

LEGISLATION NOTES

The New Zealand Tax Reforms of 2010

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I INTRODUCTION

On 20 May 2010, the Finance Minister, the Hon Bill English MP, delivered his much-awaited Budget speech. With a focus on strengthening the economy and promoting long-term growth, he outlined significant changes to the tax system that were, according to him, “the most thorough and beneficial overhaul of the tax system in 25 years”.¹ Introduced under urgency,² the Taxation (Budget Measures) Act 2010 (the amendment Act) was assented to on 27 May 2010, amending various sections of the Income Tax Act 2007 (ITA), the Goods and Services Tax Act 1985 and the Tax Administration Act 1994. Key changes included personal tax cuts, a reduction in the company tax rate, an increase in the rate of Goods and Services Tax (GST) and changes to depreciation allowances. The reforms are fairly comprehensive in their coverage and are supposed to encourage saving whilst discouraging investment in property. This note discusses the policy issues and economic background that have led to this reform, and provides a summary of the main tax changes that result from the 2010 Budget and their implications.³

II POLICY ISSUES AND ECONOMIC BACKGROUND

New Zealand’s economy has been affected by significant events over the past few years, with a domestic recession preceding the international credit crisis and global recession in 2008 and 2009.⁴ The 2009 Budget was sombre in tone and focused on managing the recession’s impact on the

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1 Bill English “Budget Speech” (Wellington, 20 May 2010) located at (2010) The Treasury — New Zealand <www.treasury.govt.nz> [“Budget Speech”] at 22.

2 (20 May 2010) 663 NZPD 11066.

3 For an account of the Inland Revenue Department’s views on the amendments, see Inland Revenue Department “Taxation (Budget Measures) Act 2010” (2010) 22(7) Tax Information Bulletin 3.

4 See generally OECD *Economic Survey of New Zealand 2009* (OECD Policy Brief, April 2009) <www.oecd.org>.

economy: tax changes were not a significant feature.⁵ Following reports by the Treasury and the Tax Working Group (TWG), the 2010 Budget, in contrast, is a response to the findings that the tax system was no longer internationally competitive or conducive to economic growth, and was causing migration of skilled workers, capital and businesses.⁶

Tax Working Group

In mid-2009, the Government commissioned the TWG, a small, high-level group of experts, to identify and assess medium-term policy options for New Zealand's tax system.⁷ Their efforts culminated in their report *A Tax System for New Zealand's Future*, published in late January 2010.

This report recommended significant changes to the tax system, to rectify three fundamental flaws. First, the structure of the system was considered inappropriate, relying mainly on taxes that were harmful to growth,⁸ the Treasury reported that personal taxes made up 53 per cent of tax revenue, GST made up 21 per cent and company tax made up 17 per cent.⁹ The remaining nine per cent of tax revenue came from a range of other taxes, such as excises on petroleum, tobacco and alcohol, tariffs on imports and stamp duties.¹⁰ While New Zealand's reliance on personal and corporate taxes was not disproportionate when compared to other countries, other countries have lower tax rates that apply to all forms of personal income, but include a social security tax that applies only to labour income, namely wages and salaries. In effect, New Zealand taxed personal capital income (such as interest) higher than other developed countries, thus taxing savings more heavily.¹¹ Secondly, the system lacked coherence, integrity and fairness, with different tax rates across entities distorting taxpayers' decision making. This led to exploitation of the system to avoid paying higher marginal tax rates.¹² Thirdly, there were significant issues regarding the sustainability of the tax revenue base arising from perceptions that the system was unfair and uncompetitive, especially in comparison to Australia, New Zealand's closest economic neighbour.¹³

To remedy these issues, the TWG made various recommendations. One suggestion was to align the top personal, company and trust tax rates,¹⁴ but the group also considered improvements to the non-aligned

5 See English "Budget Speech" (Wellington, 28 May 2009) located at The Treasury — New Zealand <www.treasury.govt.nz>.

6 See *The Treasury Challenges and Choices: New Zealand's Long-term Fiscal Statement* (2009) at 25–29.

7 Victoria University "Victoria University to coordinate Tax Working Group" (press release, 8 May 2009).

8 Victoria University of Wellington Tax Working Group *A Tax System for New Zealand's Future* (January 2010) at 21–22.

9 *The Treasury Challenges and Choices: New Zealand's Long-term Fiscal Statement* (2009) at 26.

