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**ACCOUNTABILITY AND THE FISCAL
RESPONSIBILITY PROVISIONS OF THE NEW
ZEALAND PUBLIC FINANCE ACT 1989**

LLB (HONS)

**LAWS 522: PUBLIC LAW: STATE, POWER AND
ACCOUNTABILITY**

FACULTY OF LAW

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2015

Abstract

The recent Greek debt crisis highlighted the need for a robust fiscal policy regime. New Zealand's Public Finance Act 1989 establishes principles the government must take into account when setting its fiscal strategy, and imposes reporting requirements. These provisions are discussed, and analysed from the perspective of accountability theory. In particular, I use an accountability framework developed by Mark Bovens to consider the adequacy of six potential accountability forums. These forums are Parliament, the courts, the Treasury, the media, business groups, and the public via elections. It is concluded that each is relatively weak as a forum providing accountability for fiscal policy. Three possible amendments to New Zealand's fiscal responsibility regime are then considered. The first is to establish a new accountability forum: an independent fiscal commission, to provide fiscal reports and commentary. The second and third are amendments to the Act which may enhance existing accountability arrangements: a principle requiring consideration of intergenerational equity, and a fixed numerical target or limit for debt or spending. It is argued that the first two amendments should be adopted, while the last should not. This is primarily because a fixed target or limit would be bad policy. The paper concludes with further discussion of the related concept of transparency. It is argued that the Act is best viewed as an aide to transparency, rather than accountability, for fiscal policy. While Bovens' accountability framework is a useful exercise, the political and policy-focused nature of this area of the law makes rigid accountability inappropriate.

Word length

The text of this paper (excluding cover page, abstract, table of contents, footnotes and bibliography) comprises approximately 13,645 words.

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I Introduction

Recent media coverage of the Greek debt crisis has drawn mainstream global attention to potential consequences of long-term government irresponsibility. Governments in a mixed economy like New Zealand's provide a wide range of services to their citizens, from law enforcement to education. All the activities cost money, and governments must raise enough money to provide them, typically through taxation or borrowing or a combination of both. This is essentially what is meant by fiscal policy: the government's spending and revenue decisions. If, in a given year, a government spends less than it receives, it achieves a surplus. If it spends exactly what it receives, it achieves a balanced budget. And if it spends more than it receives, it has a deficit. Governments normally pay for deficits either by using existing savings, if they have any, or more commonly by borrowing. Borrowing has long-term implications because the government must eventually repay what it has borrowed, normally with interest. But borrowing is often politically advantageous because it avoids the need to raise taxes immediately. Citizens can be led to believe they can have it all: low taxes and extensive public services – thereby leaving the mess to a later government to deal with. This happened over several decades in Greece, where generous welfare and public services were provided largely through borrowing. The problem was exacerbated as recent governments were not transparent about the country's financial situation, so the extent of the problems became apparent only when a new Prime Minister took office in October 2009. The Greek government is now in a difficult financial situation, and in recent months has failed to make debt repayments that were due.¹

The Greek situation exemplifies the need for a strong fiscal responsibility regime. Another reason for having a firm approach to fiscal policy is that the political process is responsive to demands from special interest groups.² The problem is exacerbated by future taxpayers being under-represented in the political system, so politicians are often "short-sighted or indifferent" to longer term budget constraints.³

The fiscal responsibility provisions contained in part 2 of New Zealand's Public Finance Act 1989 aim to influence government behaviour by requiring it to be transparent about its fiscal policy,⁴ and legislating principles to be followed. However, there is no legal sanction for breaching the provisions. This paper considers these provisions of the Act, and analyses their adequacy from a public law accountability perspective. It draws on existing scholarship, particularly an accountability framework proposed by Mark Bovens. Part II explains the provisions, including their background, the reasons behind them, and political commitment to them. Part III introduces accountability and Bovens' framework for assessing it. Bovens adopts a relatively narrow definition of accountability, essentially a process of 'account giving', distinct from broader concepts like transparency. The strength of accountability arrangements can be assessed using three perspectives on

¹ For further explanation, see Liz Alderman and others "Greece's Debt Crisis Explained" (20 August 2015) New York Times <www.nytimes.com>.

² R Carling and S Kirchner *Fiscal Rules for Limited Government: Reforming Australia's Fiscal Responsibility Legislation* (Policy Monograph 98, Centre for Independent Studies, Sydney, 2009) at 2.

³ At 2.

⁴ Treasury *Regulatory Impact Statement: Amendment to Part 2 of the Public Finance Act 1989 (the fiscal responsibility provisions)* (28 March 2012).

accountability: democratic, constitutional and learning. Each perspective has its own assessment criteria.

Part IV of the paper analyses the accountability for fiscal responsibility in New Zealand. It looks at six potential "accountability forums": Parliament, the courts, the Treasury, the media, business groups and the public at large via elections. It is concluded that each is somewhat weak as an accountability forum. Their common thread is a lack of formal sanctioning power. They may have the ability to impose political consequences, but this ability is limited. Part V then discusses three possible amendments to the Act, again primarily through an accountability lens. The first is whether an independent body or commission should be established to oversee fiscal policy and strategy. The second is whether there should be express reference in the legislation to intergenerational equity. The third is whether there should be a fixed target or limit to spending or borrowing. It is argued that the first two should be adopted, but the last should not, primarily on policy grounds.

The paper concludes with a discussion of whether New Zealand's fiscal responsibility legislation is really best analysed using a formal accountability framework. It is argued that while formal accountability analysis is a meaningful assessment exercise, ultimately decisions around fiscal policy are ideological, policy-oriented and inherently political. Therefore the value of legislation regulating fiscal policy cannot be fully appreciated using formalistic frameworks such as Bovens'. The legislation is concerned not so much with controlling the government through enforceable requirements, as with setting specific criteria against which the government must decide its strategy and report to the public. It exists not to truly constrain the government, but to increase transparency. Accountability and transparency are different things, and in my view the Act is better thought of as an aide to the latter than the former.

II Overview of the Fiscal Responsibility Provisions

This part provides an overview of the fiscal responsibility provisions in the Public Finance Act 1989. It first sets out and explains the provisions themselves. It then provides an outline of their history. Lastly, it looks at the effects of the provisions, including political commitment to them.

A The Provisions

The fiscal responsibility provisions are contained in part 2 of the Act. At a high level they have three key aspects:⁵ first, they specify a set of principles for responsible fiscal management in the conduct of fiscal policy; secondly, they require regular public reporting by the government on the extent to which fiscal policy is consistent with those principles; and thirdly, they provide for regular and independent economic and fiscal updates by the Treasury, including a pre-election update and a statement on the long-term fiscal position at least every four years. The provisions require the

⁵ Treasury, above n 4, at 1.

government to set and pursue long-term fiscal objectives⁶ (10 years or longer) and short-term fiscal intentions⁷ (three years or longer).

The provisions do not prescribe fiscal strategy, but rather require governments to be transparent about their objectives and intentions, whether they have changed, and how they accord with the "principles of responsible fiscal management".⁸ Those principles are:⁹

- (a) reducing debt to prudent levels by ensuring that, until those levels have been achieved, total operating expenses in each financial year are less than total operating revenues in that year;
- (b) maintaining prudent levels of debt by ensuring that, on average over a reasonable period of time, total operating expenses do not exceed total operating revenues;
- (c) achieving and maintaining adequate levels of total net worth;
- (d) managing prudently the fiscal risks facing the Government;
- (e) when formulating revenue strategy, having regard to efficiency and fairness, including the predictability and stability of tax rates;
- (f) when formulating fiscal strategy, having regard to the interaction between fiscal policy and monetary policy;
- (g) when formulating fiscal strategy, having regard to its likely impact on present and future generations; and
- (h) ensuring that the Crown's resources are managed effectively and efficiently.

Key terms including "prudent" levels of debt and "reasonable period of time" are not defined in the Act, so are left open to the government to interpret. The government's fiscal strategy may depart from the principles of responsible fiscal management if:¹⁰

- (a) the departure from those principles is temporary; and
- (b) the Minister, in accordance with this Act, states—
 - (i) the reasons for the departure from those principles; and
 - (ii) the approach the Government intends to take to return to those principles; and
 - (iii) the period of time that the Government expects to take to return to those principles.

The government must present a fiscal strategy report each year to the House of Representatives.¹¹ The report must state the government's long-term objectives and assess their accordance with the principles of responsible fiscal management.¹² It must also state the government's short-term intentions and assess their consistency with the principles. If the intentions are not consistent with the principles, the report must state: the reasons for the inconsistency; the approach the government intends to take to return to consistency; and the period of time expected to elapse before

⁶ Public Finance Act 1989, s 26J.

⁷ Section 26K.

⁸ Treasury, above n 4, at 1. See ss 26J and 26K.

⁹ Paraphrased. See s 26G.

¹⁰ Section 26G(2).

¹¹ Section 26I.

¹² Section 26J.

consistency is achieved.¹³ The report must also address certain other matters¹⁴ including an assessment of the extent to which the government's recent fiscal performance is consistent with the government's fiscal strategy report for that period.¹⁵ No penalty is prescribed by the Act for failure to comply with any of the principles or reporting requirements.

The Treasury in 2013 recommended the addition of further principles of responsible fiscal management that ultimately were not included in the Amendment Act. Notable was a principle that the government take into account economic cycles in formulating its fiscal strategy. Such an amendment would be good policy, and it is unclear why the recommendation was not acted on. However, its relevance to accountability is minimal, so it will not be discussed in this paper.

B Background and History

The fiscal responsibility provisions were intended to address high government debt by strengthening the incentives on Ministers to set budget priorities and follow an agreed fiscal strategy, and provide more regular information to the public on fiscal matters.¹⁶ When introduced in 1994, the provisions were seen as world-leading and influential institutional reform. They have been cited as best practice by international agencies such as the Organisation for Economic Cooperation and Development and the International Monetary Fund.¹⁷ The original provisions were initially contained in a separate Fiscal Responsibility Act 1994, and were incorporated into the Public Finance Act 1989 by the Public Finance Amendment Act 2004. Recently, additional provisions were added by the Public Finance (Fiscal Responsibility) Amendment Act 2013, which came into force on 4 September that year. The long title of the 1994 Act was:¹⁸

An Act to improve the conduct of fiscal policy by specifying principles of responsible fiscal management and by strengthening the reporting requirements of the Crown and, in particular,

(a) By requiring the Minister of Finance to report regularly to the House of Representatives on the extent to which the Government's fiscal policy is consistent with the specified principles of responsible fiscal management and to justify in his or her report any departures made by the government from those principles.

