

ANUSHA WIJEWICKRAMA

**THE LEGITIMACY OF PRIVATE ACTORS
WIELDING STATE COERCIVE POWER IN NEW
ZEALAND**

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States are increasingly conferring power upon private actors to perform traditionally public services. In New Zealand, this extends to private actors wielding state coercive power. This paper explores the accountability of private actors wielding coercive power, and therefore how legitimate devolution of power is to them. Transparency and effectiveness are also, more briefly, examined. Analysis reveals that if a private actor does not share key goals and values with its public sector counterpart, or with the instrument establishing the coercive power, moral hazard may develop as the actor seeks to pursue its own agenda at the expense of its obligations. Loss of legitimacy can result, particularly if actors appear to be morally culpable for ineffective use of state coercive power. Ultimately, interim, ongoing accountability mechanisms and robust transparency measures must be properly implemented, if legitimacy of the devolution of power to private actors is to be sustained.

Key words: *state coercive power; public-private partnerships; legitimacy, accountability*

I Introduction

Privatisation of what in today's world might be considered fundamentally public services is historically nothing new. On the international stage, for example, private mercenaries commonly formed militia to support nations' agendas in the Middle Ages, in the era of Dutch and British colonialism, in early colonial America and even today in the French Foreign Legion.¹ During the 19th century in North America and the UK, private companies frequently partnered with governments to create and operate large infrastructure projects.² What has changed, however, is the rise of the modern democracy, in which citizens increasingly expect to be kept informed, and consulted, about the uses of their taxes and the decisions of politicians they have elected. This has never been more true than now, with the ubiquity of the internet and the advent of social media enabling data to be disseminated in a fraction of a second, facilitating public participation and access to public information.

Today, once again, states are increasingly devolving "traditionally" public services to private actors. At times, this involves granting private actors state coercive powers. This raises a key issue of whether private actors are as accountable as public actors in their exercise of state

¹ Laura A Dickinson "Public Values in a Privatised World" (2006) 31 Yale JInt'l L 383 at 394.

² Janet McLean "Convergence in Public and Private Law Doctrines – the Case of Public Contracts" [2016] NZ L Rev 5 at 5.

coercive powers, and if so whether that accountability is sufficient to sustain the legitimacy of private actors being granted these powers. I argue that if private actors have divergent values and goals from their public actor counterparts, or from the legislation establishing the coercive powers, interim and ongoing accountability measures become vital for the proper exercise of those powers. In a related manner, private actors with divergent goals must be transparent and effective in using their powers, if legitimacy is to be sustained.

I begin by defining state coercive power and showing why legitimacy is imperative for its use. I then outline the interplay between legitimacy and three key public law values that support it, namely accountability, transparency and effectiveness. Next, I describe specific examples of public and private actors wielding state coercive power in New Zealand. They are the Department of Corrections (Corrections) and private prison operator Serco exercising powers under the Corrections Act 2004, and the Ministry for Primary Industries (MPI) and the Royal New Zealand Society for the Prevention of Cruelty to Animals (RNZSPCA) exercising powers under the Animal Welfare Act 1999.

I then analyse accountability in depth to demonstrate that all four actors share strong, formal accountability mechanisms. Problems can arise, however, in the form of moral hazard, whereby an actor is encouraged to take risks because it is shielded from consequences. This is particularly true when a private actor's profit motive is at odds with the purposes of the relevant legislation establishing its state coercive power, or with the goals of its public sector counterpart. I also more briefly analyse the transparency and effectiveness of the four actors, and show how poor transparency and ineffectiveness can erode legitimacy.

I conclude that if private actors have goals and values that diverge from those of their public actor counterparts, or from the instruments establishing the relevant state coercive powers, moral hazard becomes much more likely. In such cases, greater transparency is required in order to prevent accountability mechanisms being undermined. A private actor who is ineffective in a morally culpable manner will also likely lose legitimacy, albeit that erosion of legitimacy is possible for all ineffective actors. Most importantly, in the face of divergent goals and values, highly diligent implementation of interim or ongoing accountability mechanisms is vital in order to sustain the legitimate devolution of power to private actors.

II *State Coercive Power: Key Themes*

State coercive power can be defined broadly as the legitimised capability of a nation to force actors (individuals, organisations or other states) to act according to its purposes, backed by threat of physical force or sanction. So fundamental to a nation is its coercive power that political economist Max Weber famously defined a state as a “human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory”.³ Importantly, Weber added that physical force may only be legitimately assigned to other institutions or individuals as far as permitted by the state.⁴ Sociologist Egon Bittner adds to this understanding of coercive power by noting that it need not *require* the use of force or sanction, rather the coercive element lies in the background *threat* that the same are authorised.⁵ In his studies of policing, for example, Bitter demonstrated that the police do not need to make arrests in order to perform their various functions, however the underlying threat that arrest is possible underpins their performance capabilities.⁶ State coercive power, then, is at its most basic the ability of states to legitimately use force or sanctions in the pursuit of their own aims.

States can of course use their coercive powers on the international stage, for example to wage wars, defend themselves against attack, or impose economic sanctions on other nations. This paper however will focus on domestic state coercive power, which includes powers to enforce legislation and regulations. Key themes in its use include legitimacy, and the supporting public law values of accountability, transparency and effectiveness. The interplay between these themes is briefly explained below, before the latter three supporting values are individually examined in later sections.

A *Legitimacy*

³ Max Weber “Politics as a Vocation” in Hans H Gerth and C Wright Mills (eds) *From Max Weber: Essays in Sociology* (Oxford University Press, New York, 1946) 77, at 78 as cited in Christopher W Morris “State Coercion and Force” (2012) 29 Soc Phil & Pol’y 28 at 32–33.

⁴ At 33.

⁵ Egon Bittner *The Functions of the Police in Modern Society* (Oelgeschlager, Gunn & Hain, Cambridge (Mass), 1979), at 36–47.

⁶ At 36–47.

Legitimacy is key to state coercive power – indeed from Weber’s definition legitimacy informs the very construction of the nation-state. Legitimacy in this context has been ably defined by political analyst Alan Cromartie, who explains that “[a] given command has legitimacy to the extent that it secures willing obedience even where it conflicts with the obvious interests of those commanded”.⁷ In modern representative democracies, legitimacy is rooted in the reciprocity between citizens consenting to follow agreed-upon rules in return for the state providing organisation and security.⁸ States can – and do – devolve their powers to public and private actors, and as long as those actors “remain harnessed” to the larger social-state aims, such devolution remains legitimate.⁹ As political scientist Jonathan Hearn articulates, “[t]hus a vast ‘network’ of partial power relations, locally legitimised, add up to a strong system, with considerable legitimacy distributed along its sinews...”.¹⁰ Legitimacy is thus a key public law value supporting the state’s power to coerce.

Legitimacy itself requires the democratic state to display several values in conducting its affairs, in order for citizens to trust it and continually consent to its impositions on their lives. One such value is accountability, which requires that the state is answerable to citizens for its decisions and actions. Other key values include but are not limited to: state adherence to the rule of law and principles of natural justice; separation of powers; participatory governance; effectiveness; and transparency.

It follows that if state coercive power is devolved to various actors, those actors should display most or all of the public law values displayed by the state, in order for the “networked system” of the state to remain legitimate. In other words, if actors using state coercive power do not display the above values, citizens’ trust in the state, which informs its legitimacy, will be eroded. The extent of such erosion will depend on the importance in the minds of the public of the rule establishing the coercive power, the extent of the departure from the key public law values, and the timeliness and effectiveness of any subsequent steps taken to correct that departure. A poorly enforced law regulating littering, for example, is unlikely to destabilise a state. It may, however, erode the legitimacy of that particular law, which could lead to people

⁷ Alan Cromartie “Legitimacy” in Richard Bellamy and Andrew Mason (eds) *Political Concepts* (Manchester University Press, Manchester, 2003) 93 at 93.

⁸ Patrick H O’Neil *Essentials of Comparative Politics* (5th ed, W W Norton and Company, New York, 2015) at 34; Jonathan Hearn “The Strength of Weak Legitimacy: A Cultural Analysis of Legitimacy in Capitalist, Liberal, Democratic Nation-States” (2011) 4 *Journal of Political Power* 200.

⁹ Hearn, above n 8, at 203.

¹⁰ At 203.

ignoring it as it is effectively unenforced. By comparison, abuse of a state coercive power is likely to be highly significant to citizens. Upholding public law values in the devolution of state coercive powers to private actors is therefore a key issue for the continued legitimacy of the rules generating those coercive powers.

B Three Public Law Values Supporting Legitimacy: Accountability, Transparency and Effectiveness

Accountability, transparency and effectiveness comprise three important mainstays of legitimacy. As noted above, I will focus on how the public law value of accountability is upheld when private actors are granted state coercive power. I have chosen this value because it is inextricably linked with legitimacy in a democratic society. If citizens are to understand and accept that an actor justifiably uses coercive power against some of their number, that actor must be answerable for its actions and decisions, and must face consequences for any misuse of its powers. Otherwise, democratic systems will kick in, because misuse of state coercive power will likely be a significant public issue. For example, questions might be asked in Parliament, citizens might protest, or a government might be voted out in the next election. I have also chosen accountability because, unlike the rule of law and separation of powers for example, it is a value which private actors may potentially choose not to uphold. Examination of accountability is therefore important when considering how to steer private actors away from moral hazard when granting them state coercive powers.

I will also touch briefly on how the public law values of transparency and effectiveness are upheld in the devolution of state coercive functions to private actors. Like accountability, these values are closely intertwined with legitimacy. Transparency is a necessary element of accountability, because holding an actor to account for its decisions and actions requires access to information about those decisions and actions. Effectiveness is required for legitimacy, because if actors are ineffective in wielding state coercive powers, obvious questions will arise as to whether those powers need to exist at all, whether by contrast they need to be actualised differently, and even whether the actor is the correct actor to be using those powers. These three values, accountability, transparency and effectiveness, are next explored more in-depth through two New Zealand scenarios involving coercive powers under the Animal Welfare Act 1999 and the Corrections Act 2004.

III Examples of State Coercive Powers in New Zealand

Two pieces of legislation in particular bestow state coercive powers on specific public and private actors in New Zealand. They are the Animal Welfare Act 1999, which aims to ensure that animal owners properly care for their animals, and the Corrections Act 2004, which among other things sets out requirements for the treatment of inmates of New Zealand's prisons. The coercive powers in each piece of legislation are strong and extensive. Therefore, actors must be accountable for the use of those powers if that use is to remain legitimate. The coercive powers of each statute, and the actors wielding those powers, are detailed in this section.