10 *Ibid.*

11 Victoria University of Wellington Tax Working Group, above n 8, at 23.

12 *Ibid.*, at 28.

13 *Ibid.*, at 33.

14 *Ibid.*, at 38–39.

system as another option, to increase coherence and fairness.¹⁵ The TWG recommended an increase in the GST rate to 15 per cent, although those earning lower incomes would need to be compensated for any rise.¹⁶ Several base-broadening measures to improve sustainability and offset any reduction in personal and tax rates were also considered. These measures included introducing a low-rate land tax of 0.5 per cent,¹⁷ taxing returns from capital invested in residential rental properties using a ‘risk-free rate of return’ method,¹⁸ removing the 20 per cent depreciation loading on plant and equipment, abolishing depreciation deductions for buildings and reducing the thin capitalisation threshold applying to foreign investment.¹⁹

Budget 2010

A fair and efficient tax system was one of six “drivers” that the Government believed were necessary to propel New Zealand’s economy forward. English identified that the changes to the tax system formed the centrepiece of the Budget.²⁰ In reforming the tax system, the Government set two criteria: fairness in substance and appearance (addressing the TWG’s second concern) and overall fiscal neutrality.²¹ Furthermore, English endorsed the TWG’s view that to create a fairer and more sustainable tax system it was necessary to shift the tax burden to less growth-damaging bases, reduce tax rates and remove tax preferences.²² In line with the focus on fairness and integrity, the Inland Revenue Department is to receive increased funding over four years to increase its audit and tax compliance activities.²³ Some changes that arise from the amendment Act and the Budget are detailed below.

III KEY CHANGES

Income Tax

One of the central changes implemented by the amendment Act was the cut to personal tax rates, directly affecting most New Zealanders. This follows the general international trend of falling top personal tax rates.²⁴

¹⁵ *Ibid.*, at 39–44.

¹⁶ *Ibid.*, at 45–48.

¹⁷ *Ibid.*, at 50–51.

¹⁸ *Ibid.*, at 52–54.

¹⁹ *Ibid.*, at 54–55.

²⁰ English “Budget Speech”, above n 1, at 21.

²¹ Bill English *Minister’s Executive Summary* (2010) located at The Treasury — New Zealand <www.treasury.govt.nz> at 2 [*Minister’s Executive Summary*].

²² *Ibid.*, at 6.

²³ See New Zealand Government “Tax integrity” 2010 Budget Tax Guide <www.taxguide.govt.nz>.

²⁴ Victoria University of Wellington Tax Working Group, above n 8, at 22.

With effect from 1 October 2010, the personal income tax rates have been reduced as follows:²⁵

- Income up to \$14,000 is now taxed at 10.5 per cent, down from 12.5 per cent;
- Income from \$14,001 to \$48,000 is now taxed at 17.5 per cent, down from 21 per cent;
- Income from \$48,001 to \$70,000 is now taxed at 30 per cent, down from 33 per cent; and
- Income over \$70,000 is now taxed at 33 per cent, down from 38 per cent.

In his speech, English noted that the new top tax rate of 33 per cent is aligned with the tax rate for trustee income, which remains unchanged at 33 per cent.²⁶ This addresses one of the key opportunities for exploiting the previous system. The previously unaligned system provided opportunities for tax planning (and arguably tax avoidance)²⁷ arising from the difference between the top marginal tax rate and the rate at which trustee income is taxed. In New Zealand, beneficiaries are liable for tax on their beneficiary income at their personal marginal tax rates,²⁸ whereas all trustee income is taxed at 33 per cent;²⁹ once distributions are paid out of trustee income, they are no longer taxable for beneficiaries.³⁰ The previous top marginal rate of 38 per cent left scope for assets to be transferred into trusts, where the trustee income derived from those assets could be paid out at 33 per cent, compared to the top marginal rate that would otherwise apply to the beneficiary taxpayer.

The new top marginal tax rate removes this opportunity, for the most part.³¹ The reduction in the company tax rate to 28 per cent also maintains the potential to use company structures to take advantage of the lower tax rate and imputation credit regime, reducing the effective tax paid.³² Nonetheless, the alignment with the trust and top personal tax rate is a step that removes the blatant opportunity for high-income earners to

25 Income Tax Act 2007, sch 2.

26 English "Budget Speech", above n 1, at 24.

27 See *Commissioner of Inland Revenue v Penny and Hooper* [2010] NZCA 231. (2010) 24 NZTC 24,287 [*Penny and Hooper*].

28 Income Tax Act 2007, ss HC 17 and CV 13.

29 *Ibid*, sch 1, part A.

