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A SELF-IMPOSED RESTRICTION: THE CONSTITUTIONAL CONUNDRUM OF THE GOVERNMENT'S FINANCIAL VETO.

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Abstract:

The Government's Financial veto, contained in chapter six of Parliament's Standing Orders, places considerable limits on Parliament's freedom to legislate, by allowing Ministers to prevent the passage of any bill, amendment or motions it thinks will have a "more than minor impact" on the Government's finances. This paper seeks to answer why Parliament has set such a restriction on itself, by analysing the constitutional role the veto plays and outlining its historical context, in particular by looking at the key 1995 reforms that gave rise to the veto. It assesses the case for the abolition of the veto and concludes that, while there is merit to concerns about the democratic legitimacy of the veto, abolition is impractical in the current constitutional climate. It is argued though that the veto needs further reform, in particular around the key definition of "more than minor appropriation", which the Government currently has wide discretion in interpreting. There is therefore a need for better independent oversight in interpreting this definition. Other reform options are also considered, including stricter requirements for the Government to give particularity as to the detailed financial reasons behind any decision to exercise the veto.

Keywords:

"Government's Financial veto", "Financial Initiative of the Crown", "Parliament's Standing Orders", "Parliamentary Procedure".

CONTENTS:

I: Introduction:

A fundamental tenet of New Zealand's uncodified constitution is the concept of parliamentary supremacy; the fact that Parliament has full power to make law. There is however a major limit on this rule, the government's financial veto, under the House of Representatives' standing orders.[1] The veto allows the government to unilaterally throw out any proposed law change that might have a "more than minor impact on the Government's fiscal aggregates."

The financial veto came to prominence following its use on the Parental Leave and Employment Protection (6 Months' Paid Leave) Amendment Bill 2016. This was the first time the veto had been used on an entire Bill, having previously only been used to throw out amendments.[2] The Bill had gone through all stages in the House up to third reading, and had majority support from MPs, including some who supported the government. This was enough to pass the Bill through second reading despite government opposition.[3] The government, however, decided the cost of the proposed programme meant this was a more than minor impact on their fiscal aggregates, and therefore justified the exercise of the veto.[4] This incident brought the veto into public consciousness for the first time and resulted in significant criticism from commentators, wondering why the Government had this previously obscure power to overrule the will of Parliament in what was supposed to be a Parliamentary democracy.[5]

As a major limitation on the legislature's law-making powers the, veto seems counter to majoritarian conceptions of democracy and inconsistent with the desire in New Zealand for greater legislative independence and power that underpinned the switch to the Mixed Member Proportional electoral system. However, the restriction is entirely self-imposed, and MPs have consistently supported its continued existence. The reason for this is that it is deeply embedded in New Zealand's constitutional culture and abandoning it would require a major shift in the House's approach to fiscal policy- one MPs seem reluctant to make. Therefore, despite calls for its abolition, the veto seems likely to remain in place for the foreseeable future.

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[1] Standing Orders of the House of Representatives 2020, SO 334-338.
[2] New Zealand Parliament "Financial Veto certificates explained" (29 June 2016) New Zealand Parliament <https://www.parliament.nz/en/get-involved/features/financial-veto-certificates-explained/>.
[3] (25 May 2016) 714 NZPD 11265.
[4] (29 June 2016) 715 NZPD (Parental Leave and Employment Protection (6 Months' Paid Leave) Amendment Bill — Third Reading, Sue Moroney).
[5] Jade Du Preez "Cross-Examination: Bill vs Bill - Bill English Kills Six Months Paid Parental Leave" (14 July 2016) Equal Justice Project https://www.equaljusticeproject.co.nz/articles/2016/07/cross-examination-bill-vs-bill-bill-english-kills-six-months-paid-parental-leave>.

This does not mean the veto is not in need of reform, however. The main flaw is the definition of "more than minor impact," an ambiguous definition which the Government has full discretion in interpreting. This is liable to create controversy and disagreement whenever the veto is exercised and creates a real risk of bad faith abuse of the veto, but one which could be remedied with independent oversight. There are also issues in other areas, such as the degree of particularity the Government is required to provide when exercising the veto. If the veto is to remain in place therefore, reform to address these issues is needed.