A The Animal Welfare Act 1999: MPI and the RNZSPCA

The Animal Welfare Act criminalises the inhumane treatment of animals and the failure to properly care for them or attend to their needs. This Act delineates three categories of inspectors: MPI inspectors, police officers, and inspectors appointed after being recommended by an organisation approved by the Minister for Primary Industries.¹¹ The RNZSPCA is currently the sole approved organisation.¹² Police normally refer animal welfare complaints to MPI or the RNZSPCA, except in emergency situations.¹³

Animal welfare inspectors exercise wide-ranging coercive powers under the Act. For instance, under section 127(1) inspectors may enter any premises or stationary vehicles, aircraft or ships to inspect any animal at any reasonable time (without a warrant unless the premises are a dwelling house or marae). Inspectors may obtain search warrants to search any premises, including dwelling houses or marae, if there are reasonable grounds to believe an animal is suffering or will suffer, or a breach of the Act has been or is being committed.¹⁴ Police have further powers to stop moving vehicles if they have reasonable grounds to believe an animal is suffering or will suffer unreasonably or unnecessarily.¹⁵ All animal welfare inspectors using section 127(1) have the power take photographs or other records of anything relevant to or seen

¹¹ Animal Welfare Act 1999, s 124.

¹² Ministry for Primary Industries "Animal Welfare" (3 July 2017) <www.mpi.govt.nz>.

¹³ Danielle Duffield "The Enforcement of Animal Welfare Offences and the Viability of an Infringement Regime as a Strategy for Reform" (2013) 25 NZULR 897 at 902.

¹⁴ Animals Welfare Act, s 131.

¹⁵ Section 127(2).

during an inspection.¹⁶ Inspectors exercising their s 127(1) powers may also seize animals, by force if required, if they reasonably believe that the animal has been harmed, is at risk of harm, is not being adequately provided for, or that its owner is disqualified from owning an animal.¹⁷ Inspectors may also issue compliance or infringement notices; and may conduct legal proceedings against defendants.¹⁸ Finally, inspectors may destroy an animal who cannot reasonably be treated and who would otherwise suffer unreasonably or unnecessarily, even if its owner does not agree to its destruction.¹⁹

These are strong, extensive coercive powers. The language throughout the Animal Welfare Act is the language of ownership, consistent with historical conceptions of animals as property (albeit that the Act does now recognise animals as sentient beings following amendment in 2015).²⁰ The Act thus not only empowers inspectors to enter premises and vehicles, it authorises them to inspect, seize and destroy property. Property rights are some of the strongest rights in law, capable of being enforced against all the world, either by the property owner themselves under civil laws, or by the state via the criminal sanction.²¹ Moreover, as noted above, inspectors are empowered to use force if required to seize property. Animal welfare inspectors, therefore, are able to exercise considerable state coercive powers.

MPI is a government organisation tasked with “growing and protecting New Zealand” by facilitating primary industries.²² As a function of this core role, it administers and enforces the Animal Welfare Act. MPI has 17 trained animal welfare inspectors with coercive powers under the Act.²³ Under a memorandum of understanding (MOU) with the RNZSPCA, MPI almost exclusively handles animal welfare issues relating to large farms, while the RNZSPCA handles issues with small farms and companion animals.²⁴ MPI’s 17 inspectors must thus cater for tens

¹⁶ Section 127(4A).

¹⁷ Section 127(5).

¹⁸ Sections 156C, 162 and 168.

¹⁹ Section 138.

²⁰ Animal Welfare Amendment Act (No 2) 2015, s 4.

²¹ See FH Lawson and Bernard Rudden *The Law of Property* (3rd ed, Oxford University Press, Oxford, 2002) at 64–71; Richard Calnan *Proprietary Rights and Insolvency* (Oxford University Press, Oxford, 2010) at 44; Ben McFarlane *The Structure of Property Law* (Hart Publishing, Oxford, 2008) at 132.

²² Ministry for Primary Industries “Our Strategy 2030 – growing and protecting New Zealand” (23 October 2015) <www.mpi.govt.nz>.

²³ “MPI Enforcement Under Animal Welfare Amendment Act” (25 April 2016) (Obtained under Official Information Act 1982 Request to the Ministry for Primary Industries); Jody O’Callaghan “Enforcement of New Zealand’s Animal Welfare Act ‘inadequate’” *The Press* (online ed, Christchurch, 14 May 2017).

²⁴ Duffield, above n 13, at 902–903.

of millions of animals, a dire situation that some have described as a “major problem”.²⁵ It remains however the primary enforcer of the Act for large farms.

The RNZSPCA is a private charity whose stated mission is to “advance the welfare of all animals in New Zealand”.²⁶ It is the only non-government organisation enforcing the Animal Welfare Act.²⁷ As noted above, the charity enforces the Act with respect to domestic pets and small farms.²⁸ In practice, this means the charity undertakes “the vast majority” of animal inspections in New Zealand (around 97% in 2010).²⁹ The RNZSPCA has 75 certified inspectors.³⁰ It costs the charity between \$7m and \$9m annually to fund its inspectorate, but it receives only \$390,000 in MPI funding (which must be spent on small-scale livestock operations).³¹ The great majority of its income thus comes from private donations and grants.³²

The RNZSPCA is the only charity required to enforce a criminal statute in New Zealand.³³ This situation arose for historical reasons – the SPCA was established in England in 1824, five years before England had a central police force, thus it began investigating and prosecuting animal offences from necessity.³⁴ The charity plays similar enforcement roles in the UK, Australia, New Zealand and Canada, arising from those nations’ joint Commonwealth backgrounds.³⁵ The police do prosecute offences under the Animal Welfare Act, but usually refer cases to the RNZSPCA with the exception of gross breaches of the Act.³⁶ Thus, the RNZSPCA is the main prosecutor of offences relating to companion animals and small-scale farm livestock under the Act.

²⁵ O’Callaghan, above n 23; Duffield, above n 13, at 902; Stats NZ “Livestock numbers” <www.stats.govt.nz>.

²⁶ RNZSPCA “About Us” <www.rnzspca.org.nz>.

²⁷ SPCA New Zealand *2015 Annual Report* (2015) at 2.

²⁸ Duffield, above n 13, at 902–903.

²⁹ At 903.

³⁰ “MPI Enforcement Under Animal Welfare Amendment Act”, above n 23; O’Callaghan, above n 23; RNZSPCA “Become an SPCA Inspector” <www.rnzspca.org.nz>.

³¹ SPCA New Zealand *2015 Annual Report*, above n 27, at 5–16.

³² At 16.

³³ Duffield, above n 13, at 907.

³⁴ At 903.

³⁵ At 903–904.

³⁶ Ministry of Agriculture and Fisheries *Safeguarding our Animals, Safeguarding our Reputation: Improving Animal Welfare Compliance in New Zealand* (July 2010) at 10.

B *The Corrections Act 2004: Corrections and Serco*

The Corrections Act 2004 sets out the purpose and principles of the corrections system in New Zealand, designates the roles and responsibilities of key actors, allows prison managers to make operational decisions about how their prisons are run, and asserts the minimum rights of prisoners. It also lays out the coercive powers of prison staff. For example, prison officers may photograph, measure and fingerprint prisoners.³⁷ Officers can refuse to issue or refuse to allow prisoners to retain authorised property if certain criteria are met, for instance if the item is dangerous or if the officer reasonably believes the item could interfere with the prison's management.³⁸ Prisoners may be transferred to other prisons, segregated from other prisoners, or have electronic monitoring attached to their body during temporary release, depending on various factors such as the safety of the prisoner or other prisoners.³⁹ Prison officers may use reasonably necessary force against prisoners in certain situations – for example when a prisoner actively or passively refuses to follow lawful orders – and may use non-lethal weapons to do so.⁴⁰ Prisoners may be searched, have their cells searched, have their mail read (with certain exceptions), and have their calls monitored (again, subject to certain exceptions).⁴¹

The coercive powers at play here are again strong and extensive. Prisoners have their liberty stripped away, inherently in the fact of their incarceration. They are then subject to searches of their bodies, living quarters and property, and may potentially have force used against them. The rights to liberty and autonomy over one's body are fundamental, universal human rights. It follows then that the coercive power exercised in order to interfere with or deprive people of these rights absolutely must be legitimate, to protect people against abuse or arbitrary deprivation of these rights. Hence, it requires express statutory wording to validate the state's use of such powers.⁴² The powers expressly granted in the Corrections Act therefore confer considerable state coercive powers upon prison operators.

Corrections is responsible for administering the Corrections Act. Its stated aims are to protect the public and to reduce reoffending.⁴³ This accords with the purposes of the Corrections Act,

³⁷ Corrections Act 2004, s 41.

³⁸ Section 43.

³⁹ Sections 53–60 and 64A.

⁴⁰ Sections 83(1) and 85.

⁴¹ Subpart 4.

⁴² See *Entick v Carrington* (1765) 19 St Tr 1029, 95 ER 807 (KB) (UK).

⁴³ Department of Corrections “About us” <www.corrections.govt.nz>.

which are among other things to “improve public safety” and help maintain a “just society” by ensuring the humane treatment of prisoners and other offenders and assisting in their rehabilitation.⁴⁴ With New Zealand having the seventh highest incarceration rate in the OECD, Corrections currently operates 18 prisons nationwide managing at any given time 9000 prison inmates as well as 30,000 offenders serving community sentences or orders.⁴⁵ Corrections is thus the primary organisation implementing the Corrections Act.

Serco is a British-based company that specialises in delivering public services such as defence, transport, justice, immigration and healthcare across the globe.⁴⁶ It states its core values as trust, innovation, care and pride.⁴⁷ This omits of course its very reason for being – to return a profit for its shareholders. It is in fact a highly profitable company, being listed on the Financial Times Stock Exchange 250 Index.⁴⁸

Serco contracted with Corrections to run Mount Eden Corrections Facility, and began running the prison in 2011.⁴⁹ In July 2015 TV3 broadcast footage of organised fighting (fight clubs) at the prison.⁵⁰ The footage had been taken on contraband mobile phones and uploaded to YouTube.⁵¹ It emerged that some prisoners had been hospitalised as a result of the fights, with serious injuries including broken bones and irreversible brain damage.⁵² The chief executive of Corrections then instructed chief inspector Andy Fitzharris to investigate the existence of the fight clubs, as well as prisoner access to contraband. Fitzharris reported that the fights were occurring at least weekly, with prisoners being threatened with assault by various gangs if they refused to participate.⁵³ Additionally, Fitzharris found that staff were likely to have been the main source of contraband, including cellphones, in the facility.⁵⁴

⁴⁴ Corrections Act 2004, s 5.