30 *Ibid*, s HC 20.

31 An opportunity still exists to shift income to persons over 16 years (thus falling outside the scope of s HC 35 of the Income Tax Act 2007) earning under the top threshold of \$70,000, with students and pensioners being common examples. Section HC 35 provides that beneficiary income over \$1,000 that is derived by a minor beneficiary is taxable to trustees at 33 per cent.

32 For an example of such a structure, see *Penny and Hooper*, above n 27. The respondents had incorporated their existing orthopaedic practices; these were, in turn, substantially owned by their respective family trusts. Each of the respondents were 'employed' by the companies and paid a salary, which the Commissioner of Inland Revenue considered to be artificially low. The Court of Appeal found that the combined effect of the trust/company structure and salary level amounted to tax avoidance under s BG 1 of the Income Tax Act 1994.

shelter their income in trusts. As English stated, this should “improve the durability and integrity of the system”.³³

Companies and Savings

From the 2011–2012 income year onwards, the company tax rate is reduced from 30 per cent to 28 per cent.³⁴ In line with the TWG’s concerns about the competitiveness of New Zealand’s tax rates, English hoped that this reduction in company tax in line with the general global trend would make New Zealand a more attractive country for businesses, and reduce the incentive for multinational firms to divert profits away from New Zealand.³⁵

The thin capitalisation rules have also changed. These rules limit the use of debt between related parties, as debt is a means by which related parties can shift income to jurisdictions with more favourable tax rules. The thin capitalisation rules disallow interest deductions to the extent that the company’s debt percentage exceeds the higher of two thresholds. The first is if the percentage is greater than the prescribed “safe harbour” limit, and the second is if the debt percentage is more than 110 per cent of the debt percentage of the worldwide group.³⁶ The new “safe harbour” limit for gearing on foreign-owned investments will be reduced from 75 per cent to 60 per cent, applying from the 2011–2012 income year onwards.³⁷ The TWG had recommended this change, in order to broaden the tax base. According to the Treasury and Policy Advice Division of the Inland Revenue Department, this may also address concerns about the previous system distorting investment decisions, where an overly generous safe harbour encourages foreign multinationals to over-allocate debt, rather than equity, to New Zealand.³⁸

To encourage personal saving, the top tax rate for people investing through a Portfolio Investment Entity (PIE) also decreased from 30 per cent to 28 per cent on 1 October 2010.³⁹ This addresses the concern that savings are over-taxed in New Zealand and supports the Government’s stated intention of promoting productive saving and investment.

33 English “Budget Speech”, above n 1, at 24.

34 Income Tax Act 2007, sch 1, part A.

35 English *Minister’s Executive Summary*, above n 21, at 7.

36 Income Tax Act 2007, s FE 5(1)(b).

37 *Ibid*, s FE 5.

38 See Policy Advice Division of the Inland Revenue Department and Treasury *Budget 2010: Thin capitalisation rules* (tax policy report prepared for the Minister of Finance and the Minister of Revenue 2010) <www.treasury.govt.nz>.

39 Income Tax Act 2007, sch 6.

Goods and Services Tax (GST) and Working for Families Tax Credits

Another major change is the increase in the GST rate from 12.5 per cent to 15 per cent, effective 1 October 2010.⁴⁰ The GST rate applicable to long-term accommodation in commercial dwellings (such as hostels and rest homes) also increased, from 7.5 per cent to 9 per cent.⁴¹

In line with the TWG's suggestions, the rise in GST has been accompanied by compensatory measures to ensure that lower-income earners are not disproportionately affected by this change. The Family Tax Credit and Minimum Family Tax Credit entitlements were accordingly increased on 1 October 2010.⁴² However, from 1 April 2011 there will be a change to the eligibility calculation for Working for Families payments; families will not be able to use investment losses (including those from rental properties) to reduce their income and thereby gain eligibility.⁴³ This is part of the initiative to increase the integrity of the tax system, by denying higher-income earners assistance to which they would not normally be entitled.⁴⁴