II: The Reasons for the Veto:

Key to understanding why the veto exists is to look at the constitutional purposes it serves. It is also important to analyse the history of the veto to see what brought us to this position, particularly the 1995 reforms which produced the veto in its current form, and what influenced this process, as well as what influences were considered but not followed throughout this period. This illuminates the very deliberate constitutional position Parliament has come to and why.

A: The constitutional Purpose of the Veto:

The veto fulfils two main purposes. The first is a fundamentally constitutional one: that fiscal matters are the responsibility of the executive government and it should not be held responsible for and be made to implement policies they do not agree with. The logic goes that if Parliament wants to force through such policies, they should change the Government, and find a new one willing to take responsibility for implementing them.[6] This is a reflection of a fundamental aspect of the separation of powers and is reinforced by the long history of the financial veto, which can be traced back to an 1811 Standing Order of the Westminster Parliament.[7] The financial veto is therefore much more than a simple procedural rule. It is these factors that led one report of the Standing Orders Select Committee to conclude that abolition of the veto would "be highly undesirable from a constitutional perspective".[8]

A related justification used for the existence of the veto is the need for responsible fiscal management, which the veto secures by reigning in Parliament's ability to intervene in spending matters. The veto is in this context a tool to "avoid legislative anarchy and imprudent

[6] David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 514-515.
[7] Standing Orders of the House of Commons 1811, SO 3.
[8] Mary Harris *Review of Standing Orders: Analysis and recommendations—Financial procedures* (Office of the Clerk of the House of Representatives, April 2014) at 12.

management of the public finances."[9] The concern that opening up financial matters to ordinary legislative processes could pose a risk for the country's financial position is backed up by wider evidence. For example, partisan fragmentation of the legislature, as has been a common feature of our Parliament since the introduction of MMP, is consistently linked with higher deficits. The exception to this rule is in countries like New Zealand, where parliamentary control of finances is constrained, such as through the veto.[10]

There may be a mistaken temptation to view the financial veto as merely a procedural rule of Parliament, which can easily be abandoned. However, the rule is a fundamentally constitutional one. This can be illustrated by charting the history of the veto and how it has diverged from its Westminster origins.

B: History of Reform:

The financial veto can be traced back to the idea of the 'financial initiative of the Crown', an old piece of English customary law that prevented Parliament from passing laws that would cost the Crown money, if that legislation had not first been recommended by the Crown.[11] This was formally articulated in SO 3 of the 1811 Standing Orders of the House of Commons which formalised the financial initiative rule as follows:

> That this House will receive no Petition for any Sum of Money, relating to the Public Service, but what is recommended from the Crown.

The rule is still in place in the United Kingdom today.[12]

The rule was exported from the United Kingdom to other jurisdictions as part of the Westminster model, and in several of them remains in place today. Australia has what it calls the 'Executive Initiative', which is formalised in s 56 of the Federal Constitution and prevents the passing of appropriations without the consent of the executive.[13] Canada has a very similar provision in s 54 of the Canadian Constitution Act 1867, also prohibiting the House from passing 'money votes' without a recommendation by the Executive.[14]

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[9] Ed Davey "Making MPs Work for Our Money" in OECD *Holding the Executive Accountable: the Changing Role of Parliament in the Budget process* (OECD, An International Symposium for Chairpersons of Parliamentary Budget Committees of OECD Member countries, January 2001) at 71-72.
[10] Joachim Wehner "Institutional Constraints on Profligate Politicians: The Conditional Effect of Partisan Fragmentation on Budget Deficits" (2010) 43 Comparative Political Studies 208 at 222.
[11] Gilbert Campion and others (eds) *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (14 Ed, Butterworth & Co, London, 1946) at 654.
[12] Standing Orders of the House of Commons 2019, SO 48.
[13] Commonwealth of Australia Constitution Act 1900 (Cth), s56.
[14] Constitution Act C 1867 c3, s 54.