⁴⁵ Stats NZ “New Zealand in the OECD” <www.stats.govt.nz>; Department of Corrections “Our story” <www.corrections.govt.nz>.

⁴⁶ Serco “Reimagining Public Services” <www.serco.com>.

⁴⁷ Serco “Our Culture and Values” <www.serco.com>.

⁴⁸ Serco “About Serco” <www.serco.com>.

⁴⁹ Phil Pennington “Corrections refuses to explain Serco ratings” (23 May 2017) *Radio New Zealand* <www.radio.nz.co.nz>.

⁵⁰ Andy Fitzharris *Chief Inspector’s Report into the: Circumstances surrounding organised prisoner on prisoner fighting (Fight Club) and access to cell phones and contraband at Mount Eden Corrections Facility (MECF)* (Department of Corrections) at 1.

⁵¹ At 1.

⁵² Fitzharris, above n 50, at 4; Pennington, above n 49.

⁵³ Fitzharris, above n 50, at 2–3.

⁵⁴ At 3.

The report noted that the fight clubs had been in existence before Serco took over management from Corrections, however the problem worsened greatly after Serco began running the prison.⁵⁵ The report cited understaffing, a failure to implement anti-violence strategies, and push back against Corrections monitors as contributing to the fight club problem under Serco's management.⁵⁶ This echoed media concerns, with several journalists questioning in particular why Serco guards ate a meal and attended to paperwork while inmate Benjamin Lightbody lay in his cell with brain injuries.⁵⁷ Serco was clearly failing to meet basic prisoner safety requirements, an abuse of the state coercive power granted to it to operate a prison facility and manage prisoners. Consideration of its accountability mechanisms compared to those of the other actors discussed can therefore shed light on potential accountability failings in the devolution of state coercive power to private actors.

IV Accountability

Accountability can be difficult to define, being an umbrella term covering various concepts ranging from responsiveness, to control, to liability.⁵⁸ However public administration scholar Mark Bovens has compellingly articulated accountability as:⁵⁹

a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.

According to Bovens, accountability obligations might be formal, informal or self-imposed.⁶⁰ They might be mere transparency requirements, in which case they are not true accountability mechanisms because there is no need to answer to any specific forum, and there might not be consequences imposed.⁶¹ They might be mere reporting or justification requirements, which again do not create true accountability because of the potential lack of consequences.⁶² They might conversely be legal and direct mechanisms, for example an actor will be held responsible

⁵⁵ At 12–13 and 31.

⁵⁶ At 1–6.

⁵⁷ See for example Pennington, above n 49.

⁵⁸ Mark Bovens “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13 *ELJ* 447 at 450.

⁵⁹ At 450.

⁶⁰ At 451.

⁶¹ At 451–453.

⁶² At 451–453.

for any criminal offence they commit – a strong accountability mechanism. Alternatively, they might be political, for example a Minister might face questions in Parliament about actions of departments under their control. Actors might also be accountable socially through the media, or professionally to professional standards bodies.⁶³ There are several different types of accountability pathways therefore, of different strengths and weaknesses, and Bovens provides useful tools with which to analyse them.

In addition to Bovens' analysis, there are some practical and temporal aspects to accountability. These aspects relate to how accountability mechanisms are initially triggered, and whether they are interim (ongoing) mechanisms or conversely "end-stage" or terminal mechanisms by which an actor may be divested of their role. For instance, if the threshold for a trigger is too high, this may make cause even a strong, formal accountability mechanism to be rarely used in practice. Differentiating between ongoing and end-stage mechanisms is also important. End-stage mechanisms will usually require some transgression to have occurred and will aim to penalise an actor (though they may also have a deterrent effect), whereas ongoing mechanisms can occur regularly with a purpose of early detection or prevention of transgressions. Consideration of these practical aspects is another tool that can help determine where an accountability failure has occurred, or might occur in future.

The benefit of assessing accountability for our four actors links back to their legitimacy in wielding their powers. Accountability supports legitimacy, particularly in the use of state coercive powers, as accountability encourages the public's consent to the use of those powers by making actors responsible and answerable for their behaviour. This legitimacy is required regardless of whether the actor is public or private, if they are to retain their powers.

Analysis reveals that both public and private actors share strong, formal, legal accountability pathways that support their legitimate use of state coercive power. However, analysis of Serco's failings reveals that some accountability mechanisms were not properly implemented. I therefore argue that the best way to prevent misuse of coercive power is to have ongoing, interim accountability mechanisms in place, and for those mechanisms to be properly implemented. I also argue that Serco in particular needed these interim mechanisms, because it did not share the same values and goals as Corrections or the Corrections Act. To understand

⁶³ At 451–453.

this argument, it is necessary to understand the different types of accountability pathways, their practical aspects, and their strengths and weaknesses. They are detailed below.

A *The Employment Relationship*

MPI, Corrections and Serco staff are individually accountable in a direct, hierarchical fashion to their managers, in a chain of employment relations stretching from staff on the ground to the Minister.⁶⁴ In Bovens' parlance this is vertical accountability – the forum has formal and direct authority over the actor.⁶⁵ Consequences for employees' wayward exercise of their coercive powers might range from comments in employee performance appraisals to termination of employment. Assuming that regular employee appraisal occurs (as is the norm in large organisations in New Zealand) this could in theory be considered a strong accountability pathway because it is vertical and direct, and the costs of implementation are low. Moreover, the triggers for this mechanism are in-built into the employment relationship, so they do not require misuse of the coercive powers to have occurred before the mechanism kicks in. Additionally, it is an interim, ongoing mechanism, iterated at least annually.

The RNZSPCA's individual inspectors might be accountable in a direct, hierarchical fashion to the charity by virtue of their employment status. A "significant proportion" of RNZSPCA inspectors are however volunteers, not employees.⁶⁶ Nevertheless, this is not unduly corrosive to the accountability pathway, because the Animal Welfare Act requires that RNZSPCA inspectors be answerable to the charity.⁶⁷ The organisation risks losing its approved status if it fails to enforce this provision. It therefore has a vested interest to ensure that its inspectors do not, for example, misuse their powers to enter premises, record evidence or seize animals. The accountability of inspectors to the organisation can thus logically be deemed strong, being supported by a direct, legal mechanism.

In practice, this mechanism does require that managers are prepared to discipline staff for breaches of standards of conduct. This will vary between individuals and organisations. Certainly Serco's management, while it was aware of the existence of fight clubs, took no steps

⁶⁴ Bovens, above n 58, at 455–460.

⁶⁵ At 460.

⁶⁶ RNZSPCA "Become an SPCA Inspector", above n 30.

⁶⁷ RNZSPCA "Become an SPCA Inspector", above n 30; Animal Welfare Act, s 122(1)(e).

to investigate further or hold staff accountable.⁶⁸ Like all interim accountability mechanisms therefore, proper implementation is key to catching misconduct in a timely manner and preventing future misconduct, thereby sustaining the legitimacy of the state coercive power.

B Individual Ministerial Responsibility

Ministers are politically accountable to the government and to Parliament for their Ministries' actions, through the Westminster convention of individual ministerial responsibility.⁶⁹ This too is a type of vertical accountability in Bovens' terms, because of the relationship between actor and a figure with authority over that actor.⁷⁰ Consequences for lapse might include censure by the party or Prime Minister, or removal of the portfolio. Ministers may also resign when their position becomes untenable. The strength of this mechanism is difficult to gauge externally, however such censure can and does occur in New Zealand. For example, in 2015 Minister for Primary Industries Nathan Guy was forced to respond to questions in Parliament about his department being understaffed in China, after then Trade Minister Tim Groser publicly criticised MPI at a business conference.⁷¹ In a more extreme case, in 2014 former Justice Minister Judith Collins was admonished by then Prime Minister John Key over a possible conflict of interest involving her husband's business affairs, resigning a few months later but being reinstated the following year after being cleared of any wrongdoing.⁷² Incidents such as these, where Ministers are censured and even step down over perceived issues, suggest that this can be a robust accountability mechanism in New Zealand.

Individual ministerial responsibility applies directly to public actors, less so to private actors. Thus it holds the Corrections and MPI Ministers directly accountable for their departments to Parliament and to the government. The RNZSPCA is not directly subject to individual ministerial responsibility, however nor is it completely immune from it. Interestingly, in 1999 another animal welfare charity, the Animal Welfare Institute of New Zealand (AWINZ) sought

⁶⁸ Fitzharris, above n 50, at 38.

⁶⁹ Bovens, above n 58, at 455–460.

⁷⁰ Bovens, above n 58, at 460.

⁷¹ (17 October 2013) 694 NZPD 13997; Bernard Hickey "Primary Industries Minister Nathan Guy admits ministry understaffed on China issues after Trade Minister complains publicly" (17 October 2013) <www.interest.co.nz>.

⁷² Adam Bennet "Two strikes and Collins will be out" *New Zealand Herald* (online ed, Auckland, 13 March 2014); Derek Cheng "Judith Collins resigns" *New Zealand Herald* (online ed, Auckland, 30 August 2014); Audrey Young "John Key cabinet reshuffle: Judith Collins to return as Corrections and Police Minister" *New Zealand Herald* (online ed, Auckland, 7 December 2015).

and later gained approval to become an approved organisation under the Animal Welfare Act.⁷³ It ultimately had its approved status revoked, but in 2007 when it still retained its status, former ACT MP Rodney Hide asked written questions of the Minister of Agriculture about the incorporation of AWINZ as a trust.⁷⁴ This illustrates how Ministers can be questioned about the operation of legislation within their portfolios – an indirect way in which private actors can fall under the purview of individual ministerial responsibility. Potentially, the Minister for Primary Industries could revoke the RNZSPCA's approved status if pressured to do so by questions raised in the House, for example, if the charity's inspectors were ever to routinely misuse their powers to enter premises and this was brought to the attention of an MP. Similarly, the Corrections Minister is not directly accountable for the actions of Serco, but indirectly this mechanism can raise the political profile of issues with the company. Questions were in fact asked in Parliament after footage of the fight clubs was televised.⁷⁵

The trigger for this mechanism will vary from case to case in practice, because it relies on information coming to light that would cause questions to be asked of Ministers. This also makes it a sporadic, unpredictable mechanism, and one that might tend towards being *ex post*, relying heavily on some transgression to have occurred before it is triggered. Moreover, it is a political mechanism, so while Ministers might be encouraged or even pressured to be accountable, they might not face any practical consequences. Overall therefore, while this mechanism has the potential to be strong once triggered, it cannot be relied upon to hold actors accountable to a sufficient extent to ensure either that past transgressions will result in consequences, or that future abuse of state coercive power will be prevented. Its adequacy to maintain legitimacy in the use of public or private actors' use of state coercive power is therefore weak.