From the start Parliament's Finance and Expenditure Committee considered that transparency alone was insufficient to reduce government debt. It recommended the then-Bill be strengthened by the inclusion of legislated principles of responsible fiscal management, publication of a Budget Policy Statement, and providing for the Budget Policy Statement and other reports required under the Act to be referred to a parliamentary committee.¹⁹ According to the Treasury,²⁰ the main objectives of a

¹³ Section 26K.

¹⁴ Section 26L.

¹⁵ Section 26L(1)(c).

¹⁶ Treasury, above n 4, at 1.

¹⁷ At 1.

¹⁸ Fiscal Responsibility Act 1994, long title.

¹⁹ John Janssen "New Zealand's Fiscal Policy Framework: Experience and Evolution" (Treasury Working Paper 01/25, 2001) at 7–8.

robust fiscal responsibility regime are to ensure that governments take into account and publicly discuss all the relevant dimensions of fiscal policy. Fiscal policy can be thought of as having three dimensions: fiscal sustainability (maintaining prudent levels of debt), macroeconomic stability (fiscal decisions support rather than exacerbate economic cycles, such as recessions)²¹ and fiscal structure (the composition of tax revenue and government expenses).²² The fiscal responsibility provisions currently focus mainly on the first and third of those dimensions. The Treasury's recommendation that economic cycles be taken into account would have extended the Act to the second dimension.

C Effects of the Provisions

The political and practical consequences of the provisions are contentious. Early on, opposition politicians thought the legislation would be ineffectual because of its unenforceability. Winston Peters said "[l]egislation of this type in this country is meaningless unless this Parliament means to keep faith with the public".²³ Hon Michael Cullen, in my respectful view missing the mark, called it "constitutional nonsense" and suggested the "notion that this Parliament will somehow bind future Governments on fiscal policy by stating such matters as it must 'maintain a fiscal surplus in any year', is constitutional stupidity".²⁴ Cullen later said "why should the present Government attempt to constrain the sovereignty of voter choice, when they may choose to vote for large deficits?"²⁵ Paul Swain opined, "[i]t is neither possible nor desirable for this Government to try legislatively to 'strait-jacket in' policy directions in the area of fiscal policy for future Governments."²⁶

On the other hand there was a view that the Act would become politically entrenched, and that governments could be expected to comply with its provisions even if they are not enforceable in the courts.²⁷ That a National government created the legislation and a Labour government consolidated it with the Public Finance Act is evidence of widespread political commitment to the provisions, and that they have become politically entrenched.²⁸ More recent evidence supporting this is that the National government in 2013 added additional principles. When introducing the changes, Hon Bill English acknowledged a constitutional aspect to the provisions. He said, "[g]iven the constitutional significance of the fiscal responsibility provisions, it was important that we discussed the changes with other parliamentary parties before introducing them to Parliament".²⁹ A contrasting effect is that the consolidation of the principles into the Public Finance Act has made them "less visible".³⁰ Less visible principles

²⁰ Treasury, above n 4, at 8.

²¹ Recessions have a precise economic definition, but generally speaking are contractions in the economy. Common effects include reduced income and increased unemployment.

²² Treasury, above n 4, at 3.

²³ (7 June 1994) 540 NZPD 1490.

²⁴ (26 May 1994) 540 NZPD 1143.

²⁵ (22 June 1994) 541 NZPD 2009.

²⁶ (7 June 1994) 540 NZPD 1483.

²⁷ Chye-Ching Huang "The Repeal and Resurrection of 'Responsibility'" (2005) 11 Auckland University Law Review 230 at 235.

²⁸ At 234–235.

²⁹ Bill English "Improvements to Public Finance Introduced" (press release, 30 August 2012).

³⁰ Huang, above n 27, at 235.

may be less likely to constrain executive policy and be more vulnerable to amendment or repeal.³¹ To date, no principles have been repealed or watered down.

Have the provisions had any effect? New Zealand's fiscal position improved significantly in the first half of the 1990s, before the Fiscal Responsibility Act 1994 came into force. This was largely due to reduced expenses during an economic upswing, and lower finance costs from falling interest rates.³² A rise in the age of superannuation eligibility also contributed to the improvement.³³ Government debt continued to fall during the rest of the 1990s, though at a lesser rate, and kept falling modestly until the global financial crisis occurred in 2008.³⁴ New Zealand had relatively low government debt at the time of the crisis and domestic recession beginning in 2008.³⁵ New Zealand's government debt at the time was below 20 per cent of gross domestic product (GDP).³⁶ Many countries, including the United Kingdom and the United States, had government debt exceeding 50 per cent of their respective GDP. In other words, New Zealand's government debt, relative to the size of its economy, was small compared with similar countries. This indicates that New Zealand's successive governments were very fiscally responsible in the 1990s and early 2000s.

However, whether the provisions have really made a difference is unclear. New Zealand has maintained debt levels that are low by international standards, and much lower than in the decades preceding the enactment of the Fiscal Responsibility Act. But no research has firmly attributed this to governments' commitment to the principles of responsible fiscal management in the Act. It might simply have been that recent governments prioritised fiscal restraint for reasons unrelated to the legislation's requirements.

III Accountability

This part of the paper discusses what accountability is, and explains the framework that will be used to analyse the Public Finance Act in the next section.

Accountability is "one of those golden concepts that no one can be against. It is increasingly used in political discourse and policy documents because it conveys an image of transparency and trustworthiness."³⁷ Modern representative democracy can be analysed as a series of principal-agent relations. Citizens, the primary principals in a democracy, transfer their sovereignty to political representatives who, in turn (at least in parliamentary systems) confide their trust in a cabinet.³⁸ Accountability's place in a democracy has been put thus: "[d]elegation involves endowing another party with the discretion to act, representation is about the interests that are at stake, and accountability is meant to ensure that the exercise of discretion is checked. Each

³¹ Huang, above n 27, at 235–236.

³² Janssen, above n 19, at 15.

³³ At 15.

³⁴ Treasury *Briefing to the Finance and Expenditure Committee* (February 2013).

³⁵ Treasury, above n 4, at 3.

³⁶ At 4.

³⁷ Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 *Euro LJ* 447 at 448.

³⁸ Mark Bovens "Public Accountability" in Ewan Ferlie, Laurence E Lynn Jr and Christopher Pollitt (eds) *The Oxford Handbook of Public Management* (OUP, Oxford, 2009) at 192.

in their own way, these three mechanisms are meant to ensure that in the end the preferences of the polity are translated into policy".³⁹ The accountability framework used in the next section's analysis of the six accountability forums will now be discussed.

Bovens states that accountability "has come to stand as a general term for any mechanism that makes powerful institutions responsive to their particular publics".⁴⁰ It can be thought of by either broad or narrow conceptions. Broad conceptions may have dimensions including transparency, liability, controllability, responsibility and responsiveness.⁴¹ However, this broadness makes it hard to establish empirically whether an organisation is subject to accountability.⁴² Bovens prefers a narrower sense that refers to concrete practices of account giving. He defines accountability as "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."⁴³ There is some contention over whether a sanction is a constitutive element of accountability.⁴⁴ Bovens considers that it is and should be included in the definition, but in the broader sense of "consequences". These consequences would include political and reputational consequences, rather than strictly formal or legal sanctions.⁴⁵ The possibility of consequences "makes the difference between the non-committal provision of information and being held to account."⁴⁶ Weale argues that "[t]he most obvious example of such sanctions within democracies is elections".⁴⁷ Elections provide "an incentive for those seeking office to explain what they will do with political power if they succeed in achieving it, and an incentive for those who have held office retrospectively to justify their use of political power".⁴⁸ An election "forces rival candidates to campaign against one another in such a way that there is accountability to the electorate."⁴⁹

Brandsma and Schillemans, naming their framework the "accountability cube", similarly but more simply state that accountability has three phases.⁵⁰ The first is the information phase. Here the actor provides an account of his or her conduct to the accountability forum, for example providing reports and oral testimony. The second is the discussion phase. The forum assesses the account and may ask for additional information and pose follow-up questions. The actor may respond and clarify his or her actions. The third is the consequences phase. Here the forum passes judgment and imposes sanctions to correct or reward the actor if necessary. Sanctions may be formal or informal (such as public praise or criticism), and positive or negative. The

³⁹ Gijs Jan Brandsma and Thomas Schillemans "The Accountability Cube: Measuring Accountability" (2012) 23 *Jnl of Public Admin Research and Theory* 953 at 953.

⁴⁰ Bovens, above n 37, at 450.

⁴¹ At 450.

⁴² At 450.

⁴³ At 450.

⁴⁴ See discussion in Bovens, above n 37, at 451.

⁴⁵ At 451–452.

⁴⁶ At 451.

⁴⁷ Albert Weale "New Modes of Governance, Political Accountability and Public Reason" (2010) 46 *Government and Opposition* 58 at 65.

⁴⁸ At 65.

⁴⁹ At 65.