The rule came to New Zealand through s 54 of the New Zealand Constitution Act 1852 (UK), and reads:[15]

> It shall not be lawful for the House of Representatives… to pass, or for the Governor to assent to, any Bill appropriating to the public service any sum of money from or out of Her Majesty's Revenue within New Zealand, unless the Governor, on Her Majesty's behalf, shall first have recommended… to make provision for the specific public service towards which such money is to be appropriated…

Of these core Westminster systems, New Zealand has departed the most from the original Crown's financial initiative mechanism. Each of the others is essentially just a variation on that original power. Major reform came in 1995, following a report by Parliament's Standing Order's Committee, which identified several flaws with the existing standing order. First, that it was too restrictive on the legislative process by preventing amendments and Bills being moved and debated. Secondly, that it actually failed to fully protect the government's financial position, because it did not cover taxation. Finally, that its procedure was unclear and ambiguous- relying on the intervention and judgement of the Speaker.[16]

The first issue was resolved by allowing Bills to progress to Third Reading and amendments to be debated before the veto can be exercised. Secondly, the definition of what was covered by these standing orders was expanded from Bills appropriating revenue, to any change that might have "a more than minor impact on the Government's fiscal aggregates."[17] This covered the following far broader categories: total operating expenses, total operating revenues (including taxation), the balance between total operating expenses and total operating revenues, total debt and total net worth.[18] Finally, confusion as to application was addressed by transforming the financial initiative into a Crown financial veto, which can be unilaterally exercised by a minister in the House by presenting a certificate to the Clerk.[19] This change did create an inconsistency with s 21 of the Constitution Act 1987, which still used the now redundant financial initiative rule and s 21 was finally abolished in 2005.[20] There have been some small procedural reforms since then, but fundamentally the veto has remained the same in spirit since its introduction into the standing orders in 1995.

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[15] New Zealand Constitution Act 1852 (UK), s 54.
[16] Standing Orders Committee *Report on the Review of the Standing Orders* (Office of the Clerk of the House of Representatives, AHJR 1 18A, 1995) at 61-63.
[17] Standing Orders of the House of Representatives 2020 SO 334.
[18] McGee, above n 6, at 516.
[19] Standing Orders of the House of Representatives 2020 SO 335.
[20] Constitution Amendment Act 2005 s5.

A further effect of abandoning the financial initiative has been to escape issues related to the reserve powers. Prior to reform, and currently in the other Westminster jurisdictions that retain the financial initiative, it is unclear who exactly has the power to enforce the rule. In theory it would be the Speaker, who would prevent the passage of legislation that might be in violation of the financial initiative. However, if the Speaker for whatever reason found that the Bill did not need a recommendation from the Crown, the government would potentially have no recourse to enforce the Crown's initiative other than to advise the Queen/Governor-General to refuse Royal Assent. In both Australia and the UK in recent years, the financial initiative has come close to causing a constitutional crisis on the issue of whether under the Reserve Powers it is legitimate for the Queen/Governor-General to deny Royal Assent in this context.[21]

By contrast, New Zealand has overcome this issue, by explicitly giving the veto power to the government, to be exercised in Parliament by a minister. This allows them to exercise the power themselves, rather than having to rely on the Speaker or the Governor General to intervene on their behalf. Our system also allows for more transparency and an enhanced role for the legislature, by preventing the veto being applied to proposed changes immediately upon introduction.[22] This is in contrast to the old procedure, still in place in the other Westminster systems discussed, which allow a proposed law change to be killed off at the point of introduction. It is for these reasons that there have been calls for the UK to adopt a financial veto modelled on New Zealand's.[23]

C: Influences on the Reform Process:

Key to understanding the veto is analysing the external influences and models that helped shape it. Constitutional constraints on the legislature's ability to intervene in fiscal policy making is by no means unique to Westminster systems.[24] The reform of the financial initiative into the financial veto in 1995 was influenced by such non-Westminster political systems, and analysing those influences gives an insight into constitutional principles underpinning the reform. In fact, countries without a check on the legislature's freedom to influence Government finances are fairly rare, at least in comparable OECD economies. Further, those countries