The Family Tax Credit will continue to be automatically adjusted for inflation. However, changes to the abatement threshold — the point at which payments decrease, as the family earns more income — will be a discretionary policy decision for the government from 20 May 2010 onwards, rather than an automatic adjustment.⁴⁵ The previous two-part formula automatically indexed the Family Tax Credit to inflation, which gave higher-income families a larger proportional increase than lower-income formula. This change is expected to prevent this over-adjustment.⁴⁶

Depreciation Allowances

The TWG had suggested a number of technical changes to broaden the tax base and increase revenue, in addition to its discussion on the merits of introducing a land tax, capital gains tax and risk-free rate of return method of taxation. These technical changes included denying depreciation on buildings if evidence showed they did not actually depreciate, and removing the 20 per cent depreciation loading on new assets.⁴⁷ The Group noted support for the view that the latter distorted investment decisions.⁴⁸

English expressed the Government's concern that that many buildings

40 Goods and Services Tax Act 1985, ss 8 and 12.

41 *Ibid.*, s 10(6).

42 Income Tax Act 2007, ss MD 3 and ME 1.

43 *Ibid.*, s MB 3.

44 Inland Revenue Department "Taxation (Budget Measures) Act 2010" (2010) 22(7) Tax Information Bulletin 3 at 24.

45 Income Tax Act 2007, s MF 7.

46 See New Zealand Government "Working for Families changes" 2010 Budget Tax Guide <www.taxguide.govt.nz>.

47 Victoria University of Wellington Tax Working Group, above n 8, at 55.

48 *Ibid.*, at 54.

do not actually depreciate, and hence the previous system of allowing depreciation gave an unfair tax advantage to property owners.⁴⁹ From the 2011–2012 income year onwards, buildings with an estimated life of 50 years or greater (meaning virtually all buildings, other than structures such as greenhouses)⁵⁰ will have an annual depreciation rate of zero per cent for tax purposes:⁵¹ previously, the annual depreciation rate was set at three per cent (diminishing value method) or two per cent (straight line method).⁵² In general, depreciation reduces taxable income (and therefore the income tax paid) without an associated out-of-pocket expense, as it represents an allowance for the wear and tear on a fixed asset.⁵³ This change has particular significance to taxpayers that have invested in residential property using external finance: the investor is less likely to profit or breakeven without the annual depreciation deduction from their taxable income. English noted that the Budget continued the process of “shifting the economy away from borrowing, consumption and Government spending and back towards saving, investing in productive areas and exporting”,⁵⁴ and this appears to be one of the changes to promote productive investment.

In addition, English mentioned that the treatment of commercial building fit-out would be reviewed, to clarify the law on the split between buildings and separate assets, of which the latter would continue to be depreciable.⁵⁵ An officials’ issues paper was released in August 2010 covering both this issue and a proposed “grand-parenting” rule for depreciation loading on assets, where an asset would be eligible for depreciation loading if there was a commitment for its purchase or construction on or before 20 May 2010.⁵⁶ The latter issue arises as, following the TWG’s suggestion, the amendment Act removes the depreciation loading on new plant and equipment, which was initially introduced to encourage New Zealand businesses to invest in new capital equipment.⁵⁷ Section EE 31 of the ITA now provides that the 20 per cent accelerated depreciation previously claimable is no longer allowed for any binding contract for the acquisition or construction of assets entered into after 20 May 2010.

49 English “Budget Speech”, above n 1, at 24.

50 The meaning of “building” is discussed in the Inland Revenue Department’s interpretation statement “Meaning of ‘building’ in the depreciation provisions” (IS 10/02). Certain buildings that were treated as structures and were purchased on or before 30 July 2009 will continue to be treated as structures for tax depreciation purposes; these are considered ‘grandparent structures’ and are excluded from the new definition of “building” in s YA 1 of the Income Tax Act 2007.

51 Income Tax Act 2007, ss EE 31, EZ 13 and EZ 14.

52 Inland Revenue Department “General depreciation rates (IR265)” (September 2007) <www.ird.govt.nz> at 99.

53 See Inland Revenue Department “Depreciation (Business income tax)” (14 October 2004) <www.ird.govt.nz>.

54 English Minister’s Executive Summary, above n 21, at 1.

55 English “Budget Speech”, above n 1, at 25.

56 See generally Inland Revenue Department *Post-budget depreciation issues* (officials’ issues paper prepared by the Police Advice Division of Inland Revenue and the Treasury in August 2010).