⁵⁰ Brandsma and Schillemans, above n 39, at 955–956.

extent to which accountability exists can be assessed by considering the level of information provided, the intensity of discussions, and the reach of sanctions.⁵¹ In practice this is similar to Bovens' framework, but it is outlined here as an alternative way of thinking about accountability. As for consequences, Brandsma and Schillemans argue that what matters is not the ease by which a principal may resort to actually imposing consequences, but simply whether he or she has the possibility.⁵²

It is important to understand what accountability is not. Bovens considers transparency an important prerequisite for accountability. But it does not in itself constitute accountability due to a lack of scrutiny by a specific forum.⁵³ Transparency is discussed later in this paper. Similarly, responsiveness (of the actor to the needs and preferences of a range of stakeholders) and participation (of those stakeholders in the process) are not accountability. Accountability is retrospective – actors are required to account to a forum after the fact. Responsiveness and participation may enhance political legitimacy, but are not accountability because they lack the elements of justification, judgment and consequences.⁵⁴ Control also is broader than accountability, although there may be a fine line between the two.⁵⁵

The key question for the assessment of accountability is what the effects of the various types of accountability are and how to judge them.⁵⁶ Inadequacies in accountability can be either deficits – a lack of accountability arrangements – or excesses – a dysfunctional accumulation of a range of accountability mechanisms.⁵⁷

Three reasons are commonly given for the value of accountability, and each offers a separate perspective for the assessment of accountability relations.⁵⁸ The first is the democratic perspective, that public accountability is important in a democracy because it helps citizens to control public office-holders. Accountability provides the voters with the information needed for judging the propriety and effectiveness of the government's conduct.⁵⁹ The second is the constitutional perspective, that accountability prevents corruption and the abuse of power by tyrannical governments.⁶⁰ The third is the learning perspective, that accountability is a tool to make and keep governments, agencies and officials effective in delivering on their promises. The prospect of sanctions motivates them to find better ways of doing things.⁶¹ These three perspectives provide systematic criteria to evaluate accountability arrangements. Key types of accountability recognised by Bovens include legal accountability (involving the courts),⁶² political accountability

⁵¹ Brandsman and Schillemans, above n 39, at 960.

⁵² At 968.

⁵³ Bovens, above n 37, at 453.

⁵⁴ At 453.

⁵⁵ At 453–454.

⁵⁶ At 462.

⁵⁷ At 462.

⁵⁸ At 462.

⁵⁹ At 463.

⁶⁰ At 463.

⁶¹ At 463–464.

⁶² At 456.

(involving ministers, Parliament and ultimately the public)⁶³ and social accountability (involving, for example, interest groups and non-governmental organisations).⁶⁴

A *Summary of Accountability*

Bovens argues for a narrow definition of accountability. The key components of such an accountability relationship are that 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. Once an accountability relationship exists, three perspectives provide criteria for assessing the extent of the accountability. These are called the democratic, constitutional and learning perspectives. These perspectives will be elaborated on in the following discussion of accountability forums.

IV *Accountability and the Public Finance Act*

The Public Finance Act can be analysed using accountability frameworks. The focus in this paper is that developed by Bovens, because it is a comprehensive framework that has been widely cited and accepted. But the work of others will also be considered when appropriate. Two conceptually distinct approaches can be taken. The first is to look at the effectiveness of the accountability forums in holding the Minister to account for complying with the Act – in other words, how effective they are in enforcing the Act. The second is to look at how the Act contributes to each forum's effectiveness in holding the Minister to account for fiscal responsibility more generally – that is, whether the Act enhances their existing effectiveness. Each approach is in one sense wider and another sense narrower than the other. Although distinct, both approaches are appropriate to the subject of this paper and thus both will be used. Their distinction is outlined here for clarity.

Six accountability forums are considered: Parliament, the courts, the Treasury, the media, business groups, and the public through elections. It is argued that each forum provides relatively weak accountability using Bovens' framework. It is also noted that the forums are interdependent: the media communicates the work of the other forums to the public; elections are the ultimate means by which political consequences are imposed. It is worth noting now that an actor, namely the government or in some cases the Minister of Finance, is present in each accountability forum below.

A *Parliament*

Parliament is an important intermediary between the government and the public, and can engage in accountability dialogue with the executive.⁶⁵ It loosely meets Bovens' definition of an accountability relationship, particularly once Parliamentary select committees are taken into account. By convention, ministers are answerable to Parliament and must explain all matters affecting their portfolios.⁶⁶ The government's fiscal strategy report must be tabled in Parliament. The Finance and Expenditure

⁶³ Bovens, above n 37, at 455.

⁶⁴ At 457.

⁶⁵ Auditor-General *Third report for 1999: The accountability of Executive Government to Parliament* (1999) at 15–16.

⁶⁶ Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 244.

Committee considers government economic and financial matters, including the reports required by the Public Finance Act. One of its primary functions is to examine the government's fiscal policy objectives against the principles in the Act.⁶⁷ The Committee has various powers including requesting ministers, or anyone else, to give evidence and be examined.⁶⁸ If a person refuses, the chair of the Committee can apply to the Speaker of the House of Representatives to issue a summons.⁶⁹ There is no specific debate in the House on the report or the government's fiscal strategy it contains. But there is typically a lot of general discussion of government financial matters. There is significant debate on the Appropriations Estimates Bill, the legislation component of the Budget, during the legislative process. The Minister clearly has the opportunity to explain and justify the government's fiscal decisions, and opposition Members of Parliament (MPs) can give speeches in criticism. In addition, there is Parliament's question time, in which opposition and government backbench MPs can ask ministers questions and receive responses.

Political consequences may result from all this. However, Parliamentary debates and questions on matters that involve ideology, such as economic and fiscal policy, are often directed at political point-scoring rather than serious consideration of the issues. It is questionable how seriously such discussion is taken by the public. And it is questionable whether any political consequences to the Minister or government can actually be attributed to compliance with the Public Finance Act or fiscal responsibility in general. Consequences might simply arise because of a poor oral performance in the House by the Minister. On a formal level, Parliament can control the executive because it 'controls the purse strings': it examines and approves by statute the revenue and expenditure proposals of the Government (that is, the Budget).⁷⁰ Further, many government policies must be passed by Parliament in legislation. This in theory gives it significant power over fiscal policy, both directly (budgets must be passed by Parliament) and indirectly (as a political bargaining chip). In practice, however, the government's majority in Parliament places major limits on Parliament's control over the executive. So when it comes to matters like the Public Finance Act, Parliament may have only softer political tools and rhetoric to control the executive. It has been suggested that New Zealand's mixed member proportional electoral system does limit the government and ensure greater separation of powers, so "widely unpopular policies cannot be rushed through".⁷¹ This may place limits on the government in extreme circumstances. But fiscal policy is foundational government policy supported by minor parties in coalition or confidence and supply agreements. Therefore the fiscal policy would have to be so extreme as to break the government before Parliament could prevent its passage. Ministers are appointed by the Governor-General on the advice of the Prime Minister;⁷² Parliament has no involvement in the appointment process and has no removal powers as legislatures in some countries have. In extreme situations, a Minister who deceives or misleads Parliament over any portfolio responsibilities breaches the convention of individual ministerial responsibility and may be charged with contempt of Parliament.⁷³ But

⁶⁷ Standing Orders of the House of Representatives 2011, SOs 127, 330–331.

⁶⁸ Standing Orders of the House of Representatives 2011, SO 192.

⁶⁹ Standing Orders of the House of Representatives 2011, SO 194.

⁷⁰ Auditor-General, above n 65, at 26.

⁷¹ Mai Chen *Public Law Toolbox* (2nd ed, Lexis Nexis, Wellington, 2014) at 28.

⁷² By constitutional convention. See Joseph, above n 76, at 237–238.

⁷³ At 244.

Parliament would still have no removal powers and could only put pressure on the Minister to resign. Thus Parliament has a lack of formal sanctioning power.

Parliament could perform well from the democratic perspective, in which the key question is whether the accountability arrangement adds to the possibilities open to the voter, parliament or other representative bodies to control executive power.⁷⁴ From this perspective, Parliament helps highlight information in the reports that are mandated by the Public Finance Act. MPs can also request further information from the Minister, which may be brought to the public. As a representative body made up of elected (either directly or via party lists) members, its ability to question the Minister is important as MPs are the public's elected representatives. The fusion in the Westminster system of the legislature and executive somewhat diminishes this in practice. But nonetheless the ability of opposition MPs to ask questions does mean the government can be held to account by other elected members. Again, however, the discussion is so partisan and the potential political consequences so hard to isolate that it is questionable whether Parliament provides sufficient incentives for the government to commit itself to the agenda of its democratically legitimised principals. Ministers are also democratically elected members of the legislature, so in principle are as responsive and accessible to the public as other MPs are. This contrasts with the more rigid separation of powers systems in some other countries in which ministers are unelected, resulting in a greater distinction between elected representatives (members of the legislature) and the executive.

Also relevant is the constitutional perspective, in which the fundamental questions are whether the accountability arrangement offers enough incentives, including sanctions, for public officials and agencies to refrain from the abuse of authority, and whether the accountability forum has enough inquisitive powers to reveal corruption or mismanagement. Parliament maintains continuous oversight of the Government's fiscal activities through reports, Parliamentary questions, debates and select committees, and through the Controller and Auditor-General.⁷⁵ The Select Committee, as already noted, can call and examine the Minister. The political consequences of Parliament's process may act as an incentive on the Minister to comply with the Act, although this is questionable as already discussed. Other weaknesses from a constitutional perspective are those discussed above. Parliament does not have the power to remove a minister from office. And the focus of Parliamentary interaction is generally aimed at making political gain, rather than on conformity of actions with laws and norms. From a learning perspective, the overall question is whether the arrangement enhances the learning capacity and effectiveness of the public administration.⁷⁶ Parliament contributes little from this perspective, other than to potentially highlight weaknesses with fiscal strategy.

On the point about a lack of serious debate, here are some examples of typical parliamentary discussion on fiscal and economic issues. They provide some indication of the level of debate and the extent to which Parliament really holds the government to account for fiscal responsibility. Opposition MP Chris Hipkins criticised the government by saying, "I should remind people, [Labour] produced nine surpluses in

⁷⁴ Bovens, above n 37, at 465.

⁷⁵ Auditor-General, above n 65, at 26.

⁷⁶ Bovens, above n 37, at 466.

a row to National's seven deficits".⁷⁷ Chris Bishop defended the government's policies by saying, "Labour members have absolutely no fiscal credibility whatsoever ... they should be apologising to New Zealanders for [their past fiscal decisions]." Minister Nick Smith said, "Members on this side know the definition of good fiscal management". There have been some higher quality questions and answers. For example, David Bennett said, "when you look at a Budget surplus or deficit—in this case, we are looking at losses of about \$684 million in 2014-15, followed by a surplus of \$176 million in 2015-16, and increasing surpluses after that—it shows that New Zealand is on the right track. It shows that the economic management of this Government is on the right track". Notably, he had also previously referred to Treasury reports. Green MP Jan Logie said, "the tax cuts that this Government introduced have cost this country \$5 billion over the last term of Parliament. The \$61 billion of debt that this Government has got the country into—up from \$14 billion—has now meant that we are paying \$1 billion a year in interest off that debt."⁷⁸ However, substantively good speeches seem to be in the minority as many are purely political.