⁷³ Letter from Neil Wells (on behalf of Animal Welfare Institute of New Zealand) to the Minister of Food, Fibre, Biosecurity and Border Control regarding approved organisation status (2 November 1999) (Obtained under Official Information Act 1982 Request to the Ministry of Agriculture and Fisheries); 9240 (31 May 2007) Rodney Hide to the Minister of Agriculture; 9241 (31 May 2007) Rodney Hide to the Minister of Agriculture.

⁷⁴ 9240 Hide, above n 73; 9241 Hide, above n 73; Letter from the Animal Welfare Institute of New Zealand to the Minister of Agriculture regarding approved organisation status revocation (7 October 2009) (Obtained under Official Information Act 1982 Request to the Ministry of Agriculture and Fisheries).

⁷⁵ See (21 July 2015) 707 NZPD 5112; (22 July 2015) 707 NZPD 5196.

C Principal–Agent Accountability

Organisations can face consequences for the actions of their employees (or others) doing work on their behalf. This is a principal-agent accountability pathway. For example MPI inspectors entering premises under s 127 of the Animal Welfare Act must produce evidence of their identity and their appointment as inspectors at time of first entry.⁷⁶ Consequences of failure to do so might be that MPI's evidence is deemed inadmissible in court proceedings. Principals are also vicariously liable if their agents commit tortious actions, for example Corrections, or Serco, would be liable if their respective staff negligently failed to properly ensure prisoner safety.

This is a formal, legal accountability mechanism that has the potential to be considered strong, especially in the context of New Zealand's robust legal system. It is a retrospective mechanism, requiring a transgression to have occurred before it is triggered, but being legally accountable can be a powerful encouragement not to transgress. The existence of this mechanism can thus shape future behaviour. Consequences are unpredictable and variable however, depending on the degree of the transgression and the willingness of those affected to enforce their rights. Regarding misuse of state coercive power, such willingness might be high, but so might implementation costs, particularly of bringing a tort claim to court. This mechanism can therefore be deemed robust once triggered but variable in its likelihood of being triggered, thus it can be held only weakly supportive of legitimacy in the use of state coercive power overall.

D Criminal Liability

Individuals are of course legally accountable for any crimes they commit in venturing beyond the scope of their state coercive powers. This is a highly formal accountability mechanism. An example would be if an RNZSPCA inspector were to assault an owner instead of using force only "if necessary" to remove an animal.⁷⁷ Implementation costs of this mechanism are low for the complainant, as once a complaint is made to the police, police will lay charges if appropriate. There may theoretically be implementation barriers, particularly relating to prisons where prisoners might fear backlash by staff if they complain. There is no evidence that this is

⁷⁶ Animal Welfare Act, s 128.

⁷⁷ Section 127(5).

typically a problem in New Zealand however, and victim fear of reprisal is theoretically possible for almost any crime. This formal, legal mechanism can be considered stronger than the principal-agent pathway therefore. It is still retrospective, however the criminal law is a powerful incentive for actors not to transgress. This can be deemed a highly robust mechanism therefore, that can sustain the legitimacy of the use of state coercive power by public and private actors alike.

E Judicial Review

Public decision-makers are legally accountable through the common law mechanism of judicial review.⁷⁸ This creates a further accountability pathway. Corrections and MPI as public actors are subject to judicial review if a complainant can show that a decision should be reviewed, that is, if the decision is essentially public in nature or has significant public ramifications.⁷⁹ Thus a decision by MPI to seize all of a farm's livestock, for example, is potentially reviewable. Consequences for the decision-maker include for instance being tasked with re-making the decision in a proper manner. This is an important constitutional mechanism that supports the rule of law, ensuring that the government acts according to the law.⁸⁰

Implementation costs of this mechanism are very high, creating a significant hurdle to accessing this pathway. Complainants must pay expensive court costs and lawyers' fees, and the process of taking a decision to court for review is extremely slow. It is also somewhat narrow in scope, being available only to assess the decision-making process, not the substance of the decision itself. Once triggered it is ex post in nature, looking back at some transgression. This is not fatal however, because as Bittner pointed out in relation to use of force in policing, an underlying threat can be sufficient to coerce. The fact that judicial review is possible can therefore be enough to nudge public decision-makers to make future decisions in the proper manner – rationally, legally and according to the tenets of natural justice.⁸¹

A private actor might also be subject to judicial review, if the interests of justice necessitate that requirements of fairness be imposed on it, for instance if “the organisation is publicly

⁷⁸ Bovens, above n 58, at 456; Richard Mulgan *Comparing Accountability in the Public and Private Sectors* (2000) 59 AJPA 87 at 89.

⁷⁹ *Laws of New Zealand Administrative Law: Judicial Review: General Principles* (online ed) at [8].

⁸⁰ At [3].

⁸¹ At [5] and [13].

owned and its decisions in the public interest could adversely affect the rights of private individuals without other forms of redress”.⁸² Purely management and administrative operations of private actors are not subject to judicial review.⁸³ This creates a very high threshold for judicial review of private actors, which coupled with the high implementation costs noted above, leaves it a rather remote possibility for the RNZSPCA and Serco. Such remoteness means private actors are unlikely to be nudged by any underlying threat, in Bittner’s parlance, unlike public actors.

Judicial review of public actors such as MPI can overall be considered a somewhat remote accountability mechanism, because of its high implementation costs and its narrow scope. Its applicability to private actors is even weaker, making it an extremely tenuous support for the legitimacy of devolution of state coercive power to private actors.

F The Ombudsman

The Office of the Ombudsman is a respected institution in New Zealand, with the power to deal with complaints, investigate and carry out inspections.⁸⁴ This creates another accountability pathway, one that in Bovens’ terms is a type of professional accountability, as the Ombudsman endeavours to hold government agencies to certain professional standards.⁸⁵ The Ombudsman’s scope of influence generally only extends to government bodies.⁸⁶ The RNZSPCA is a private actor, thus not subject to the Ombudsman’s oversight. Serco however is an exception to the general rule, because even privately run prisons are subject to visits and formal inspections by the Ombudsman as part of New Zealand’s implementation of the United Nations Optional Protocol to the Convention Against Torture.⁸⁷

The Office of the Ombudsman can make recommendations to relevant agencies, but significantly, it has no enforcement powers.⁸⁸ This is a serious blow to accountability, as organisations are free to reject the Ombudsman’s recommendations. For example, Chief

⁸² At [3].

⁸³ At [12], n 2.

⁸⁴ Office of the Ombudsman “Fairness for all – it’s why we exist” Ombudsman <www.ombudsman.parliament.nz>.

⁸⁵ Office of the Ombudsman “Fairness for all – it’s why we exist”, above n 84.

⁸⁶ Office of the Ombudsman “What we do” Ombudsman <www.ombudsman.parliament.nz>.

⁸⁷ Fitzharris, above n 50, at 10–11.

⁸⁸ Office of the Ombudsman “What we do”, above n 86.

Ombudsman Peter Boshier this year carried out a surprise inspection of Spring Hill Corrections Facility, making a range of basic recommendations about prisoner custody, safety and health and well-being (such as pointing out that some prisoners had not been issued with shoes, and recommending that meals be served at normal, standardised hours).⁸⁹ The Department of Corrections accepted some suggestions but firmly rejected others, at times criticising them for being too trivial and lacking in justification.⁹⁰ This graphically illustrates the ability of entities to effectively ignore the Ombudsman. Consequences from an Ombudsman's report may therefore be merely social or political in nature. In the absence of legal enforcement powers allowing the imposition of consequences, this accountability mechanism is very weak, and does not apply at all to the RNZSPCA. It can be considered a frail to non-existent support for legitimacy in the devolution of coercive powers to private actors.

G Social Accountability to Interest Groups and the Wider Public

Less formally, actors might be socially accountable to interest groups and stakeholders such as charities and sponsors of their various programmes and projects.⁹¹ For instance MPI must prepare annual reports, which are available to interested parties on its website.⁹² The reports contain information pertinent to its use of state coercive power, such as statistics on how many animal welfare inspections it carried out.⁹³ Social accountability would occur if interested parties could pass judgement on MPI, for example by sponsors removing funding for MPI projects. Corrections and the RNZSPCA also publish statistics, strategies and annual reports on their respective websites.⁹⁴

Social accountability can of course extend to the wider public, which can feed into pressure placed on Ministers, as occurred when Nathan Guy was questioned in Parliament after Tim Groser publicly criticised MPI staffing, discussed above. However, Bovens explains that social accountability is not full accountability if forums are not sufficiently delineated for actors to

⁸⁹ Peter Boshier *Report on an unannounced inspection of Spring Hill Corrections Facility under the Crimes of Torture Act 1989* (Office of the Ombudsman, OPCAT Report, 2 August 2017).

⁹⁰ Department of Corrections *Corrections response to Ombudsman's Spring Hill Corrections Facility COTA Report Recommendations* (2017).

⁹¹ Bovens, above n 58, at 457.

⁹² Public Finance Act 1989, s 44; Ministry for Primary Industries "Corporate publications" (20 June 2017) <www.mpi.govt.nz>.

⁹³ Ministry for Primary Industries *Annual Report 2014/15* (2015) at 2.

⁹⁴ See <www.corrections.govt.nz>; <www.rnzspca.co.nz>.

communicate with, or if the ability of the forum to impose consequences is missing.⁹⁵ In the example above, Guy was not exposed to consequences after questioning (albeit partly because he had already decided to increase staffing numbers).⁹⁶

Another problem with this mechanism, apart from a lack of clear consequences, is uncertainty in triggering it. There are two pathways to trigger this mechanism. One relies upon interest groups, stakeholders or the wider public accessing information that the actor itself publishes. It is relatively easy to forecast what information might lead to adverse consequences if published, for example if the RNZSPCA announced it would spend all donations on prosecutions instead of providing shelter for homeless animals, donations would likely drop. Such triggers are simply unlikely to occur unless the actor decides itself, or is forced, to publish, for example through Official Information Act 1982 (OIA) requests of public entities. The other pathway relies upon leaks of information to the media, and then upon the media to disseminate the information to the public. This likely requires the issue to be of high public interest.