57 Inland Revenue Department “Taxation (Budget Measures) Act 2010” (2010) 22(7) Tax Information Bulletin 3 at 16.

IV CONCLUSION

The changes introduced by the amendment Act represent a significant turning point for New Zealand's tax system. The Government has made use of the TWG's findings on the problems with the previous system by adopting some of their recommendations; the Budget goes some way towards addressing their concerns. First, the structure of the system has changed with the lowering of personal and company taxes and the increase in GST rate; this, combined with the reduction in PIE rates, also demonstrates the Government's objective of promoting productive saving and investment. Secondly, the top marginal tax rate is now aligned with the trust rate of 33 per cent, removing the opportunity for exploitation in this area that previously existed. This being said, some opportunities remain. For instance, there is still potential for income shifting practices in trusts to persons over 16 years old who earn under the top marginal threshold of \$70,000. Thirdly, the Government has somewhat addressed concerns about the sustainability of the tax base by increasing the GST rate and effecting changes to depreciation allowances that affect asset owners and property investors. It appears these changes also form part of the Government's initiative to incentivise 'productive' saving and prevent distorted investment decisions.

With such significant changes, the response has understandably been mixed. The initial response from tax specialists appeared positive, citing the changes as a step in the right direction and lauding the capacity to redirect the preference to invest in property.⁵⁸ This can be contrasted with those claiming the reform mainly resulted in benefits for the wealthy, with the Opposition labelling the reform "a tax swindle".⁵⁹ While GST (a regressive tax) has increased at the same time that company and top personal tax rates have decreased significantly, the Government has attempted to put compensatory measures in place such as through changing the Family Tax Credit system. In addition, these moves have closed some of the opportunities for exploitation that previously existed for the 'wealthy', such as the alignment of top personal and trust tax rates. Despite the Government rejecting some of the TWG's recommendations (especially those focused on taxing the property sector, such as a capital gains tax, land tax and risk-free rate of return method of taxing property), denying building depreciation expenses will significantly impact some property owners, who tend to have higher incomes. While these reforms are not

58 See for example NZPA "Budget 2010: Tax specialists impressed" *The National Business Review* (New Zealand, 21 May 2010) <www.nbr.co.nz>; "Budget 2010: Business reacts" *The New Zealand Herald* (New Zealand, 20 May 2010) <www.nzherald.co.nz>.

59 See David Cunliffe "Budget 2010 a tax swindle" *The New Zealand Herald* (New Zealand, 20 May 2010) <www.nzherald.co.nz>; Derek Cheng "Budget 2010: Average family loses \$55 a week – Goff" *The New Zealand Herald* (New Zealand, 21 May 2010) <www.nzherald.co.nz>; Matt McCarten "Brutal Budget wallops the poor, pampers the rich" *The New Zealand Herald* (New Zealand, 23 May 2010) <www.nzherald.co.nz>.

perfect, this author believes they are nonetheless realistic and embody a step forward for the economy, according with English's assertion that the Budget "continues to build a platform for a much more ambitious New Zealand".⁶⁰

⁶⁰ English "Budget Speech", above n 1, at 31.

***Prisons for Profit:
The Corrections (Contract Management of Prisons)
Amendment Act 2009***

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I INTRODUCTION

On 7 December 2009, the Corrections (Contract Management of Prisons) Amendment Act 2009 (the Act) sanctioned the privatisation of prisons.¹ This Act amended the Corrections Act 2004 (the Principal Act) to “allow competitive tendering for contracts by private-sector organisations to manage prisons”.² The Law and Order Select Committee received 51 written submissions on the subject; all but 4 were opposed to or had serious concerns about the Government’s proposal to privatise prisons.³ This note analyses the Act’s new framework for private incarceration, justifications for that framework, accountability issues and constitutional implications. The main controversy arising from this legislation concerns the transfer of the state’s coercive powers to private corporations and how this might impact on the state’s accountability for the delivery of prison services to the public.

II THE CORRECTIONS (CONTRACT MANAGEMENT OF PRISONS) AMENDMENT ACT 2009

Under the unamended principal Act, the Crown could not enter into a contract to manage prisons. The rationale behind this policy recognised that imprisonment involves one of the “state’s most highly coercive powers against individuals”.⁴ Further, the ability of the state to deprive a person of their liberty carries with it grave responsibilities to act with the utmost respect for human rights. It was thought that public accountability for the exercise of the state’s coercive powers could be best achieved through a government department (in this case, the Department of Corrections), which was directly accountable to a responsible Minister.⁵

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1 Corrections Act 2004, s 198.