The Finance and Expenditure Committee works behind the scenes. It must release reports which consider, among other things, the government's Fiscal Strategy.⁷⁹ This in theory is a good opportunity to closely analyse the strategy, but in practice is not done. Recent reports have done little more than summarise the key points of the strategy, without critical examination.⁸⁰

To summarise, Parliament does meet Bovens' definition of an accountability forum. The democratic perspective is especially relevant, and Parliament has the potential to perform well from this perspective. The constitutional perspective is also relevant. But Parliament in practice is reasonably weak in both perspectives, primarily because the standard of debate and criticism is low. It is therefore questionable whether political consequences would follow. But are these weaknesses a serious problem with the forum? They are probably just a reflection of the inherently political nature of fiscal policy and that Parliament is not the best place for precise and neutral analysis of the government's actions. Parliament is the battleground of opposing sides, and its main strength is in giving the public both sides of the picture from which to decide. Nonetheless, when using Bovens' framework it is difficult to conclude that Parliament is anything other than a relatively weak accountability forum.

B The Courts

The first issue to consider here is whether the courts will actually engage with the Public Finance Act. Judicial review is the primary means of calling the executive to account.⁸¹ Some language that was formerly non-justiciable⁸² has now been held to be justiciable. An example is certain "aspirational"⁸³ provisions in s 9 of the State Owned

⁷⁷ (21 May 2015) 705 NZPD 3789.

⁷⁸ (15 May 2014) 698 NZPD 17931.

⁷⁹ Standing Orders of the House of Representatives 2011, SO 327.

⁸⁰ For example see Finance and Expenditure Committee *2015/16 Estimates for Vote Finance, Fiscal Strategy Report 2015, and Budget Economic and Fiscal Update 2015* (2 July 2015).

⁸¹ Janet McLean "New Public Management New Zealand Style" in Paul Craig and Adam Tomkins (eds) *The Executive and Public Law* (Oxford University Press, Oxford, 2006) at 142.

⁸² Justiciability refers to the capability of being determined by the courts.

⁸³ McLean, above n 81, at 142–143.

Enterprises Act 1986, at issue in *New Zealand Maori Council v Attorney-General*.⁸⁴ Nonetheless, not all legislation is justiciable, and in any event, remedies in judicial review are discretionary.⁸⁵

In one sense the Public Finance Act is a type of legal accountability because it imposes legal requirements on the government. However, if it cannot be legally enforced it is difficult to call it legal accountability in substance. As already noted, the Act does not prescribe any specific penalties for breaching the fiscal responsibility provisions. Huang, discussing the predecessor Fiscal Responsibility Act 1994, identifies three reasons why the provisions may not be enforced by the courts at all. This type of legislation is sometimes called "responsibility" legislation.⁸⁶

First, justiciability principles may limit judicial enforcement, because courts have decided they do not have the capability to decide on some matters, including matters of "high policy". This does not apply in every situation with an element of policy, nor does it require a decision-maker to take account of competing relevant considerations.⁸⁷ It could be argued that the "high policy" doctrine should be interpreted narrowly. The argument is that the doctrine should be reserved for cases where the subject-matter of a decision is such that it should be made *only* by elected officials, and be subject to accountability via the democratic process rather than the supervisory jurisdiction of the court.⁸⁸

Even with a more restricted interpretation, the doctrine raises a problem for the Act. Fiscal policy is so central to the operating of government (and the economy) and is so 'high level' rather than operational that it should be only the government that sets it. If this is correct, then if, for example, a court were required to decide whether the government had reduced its debt to "prudent" levels, as required the Act, it arguably would have to assess high policy.⁸⁹ Issues might also arise if the court had to consider whether budgets were balanced over a "reasonable period of time" or whether the government has adequately had regard to the interaction between monetary and fiscal policy. The latter is a technical economic question on which views may differ.⁹⁰ As noted already, the Act does not define or provide guidance on a number of key terms in the legislation. Courts also may refuse relief that would not be in the public interest, and there are wide areas of public decision-making in which political judgment of the public interest must prevail.⁹¹ Joseph describes it as a court's reluctance to involve itself in national political or policy considerations.⁹² Fiscal policy is arguably such an area, because it does involve wider economic and social wellbeing considerations. The Supreme Court recently said the courts should be very reluctant to make "an examination of general government policies, priorities and

⁸⁴ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

⁸⁵ McLean, above n 81, at 151.

⁸⁶ Responsibility statutes typically require the executive to prepare and publish reports, but lack explicit judicial enforcement and remedial provisions. See Huang, above n 27, for further discussion.

⁸⁷ See *Waitakere City Council v Lovelock* [1997] 2 NZLR 385.

⁸⁸ Chen, above n 71, at 861.

⁸⁹ Huang, above n 27, at 232.

⁹⁰ Monetary policy concerns the country's money supply, and primarily seeks to influence interest rates and inflation. Fiscal policy – government spending and taxation – has side-effects on interest rates and inflation, so there can be tension between the two policy types.

⁹¹ *Laws of New Zealand Administrative Law* (online ed) at [159].

⁹² Joseph, above n 66, at 874–876.

funding decisions".⁹³ This would not be such a problem with respect to the very publication of the mandated reports – if the Minister failed to present a particular report, presumably the courts would have no difficulty saying so. But there may still be issues with determining the adequacy of the reports' content. The reports' substance is more important than their titles, so little would be gained by the courts reviewing whether a report has been published if they do not consider its substance.

Secondly, there may be no one who has legal standing to bring an action against the government. The duties imposed on the government in statutes like this are arguably for the general public benefit, and may not be owed to any particular person or group who can ask the courts to enforce the duties.⁹⁴ To have standing, a person must have a sufficient interest in the matter to which the application relates;⁹⁵ someone who suffers in no appreciable way will lack standing to proceed.⁹⁶ Courts have in recent decades adopted a relatively liberal approach to standing, particularly in what is often called "public interest litigation". Nonetheless, it is difficult to apply their reasoning to the Public Finance Act. The Court of Appeal has endorsed⁹⁷ dicta of Lord Diplock in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd*. Agreeing with Lord Denning in a prior case, Lord Diplock said "if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced".⁹⁸ It is a stretch to say that any particular fiscal strategy would offend or injure the public, because even severe fiscal irresponsibility normally must continue for years or decades before its consequences become problematic. For instance, the Greek government has run a deficit every year since 1974 but its debt crisis arose only in the last few years. Further, the long-term harm typically arises due to short-term benefit – deficits occur because government spending is greater than revenue, so the public is essentially receiving more from the government than it is putting in. If a fiscal strategy has significant immediate advantages it might be difficult to argue it is harmful to the public.

Lord Diplock then said "[t]he reference here is to flagrant and serious breaches of the law by persons and authorities exercising governmental functions which are continuing unchecked"⁹⁹ and "[i]t would, in my view, be a grave lacuna in our system of public law if a pressure group ... or even a single public spirited taxpayer, were prevented by outdated technical rules of *locus standi*¹⁰⁰ from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."¹⁰¹ He lastly said "[i]t is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is

⁹³ *Couch v Attorney General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [161].

⁹⁴ Huang, above n 27, at 232.

⁹⁵ *Laws of New Zealand Administrative Law* (online ed) at [153].

⁹⁶ See Joseph, above n 66, at 1225.

⁹⁷ *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216.

⁹⁸ *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) at 641, citing *Blackburn v Greater London Council* [1976] 3 All ER 184 (CA) at 192.

⁹⁹ *Inland Revenue Commissioners*, above n 98, at 641.

¹⁰⁰ The right to bring an action in court.

¹⁰¹ *Inland Revenue Commissioners*, above n 98, at 644.

unnecessary because they are accountable to Parliament for the way in which they carry out their functions... they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge."¹⁰² On these points, it is highly unlikely that any fiscal strategy will be a "flagrant and serious" breach, or that the government is acting unchecked, given that its budget must be passed by Parliament every year. Thus it might be a "sufficient answer" in this situation to say the central government is accountable to Parliament for the way it carries out its functions.

Thirdly, judges might conclude that Parliament did not intend them to enforce the legislation.¹⁰³ The statute lacks explicit judicial enforcement and remedial provisions. The then-Bill's promoters did not mention judicial enforcement, instead explaining they intended political pressure to enforce the duties.¹⁰⁴ The courts might determine that Parliament intended the statute to be a "blueprint for the behaviour of political actors, to be enforced by those actors amongst themselves using political processes inside and outside the House."¹⁰⁵ Consequently, for these reasons the courts are unlikely to get involved in the Public Finance Act and matters of fiscal responsibility. Thus the courts do not meet Bovens' definition of accountability.

Hypothetically, if the courts were to get involved then they would likely meet Bovens' definition, subject to cross-examination issues discussed below. There would be an actor (the Minister), a forum (the court) in which the actor is obliged to explain and justify his or her conduct, the forum may pose questions and pass judgment, and the actor may face consequences. Those consequences would most likely be political, because the Act contains no penalties and judicial review is concerned with process rather than outcome. The government would likely be instructed simply to reconsider its decision.

Bovens' perspective most relevant to the courts is the constitutional perspective. Courts would be good from this perspective if they grant leave requiring Ministers and other individuals to be cross-examined. Doing so would give the Minister an opportunity to explain the government's decision, and be questioned on it. However, granting leave for cross-examination has a high threshold: it must be shown that cross-examination is "necessary", rather than just of assistance.¹⁰⁶ Leave will not be granted where an applicant seeks to engage in a "fishing expedition".¹⁰⁷ So it is questionable whether the Minister would be cross-examined. In any event, the political embarrassment of having major economic policy judicially reviewed, as well as the consumption of time and other resources involved in judicial review, may provide a strong incentive for the government to comply with the legislation's requirements. Another strong point is that courts do focus their interaction on conformity of the executive's actions with the law, which Bovens considers a criterion for the constitutional perspective.¹⁰⁸

¹⁰² *Inland Revenue Commissioners*, above n 98, at 644.