[21] Anne Twomey "The Reserve Powers in Times of Political Crisis: The Dutton/Turnbull Leadership Challenge and Royal Assent to the Medevac Bill and Brexit Bills" (2021) 49 FL Rev 96 at 112-120.
[22] Standing Orders of the House of Representatives 2020 SO 336-337.
[23] Paul Evans *Braking The Law: Is there and should there be, an Executive Veto over Legislation in the UK Constitution?* (The Constitution Unit- University College London, October 2020) at 43-44.
[24] Evans, above n 23, at 22.

which are exceptions tend to have a fundamentally different process for developing fiscal policy than we do in New Zealand.[25]

Germany was the most widely cited model for the reform, with MPs having travelled there on a trip to investigate what constitutional reforms might help complement the new proportional electoral system.[26] Article 113 of the German Basic Law holds that any laws proposed by the Bundestag that would increase expenditure or decrease income requires the consent of the Federal Government, a very close parallel to our current veto power, and influence on it.[27]

It is also worth considering different models of Parliamentary control of finances that were not adopted. Sweden, like Germany and New Zealand, has a proportional electoral system but does not have restrictions on the legislature's ability to modify expenditure.[28] But its approach to developing fiscal policy is very different, with spending plans only being able to be approved as part of one single "package". The opposition is barred from making spending proposals on a single issue and must instead present a full coherent alternative budget "package" to the Government's, with both being voted on in the legislature.[29]

Another jurisdiction examined by Parliament during the reform period, but not followed was that of the United States. In the US, Congress has full powers to alter the spending proposals of the President and initiate its own, but this comes with a far more drawn-out process to come to decisions. Congress holds extensive hearings with significant independent resources at its disposal to help it provide input to the Executive's and develop its own fiscal policy, with its own Independent Congressional Budget Office. The fact that fiscal policy needs agreement from both a powerful executive and legislature means that the process must be collaborative to succeed but is frequently highly combative and runs the risk of Government shutdown.[30]

In both the Swedish and US examples, the lack of an executive veto on spending proposals is in the context of a system that gives the opposition in the legislature significant powers to make its own fiscal policy. These powers are balanced by the legislature taking greater responsibility

[25] Evans, above n 23 at 22.
[26] (19 December 1995) 552 NZPD 10832-10833.
[27] German Basic Law, Article 113.
[28] OECD *Holding the Executive Accountable: The Changing Role of Parliament in the Budget process* (OECD, An International Symposium for Chairpersons of Parliamentary Budget Committees of OECD Member countries, January 2001) at 38.
[29] Mats Odell "What do Parliaments Need for Effective Oversight" in OECD *Holding the Executive Accountable: the Changing Role of Parliament in the Budget process* (OECD, An International Symposium for Chairpersons of Parliamentary Budget Committees of OECD Member countries, January 2001) at 47-48.
[30] Davey, above n 9, at 72-74.

over fiscal matters; in Sweden by having to propose its own comprehensive alternative to the budget and in the USA by accepting the risk of Government shutdown if an agreement cannot be reached with the executive. These models were clearly eschewed in New Zealand in favour of one that retained Government control over fiscal policy.

D: Implications of the Current Form of the Veto:

The outcome of the reform process illustrates the constitutional settlement that was reached on the issue of fiscal policy following the change of electoral system. New Zealand's budget process remains remarkably dominated by the executive, despite the introduction of MMP. [31] There has been little appetite in the House to get seriously involved in this process, despite in theory having the power to do so, particularly given how prevalent minority Governments have been over recent decades. The fact that it took until 2017 for the veto to be used on a full Bill is indicative of this trend. There were some calls at the introduction of the veto in 1995, also just before the introduction of MMP, to make a significant move to more legislative involvement in fiscal policy. Winston Peters advocated moving away from the current system of:[32]

> …a Minister of Finance walking into the House with about six telephone books full of figures and information, called a Budget, placing them on the floor of the House, and saying: `There you are gentlemen and ladies. Take it or leave it.'

However, this change did not materialise. Therefore, until Parliament shows intent to adopt such an expanded role, the veto will continue to have an important role to play in ensuring the government can retain responsibility for fiscal policy.