2 Corrections (Contract Management of Prisons) Amendment Bill 2009 (20-2) (select committee report) at 1.

3 Law and Order Select Committee “Corrections (Contract Management of Prisons) Amendment Bill — Summary of Submissions” (1 July 2009).

4 (7 April 2004) 616 NZPD 12507.

5 *Ibid.*

The new Act removes the Crown's monopoly over prison management and enables collaboration with the private sector to achieve public objectives.⁶ The National Government's main justifications for this policy change were economic: it believed that allowing private companies to manage prisons will improve the efficiency and effectiveness of the New Zealand corrections system and that competition will lead to greater innovation.⁷ The Government insisted that the privatisation of prisons was consistent with the principles of the New Zealand corrections system, which are the maintenance of public safety and a just society, as well as the "safe, secure, humane and effective containment of prisoners".⁸

There are a number of important aspects to the new prison management scheme. The Chief Executive of the Department of Corrections remains responsible for all prisoners in New Zealand and accountable for their welfare.⁹ Under ss 199(2)(b) and (d) of the Act, contract-managed prisons must comply with the New Zealand Bill of Rights Act 1990 (NZBORA) and international obligations that apply to public prisons. Section 199B stipulates that the Crown is entitled to be indemnified by the private contractor if it is held liable for the conduct of the private contractor. Under s 199(1)(h), private contractors must also provide rehabilitative and reintegration programmes for prisoners. Section 199D establishes reporting mechanisms to enforce compliance with these legislative standards and special monitors will be appointed under s 199E to ensure that this occurs. The monitors report to the Chief Executive and can make any recommendations on any matters relating to a prison.¹⁰ In order to do this, the monitors must have free and unfettered access to all areas of the prison, all the prisoners and to prison records.¹¹

III ISSUES OF ACCOUNTABILITY

By far the most important concern with the privatisation of prisons is legal accountability. Although the Chief Executive of the Department of Corrections will still be accountable for the overall operations of a contract-managed prison, it may become more difficult to scrutinise and monitor the state's control over detainees. The state may also have greater opportunity

6 Corrections (Contract Management of Prisons) Amendment Bill 2009 (20-1) (explanatory note) at 1. Contract-managed prisons are not an entirely new phenomenon in New Zealand. From 2000 to 2005, the Auckland Central Remand Prison (ACRP) was privately managed under contract. When the ACRP contract for private management ran out in 2005, the Labour Government decided not to renew the contract, instead allowing management to revert to the public system. See Derek Cheng "Mt Eden Jail to be Handed Over to Private Sector" *The New Zealand Herald* (New Zealand, 11 May 2010) <www.nzherald.co.nz>.

7 (17 November 2009) 659 NZPD 7724.

8 *Ibid.*, at 7725.

9 *Ibid.*

10 Corrections Act 2004, s 199E(5).

11 *Ibid.*, s 199F(2).

to retreat from its responsibility to ensure that human rights are properly observed.¹² The extensive statutory powers that prison officers exercise over detainees provides an additional reason as to why prison management should be subject to the highest quality of oversight and management.¹³

Accountability is a particularly important concern for Opposition Members of Parliament. Labour members of the Law and Order Select Committee argued that prison privatisation would weaken the ability of parliamentarians, the media and the general public to hold a private contractor accountable in respect of corrections-based outcomes. Private companies cannot be scrutinised through the usual parliamentary processes such as a select committee inquiry and the use of parliamentary oral and written questions.¹⁴ Furthermore, the Office of the Auditor-General, which usually has unfettered access to all Government departments and agencies, has indicated that it would not be able to audit a private partner in a private prison management scheme and, therefore, it could not comment on the performance of a company.¹⁵ The Opposition also argued that the incarceration of citizens is a core Crown responsibility and therefore “should be under the direct control of the Crown through the Department of Corrections”.¹⁶