¹⁰³ Huang, above n 27, at 232.

¹⁰⁴ At 232.

¹⁰⁵ At 232.

¹⁰⁶ *Commerce Commission v Powerco Ltd* CA123/06, 9 November 2006 at [38].

¹⁰⁷ Joseph, above n 66, at 933.

¹⁰⁸ Mark Bovens, Thomas Schillemans and Paul 'T Hart "Does Public Accountability Work? An Assessment Tool" (2008) 86 *Public Administration* 225 at 231.

There would be little positive effect from the learning perspective, except to highlight failure to comply with the legislation. In fact there may even be a negative effect if the prospect of judicial review leads to a proceduralism and rules-based approach that hampers the making of decisions which are good from a policy standpoint – policy being a key role of the executive branch.

Courts would score poorly from a democratic perspective, because the purpose of judicial review is not to gather information for the public but rather to assess process. Moreover, it is an unelected judiciary inquiring into the workings of an elected executive branch which in principle exercises popular sovereignty. Bovens acknowledges that accountability arrangements may score well from one perspective but not from others, making the evaluation of accountability arrangements a "somewhat equivocal exercise". Further, the perspectives may not always point in the same direction.¹⁰⁹ The courts present a situation where this conflict occurs.

Regardless of whether courts were to engage in judicial review, Huang argues the legislation may still have some indirect legal effect: "[a]ll Acts of Parliament must fit into the body of law as a whole",¹¹⁰ so when interpreting one piece of legislation, judges can consider other legislation. Responsibility legislation can help judges interpret other statutes that use similar terms or address similar areas of law. It can also shape the judicial views of New Zealand's constitutional structure, and can affect the development of the common law.¹¹¹ For example, in *Lange v Atkinson* the Court of Appeal decided to develop the defamation defence of qualified privilege in a way that was consistent with the constitutional principles the Court had articulated.¹¹² It is not clear when and how this would likely happen in relation to the Public Finance Act, but it is something to bear in mind.

There are also good policy reasons why legislation of this kind should not be legally enforceable. It belongs to an area of the law and government policy that requires scope for significant political and economic judgment. Budget deficits are regarded by many economists as an important, or even essential, short-term tool to help a country recover from a recession.¹¹³ Further, economic policy is highly ideological and it is important in a parliamentary democracy such as New Zealand's that popular sovereignty be exercisable on such a matter.

To summarise, the courts are unlikely to consider the fiscal responsibility provisions of the Public Finance Act. Therefore Bovens' definition of an accountability forum is not met. If the courts were to consider it, they might be a good accountability forum from the constitutional perspective. They would be independent, and focused on compliance with the law, rather than scoring political points. Even so, it is unlikely the Minister would be cross-examined. This would reduce the courts' effectiveness. The Act contains no express legal remedial provisions, and judicial review is

¹⁰⁹ Bovens, above n 37, at 466.

¹¹⁰ JF *Burrows Statute Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2003) at 168 in Huang, above n 31, at 233.

¹¹¹ Huang, above n 27, at 233.

¹¹² *Lange v Atkinson* [1998] 3 NZLR 424, discussed in Huang, above n 26, at 233.

¹¹³ The Keynesian school of economic thought. See Sarwat Jahan, Ahmed Saber Mahmud and Chris Papageorgiou "What is Keynesian Economics?" (2014) 51(3) *Finance & Development* 53 at 53–54.

concerned with process. Therefore, consequences from court action would likely be political, rather than legal. This is good from a policy perspective, as fiscal policy is ideological and requires political and economic judgment. But it does mean the courts are at most a fairly weak accountability forum.

C *The Treasury*

The Public Finance Act requires the Treasury to prepare several reports to then be presented by the Minister of Finance, including a statement on the country's long-term fiscal position and an economic and fiscal update. Another key report presented by the Minister, the fiscal strategy report, does not need to be prepared by the Treasury. But in practice it is because the Treasury is the organisation that works with the report's subject-matter. All reports are publicly available on the Treasury's website, and some are also available on the separate Budget website. It is unclear how independent the Treasury is in preparing the reports, and how much influence the Minister has over them, if any.

The Treasury does not meet Bovens' definition of an accountability forum. It is under the direction of the Minister of Finance, so is not institutionally independent, even if it may exercise independence on some matters. In a sense this is an accountability relationship of the opposite kind – the Treasury is accountable to the Minister, rather than vice versa. It cannot impose sanctions on the Minister, but the reports it issues could lead to political consequences. The Treasury's value in relation to the Public Finance Act might be characterised as a contribution to fiscal transparency, rather than accountability.

Could the Treasury nonetheless be effective as an accountability forum? Its reports publicly provide important fiscal and economic information, thus improving the ability of the public and Parliament to make informed decisions and exercise democratic control. It could therefore be good from the democratic perspective. Unfortunately the latest fiscal strategy report¹¹⁴ arguably does not comply with the legislation's requirements. Sections 26J and 26K of the Act require the report to "assess the consistency" of the government's long-term objectives and short-term intentions with the principles of responsible fiscal management. In the context of the written report, this implies the objectives and intentions should be evaluated against each principle. However, the report merely lists the government's fiscal objectives and intentions and asserts that "[t]hese short-term intentions and long-term objectives are consistent with each other and with the principles of responsible fiscal management as set out in the Public Finance Act 1989."¹¹⁵ This bare assertion leaves the reader to determine how the fiscal intentions and objectives are consistent with the Act. It therefore limits the usefulness of the report as a tool for the public and Parliament to assess compliance with the Act. Some of the Treasury's reporting activities were emerging practices before the fiscal responsibility provisions were enacted, but their enactment has transformed them into legislative requirements. This improves the Treasury's robustness by ensuring that it will not be pressured by the government into scaling back its reporting. However, as stated, there is no information available on whether the Treasury is truly independent in its production of the reports.

¹¹⁴ Bill English *Fiscal Strategy Report* (Treasury, 21 May 2015).

¹¹⁵ At 15.

It is also worth noting that the Treasury is a government department subject to the Official Information Act 1982 (OIA). Further information on fiscal matters, which is not published in reports mandated by the Public Finance Act, could be obtained by an OIA request. This legislation enhances the Treasury's effectiveness, by expanding the scope of information on fiscal matters available to the public. However, it is helpful in theory more than in practice. Making OIA requests can be onerous for individuals. Requests are often made by the media. But there do not appear to have been any on fiscal policy matters that have been published in articles.

The Treasury is weak from a constitutional perspective, because it is under the Minister's direction, does not have inquisitorial powers and cannot issue sanctions against the Minister or government. Its reports may lead to political consequences for the government, but it is not clear how strong an incentive this is for compliance with the Act. From a learning perspective, its reports may highlight weaknesses in the government's fiscal and economic strategy. It is worth noting that the Treasury also gives economic and fiscal advice to the government. This does not affect the Treasury as an accountability forum, but does mean it can influence policy in ways outside the scope of the Act-mandated reports.

To summarise, the Treasury does not meet Bovens' definition of an accountability forum. It is under the direction of the Minister, so is in fact accountable to the Minister, not the other way round. It does nonetheless help provide accountability. It publishes reports mandated by the Act, which are made available publicly and tabled in Parliament. These reports have the potential to produce political consequences for the government. However, key reports are limited and tend to assert, rather than explain, compliance with the Act. Overall, the Treasury is a fairly weak provider of accountability. It could more appropriately be considered a provider of transparency.

D The Media

Mass media are "by far the most important" source of information about officials' activities and decisions,¹¹⁶ representing a necessary condition for the existence of democratic government and a pre-condition for accountability.¹¹⁷ The media can "play a key role in enabling citizens – who have imperfect information about government activities – to monitor the actions of ministers", which "leads to a government that is more accountable and responsive to its citizens and render[s] elected politicians more accountable."¹¹⁸

Bovens considers the media to be a form of political accountability,¹¹⁹ although, in this context at least, it does not stack up well against his definition of accountability. It does not have any power over the Minister, and the Minister is not necessarily given the opportunity to explain and justify his or her conduct. The media cannot impose formal sanctions, but its actions can result in political consequences for the

¹¹⁶ R Douglas Arnold *Congress, the Press, and Political Accountability* (Princeton University Press, Princeton, 2004) at 1.

¹¹⁷ Martino Maggetti "The Media Accountability of Independent Regulatory Agencies" (2012) 4 *European Political Science Review* 385 at 387.

¹¹⁸ At 387.

¹¹⁹ Bovens, above n 37, at 455.

Minister and government. The positive or negative tone of media coverage is significant, and citizens ever more frequently form their political opinions based on what they learn from the news media.¹²⁰ The 'new media' has also helped with accountability: the general availability of real-time information, particularly on internet blogs and news websites, increases the public's ability to hold the government accountable. It also requires governments to respond more quickly, especially when they are making policy or law reform announcements.¹²¹

From a democratic perspective, the media could be a very effective forum. It is at least a major, if not the main, channel by which the public learns about government issues, and the government communicates with the public. The media typically reports extensively on budget and general fiscal and economic issues. Although little coverage has been given specifically to the reports mandated under the Public Finance Act, the content is reported on in more general terms. This provides members of the public with information that will help them to make informed decisions and democratically constrain the government. From a constitutional perspective, the media is less effective. It does not have inquisitorial powers either generally or under the Public Finance Act, and it cannot impose sanctions. However, there may be political consequences of reporting so the media does provide an incentive to the government to behave in a fiscally responsible manner. It is independent, so is not formally constrained by the government.