Neither trigger leads to any guarantee of consequence. There may be social or political ramifications, of course, for instance an actor might have to amend its practices. This was certainly the case when the media highlighted ill-treatment of bobby calves on farms in late 2015, which led to MPI initiating new regulatory measures to mitigate calves' suffering.⁹⁷ Ramifications may even involve end-stage consequences. In fact, this was exactly the mechanism that brought the Mt Eden prison fight clubs into the public eye, led to questions being raised in Parliament, and led to the Chief Inspector's report and Serco's subsequent loss of contract.

Like many of the accountability mechanisms discussed already therefore, this social accountability can be strong once triggered. However, it is not easy to trigger. In Serco's case, it required footage to be filmed on contraband cellphones, uploaded to YouTube, and the mainstream media to become aware of the footage. Using Bovens' parlance this is a weak accountability mechanism therefore, lacking formality and a clear way for consequences to be imposed upon the actor. It relies on issues being important enough for the public to care about,

⁹⁵ Bovens, above n 58, at 457.

⁹⁶ (17 October 2013) 694 NZPD 13997; Hickey, above n 71.

⁹⁷ Ministry for Primary Industries *Mortality rates in bobby calves 2008 to 2016* (MPI Information Paper No 2017/01, February 2017) at 6–7.

though this is not fatal because issues involving the exercise of state coercive power are highly likely to matter to the public. It is quite possible that other issues will not be brought to light in the same manner however, making this a very weak support for maintaining legitimacy in the use of state coercive power, by public or private actors.

H Complaints Mechanisms and Approaching One's MP

Citizens' abilities to use an agency's own complaints mechanism, and to approach their local member of Parliament, are two further accountability pathways.⁹⁸ However, these are not full accountability mechanisms under Bovens' analysis. Using a complaints mechanism may not actually oblige the relevant actor to face consequences, because the actor can itself determine how to handle complaints.⁹⁹ Thus a complaint about a lack of response to an animal welfare incident, for example, may not necessarily lead to the incident being investigated, but might only lead to an explanation that there are too few inspectors available to investigate all complaints. Approaching one's MP is similarly no guarantee of consequence, albeit that there may be social or political ramifications, particularly in cases of a clear requirement for the public actor's state coercive power to be exercised. The fact that complaints mechanisms and approaching one's MP cannot guarantee consequences is a fatal blow to any of these being accountability mechanisms. They can at best only weakly support legitimacy in the use of state coercive power.

I The State Services Commission

The State Services Commission assesses Crown agencies, and in 2012 rated Corrections' management of its handing over custodial services of Mt Eden prison to a third party.¹⁰⁰ The Commission said Corrections was vigilantly addressing performance shortfalls.¹⁰¹ The Commission also reviewed MPI in 2013, rating MPI as "needing development" in the effectiveness and efficiency of most of its core business areas.¹⁰²

⁹⁸ Mulgan, above n 78, at 89.

⁹⁹ Ministry for Primary Industries "Contact Us" (8 May 2017) <www.mpi.govt.nz>.

¹⁰⁰ Fitzharris, above n 50, at 11.

¹⁰¹ At 11–12.

¹⁰² State Services Commission, The Treasury, and the Department of the Prime Minister and Cabinet *Performance Improvement Framework: Formal Review of Ministry for Primary Industries (the Ministry)* (March 2013) at 20.

The Commission's reviews are iterative, formal mechanisms by which the forum can directly question the actor. The Commissions reviewers speak not only to staff and Ministers of the government agencies under review but also related actors (including Serco in the case of Corrections but not, interestingly, the RNZSPCA in the case of MPI).¹⁰³ However this mechanism does not directly impose consequences on actors. Nor does the Commission directly review the activities of private actors. This mechanism only weakly supports legitimacy of state coercive power in the hands of public actors therefore, and even more weakly and indirectly that of private actors.

J Financial Accountability

One area in which public actors have a great deal of discretion, that is, less external accountability, is in how they spend money apportioned to them by Parliament. Government entities must present independently audited financial statements and performance reports to Parliament annually.¹⁰⁴ Using the example of MPI, Parliament apportions around \$6.7m each year for MPI spending on “animal welfare education and enforcement”.¹⁰⁵ MPI therefore has a wide discretion around its spending in this area – including decisions on whether or not to spend money on prosecuting. This is to be expected in a public actor in New Zealand where prosecutorial discretion is the norm. MPI does have social accountability to the public, for example when animals are found in appalling states of neglect, and ultimately there is political accountability to the voting public for the same, however these are indirect mechanisms. Similarly, Corrections receives appropriations from Parliament for spending on specific operational areas such as custodial services and rehabilitation, but it has a wide discretion on how it spends money within those areas.¹⁰⁶

While financial accountability is a strong mechanism in terms of public actors being responsible for their spending, it actually weakens accountability for their exercise of state coercive power because of their wide discretion. The fact that MPI and Corrections can simply decide not to spend resources on the exercise of any particular state coercive power does not

¹⁰³ State Services Commission, The Treasury, and the Department of the Prime Minister and Cabinet *Performance Improvement Framework: Formal Review of the Department of Corrections (Corrections)* (September 2012) at 58; State Services Commission *Formal Review of Ministry for Primary Industries*, above n 102, at 80–81.

¹⁰⁴ Public Finance Act, s 44; Ministry for Primary Industries *Annual Report 2014/15*, above n 93, at 63–64.

¹⁰⁵ Ministry for Primary Industries *Annual Report 2015/16* (C.5 AR 2016) at 77.

¹⁰⁶ Department of Corrections *Annual Report 1 July 2015 – 30 June 2016* at 84–110.

support the legitimacy of them wielding those powers therefore. This is not surprising, because the executive is generally expected to determine for itself how best to use its resources to carry out its tasks – it is not the function of Parliament to do this it.

Financial accountability is stronger in general for private actors, and Serco and the RNZSPCA are no exception. Serco is a UK-based company and must abide by company law, including preparing annual reports for shareholders. The RNZSPCA and its 46 SPCA centres nationwide, which are all separate legal entities, are accountable to their members for the fiscal performance of their respective organisations.¹⁰⁷ This is an internal accountability mechanism lacking in public actors, who have discretion on how to spend Crown funding. However, this does not necessarily translate to more effective or more efficient exercise of state coercive powers by private actors. In fact, implementation costs of coercive powers may nudge the RNZSPCA, for example, away from using them. For instance, internal fiscal accountability has the potential to lead RNZSPCA management to avoid prosecution where at all possible because prosecution is an expensive option. The charity has acknowledged a problem with lack of funding causing local centres to decline to prosecute.¹⁰⁸ In a similar vein, staffing costs caused Serco to fail to ensure prisoner safety. Private actors' financial reporting requirements thus create a strong, direct mechanism holding them accountable to internal stakeholders, but one that does not necessarily lead to good exercise of their state coercive powers. This again has the potential to degrade the legitimacy of the devolution of state coercive power to private actors. In Serco's case, its cost-consciousness and resultant understaffing ultimately led to its loss of legitimacy.

K Approved Organisation and Charitable Status: Additional Accountability Mechanisms for the RNZSPCA

The RNZSPCA is, uniquely in New Zealand, accountable under the Animal Welfare Act's approved organisation provisions. For example, under ss 123A and 123B of the Act, approved organisations may be audited for compliance with performance and technical standards, compliance with MOU terms, and ability to meet criteria required for approval of

¹⁰⁷ Royal New Zealand Society for the Prevention of Cruelty to Animals Inc *Constitution* (14 June 1980); RNZSPCA "About Us", above n 26; Letter from Alan Wilson (on behalf of RNZSPCA) to SPCA Wairarapa regarding the One SPCA Proposal (2 June 2017); SPCA Auckland "Board Charter" <www.spcaauckland.org.nz>; SPCA New Zealand *2015 Annual Report*, above n 27, at 5.

¹⁰⁸ SPCA New Zealand "Fight Fund" (2016) <www.rnzspca.org.nz>.

organisations.¹⁰⁹ Such criteria include having suitable financial arrangements and lacking any conflicts of interest that would interfere with animal welfare obligations.¹¹⁰ Furthermore, approved organisations' inspectors must have the expertise and experience to competently perform their functions under the Animal Welfare Act, and they must be "properly answerable" to their organisation.¹¹¹ The RNZSPCA as an organisation is thus directly, legally accountable for the conduct of its inspectors to the Minister, who can issue consequences such as imposing conditions on it or revoking its approved status.¹¹² The strength of these reporting requirements can be seen in the 2009 decision of AWINZ to request revocation of its approved status under the Act, because it could not meet the compliance standards set by the then Ministry of Agriculture and Fisheries.¹¹³ The statute thus imposes a strong, formal, direct mechanism to hold the RNZSPCA accountable to MPI, supported by the MOU between the two organisations. The mechanism is ongoing, appears well implemented and involves potentially end-stage consequences. In this way it strongly supports the legitimacy of the devolution of state coercive power to the charity.

The RNZSPCA Board is moreover a registered charity, so must comply with the Charities Act 2005 – another formal, legal accountability mechanism. Non-compliance involves consequences such as being removed from the register.¹¹⁴ Grounds for removal include a "significant or persistent failure" by the entity to fulfil its obligations under the Charities Act or any other Act, or the entity or anyone in connection with the entity engaging in "serious wrongdoing".¹¹⁵ This means that if the charity misuses its coercive powers under the Animal Welfare Act, it might lose its registered charity status. The Charities Registration Board is a robust organisation, for example it recently acted to strip contentious organisation Family First of its charitable status for failing to promote "exclusively charitable purposes".¹¹⁶ This mechanism does require a transgression to be triggered, however it is powerful, being an end-stage mechanism that could result in termination of an actor's role, and is thus strong enough to nudge actors' future behaviour. It can thus be deemed strongly supporting of maintaining the legitimacy of the RNZSPCA exercising state coercive power.

¹⁰⁹ Animal Welfare Act, s 123B(2).

¹¹⁰ Section 122(1).

¹¹¹ Section 122(1)(e).

¹¹² Sections 122 and 123.

¹¹³ Letter from the Animal Welfare Institute of New Zealand, above n 74.