Parliament made a conscious choice in delineating its relationship with the government and its finances. In removing the financial initiative, Parliament gave itself greater ability to advance financial legislation and more clearly articulated the relationship between itself and the Executive in this sphere. It did not however remove the Government's power of having a final say on financial legislation. The spirit of the reform remains essentially unchanged today. It is therefore inaccurate to describe the veto as a "vestige of colonialism" as some critics have. [33] It is very much a unique New Zealand constitutional creation, which Parliament has arrived at

[31] Jonathan Boston and Stephen Church "The Budget Process in New Zealand: Has Proportional Representation Made a Difference?" (2002) 54:2 Political Science 21 at 43.
[32] (19 December 1995) 552 NZPD 10832.
[33] Equal Justice Project, Law Reform Group and Women and the Law Group "Submission to the Government Administration Committee on the Parental Leave and Employment (Six Months' Paid Leave Amendment) Bill 2012" at 23.

as a carefully considered demarcation of the respective roles of itself and the Executive as regards fiscal policy.

III: Abolition of the Veto:

The aftermath of the exercise of the veto on the Paid Parental Leave Bill in 2017 resulted in a wave of public criticism, including submissions to the House Standing Order's Committee advocating the total abolition of the veto. The main argument of these calls for abolition was that the veto is undemocratic by limiting MPs ability to freely make law, especially as the introduction of MMP was supposed to reduce executive dominance of the legislative process and facilitate stronger law making from the legislature. In the words of one submitter:[34]

> "It is Parliament which is sovereign, not the executive, and it is Parliament which makes the rules. This principle applies for ordinary legislation. It should apply for financial matters too."

Barugh has argued persuasively on the topic of the democratic implications of the veto and in favour of its abolition, specifically through using confidence mechanisms to fill its constitutional role. He argues that the veto runs contrary to fundamental democratic principles, specifically that:[35]

> "It does so by restricting majority rule, distorting the incentives faced by Members, preventing deliberative decision-making and elevating the Government over Members in Parliamentary decision-making."

Therefore, to many the veto sits uncomfortably with many democratic principles that supposedly underpin our political system, and this hurts its legitimacy in the eyes of the public.

However, despite the criticism of the veto, and the calls for its abolition, MPs remain firm in their support for it. Consecutive Standing Orders Review Committees, starting with the one in 1995 that developed the veto, through to reviews of it in 2003, 2014 and 2017 have consistently reached unequivocal conclusions to keep it. This shows consistent support in the House across a long period. An illustration of the depth of support for the veto in Parliament is the fact that Sue Moroney, the MP whose name the vetoed Paid Parental Leave Bill was in, stated in her valedictory speech, "I think the financial veto does have its place in an MMP Parliament."[36]

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[34] Malcolm Harbrow "Submission on petition 2014/0107 of Malcolm Harbrow regarding the financial veto".
[35] Tyrone-Jay Barugh "The Power to Propose: An Analysis of the Government's Financial Veto" (LLM Research Paper, Victoria University of Wellington, 2017) at 47.
[36] (8 August 2017) 724 NZPD (Speech, Valedictory Statements, Sue Moroney).

The financial veto therefore recognises an important part of the Constitution that cannot lightly be abandoned. According to the Standing Orders Review Committee: "Revoking the mechanism now would be a significant constitutional step."[37] That is not to say that this invalidates the arguments about its incompatibility and inconsistency with some democratic principles. These are still very pertinent, and it is true that the veto seems at odds with the objectives of greater legislative responsibility that underpinned the move the MMP in 1996. However, the practical arguments in the veto's favour, and more importantly the impact these arguments clearly have on MPs, mean that in the foreseeable future total abolition of the veto is not realistic, unless a fundamentally different approach to Parliamentary involvement in budgetary affairs is adopted.