The main weakness of the media, besides its lack of formal power, is that it is understandably driven by its own need to attract readers, viewers or listeners, so reporting may be sensationalised to achieve this end. Media actors "follow their commercial and/or ideological goals... They are indeed involved in the process of constructing reality and [they] impose their views on the story."¹²² As a consequence, reporting on fiscal issues tends to be directed towards broken promises, presented in a light that focuses on failure, rather than a serious analysis of the more delicate and complex issues of fiscal strategy and the principles in the Public Finance Act. For example an article on the website www.stuff.co.nz in May 2015 was titled "Government will not deliver long promised surplus: Treasury".¹²³ The article included a quote from opposition MP Grant Robertson that the government had "staked its economic credibility on" achieving a surplus. Further, reporting may not necessarily give the public an accurate impression of the facts. Because of this, it is questionable whether the government is incentivised to comply with the Public Finance Act, because it might not be criticised by the media unless its actions can be presented sensationally. The government could plausibly ignore the Act and fiscal responsibility in general as long as it handles the publicity well. New Zealanders tend to be less concerned about the economy than citizens of some other countries,¹²⁴ so the media does not have a significant incentive to report on it in detail.

To summarise, the media is an important means by which the public learns of government conduct, including fiscal policy. It therefore has significant potential to

¹²⁰ Maggetti, above n 117, at 389.

¹²¹ Chen, above n 71, at 39.

¹²² Maggetti, above n 117, at 390.

¹²³ Hamish Rutherford "Government will not deliver long promised surplus: Treasury" (11 May 2015) Stuff <www.stuff.co.nz>.

¹²⁴ See Pete George "Poll – Top 4 Election Issues" (11 March 2014) Your NZ <<http://yournz.org>>.

impose political consequences on the government. However, an important weakness is that the media's focus is understandably on attracting readers, viewers or listeners. Its reporting therefore tends to be sensationalised, rather than neutral and analytical. Further, New Zealanders are relatively apathetic to economic issues, so the media has little incentive to make fiscal policy a focus of its reporting. The government might minimise any political consequences by handling publicity well. Therefore in practice the media is a much less effective accountability forum than it might be in theory.

E The Business Community

Could business groups be considered an accountability forum? Business New Zealand is a prominent business union or advocacy group. The New Zealand Initiative (NZI), formerly the New Zealand Business Roundtable, is a business-oriented think-tank that also engages in public discourse. Neither meets Bovens' definition of an accountability forum. They are similar in a sense to the media, but are further removed from both the political process and the public, and do not have the same privileges that the press does. They have no formal power over the Minister, and the Minister is not necessarily given the opportunity to explain the government's decision. These issues are similar to those faced by the media, but more marked. The groups could nonetheless be effective in holding the government to account. Most relevant is the democratic perspective. NZI in particular is frequently cited by the media, and regularly produces reports on government policy including fiscal policy.¹²⁵ This can provide an independent perspective on the government's policy, and highlight potential issues with it. The organisation's high profile in the media could help it to produce political consequences for the government.

There are important limitations. Business New Zealand is a lobby group that represents business interests. It is fairly ideological, supporting free enterprise and low business taxes, among other things.¹²⁶ Similarly, NZI is a think-tank that advocates small government and a market-based economy.¹²⁷ Having such an agenda arguably minimises public credibility and trust. This raises a general point on the relationship between ideology and fiscal responsibility. Fiscal responsibility is often associated with small-government, libertarian or conservative philosophies. For example, Carling and Kirchner, whose work is referred to in this paper, are connected to a libertarian think-tank and have also published books and papers arguing for "limited government" in Australia.¹²⁸ (I have accordingly been discerning in citing their work.) There is no particular reason why this should be, either generally or in relation to the Public Finance Act. Fiscal responsibility is concerned with transparency and balanced budgets, not with reducing the size of government per se. I seek to approach the topic from a neutral standpoint, and do not seek to advocate any particular ideological position.

¹²⁵ See for example Bryce Wilkinson and Khyati Acharya *Guarding the Public Purse: Faster Growth, Greater Fiscal Discipline* (The New Zealand Initiative, 2014).

¹²⁶ See Business New Zealand <www.businessnz.org.nz> for more information.

¹²⁷ See Patrick Smellie "Roundtable and NZ Institute morph into new libertarian think tank" (4 April 2012) National Business Review <www.nbr.co.nz>.

¹²⁸ See Carling and Kirchner, above n 2.

F Elections

For the sake of thoroughness, could elections themselves be considered an accountability forum? No, but they are still a crucial part of accountability in New Zealand's fiscal responsibility regime. First, they are the main avenue by which sanctions can be imposed on the government – as discussed above, there will not likely be any legal sanctions. Secondly, they are therefore a key event around which the media, Parliament, the Treasury (which must issue a pre-election update), business groups and informal forums such as debates, question and answer sessions, and any other campaign events, revolve. The opposition can criticise the government, the government must explain and defend its past actions, and the public may have a unique chance to interrogate all candidates. Elections therefore provide an opportunity to the public to obtain information and give feedback in a way that may not be available at other times, even though elections do not come close to meeting Bovens' definition. Elections are the ultimate means by which the public imposes consequences on the government. When this paper refers to political consequences, the main consequence is electoral defeat. In extreme situations pressure for resignation may arise, but normally an election is where the consequence is imposed.

G Forums: Interdependence and Conclusion

These accountability forums have been discussed separately because each has its own pros and cons. But the effectiveness of each one is heavily dependent on the workings of the others. The Treasury may publish its reports and MPs may work to hold the government to account through parliamentary criticism. But the political consequences of each will be minimal unless the media communicates their efforts to the public. Similarly, there is little evidence of penetrating independent reporting by the media – it appears to report mainly on what is said in Parliament, and occasionally on the Treasury's reports. It also reports on major court cases, including judicial review, and gives attention to NZI. Thus without these other forums, the media would have little to communicate to the public. Elections are an event around which the forums periodically revolve, so significantly increases scrutiny and the opportunity for the public to test the government and the opposition. Further, elections provide the ultimate political consequence for the government. For analytical purposes the forums have been treated discretely in this paper, but it is important to acknowledge their interdependency in imposing political consequences on the Minister and government. Such consequences do not occur in a vacuum.

V Possible Amendments

This section of the paper considers how New Zealand's fiscal responsibility regime could be improved. Three possible amendments are discussed, two of which are recommended. The first is the establishment of an independent fiscal commission to produce reports currently produced by the Treasury, and provide additional commentary on fiscal matters. The second is an amendment to the principles of responsible fiscal management to include express reference to intergenerational equity. The third amendment, the creation of a numerical target or limit to debt, spending or some other measure, is not recommended, primarily on policy grounds. The first would be a new accountability forum, while the latter two would simply alter

the Act to enhance existing accountability relationships. Each amendment will now be discussed in turn.

A *Independent Body*

In 2012 the Treasury considered whether an independent fiscal council should be established to provide commentary on fiscal policy. The Treasury concluded that although the council would likely produce a net benefit, it was insufficient to achieve specific goals the Treasury was aiming for at that time.¹²⁹ Accordingly, none has been established.

Other models for an independent body have been proposed in Australia. One such model is a more substantial fiscal commission. It would be part of a stronger enforcement regime that could impose pecuniary penalties on members of the Australian federal parliament for breaches of fiscal rules.¹³⁰ In reality, the pecuniary penalty would probably be less significant than the loss of political reputation that would come from the imposition of such penalties by an independent commission.¹³¹ The commission would be independently resourced, with commissioners serving five-year terms with staggered initial appointments.¹³² The commission would set fiscal policy rules, and any government policy decisions would be required to comply with those rules.¹³³ The commission would also become the agency required to prepare key reports, currently prepared by the Australian Treasury.¹³⁴

A similar agency in New Zealand might provide real advantages, as a more clearly independent check on the executive. While the Treasury must at present prepare certain independent reports under the Act, there could be issues of perception about its independence. Concern has been expressed that fiscal statements in Australia "are often seen as lacking credibility because of a perception that [its] Treasury is overly beholden to the executive." Notably in a May 2009 poll 84 per cent of respondents said they did not trust Treasury forecasts.¹³⁵ The Australian Treasury has also been accused of changing its forecast assumptions, presentation and methodology to suit the government's priorities.¹³⁶ While similar polling data is unavailable in New Zealand, and no such accusations appear to have been leveled against the New Zealand Treasury, it is still possible this perception could exist and undermine confidence in the reports. Reports prepared by a genuinely independent agency outside the purview of the Minister of Finance might be more credible than those prepared by the Treasury. Whether the commission should have the power to impose financial penalties on government ministers personally for failure to comply with fiscal responsibility provisions, as suggested in Australia, is questionable. The absence of penalties contrasts with the serious consequences imposed on company directors for failure to comply with accounting standards, including the submission of

¹²⁹ Treasury, above n 4, at 9.

¹³⁰ Stephen Kirchner "Reforming Fiscal Responsibility Legislation" (2011) 30 Economic Papers 29 at 32.

¹³¹ At 32.

¹³² Carling and Kirchner, above n 2, at 10–11.

¹³³ At 11.

¹³⁴ At 11.

¹³⁵ At 3–4.

¹³⁶ At 4.

certain reports.¹³⁷ However, this contrast is arguably justifiable because economic policy is made by elected representatives and is inherently political, so it ought to be enforced politically. On the other hand, it is understandable that certain standards should be imposed on company directors, who are private individuals with fiduciary obligations to the company and at times its various stakeholders. Including sanctions might raise issues because of the broadness and ambiguity of some important terms in the Act, and their openness to interpretation. Sanctions would be reasonable only if there was a much clearer benchmark against which the actions of the government could be assessed – for example if a numerical target were included, then this could accompany it. And presumably if penalties could be imposed by the commission, the courts might at some stage become involved. As discussed already, the courts will probably be reluctant to consider legislation like the Public Finance Act.

Using Bovens' framework, how good would an independent body or commission like this be? From a democratic perspective, its independence would give greater credibility to the reports that are currently provided by the Treasury. If it were to also publish commentary that provides the public with fiscal information in an accessible and understandable manner, rather than the more technical and 'government-speak' nature of the reports currently produced under the Act, this may help the public to make more informed choices and so enhance accountability from a democratic perspective. If the body had inquisitorial powers, and could examine the Minister and any other relevant individual, then it would be strong from a constitutional perspective. This would be improved further if the body could impose penalties on the Minister, as it would provide a more solid incentive to comply with the legislation. But, as discussed above, imposing penalties would likely require more substantive changes to the legislative regime. However, if it has actual sanctioning power then it would be weaker from a democratic perspective – it would essentially restrict the exercise of democratic political judgment. So there is a tension between being strong from a constitutional perspective and weak (or even negative) from a democratic perspective.