¹¹⁴ Charities Act 2005, s 32.

¹¹⁵ Section 32(1).

¹¹⁶ "Charities Commission strips Family First of charitable status" *Stuff.co.nz* (21 August 2017).

L The Purchaser-Supplier Contractual Relationship: An Additional Accountability Mechanism for Serco

Contractual relationships offer strong, legal, formal accountability mechanisms, because breach of contract can typically lead to civil liability. Unlike the RNZSPCA and MPI, Serco's relationship with Corrections was contractual. Serco's contract comprised a strong accountability mechanism, because the Corrections Act sets out minimum standards for prisons (including adherence to the United Nations Standard Minimum Rules for the Treatment of Prisoners) and requires contracting third parties to adhere to the same performance standards as Corrections.¹¹⁷ The Corrections Act lays out terms that must be included in prison contracts (for example provision for termination in cases of breach of contract) and stipulates that such contracts and any variations to them must be presented to the House of Representatives.¹¹⁸ Thus the statute provides for the contract being the primary accountability mechanism for third party prison operators.

Serco's chief accountability mechanism therefore, and the mechanism actually used in relation to Mt Eden prison, was contractual. This contract is readily accessible to the public on the Department of Corrections website. Under the terms of its contract, Serco set its own staffing levels.¹¹⁹ The company was required to ensure that it had sufficient staff to allow it to fulfil its statutory and contractual obligations.¹²⁰ One contractual obligation was that Serco had to make regular performance reports to Corrections, and also report any incidents within 24 hours.¹²¹ These obligations were weakened by a lack of oversight of Serco's decisions about what constituted "sufficient" staffing levels. Since a core motive of Serco's was profit, it was incentivised to lower its costs by using as few staff as it felt possible – a clear case of moral hazard. Detection and reporting of incidents was therefore poor. There was monitoring of prison operations by Corrections as is required under the Corrections Act – a strong, legal, ongoing accountability mechanism if properly implemented – but those monitors were

¹¹⁷ Corrections Act ss 5 and 198–199; Fitzharris, above n 50, at 8.

¹¹⁸ Corrections Act ss 199 and 199I.

¹¹⁹ Department of Corrections *Prison Management Contract for Mt Eden Corrections 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]* at cl 16.2; Fitzharris, above n 50, at 8.

¹²⁰ *Serco contract*, above n 119, at cl 16.2; Fitzharris, above n 50, at 8.

¹²¹ *Serco contract*, above n 119, at cl 22 and Schedule 5.

impeded and stymied by Serco.¹²² Fitzharris's report made it clear that lack of staff and this obstruction of monitors were key factors in Serco's senior management having limited knowledge of the pervasive nature of the fight clubs.¹²³ All of this resulted in Corrections failing to hold Serco to account while the fight clubs were operating – in fact Corrections graded Serco in its top two performance categories from 2013 to September 2015.¹²⁴ Since its own monitors were being obstructed by Serco, it must be assumed that Corrections relied largely on the company's own quarterly performance reports.¹²⁵ Clearly therefore, the terms of the contract involving staffing levels were undermined, at least in part due to Serco's profit motive.

Other accountability mechanisms in the contract were strong once actually triggered. The contract allowed Corrections to “step in” and perform any or all services it deemed necessary, if Serco was not properly meeting its obligations.¹²⁶ Corrections did in fact step in in July 2015, after the YouTube footage was aired on television.¹²⁷ Moreover, Corrections had the ability to terminate the contract if Serco more seriously breached its obligations.¹²⁸ Interestingly, this clause was not used. Instead Corrections used an in-built “break point” in the contract allowing either party to terminate the ten-year contract on a date six years after commencement.¹²⁹ Thus Serco finally ceased running Mt Eden prison in early 2017 (although it continues to run a prison facility in Wiri, South Auckland).¹³⁰

Overall, the contractual mechanisms are strong on paper, with some being ongoing, repetitive, direct and vertical, and having strong legal, potentially end-stage consequences. However in practice the ongoing mechanisms were poorly implemented, with Corrections inspectors failing to follow up on investigations, and with the department relying on Serco's own poorly informed performance reports. The trigger that sparked the use of the final step-in and break point mechanisms was the televised broadcast of YouTube footage, filmed on contraband mobile phones. It is unclear whether Serco would ever have been held to account had that

¹²² Corrections Act ss 172 and 199E; Fitzharris, above n 50, at 1–6 and 9.

¹²³ Fitzharris, above n 50, at 1–6.

¹²⁴ “Serco rated 'exceptional' as fight clubs operated” (7 October 2016) *Radio New Zealand* <www.radionz.co.nz>.

¹²⁵ *Serco contract*, above n 119, at cl 22.1 and Schedule 5.

¹²⁶ At cl 28.

¹²⁷ Fitzharris, above n 50, at 15.

¹²⁸ *Serco contract*, above n 119, at cl 29.

¹²⁹ *Serco contract*, above n 119, at cl 3; Fitzharris, above n 50, at 8; Isaac Davison “Serco's contract to run Mt Eden prison not renewed” *New Zealand Herald* (online ed, Auckland, 9 December 2015).

¹³⁰ Pennington, above n 49.

footage not emerged, particularly given its understaffing and push back against Corrections monitors. This course of events illustrates the fact that proper implementation of ongoing accountability mechanisms is vital if actors are to be nudged away from the pitfall of moral hazard, and if future abuse of state coercive power is to be investigated when it occurs, or indeed prevented. Simply relying on an unlikely quirk of events to trigger a termination mechanism, most would argue, is not enough.

M Overall Assessment of Accountability: The Importance of Interim Accountability Measures in the Absence of Shared Values

From the above analysis, there are a range of accountability mechanisms for both public and private actors wielding state coercive power. They range from strong, formal, legal accountability, to political accountability, to informal social accountability. They include measures germane mainly to public actors, such as the avenue of judicial review and the ability to make an official information request, and tools applicable to private actors, such as the RNZSCPA's approved organisation status and Serco's contract.

MPI accountability is certainly not perfect, as the weak accountability surrounding its wide prosecutorial discretion has significant ramifications for its effective enforcement of the Animal Welfare Act (as will be discussed in more detail below). Nor is Corrections accountability perfect – for example, one of the purposes of the Corrections Act is the rehabilitation of prisoners, yet recidivism rates remain stubbornly high at 52%.¹³¹ However, both government actors remain substantially accountable for any misuse of their coercive powers, most strongly through the criminal law and via employment relationship mechanisms such as annual performance reviews, provided that these are properly implemented. Private actors' strongest accountability mechanisms also include the criminal law and, in Serco's case, the employment relationship also, but can extend beyond these. For example Serco's strongest mechanism lay in its contract, while the RNZSPCA is strongly accountable through its status as an approved organisation under the Animal Welfare Act.

¹³¹ Corrections Act 2004, s 5(1)(c); Arul Nadesu *Reconviction patterns of released prisoners: A 60 months follow-up analysis* (Department of Corrections, March 2009).

Thus the fact that private actors are not easily accountable to the ombudsman, nor via judicial review, nor are they subject to OIA requests or State Services Commission oversight, does not necessarily mean they are less accountable for the exercise of state coercive powers granted to them. I have shown that private actors can in fact be subject to strong, formal, direct accountability mechanisms that firmly uphold the legitimacy of their wielding state coercive power, such as the RNZSPCA's accountability arising from its approved organisation status. I have also shown that the strongest mechanisms for preventing future abuse of power are either interim and ongoing in nature (for instance, iterative contractual requirements) in which case they must be properly implemented to be effective, or are ex post but formal and legal in nature (for instance, criminal responsibility) in which case they can nudge actors towards correct future behaviour.

Arguably, the risk of Serco falling prey to moral hazard lies in its lack of shared goals and values with either Corrections or the Corrections Act. Indeed, shared values are key to understanding differences between the devolution of state coercive power to Serco and the devolution of power to the RNZSPCA. Both are private actors, and both were subject to strong, direct, legal accountability measures, yet each brought very different values into its role. The RNZSPCA is a charity established to care for and prevent cruelty to animals, a role it has held for over a century. Its values of care and compassion towards animals align closely to the values set out in the Animal Welfare Act.¹³² The charity seeks to be transparent and depends on public goodwill for its continued existence, which acts as an incentive for it not to abuse its state coercive powers. While MPI receives annual reports on how the RNZSPCA enforces the Act and may audit the charity, there are no requirements for such close monitoring, inspection, quarterly performance reporting and incident reporting as Corrections requires of Serco.¹³³ Thus the charity's ongoing and interim reporting accountability mechanisms, while strong in themselves, are actually weaker than Serco's. It is arguably therefore RNZSPCA's shared values with the Animal Welfare Act and with MPI, with the ultimate aim of protecting animals, that strongly support its disinclination to misuse its state coercive powers. This holds true even in light of its low prosecution rates, which are in common with MPI and attributable to funding issues (as will be explored further below in the section on effectiveness).

¹³² Animal Welfare Act, s 9.

¹³³ Memorandum of Understanding between the Royal New Zealand Society for the Prevention of Cruelty to Animals Incorporated (RNZSPCA) and the Her Majesty the Queen in right of New Zealand acting by and through the Ministry of Agriculture and Forestry (MAF) (2 December 2010) (Obtained under Official Information Act 1982 Request to the Ministry for Primary Industries) at 15–17.

By contrast, Serco is a private company, answerable ultimately to its shareholders who require it to return a profit. Profit is its very reason for being, thus it is highly incentivised to cut costs where it can. The purpose of the corrections system is to provide for the safe, secure, humane treatment of offenders and to help reintegrate and rehabilitate them where appropriate.¹³⁴ It has no profit motive. Serco has a clear tension, therefore, between meeting its obligations to Corrections and meeting its obligations to shareholders – a tension that the RNZSPCA does not share. Serco's contract and the Corrections Act do recognise this tension, imposing ongoing reporting and monitoring requirements on the company, but ultimately Serco's strong need for profitability led it to succumb to moral hazard and undermine these mechanisms.

Comparison of the RNZSPCA and Serco therefore illustrates that in the absence of shared values, even formal and strong end-stage accountability mechanisms can be insufficient to combat moral hazard. This logic extends beyond the issue of state coercive power, because the problem of moral hazard is inherent in any public-private partnership where one party's primary motive is profit. That party will always seek to cut costs, particularly where it can fill out its own performance reports. Demonstrably then, what is required in such instances is ongoing, interim accountability mechanisms making the private actor answerable to the state, and for those mechanisms to be diligently implemented. Conversely, shared values can help support legitimacy in private actors being granted state coercive power even where interim accountability measures are relatively weak. If a private actor shares fundamental goals with its public counterpart or with the instrument from which it derives its power, it is unlikely to seek to undermine those goals.