A: Why Confidence Mechanisms Can't Be Used to Facilitate Abolition:

Barugh argues that the veto could be effectively abolished if Governments instead made any proposals it opposed a confidence issue.[38] Similar calls could be found in the media following the veto's use on the Paid Parental Leave Bill. This would prevent MPs doing what has been described as "having their cake and eating it", such as when Peter Dunne and the Māori Party supported the Paid Parental Leave Bill while still being in a Confidence and Supply Agreement with a Government which insisted it would have a detrimental effect on their finances.[39] Such a position is somewhat contradictory, because the MPs are claiming to have confidence in the Government's ability to occupy the Treasury Benches, yet are contradicting its judgement on whether this particular Bill is fiscally responsible. Therefore, the argument for invoking a confidence vote in these scenarios is that it forces these MPs to make a clear choice between backing the Government or backing the Bill in question. This would allow the Government to continue to retain responsibility for fiscal policy without having an outright veto, by giving MPs the choice between the policy at stake and the Government.

However, in its 2017 review of the veto, the House Standing Orders Committee rejected such proposals. They argued that making these scenarios confidence issues may actually result in less political accountability, given the veto cannot be invoked until the third reading of a Bill, therefore guaranteeing a high degree of debate and scrutiny of the proposals, whereas if a Bill was deemed a confidence issue, it would be more likely to simply be voted down at first

[37] David Carter *Review of Standing Orders* (House of Representatives, Report of the Standing Orders Committee I.18A, July 2017) at 33.
[38] Barugh, above n 35, at 44-45.
[39] Bryce Edwards "Political round-up: Parental bill veto" The New Zealand Herald (online ed, Auckland, April 12 2012).

reading. Further, they argued that the increased use of confidence votes also risked undesirable Government instability, potentially jeopardising governing relationships.[40]

The argument about reducing accountability is very pertinent, and removing the ability for these Bills to advance to Third Reading would be something of a backwards step. It is hard to judge what effect this change would really have on Government stability if introduced. It is easy to counter such concerns by arguing that any instability would only result if MPs chose to exploit such an opportunity, and generally, as the reluctance to interfere with fiscal policy itself shows, MPs have prioritised Government stability over asserting their own power.

But it is certainly legitimate for MPs to be reluctant to accept increasing the risk of instability, even if the level of that risk is uncertain. Modern New Zealand political history has been defined by a desire for stable executive Government, even when no one party holds a majority. Certainly, the political instability which countries like the United Kingdom and Sweden have experienced in recent years because of unstable legislatures and Government's lacking a majority is something undesirable for New Zealand. This does not however mean that flaws in the veto should be ignored. On the contrary, if the veto is to be kept, the issues with it must be analysed and addressed.

IV: Operational flaw: the Ambiguity of "More Than Minor Impact":

The biggest issue with the veto, which must be addressed if it is to remain in place, is the ambiguity in the definition of what is a "more than minor impact" on the Government's finances.[41] There is no guidance on what this vague wording specifically translates to in fiscal terms, and therefore the interpretation of it is a frequent source of controversy when the veto is invoked. During the debates on the Paid Parental Leave Bill for example, this became a central point of contention. The opposition repeatedly made the argument that the Bill would cost 0.03% of the $3 Billion in tax cuts the Government had proposed around the same time, and therefore could not be considered "more than minor".[42] This argument was ignored by the Government. The confusion and disagreement caused by this wording whenever the veto is invoked is certainly an issue, but far graver problems are possible because of this ambiguous wording.

[40] Carter, above n 37, at 33.
[41] Standing Orders of the House of Representatives 2020 SO 334.
[42] (29 June 2016) 715 NZPD (Parental Leave and Employment Protection (6 Months' Paid Leave) Amendment Bill — Third Reading, Sue Moroney).

A: Lack of Checks on Use of the Veto:

The ambiguous nature of the veto and lack of checks on its use mean it is open to being used in bad faith. Under Standing Order 334 the government can veto any bill or amendment it deems to have a "more than a minor impact on the Government's fiscal aggregates", and the discretion as to what is a "more than minor impact" is entirely up to the Government and cannot be contradicted.[43]

It could be argued that the Speaker still has a residual power to intervene and enforce reasonable use of the veto. The Speaker is the ultimate arbiter of Parliamentary procedure and therefore has considerable scope to enable the House to exercise its will, even when that is in conflict with the Executive.[44] The United Kingdom provides a recent example of the Speaker asserting their power in this manner.[45] To take such a position would however be contrary to the will of Parliament, which indicated in the select committee report on the 1995 reforms that in the face of abuse of the veto it was expected MPs would step in to remedy the situation, not the Speaker.[46] It would also run counter to strong authorities like McGee,[47] as well as past precedent in Speaker's rulings and statements.[48] For a speaker to ignore these factors and prevent the introduction of a financial veto certificate would be an extremely bold and controversial constitutional move, and therefore fairly unlikely.

