Both service processes and outcomes should be reported regularly to maintain transparency and encourage compliance. The contract should clarify the nature of the Government's role in prison privatisation, including the mechanics of redress for legal and contractual breaches. Any prospective changes to the legislative framework would need to be reflected in the drafting of future contracts.

248 Amelia Langford "PM won't rule out Serco as future operator" (10 December 2015) Radio New Zealand <www.radionz.co.nz>.

Administration Versus Allocation of Justice

The distinction between the administration and allocation of justice is a tenet of proper accountability.²⁴⁹ The contractor's role should be confined to administering the justice allocated by the state. This distinction largely counters the argument of core government responsibility where prisoners' liberty is not actually controlled by the contractor. For private companies, prisons are "customers".²⁵⁰ In order to maximise profits, contractors are incentivised to imprison more people, keep them imprisoned longer, reduce rehabilitative programmes and use their market influence to push hard penal agendas.²⁵¹

In New Zealand, contractors' fees are not contingent on the number of beds filled and SecureFuture is incentivised to improve rehabilitation because it is eligible for a bonus if recidivism rates fall. Contractors are not delegated the Chief Executive's "allocation" functions. For example, contractors have no influence on prisoners' security classifications and may not make parole applications for prisoners.

However, contractors may still affect the length of a prisoner's sentence through internal disciplinary decisions.²⁵² It is not possible to entirely separate the administration and allocation of justice when prisons are privately managed, but the distinction should be regulated as far as possible. The Department should decide in-prison discipline and penalties, sentence planning, prisoner transfers and all release decisions. Any of these discretions not controlled by the Department should be compulsorily reviewed by the Department to ensure consistency with prisoners' rights.

249 Richard Harding *Private Prisons and Public Accountability* (Open University Press, Buckingham, 1997) as cited in Roth, above n 168, at [7.2.1].

250 Harding, above n 17, at 316.

251 Price, above n 33, at 145; and Nassar and Newman, above n 29, at 3.

252 Andrew, above n 167, at 32.

VI CONCLUSION

Although prison privatisation under the 1994 Act was without scandal, privatisation since the Amendment Act has mirrored other jurisdictions' failures, confirming critics' fears. Private prison management has compromised service quality. That prisoners' rights have been so repeatedly compromised under private management is abhorrent and unacceptable. Resisting privatisation is perhaps futile but, more importantly, ineffective for safeguarding prisoners' rights. Contractors' failures have raised the public profile of both the essentiality of safeguarding prisoners' rights and the acceptable standards of prison service delivery.

Arguments against the Government's delegation of coercive powers are normatively baseless and pragmatically misguided. They overlook the powerful, non-delegable nature of governmental accountability. Regardless of how inadequately the Government performs its custodial role, it never divests accountability. No level of indemnity, self-reporting or delegation of duties can take away from the fact that prisoners remain in the legal custody of the Chief Executive at all times. The Government is the provider and protector of prisoners' rights under the BoRA regardless of whether or not it is the provider of prison services. Prisoners' rights should not fluctuate with political persuasion; prisoners' welfare should not be contracted to the lowest bidder.

Contractors clearly have a role in upholding prisoners' rights and should be held accountable for any failure to do so. When the Government decides to privatise prison management, it is obliged to actively uphold the rights of privately held prisoners. Its obligations go beyond drafting a competent legal framework. They require the Government to thoroughly and unrelentingly regulate prison management to ensure rights compliance for prisoners.

The current regime does have some positive accountability measures, but it also has critical deficiencies. Cracking down on the existing regulatory scheme and implementing additional mechanisms will take time and careful consideration, and will likely increase the Government's costs. However, adequate accountability mechanisms should not be treated as aspirational; they are a requirement for prison privatisation.

Cancelling management contracts is a costly and impractical solution to contractors' mismanagement. The Government must take a holistic approach to accountability, using a combination of different measures to tackle different facets of private prison management and

prevent rights violations before they occur. With the potential re-tendering of MECF next year, the Government is in the perfect position to critically analyse and address New Zealand's privatisation regime and make the alterations required for the regime to function appropriately. Regardless of whether the Government intends to re-tender MECF, the contract at ASCF is ongoing, and the privatisation regime must be addressed to better protect those prisoners' rights. The Government is in breach of its international and domestic human rights obligations to uphold and protect prisoners' rights if it cannot, or does not, adequately regulate New Zealand's private prison regime.