This is an issue that Corrections should look into, given that Serco continues to run a prison facility at Wiri, and given that the power to contract prison services out to private operators remains possible under the Corrections Act. More significantly, the problem of moral hazard, which led Serco to understaff Mt Eden prison in the first place, remains a danger that can extend to any public-private partnership, where the private actor has a profit motive. More broadly therefore, in any relationship where private actors are incentivised to cut costs while providing public services, proper implementation of ongoing accountability mechanisms is vital.

¹³⁴ Corrections Act, s 5.

Another important aspect of accountability, which deserves consideration on its own merits, is transparency. As observed earlier, Bovens asserts that transparency alone is insufficient for accountability because it does not require the actor to be answerable to any particular forum.¹³⁵ This does not however render transparency unimportant. Indeed, New Zealand's Controller and Auditor-General highlights public sector values of integrity, fairness and transparency, and the resultant consequence of trust, as central to public sector accountability.¹³⁶ This can be reconciled with Bovens' conceptualisation by thinking of transparency, fairness and integrity as desirable elements in an accountability framework. Transparency in particular is essential because it allows those outside an organisation to obtain the information they need to scrutinise and question it. Examination of this value can therefore shed further light on actors' accountability, and thus on the legitimacy of their wielding state coercive power. The following section will outline the reasons why transparency is so important to legitimacy. It will then consider how actors are required to display transparency.

V Transparency

Transparency helps those within or external to an organisation to hold it accountable, by providing them with the information they need to form a judgement.¹³⁷ Political scientists Catharina Lindstedt and Daniel Naurin define transparency as meaning "that it is possible to look into something, to see what is going on".¹³⁸ In a broad, democratic context, transparency requires access to information held by the state sector, as well as the ability to witness deliberative processes such as parliamentary debates.¹³⁹

Transparency supports state accountability and legitimacy in a fairly straightforward manner. Requiring governments to be exposed to public scrutiny and criticism is one way of checking executive power in democracies, with citizens ultimately able to vote governments in or out of power in national elections. In the context of institutions, agency theory explains that transparency helps reduce information asymmetry between principals (such as Ministers) and

¹³⁵ Bovens, above n 58, at 453.

¹³⁶ Controller and Auditor-General *Public sector accountability through raising concerns* (March 2016) at [2.4].

¹³⁷ Catharina Lindstedt and Daniel Naurin "Transparency is not Enough: Making Transparency Effective in Reducing Corruption" (2010) 31 *IPSR* 301 at 304.

¹³⁸ At 304.

¹³⁹ Axel Gosseries "Democracy and Transparency" (2006) 12 *SPSR* 83 at 83.

agents (such as government departments).¹⁴⁰ Transparency also helps those external to the organisation, such as Parliament and citizens, to obtain the information they need in order to scrutinise it.¹⁴¹ Transparency is thus a significant element of public sector accountability, albeit that as Bovens pointed out, the ability for a forum to pass judgement on an actor is also required. In this way, transparency supports accountability and legitimacy, as people are more likely to accept rules as legitimate when there is no secrecy surrounding how decisions are made to enforce them.

The primary statutory instrument relating to transparency in New Zealand is the Official Information Act. The OIA applies to all public sector organisations and espouses a principle of availability of information, stating that information held by government departments should be released upon the request of any person “unless there is good reason for withholding it”.¹⁴² Thus MPI and Corrections are subject to OIA requests, a good transparency mechanism for their exercise of state coercive power.

Private actors, by contrast, are not subject to OIA requests. Serco’s Mt Eden prison contract with Corrections did allow one prisoner to obtain CCTV footage of an assault from Corrections despite the prison being run by Serco at the time of the assault, but this was likely because Corrections was running the prison again by the time the request was made.¹⁴³ There is some transparency in Serco’s activities by virtue of its contractual relationship with Corrections, for example its contracts are available on the Corrections website, as are its performance statistics about prisons it manages in New Zealand.¹⁴⁴ This is information posted by Corrections, however, not Serco. The private company unsurprisingly makes no mention of the Mt Eden prison fight clubs online.¹⁴⁵ The RNZSPCA is also not subject to OIA requests, however as a charity reliant on public donations and goodwill it does have some incentive to respond to requests for information. Its publication of information such as annual reports on its websites, which include information about its spending on its inspectorate, suggests it is willing to be reasonably transparent to the public about its activities.

¹⁴⁰ Jenny de Fine Licht and others “When Does Transparency Generate Legitimacy? Experimenting on a Context-Bound Relationship” (2014) 27 *Governance* 111 at 114.

¹⁴¹ At 114–115.

¹⁴² Official Information Act 1982, s 5.

¹⁴³ Carla Penman “Former inmate Benjamin Lightbody who lost chunk of skull in jail attack speaks” *Stuff.co.nz* (3 August 2017).

¹⁴⁴ <www.corrections.govt.nz>.

¹⁴⁵ <www.serco.com>.

Serco and the RNZSPCA are required to be more transparent with Corrections and MPI respectively as their principals, than with the general public. The RNZSPCA as an approved organisation may be audited for compliance with various standards and its MOU with MPI.¹⁴⁶ This is a strong transparency mechanism as it requires the RNZSPCA to provide specific information directly to MPI. Serco is obliged by statute to allow Corrections to monitor prisons it manages, another transparency device.¹⁴⁷ This also appears strong, but in practice it was not implemented well.

Overall, the fact that private actors are not subject to OIA requests, and that they are not required to disclose information to the public, makes them less transparent than public actors. There is real danger that if private organisations are not transparent, their misuse of state coercive power might go unchecked – as indeed occurred at Mt Eden prison until the YouTube footage surfaced. This can and does erode legitimacy, as illustrated by Serco losing its contract. Moreover, a lack of transparency raises a significant issue of timeliness. If Serco had been properly transparent with Corrections, the fight clubs might have been halted more quickly, and the horrendous injuries inflicted on some of the inmates might not have happened. Mechanisms requiring private actors to be transparent to their public actor principals clearly have the potential to be powerful therefore, but must be properly implemented to be effective in supporting accountability.

Just as strong interim accountability mechanisms are required when private actors lack shared values and goals with their public actor counterparts or the instruments establishing the state coercive powers, so greater emphasis on transparency is needed also. The tendency for a private actor with a profit motive to succumb to moral hazard will be reduced if it must be transparent in its decisions and actions, allowing greater scrutiny of it by an external forum. Such transparency can allow the forum to quickly obtain the information it needs to pass judgement on the actor and swiftly act to curtail transgressions. Thus a lack of shared values creates the need for diligent implementation of transparency requirements, to prevent misuse of state coercive power or at the very least, catch it within a short period of time.

¹⁴⁶ Animal Welfare Act, ss 123A and 123B.

¹⁴⁷ Corrections Act ss 172 and 199E.

VI *Effectiveness*

Effective use of state coercive power supports the legitimacy of that use, along with accountability and transparency, because it encourages consent. Legitimacy, as Cromartie articulated, occurs when laws accomplish acquiescence even where they conflict with the interests of those subject to them. This in turn requires that laws are effectively enforced. If laws are not enforced at all, they will eventually simply be ignored. If laws are simply poorly enforced, this raises questions about the consistency of treatment of offenders. Effectiveness of a law's enforcement is thus essential for its continued legitimacy. The effectiveness of implementation of the Animal Welfare Act and of the Corrections Act is discussed below.

A *The Animal Welfare Act: Effectiveness*

Effective use of state coercive powers under the Animal Welfare Act requires that Act to be properly enforced. This upholds legitimacy because it encourages citizens' consent for the relevant actors to be using the Act's coercive powers. Enforcement here relies upon animal welfare inspectors of all classes – including the police – to use their powers under the Animal Welfare Act to promote its purposes. The statute articulates several purposes in its various Parts, including ensuring that animal owners and others in charge animals look after their welfare, and prohibiting certain conduct.¹⁴⁸ As noted previously, the Act contains strong coercive powers, touching upon some of the strongest rights in law. This section on effective enforcement will, however, focus specifically on the power to prosecute under the Act, for several reasons. First, prosecution can lead to the ultimate sanction possible under the Animal Welfare Act, namely imprisonment. Second, prosecution is the appropriate response to the most severe and wilful cases of animal cruelty – behaviour the Act was designed to protect against. Third, prosecution is potentially the most problematic of the Act's coercive powers, as its high implementation costs mean it is infrequently used. Fourth, there is a high public interest in prosecution, because it sends a strong, very public message that certain behaviour is not condoned. Fifth, prosecution frequency can be a factor in sentencing decisions of judges, who may consider the prevalence of a crime when determining the length or type of sentence.¹⁴⁹

¹⁴⁸ Animal Welfare Act, ss 9 and 27.

¹⁴⁹ Duffield, above n 13, at 911–916.

This means decisions on whether or not to prosecute can reach beyond the immediate decision to actually influence the future effectiveness of the Animal Welfare Act.

Enforcement of the Act is problematic at best. In 2016, the RNZSPCA conducted 61 prosecutions but responded to 15,000 complaints, a prosecution rate of less than 0.41 per cent. The charity does not prosecute in some cases simply because of a lack of funding.¹⁵⁰ MPI also receives around 15,000 complaints annually, leading to approximately 100 prosecutions, a rate of just under 0.67 per cent.¹⁵¹ Both the RNZSPCA and MPI follow up on nearly all non-frivolous complaints.¹⁵² Of course, not every complaint should lead to prosecution. MPI notes that about one third of the complaints it receives are either unsubstantiated, or able to be resolved without further action being necessary.¹⁵³ In the vast majority of instances, it issued verbal warnings.¹⁵⁴ Media reports have however highlighted issues of a lack of resources leading to extremely poor enforcement of the Act. For instance, the RNZSPCA has 75 inspectors for all of New Zealand's domestic pets and small-scale farm animals.¹⁵⁵ MPI has 17 inspectors catering for tens of millions of animals, and a budget of \$6.7m for "animal welfare education and enforcement".¹⁵⁶ This works out to just a few cents per animal. With prosecution being an expensive, time-consuming option, and prosecution rates being so low, the New Zealand Vet Association head of veterinary services has called the Animal Welfare Act "non-enforceable at the moment".¹⁵⁷ Effective enforcement of the Act through prosecution is therefore clearly very weak for both MPI and the RNZSPCA, in all but the most serious of cases. This is not a problem of coercive power being devolved to a private actor, but a financial issue common to both organisations.