The public and private sectors may also have incompatible understandings of accountability. Public prisons are morally and financially accountable to taxpayers, whereas private prisons are legally bound to maximise profit for their shareholders.¹⁷ Although private contractors would also be accountable to the Department of Corrections, their overwhelming responsibility would still be to the owners of the businesses, and not to the prisoners themselves. The Green Party argued that privatising prisons would create perverse incentives for compromised service quality (such as lower staff-to-inmate ratios, fewer rehabilitative services and reductions in staff pay) in order to cut costs.¹⁸ Additionally, the primary safeguard provided by the Act — monitors who report to the Chief Executive — may not be entirely reliable sources of accountability. It has been suggested that these monitors might rely on information provided to them by the private contractors instead of conducting thorough investigations themselves.¹⁹

Jane Andrew argues that “public accountability is crucial to a democratic government’s ability to exercise its powers of restraint and punishment”.²⁰ However, accountability needs to be understood holistically. A technical discharge of the government’s responsibility to

12 Jane Andrew “Prisons, the Profit Motive and Other Challenges to Accountability” (2007) 18 *Critical Perspectives on Accounting* 877 at 882.

13 *Ibid.*, at 897.

14 Corrections (Contract Management of Prisons) Amendment Bill 2009 (20-2) (select committee report) at 7.

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*, at 11.

19 Jane Kelsey “Submission on the Corrections (Contract Management of Prisons) Bill 2009” at [20].

20 Andrew, above n 12, at 878.

the public is insufficient. The vulnerability of those incarcerated bestows a severe moral duty on those managing that incarceration.²¹ There is danger in defining accountability for private prisons in limited terms, focusing on cost-effectiveness and other economic performance measures, with the consequence that considerations of the ethical responsibilities of government and society to prisoners are almost entirely removed from debate.²²

In a submission to the Law and Order Select Committee, Professor Jane Kelsey argued that there lacked any statutory provisions recognising the government's ethical obligations towards Māori.²³ Despite the overrepresentation of Māori in prison populations, the Act does not include any references to the Treaty of Waitangi or its principles nor does it require engagement with iwi. Whilst iwi may submit tenders for prison management, there is no guarantee that Māori groups will succeed or that the successful contractor will be obliged to undertake "culturally safe" corrections regimes that Māori consider to be appropriate.²⁴ This could potentially leave Māori prisoners vulnerable in a private prison arrangement.

IV CONSTITUTIONAL RIGHTS IMPLICATIONS

Opponents of the privatisation of prisons also fear the negative impact of the scheme on prisoners' constitutional rights. It is important to recognise the wide-ranging effects that incarceration can have on a person's life: their freedom is restrained, their life path interrupted and their social and familial relations threatened.²⁵ Moreover, it may not be realistically possible to separate the sentencing part of the criminal justice process from the prison administration.²⁶ Arguably, prison officers exercise quasi-judicial powers in the sense that prison management has the ability to change the experience of that sentence significantly. For example, the length of a prisoner's sentence may depend on internal decisions in cases of alleged breaches of discipline.²⁷ Diminishing the state's accountability in situations where prisoners are vulnerable to having their rights infringed seems constitutionally unacceptable.

In 2009, the High Court of Justice in Israel declared by an eight-to-

21 *Ibid.*

22 *Ibid.*, at 884.

23 Kelsey, above n 19, at [25]–[27].

24 *Ibid.*, at [27].

25 Andrew, above n 12, at 881.

26 *Ibid.*, at 882.

27 *Ibid.*, at 897.

one majority that prison privatisation was unconstitutional.²⁸ It held that transferring authority for prison management from the state to a private contractor, whose aim is monetary profit, would seriously violate the prisoners' basic human rights to freedom and dignity. Indeed, the Court recognised the exceptionality of this case, admitting that it would not usually interfere in matters of economic policy, but that the gravity of the breach of constitutional rights in this situation justified the expansion of judicial review. The Court held that the state's monopoly over the use of force and particularly the right to put people behind bars was one of the most invasive powers of the state. Thus, when the state's power to incarcerate is transferred to a private corporation whose purpose is to make money, the act of depriving a person of his or her liberty loses its legitimacy. The dignity of prisoners is not valued when they are reduced to a "means of extracting profit". President Beinisch wrote that "efficiency is not a supreme value when the most basic and important human rights for which the state is responsible are at stake".²⁹