A good analogy comes from Speakers' attempts to police the use of urgency in the House, where, despite a desire to police abuse, Speakers have felt compelled to defer to the judgement of the Government on when use is appropriate. [49] There have been attempts by the Speaker to try and ensure the Government complies with the spirit of the standing order to prevent abuse, but these have proven unsuccessful, and so Speakers have reverted to deferring to the position of the Government.[50] Urgency is the far more tested of the two examples, and the reluctance to contradict the view of the Government and police abuse of the standing orders is likely to be shared in the context of the financial veto.

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[43] McGee, above n 6, at 518.
[44] McGee, above n 6, at 78.
[45] Stephen Laws *The risks of the "Grieve amendment" to remove precedence for Government business* (Policy Exchange, A Policy Exchange Research Note, January 2019) at 5-6.
[46] Standing Orders Committee (1995), above n 16, at 62.
[47] McGee, above n 6, at 518.
[48] (16 June 2016) 715 NZPD (Parental Leave and Employment Protection (6 Months' Paid Leave) Amendment Bill- Financial Veto, Mr Speaker).
[49] Claudia Geiringer, Polly Higbee and EM McLeay *What's the hurry?* (Victoria University Press, Wellington, NZ, 2011) at 24.
[50] Pita Roycroft "The Ayes Have It: The Development of the Roles of the Speaker of the House, 1854-2015" (2017) 15 NZJPIL 353 at 368.

The Speaker would probably be able to police extreme abuses. For example, if the Government attempted to exercise the veto on a Bill simply altering the birth certificate of a single individual, arguing the administrative cost technically amounts to a (tiny) appropriation, the speaker would probably feel justified in preventing the introduction of a financial veto certificate, as this use would not be in the spirit of the standing order's purpose. Legislation should be viewed on a spectrum in relation to the veto, with the latter example as one extreme, and legislation that clearly would amount to a "more than minor" appropriation (e.g., doubling the state pension) on the other. However, the point upon that spectrum where the Speaker will draw the line for what is a "more than minor" appropriation will likely differ significantly from where members of the public may draw it due to the factors discussed above. Therefore, unless this gap is narrowed, there will continue to be incidents of controversy and the risk of what amounts to abuse of the veto in the eyes of the public.

B: Abuse of the Veto:

An example of an attempt to push the veto beyond the scope of its intended purpose comes from the Parliamentary Debates on the Homosexual Law Reform Bill 1985. Opposition MPs Merv Wellington, Winston Peters and Robert Muldoon attempted to use the old financial initiative rule in the Constitution Act 1986, which prevented the House passing legislation that amounted to an appropriation, if it was not recommended by the Crown. As this was a member's bill, although advanced by a Government MP, it did not have such a recommendation. Despite the law change on the face of it being removed from fiscal matters, they advanced an argument that legalising homosexuality would increase Crown expenditure because encouraging such activities would increase the spread of AIDS and therefore incur significant costs for the health service, creating an appropriation.[51]

Given these were opposition MPs, this argument was hardly out of a substantive concern for government finances. This was a tactical political argument which, if successful, would have delayed the passage of the Bill and forced the Government to choose whether or not to explicitly come out in support of, and provide a Crown recommendation for, an extremely controversial Bill, strongly opposed by some of its MPs.[52] The Speaker, however, made the decision, based on previous precedent in Speakers Rulings,[53] that any change in government

[51] (9 April 1985) 470 NZPD 877-878.
[52] New Zealand Parliament "30th anniversary of Homosexual Law Reform Act" (7 July 2016) New Zealand Parliament < https://www.parliament.nz/en/get-involved/features/30th-anniversary-of-homosexual-law-reform-act/>.
[53] Speakers' Rulings of the House of Representatives 1867-1980 inclusive, at 16 and 17.