It is worth noting that powers given to such a commission must be linked to provisions to ensure the commission itself is accountable. Scholars have considered that independent regulatory agencies, which operate outside democratic institutions, need a "multi-pronged system of controls" to keep them accountable.¹³⁸ The control mechanisms that might be necessary are: (1) specification of clear and narrow objectives, rather than broad and ambiguous ones; (2) oversight by governmental and parliamentary committees; (3) procedural requirements like hearings and reporting duties; (4) judicial review; (5) professionalism and peer review; and (6) transparency and public participation. An active media would also be of help,¹³⁹ but that cannot be controlled. Such mechanisms might work well for the commission, particularly if it has sanctioning power. The exception would be (2), because oversight by governmental and parliamentary committees would be problematic for a fiscal responsibility commission, since its object would be to oversee the government.

¹³⁷ Graeme Wines and Helen Scarborough "Behind the Headlines: An Analysis of Australian Commonwealth, State and Territory Budget Balance Numbers" (2006) 12(2) *Accounting, Accountability & Performance* 82 at 109.

¹³⁸ See Maggetti, above n 117, at 386.

¹³⁹ At 387–388.

B Intergenerational Equity

New Zealand's population is ageing. It is expected that by 2061, between 22 and 30 per cent of New Zealanders will be aged over 65, compared to 14 per cent in 2012.¹⁴⁰ This means there will be fewer working age people (taxpayers, essentially) per person over 65 to pay for the costs of government.

An ageing population causes long-term fiscal concerns, because of the extra cost of superannuation and healthcare, among other things. Including generational equity in fiscal responsibility legislation is important because "as the cost is shifted to future generations, the current governments obviously cannot be held accountable."¹⁴¹ Intergenerational equity refers to the maintenance of living standards. It more concretely requires that "the cost of public expenditures should be distributed over time in a way that reflects the inter-temporal spread of the benefits generated by those expenditures".¹⁴² An important part of this is that taxpayers in each period should, as a group, contribute to public expenditures from which they derive benefits in accordance with the share of the benefits they receive. In other words, they should 'pay their way' without either subsidising or being subsidised by taxpayers in other time periods.¹⁴³ Besides demographic changes, climate change and other environmental problems may also result in significant costs to future generations.¹⁴⁴ Fiscal strategy reports in some other jurisdictions include discussion of climate change as it relates to fiscal policy and intergenerational concerns,¹⁴⁵ and this might be well worth including in New Zealand.

The Public Finance Act's principle relating to generational concerns is: "when formulating fiscal strategy, having regard to its likely impact on present and future generations".¹⁴⁶ This wording does not preclude considerations of intergenerational equity. But similar wording in an equivalent Australian Act has been applied in a way concerned with fiscal sustainability across generations, rather than intergenerational equity.¹⁴⁷ Thus it is entirely possible that the New Zealand government will ignore matters of equity and focus on fiscal sustainability.¹⁴⁸ The principle was added in the 2013 Amendment, so the way it is applied in practice is still developing. But so far references to intergenerational equity have been minimal, and general in nature. An explicit reference in the legislation to considering intergenerational equity would be advantageous to future generations.

¹⁴⁰ Statistics New Zealand *How will New Zealand's ageing population affect the property market?* (April 2013) at 6.

¹⁴¹ Greg Coombs and Brian Dollery "The Ageing of Australia: Fiscal Sustainability, Intergenerational Equity and Inter-Temporal Fiscal Balance" (2004) 39 *Australian Journal of Social Sciences* 459 at 464.

¹⁴² At 467.

¹⁴³ At 467.

¹⁴⁴ See Barry Anderson and James Sheppard "Fiscal Futures, Institutional Budget Reforms, and Their Effects: What Can Be Learned?" (2009) 9(3) *OECD Journal on Budgeting* 7.

¹⁴⁵ For example Australia and Denmark.

¹⁴⁶ Section 26G(1)(g).

¹⁴⁷ Judith C Bessant, Michael Emslie and Rob Watts "Accounting for Future Generations: Intergenerational Equity in Australia" (2011) 70 *Australian Journal of Public Administration* 143 at 146.

¹⁴⁸ Fiscal sustainability is concerned merely with whether spending can be sustained in the long run.

How would it perform under Bovens' framework? It would add another dimension to the fiscal strategy and therefore the reports mandated by the Act. The public would be able to see more clearly the long-term implications of fiscal strategy, and whether some generations are effectively subsidising others – for example, if current fiscal policy is shifting financial burdens to today's children in the future. This will enhance the public's ability to make informed choices and voice reasoned opinions on issues of fiscal strategy. Thus democratic accountability would be improved. There may be benefits from a learning perspective, because it would highlight a different way of thinking about fiscal policy. It might lead to a departure from the normal focus of economic growth and fiscal sustainability, in favour of a more holistic and fairness – even long-term wellbeing-oriented – focus. Western countries' fixation with economic growth has been criticised,¹⁴⁹ so including a principle like this may have the added benefit of helping to move away from that focus. This amendment is therefore recommended.

C Numerical Target or Limit

The Treasury opposed adding to the Act a new principle that imposes a numerical limit or target for certain financial variables,¹⁵⁰ such as spending increases or debt. Under the system contemplated by the Treasury, the government could depart from the limit temporarily, provided the Minister explains the reason for the departure, the approach the government intends to take to return to the limit, and the period of time the government expects to take to return to the limit. The amendment might also include corresponding requirements that the spending limit for the coming financial year be announced in the Budget Policy Statement, and a requirement that the Minister of Finance explain in the Statement whether expenses for the past year remained within the spending limit for that year.

Using Bovens' framework, how would a fixed target or limit improve accountability? It would in a sense get around some ambiguities in the legislation, like "prudent" level of debt. This is because there would be a number value against which the government's fiscal performance can be measured. It would therefore provide the public with a clearer and more understandable assessment of the government's fiscal responsibility. Because of this clear benchmark, which would be understandable to the public, the media might be more inclined to give attention to it. The government would have no discretion over interpretation, and would be less able to use political rhetoric to 'spin' its fiscal decisions and obscure their true nature. It has been argued that similar Australian principles are "too general and open to interpretation to provide an effective constraint on the conduct of fiscal policy".¹⁵¹ The same could be said of New Zealand's Act, so firm limits or targets would rectify this issue. It may help the public to better evaluate the government's actions and make more informed demands either to the government directly or at the ballot box.

From a constitutional perspective there would be little substantive change. Enacting a fixed target or limit in legislation might increase the appearance of separation of

¹⁴⁹ For example see Joseph Stiglitz, Amartya Sen and Jean-Paul Fitoussi (eds) *Report by the Commission on the Measurement and Economic Performance and Social Progress* (French Government, September 2009).

¹⁵⁰ Treasury, above n 4, at 15–18.

¹⁵¹ Carling and Kirchner, above n 2, at 6.

powers and thus enhance Parliament's control over the executive. But in reality the fusion of the legislative and executive branches means the government could simply amend or repeal the legislation. If the legislation is not entrenched, then a simple majority using the normal legislative process would be capable of freeing the government from the limit. Further, the legislation still would not be enforceable by the courts, if the discussion above is correct, so the target would have no teeth.

The Act is a very policy-driven piece of legislation, and the addition of a fixed target would have distinct advantages and disadvantages from a policy perspective. The advantages are, first, that it prevents increases in spending that might be tempting to the government in the event that tax revenue is higher than expected. Secondly, it helps drive productivity and efficiency gains in the state sector. And thirdly, it avoids pro-cyclical¹⁵² fiscal policy in an upturn (such as increasing spending for political gain – for example election sweetener spending on highly visible projects – if tax revenue increases due to strong economic conditions).¹⁵³ The major disadvantage is that its inherent inflexibility may prevent the government from pursuing targeted and short-term counter-cyclical fiscal policy, such as a stimulus package to minimise the effects of a recession.¹⁵⁴ The absence of a numerical target in the Act has been praised: "[b]y not imposing specific numerical targets in the *Fiscal Responsibility Act* [as it then was], New Zealand's multi-year budgeting process affords greater policy flexibility for the government to respond to changes in general economic conditions."¹⁵⁵ For example the legislation has enabled the government to make rapid adjustments to fiscal policy to alleviate the effects of a severe drought and the Asian economic crises of 1998.¹⁵⁶ A more recent scenario is the government's response to the Global Financial Crisis in 2008, after which debt was permitted to increase substantially due to reduced tax revenue and an increase in spending. A limit may impede such action. An allowance for short-term departures from the limit may be insufficient. Some recessions¹⁵⁷ are prolonged, and good economic policy may require the government to run deficits for a decade or more. An issue from both a policy and an accountability perspective is that it would increase the incentives on the government to find less transparent ways of spending, in order to circumvent the limit.¹⁵⁸ The consequence is that accountability and transparency could be worse than they are under the current legislation. The current broad and ambiguous language does at least minimise the government's incentive to reduce transparency.

The select committee considering the original Fiscal Responsibility Bill explicitly considered the role of mandatory targets, but rejected their inclusion for several reasons.¹⁵⁹ Some are in substance similar to those discussed above, so are not repeated here. But two are different from those already discussed. First, there is no

¹⁵² Pro-cyclical fiscal policy reinforces the economic cycle. Its effects may be, for example, to worsen a recession or inflate a bubble. Economists often argue for counter-cyclical policy to minimise economic cycles, in order to stabilise the economy.

¹⁵³ Treasury, above n 4, at 16–17.

¹⁵⁴ At 17.

¹⁵⁵ LF Jameson Boex, Jorge Martinez-Vazquez and Robert M McNab "Multi-Year Budgeting: A Review of International Practices and Lessons for Developing and Transitioning Economies" (2002) 20(2) Public Budgeting & Finance 91 at 101.

¹⁵⁶ At 101, footnote 19.

¹⁵⁷ As noted, recessions are essentially contractions in the economy.

¹⁵⁸ Treasury, above n 4, at 17.