One factor that ameliorates this situation for the RNZSPCA is that it is unlikely that the public would hold the charity responsible for poor enforcement of the Act, given that police and MPI inspectors have the same inspection powers, and given that the charity relies on the public for funding. Indeed, a 2007 survey found the RNZSPCA New Zealand's second most trusted

¹⁵⁰ "Anita Killeen: SPCA Auckland Pro Bono Panel of Prosecutors" (2017) 904 LawTalk 62 at 63.

¹⁵¹ Gerard Hutching "Government to crack down on animal abusers under new rules" *Stuff.co.nz* (20 July 2017).

¹⁵² Gill Galloway "Animal welfare taken seriously by SPCA and MPI" *Stuff.co.nz* (3 November 2015).

¹⁵³ Hutching, above n151.

¹⁵⁴ Hutching, above n151.

¹⁵⁵ Duffield, above n 13, at 902–903.

¹⁵⁶ O'Callaghan, above n 23; Duffield, above n 13, at 902; Stats NZ "Livestock numbers", above n 25; Ministry for Primary Industries *Annual Report 2015/16*, above n 105, at 77.

¹⁵⁷ Callum Irvine, as cited in O'Callaghan, above n 23.

charity.¹⁵⁸ Moreover, any erosion of trust in the minds of the public that ineffective enforcement causes the charity could easily be alleviated by the state granting funding to the charity specifically for its enforcement work.

MPI, by contrast, is highly likely to be held responsible for poor enforcement of the Animal Welfare Act by the public. This was certainly the case when the media highlighted widespread and ongoing mistreatment of bobby calves in 2015.¹⁵⁹ Some commentators have already questioned an inherent conflict in MPI being tasked with prosecuting animal cruelty offences under the Act, while at the same time being required to improve the productivity of the primary sector.¹⁶⁰ This criticism raises a question however, that if MPI were not to enforce the Act in relation to livestock, who would? The organisation already has expertise in this area, the police are unlikely to prioritise animal welfare, and the RNZSPCA is already over-burdened. MPI thus is currently the most appropriate actor available to legitimately exercise state coercive power in this regard. An alternative solution for the future might be to establish a central, independent commissioner for animal welfare, or a ministry for animal welfare, or both.¹⁶¹ A commissioner could advocate for better enforcement of the statute. A central ministry for animal welfare could erase MPI's conflict of interest, and relieve both MPI and the RNZSPCA of the burden of prosecuting offences, leaving the charity in particular free to investigate instances of animal abuse and to care for animals in need.

To summarise, prosecution is an important state coercive power for effective enforcement of the Animal Welfare Act. It is the ultimate sanction available, and a form of public censure in nature. It can also have consequences for sentencing. Both MPI and the RNZSPCA suffer from inadequate funds being set aside for prosecution, and too few inspectors being available for too many animals. The situation has essentially resulted in non-enforcement of the Act in all but the most extreme cases – something that could affect the legitimacy of the law. The issue does not arise out of whether the responsible actor is public or private, it arises from insufficient funds. This can be easily rectified, particularly if the government commences funding the RNZSPCA, and better funds MPI, to enforce the Act. It is unlikely that the existing prosecution

¹⁵⁸ SPCA Auckland *The Circle of Life*.

¹⁵⁹ Ministry for Primary Industries *Mortality rates in bobby calves*, above n 97, at 6–7.

¹⁶⁰ Catriona MacLennan “Animal welfare commissioner needed” *New Zealand Herald* (online ed, Auckland, 23 May 2016); Charlie Mitchell and Anne Clarkson “Call to punish cruel farmers” *Stuff.co.nz* (21 March 2015); Ministry for Primary Industries “Growing and protecting New Zealand” <www.mpi.govt.nz>.

¹⁶¹ Green Party “Animal Welfare Policy” <www.greens.org.nz>.

situation erodes the reputation of the RNZSPCA in the public perception, given the charity's reliance on public donations and the fact that MPI and the police can also prosecute. However, government funding could only strengthen its standing by allowing it to be more effective. Moreover, the legitimacy of the Act itself is called into question when its enforcement is inconsistent and largely ineffective. This is dangerous territory for any law to be in, therefore this situation should be investigated by policy-makers. One possible solution is to establish a central ministry or independent commissioner (or both), for better enforcement of animal welfare legislation.

B The Corrections Act: Effectiveness

Proper use of state coercive power under the Corrections Act requires, among other things, that prison operators carry out their tasks under that Act, and fulfil its purposes. Purposes of the Corrections Act that relate to state coercive power include keeping prisoners safe and secure, treating them humanely, and assisting where appropriate with the rehabilitation of offenders and their reintegration into the community.¹⁶²

It is questionable whether actions and decisions relating to the Corrections Act are as effective as they could be in New Zealand. For instance, one purpose of the Corrections Act is to assist in the rehabilitation of prisoners, as far as reasonable and practicable in the circumstances and within resource constraints.¹⁶³ Yet recidivism rates in NZ remain stubbornly high, at 52% according to one five-year study.¹⁶⁴ This cannot be laid solely at Corrections' door, as several factors feature in rates of reoffending, such as drug use or lack of education.¹⁶⁵ Corrections could still improve its effectiveness in some areas however. For example, Chief Ombudsman Peter Boshier's recent report on Spring Hill Corrections Facility raised several concerns such as incomplete or missing use of force forms (required when staff use force against prisoners), overuse of strip search powers, insufficient supplies of clothing and footwear for prisoners and a lack of mental health services for prisoners.¹⁶⁶ It is unlikely however that this weakens the legitimacy of Corrections to wield state coercive power, as it remains the most appropriate agency to do so. Moreover, Corrections is actually performing well in general. The State

¹⁶² Corrections Act, s 5.

¹⁶³ Section 5(1)(c).

¹⁶⁴ Nadesu, above n 131, at 6.

¹⁶⁵ Department of Corrections "Areas of focus" <www.corrections.govt.nz>.

¹⁶⁶ Boshier, above n 89.

Services Commission in 2012 rated it as “well placed” or “strong” in effectiveness and efficiency of most aspects of its core business, the sole exception being a rating of “needing development” in its rehabilitation and reintegration services.¹⁶⁷ Overall therefore, the department can be deemed generally effective, albeit needing improvement in some areas.

Serco, as we have seen, performed its duties very poorly at Mt Eden Prison. It misused its state coercive powers, allowing prisoners to run fight clubs and failing to ensure their safety. Its ineffectiveness destroyed its legitimacy, with Corrections ultimately stepping in and taking over. This situation reveals a significant difference between public and private actors who lose legitimacy – private actors may far more easily have their state coercive powers stripped from them. While a public actor can lose its powers, there is less likely to be an agency already in place to take over its role. For example, if Animal Welfare Act enforcement powers were to be taken from MPI, a new organisation such as a ministry for animal welfare would need to be established to administer the statute, and this would take time and resources. When Serco lost its power, by contrast, Corrections was already well-placed to take over its functions.

An interesting question that arises from consideration of effectiveness is why the RNZSPCA retains legitimacy in the face of poor enforcement of the Animal Welfare Act as regards prosecution, whereas Serco lost its contract when it misused the powers granted to it to perform its duties under the Corrections Act. Partly, of course, this is because Serco’s behaviour directly led to horrific violence against human beings. Another reason is that the RNZSPCA is a charitable organisation reliant on donations, whereas Serco is a successful company that chose to place profits over safety, thus might be seen as more morally culpable. Yet another reason, as I have suggested earlier, is that the RNZSPCA does not seek to undermine its accountability mechanisms because it shares goals and values with its public entity counterpart and the instrument granting it state coercive powers. Since its existing accountability measures are properly implemented, it largely retains its legitimacy. However, if prosecution rates remain low, eroding the charity’s effectiveness, this could lead to greater public support in future for a separate body such as a ministry or commissioner for animal welfare to better enforce animal welfare legislation.

¹⁶⁷ State Services Commission, *Formal Review of the Department of Corrections*, above n 103, at 19.

VII Conclusion

I have demonstrated that proper implementation of accountability measures is imperative for the legitimate devolution of state coercive power to private actors, particularly interim measures where the actor risks succumbing to moral hazard. Such legitimacy means that citizens consent to coercive force being appropriately used against some of their number, in return for the order and safety provided by the law. I have further shown how the related public law values of transparency and effectiveness also advance legitimacy by informing and encouraging the consent it requires.

The four actors examined, Corrections, MPI, the RNZSPCA and Serco, demonstrably share strong, formal, legal accountability mechanisms, particularly via the RNZSPCA's standing as an approved organisation under the Animal Welfare Act and through Serco's contract with Corrections. Problems arise however when moral hazard incentivises private actors to emphasise profit over the proper exercise of their state coercive powers. I have demonstrated that where moral hazard is a risk, diligent implementation of ongoing, interim accountability measures is vital for sustaining legitimacy. Simply implementing end-stage mechanisms after the fact of a transgression is not enough, because it allows too much leeway for abuses of state coercive power to occur. I have also shown how shared values between private entity agent and public entity principal support legitimacy, even where interim accountability mechanisms are relatively weak. Shared values between private actor and the relevant instrument establishing its state coercive power support legitimacy in the same manner. The flip side of this coin is that where goals and values diverge, more conscientious implementation of interim or ongoing accountability mechanisms must occur, in order to sustain the legitimate devolution of power. Similarly in such cases, greater transparency is required in order to prevent accountability mechanisms being undermined. A private actor who is ineffective in a morally culpable manner will also likely lose legitimacy, albeit that erosion of legitimacy is possible for all ineffective actors.

Words, to the delight of lawyers and poets, are shape-shifters, changing their meaning depending on context, popular usage, the mind of the receiver and even tone and inflection. Words form the basis of any legal agreement including those of public-private partnerships, yet can never be so tightly pinned down as to make a "watertight" instrument. As every person

familiar with the Treaty of Waitangi will attest, it is sometimes the spirit, not always the literal meaning of the words, that is important. Private actors who share goals and values with their public sector counterparts, or with the instruments conferring the relevant coercive powers, will have less incentive to undermine the purposes for which those powers exist. Shared values, therefore, particularly together with strong accountability mechanisms, can create a much more robust network of legitimacy in the devolution of state coercive power to private actors.

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