It is important to subject New Zealand's scheme for prison privatisation to the same constitutional scrutiny. New Zealand has obligations in domestic and international law to ensure the protection of prisoners' human rights, with human rights commitments under the NZBORA, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and other Cruel, Degrading or Inhuman Treatment and the United Nations Minimum Rules for the Treatment of Prisoners. Amnesty International Aotearoa New Zealand has recognised that the state "has [a] primary responsibility to respect, protect, fulfil and promote" these human rights.³⁰ In the context of prison management, the right to dignity and the freedom from torture and inhuman treatment are especially important.³¹ It is feared that the private management of the prisons system would diminish the state's accountability to meet these human rights obligations,³² because the state may no longer be directly responsible for the delivery of prison management services. However, the Act does subject the private partner to the controls under the NZBORA "as if the prison were ... managed by the

28 *Academic Centre of Law & Business, Human Rights Division v Minister of Finance* HCJ 2605/05. An English version of this case is not yet available. But see generally reports on this case: "[Cases] Prison Privatization Judged Unconstitutional by the Supreme Court of Israel" (2009) *Comparative Administrative Law* <blogs.law.yale.edu>; Tomer Zarchin "International Legal Precedent: No Private Prisons in Israel" *Haaretz* (Israel, 20 November 2009) <www.haaretz.com>.

29 "[Cases] Prison Privatization Judged Unconstitutional by the Supreme Court of Israel", above n 28.

30 Amnesty International Aotearoa New Zealand "Submission to the Law and Order Committee on the Corrections (Contract Management of Prisons) Amendment Bill 2009" at [7.0].

31 *Ibid.*, at [3.0] and [5.0].

32 See generally Amanda Reilly "Privatised Prisons and Forced Labour" [2009] NZLJ 247 at 248. Reilly argues that prison labour may raise policy and ethical challenges as it exposes prisoners to the risks of exploitation and abuse. In particular, the private management of prisons may affect New Zealand's compliance with the International Labour Organisation Convention (No 29) Concerning Forced Labour 1930. Work in prisons may not be supervised by a public authority, which could leave prisoners vulnerable as hired employees "at the disposal of a private entity".

department”³³. Presumably this would mean that the responsible Minister could be held liable in a court for breaches of the NZBORA by a private contractor.

Fittingly, the United Nations Human Rights Committee (UNHRC) has expressed concern over New Zealand’s move to privatise prisons.³⁴ In March 2010, the UNHRC questioned New Zealand’s decision to privatise an area where the state is responsible for ensuring that the protection of the human rights of persons deprived of their liberty effectively meets the state’s obligations under the ICCPR.³⁵ If the state decides to transfer some of those obligations to the private sector, the state must continue to hold itself accountable for any violation of them. The UNHRC advised that New Zealand closely monitor the delivery of private prison management to ensure that privatisation does not impede New Zealand’s responsibilities under the ICCPR.³⁶ Clearly, the international community recognises that New Zealand’s decision to implement the private management of prisons may potentially conflict with its human rights obligations.

V A TENTATIVE EVALUATION

The delegation of public functions to the private sector in the corrections system is a worldwide phenomenon. Burgeoning prison populations and the spiralling costs of correction systems have spurred many countries to adopt public–private partnerships. However, comprehensive constitutional safeguards are necessary to ensure the protection of prisoners’ rights in privatised prisons. Contractors should not subordinate fairness and dignity to financial considerations. If prisons are to be managed by private organisations, profitability incentives must be balanced with integrity of administration.³⁷

Finally, any analysis of the privatisation of prisons should be wary of limiting the debate in terms of the public–private dichotomy. Considering accountability issues within this binary framework is itself problematic because it does not critically explore the full set of options available, especially where neither the public nor the private sector can solve the problems of the current corrections system.³⁸ Robust debate should not be confined to who should provide the prison; rather, one must consider whether prison (or any other form of punishment) provides “a solution to

33 Corrections Act 2004, s 199(2)(b).

34 *International Covenant on Civil and Political Rights: Consideration of Reports Submitted by States Parties under Article 40 of the Covenant* CCPR/C/NZL/CO/5, UN Human Rights Committee, 98th sess (25 March 2010).

35 *Ibid.*, at [11].

36 *Ibid.*

37 Douglas Dunham “Inmates’ Rights and the Privatization of Prisons” (1986) 86 *Colum L Rev* 1475 at 1484.

38 Andrew, above n 12, at 884.

the social challenges that our societies face”.³⁹ There is room for fruitful collaboration between the public and private sectors so long as corrections policy is guided by public welfare and the prisoners’ dignity, and not simply by economic imperatives.

³⁹ *Ibid.*