¹⁵⁹ Janssen, above n 19, at 8.

theoretical justification for any *particular* fiscal target that can be maintained over a period of time. Judgments on the appropriate level of spending vary over time and depend on the country's economic circumstances at the relevant time. Secondly, other countries' experience of legislated targets suggests there are substantial risks attached to their use. Rigid adherence to targets can distort decision making, while lack of adherence – even a minor variation from the target – can significantly damage credibility.

In fact, this type of constraint has already been tried in New Zealand in the early 2000s, and was far from successful: "[e]fforts to restrict likely spending pressures saw the introduction of a mechanism known as 'fiscal provisioning,' essentially a pre-stated and fixed limit on total new spending over the parliamentary term of three years. This has proved to be a difficult instrument to manage politically. During the second cycle of operation, most of this money was spent during the first two years of government and the framework proved incapable of limiting the spending intentions of a coalition government facing six consecutive budget surpluses and an impending election."¹⁶⁰ The failure led the Treasury to introduce a new fiscal management approach that allowed for more fiscal flexibility.¹⁶¹ One key difference is that there was no legislation mandating the "fiscal provisioning" cycles. The first limit, \$5.9 billion in new operating spending during the following three years, was self-imposed during the 2000 campaign.¹⁶² There is a difference politically between complying with existing, albeit unenforceable, legislation and creating self-imposed non-legal constraints. So more commitment might be expected if the limit was prescribed in legislation. Nonetheless, the ineffectiveness of the past experiment does suggest that governments would not take a limit seriously – which is arguably good from an economic policy perspective, but defeats the purpose of the limit.

Therefore, this change is not recommended. The disadvantages discussed above are significant, and there would be a risk the legislation may simply be ignored or changed if it lacks widespread support. Because of the importance of fiscal policy to the economy and thus all New Zealanders, policy implications are extremely important in this area of the law. Essentially, this is a situation where there is a tension between accountability and workability which in my view comes down strongly in favour of workability.

D Conclusion on Amendments

Thus it is recommended that an independent fiscal body be established, and the Act's principle relating to intergenerational concerns explicitly refer to intergenerational equity. Each of these has benefits for accountability, and is good policy. A numerical target or limit is not recommended, because it likely would be ineffective. And if it was to prove effective it may undesirably constrain economic policy.

¹⁶⁰ Irene S Rubin and Joanne Kelly "Budget and Accounting Reforms" in Ewan Ferlie, Laurence E Lynn Jr and Christopher Pollitt (eds) *The Oxford Handbook of Public Management* (OUP, Oxford, 2009) at 570.

¹⁶¹ At 570.

¹⁶² OECD *Reallocation: The Role of Budget Institutions* (2005) at 18.

VI Conclusion

The fiscal responsibility provisions of the Public Finance Act are an important part of New Zealand's government finance legislation. The increased transparency led the provisions as seen as world-leading when they were first enacted. However they are unlikely to be directly enforced by the courts. Further, some important terms in the legislation are undefined, leaving the government with the discretion to interpret those terms as it likes. Using Bovens' framework for assessing accountability, the legislation performs acceptably in some respects. Obligations are imposed by the legislation, and can be pressed by Parliament, a political forum. But the lack of legal accountability and legal consequences weakens the regime. Overall, the main accountability forums considered in this paper – Parliament, the courts, the Treasury and the media – are limited. They have the potential to impose significant political consequences on the government, but in practice do not.

The regime could be improved by the establishment of an independent commission to oversee fiscal policy, provide commentary, and prepare Act-mandated reports that are currently prepared by the Treasury. Another recommendation is that the principle of responsible fiscal management relating to intergenerational concerns be amended to expressly include consideration of intergenerational equity. International experience suggests that intergenerational concerns are focussed on long-term fiscal sustainability, to the exclusion of equity issues. New Zealand's ageing population will put pressure on future generations, as will other emerging issues including climate change. A legislative amendment to include numerical limits or targets is not recommended, primarily on policy grounds. It is important for the government to have a degree of flexibility when setting economic policy, and be able to respond effectively to economic shocks, natural disasters, and other such pressures. Further, such an amendment would increase incentives on the government to find less transparent ways of spending.

Could Bovens' approach be too narrow and rigid? Does the mere process in the Public Finance Act not add something – control, trust, an assumption of good outcomes because the public knows the government is taking the provisions into account? Some other formulation may suit the Act and fiscal responsibility better. The foregoing analysis indicates there is weak accountability surrounding the Act and fiscal responsibility in general. But this may not a problem for the regime – although it could be improved by the recommendations above – but rather shows that accountability is not the best framework to use for major, high-level policy decisions such as fiscal strategy. It is arguably better suited to more routine and operational decisions and actions. For example, the decisions of an independent regulatory agency might be well suited to the application of Bovens' accountability framework. Olsen suggests that accountability analysis can be used for political issues.¹⁶³ He says the task is to discover and possibly punish noncompliance, for example by investigations into whether public funds are spent as intended and laws are followed. He considers it important to analyse where accountability regimes come from, how they are maintained and changed, and how accountability processes feed back into

¹⁶³ Johan P Olsen "Democratic Order, Autonomy, and Accountability" (2015) 28 *Governance* at 2 (upcoming issue; journal page number not known).

accountability regimes and political orders.¹⁶⁴ Perhaps Olsen's view is based on lower standards; accountability as he describes it might not perform well under Bovens' framework, yet still in a sense constitute accountability.

Brandsma and Schillemans emphasise that the question whether an accountability deficit is *normatively* problematic is a different matter from the measurement and analysis of accountability. The answer depends on one's view of good governance, whereas the accountability framework is evaluative and is not itself a normative tool.¹⁶⁵ In the case of the Public Finance Act the weakness probably is not normatively problematic, given the policy-driven nature of this legislation. Further, too much accountability can also be undesirable: "[a]ccountability is conceived as a precondition for democratic government, but accountability overload is seen to reduce performance and erode public trust in democratic government."¹⁶⁶

The relationship between accountability and transparency is unclear and contentious. The Public Finance Act might be better thought of as an aide to transparency rather than accountability. Transparency broadly means "the conduct of business in a fashion that makes decisions, rules and other information visible from outside."¹⁶⁷ The Act essentially imposes mandatory considerations on the government when determining fiscal strategy, and mandates the public reporting of that strategy against those requirements. This certainly increases transparency because the public knows that particular principles underpin fiscal policy, and also learns from the reports whether the government's strategy is consistent with those principles. This transparency builds trust in the government even if there is no firm mechanism to hold the government accountable for fiscal responsibility.

As already mentioned, Bovens considers transparency to be a prerequisite for accountability, but not in itself sufficient due to the lack scrutiny by a specific forum.¹⁶⁸ Hood outlines three prominent characterisations of the relationship between accountability and transparency.¹⁶⁹ The first is a "Siamese twin" interpretation: accountability and transparency are considered to be inextricably intertwined to the point where they cannot meaningfully be distinguished as different things. This view is problematic because transparency in the general sense of disclosure to the public need not be present in order for accountability to exist. For example, civil servants may be held accountable to Ministers without the details of their activities being available publicly.¹⁷⁰ And as Bovens notes, there can be transparency without accountability. The second interpretation is that accountability and transparency are "matching parts": they are separable but complementary because they produce good governance only in combination, not independently.¹⁷¹ For example, transparency in the general sense of disclosure of information about government affairs provides the necessary material for democratic accountability.¹⁷² This is approximately the view

¹⁶⁴ Olsen, above n 163, at 2 (upcoming issue; journal page number not known).

¹⁶⁵ Brandsma and Schillemans, above n 39, at 961.

¹⁶⁶ Olsen, above n 163, at 1.

¹⁶⁷ Christopher Hood "Accountability and Transparency: Siamese Twins, Matching Parts, Awkward Couple?" (2010) 33 West European Politics 989 at 989.

¹⁶⁸ Bovens, above n 37, at 453.

¹⁶⁹ Hood, above n 167.

¹⁷⁰ At 990–991.

¹⁷¹ At 990.

¹⁷² At 992.

that Bovens has espoused. However, there is again the difficulty that such general transparency need not be present for accountability to exist and be effective. The third interpretation is that transparency and accountability are an "awkward couple": they involve elements that are not only separable but actually may not always combine to produce good governance, and there may even be a tension and trade-off between the two.¹⁷³ Proponents of this view argue that formal transparency requirements tend to lead to low-intelligence, defensive box-ticking and one-way communication rather than real answerability in effective dialogue.¹⁷⁴ Although this view may be seen as an occasional aberration rather than a widely applicable interpretation, it should not be dismissed.¹⁷⁵

In the context of fiscal responsibility and the Public Finance Act, the "awkward couple" conception might in fact be most accurate, because overly firm accountability could lead to bad policy. This point is made several times in this paper (especially when discussing the courts, and an amendment to include a numerical target). So leaving weak accountability but with an emphasis on transparency, as the Act essentially does, is the best way to achieve good fiscal governance: providing the policy flexibility to meet economic challenges, but with transparency and relatively soft, political accountability. The fiscal responsibility regime is a good middle ground between two extremes: a lack of formal accountability or transparency arrangements at one end, and firm constraints on fiscal policy at the other.¹⁷⁶

Thus it is arguable that accountability analysis does not fully recognise the value in legislation like the Public Finance Act, and the Act is better thought of as an aide to transparency than accountability. It is also an instance in which, due to policy considerations, the so-called "awkward couple" conceptualisation of the relationship between accountability and transparency might be apt: too much of them might constrain good governance.

¹⁷³ Hood, above n 167, at 990.

¹⁷⁴ See Hood, above n 167, at 992.

¹⁷⁵ At 993.

¹⁷⁶ While writing this paper I began to see an analogy with New Zealand's Bill of Rights Act 1990 (BORA). BORA combines pre-enactment rights review with weak-form judicial review. Parliamentary sovereignty remains, but in a weakened form. Moreover, BORA's procedures may assist the political enforcement of its rights. Gardbaum argues that such a constitutional structure is a "normatively appealing" middle ground between straight legislative supremacy and judicial supremacy. See Stephen Gardbaum "The Case for the New Commonwealth Model of Constitutionalism" (2013) 14 *German LJ* 2229. I regard New Zealand's fiscal responsibility regime similarly. Further discussion on this point is outside the scope of this paper.

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