expenditure resulting from a Bill that was merely the extension of the already existing day-to-day responsibilities of a government entity did not represent an appropriation in the context of the veto, thus he was not obliged to invoke the financial initiative.[54]

Despite being unsuccessful, the attempts to use this power to defeat a Bill relating to reform on such a deeply socially significant issue with majority Parliamentary support, on the face of it very distant from fiscal matters, is highly concerning. A scenario directly like the above could not happen under the current standing order because it is now a power exercised by a minister, not the Speaker. Nevertheless, it provides an illustration of the way in which the financial veto can be pushed to, and perhaps beyond, the limits of what can be considered a fiscal matter. The fact that in this case, experienced parliamentarians, including a former Prime Minister, were prepared to go to such lengths to defeat a bill they opposed, and to exploit such a mechanism, indicates the danger of abuse inherent in the veto.

Further, the scope for such an abuse of the veto is far greater under the new standing order than under the old financial initiative because the veto can be unilaterally invoked by the Government.[55] Under the old provision, the Speaker could exercise their judgement as to whether the contents of a bill or amendment amounted to an "appropriation", as discussed above. This created a check on abuse, by allowing for a degree of independent judgement to be exercised. It also ensured a thorough and public examination of any claims to the financial impact of the legislation at issue by the Speaker, as in this case. This is no longer present in the current financial veto as discussed above.

Since its implementation, use of the financial veto has been relatively sparing and restrained.[56] This is mainly due to the fact that, despite the introduction of MMP governments have been able to secure fairly stable governing arrangements, even when involving coalition and confidence and supply arrangements. Parties supporting the government have also been very willing to let the Executive retain tight control of fiscal affairs, with little conflict or interference. This has meant that Parliament has not got involved in fiscal policy as much as it might have, and therefore there has been no need for use of the veto by ministers to counter this.[57]

[54] (23 April 1985) 470 NZPD 1219-1220.
[55] David McGee, above n 6, at 518.
[56] Harris, above n 8, at 12.
[57] Boston and Church, above n 31, at 43.

The restrained use, however, is not a substantive defence of potential shortcomings and constitutional risks inherent in the veto, as the Government stability New Zealand has enjoyed under MMP over recent decades is not guaranteed to last forever. [58] Scenarios where the veto comes to be relied on more by the government could still arise, for example under an unpopular minority government reliant on rebellious support parties.

It could be argued that the restrained and responsible use of the veto is now a constitutional convention, which would in theory restrain ministers from overreach when applying it. The standard test for identifying a constitutional convention comes from Jennings; first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?[59] Here there does seem to be a precedent of restrained use of the veto, given its limited and infrequent use. It is arguable whether ministers feel they are bound by this, given circumstances have never arisen in which there may have been a real temptation for misuse of the veto. But the broader writings on the veto certainly seem to conclude there is an understanding as to the requirement for responsible use. The House Standing Orders Committee in its 1995 Report said that: "In proposing this new procedure we have the strong expectation that it will be used only for serious initiatives and amendments."[60] McGee echoes this sentiment, stating in *Parliamentary Practise in New Zealand* that "Governments are expected to apply the procedure reasonably."[61] Finally, there is clearly a reason for the rule, given that responsible use of the veto is needed to prevent abuse, for which there is significant potential. There is therefore a case to be made that a convention exists around responsible use of the veto.

However constitutional conventions are not legally binding and can be very vulnerable when political circumstances change. In the words of Harold Laski:[62]

> Each generation will interpret [the conventions of our constitution] in the climate of its predominant opinion. Where that climate is calm, they admit of a generous interpretation; where it is stormy, their construction is gradually narrowed until the interpretation put on them by one side is unintelligible in its spirit to the other.

It would be naïve to assume that in the future such a calm climate will endure forever, and precautions should be taken to put in place safeguards for circumstances where respect of these

[58] Boston and Church, above n 31, at 43.
[59] Sir Ivor Jennings *The Law and the Constitution* (Fifth ed, University of London Press, London 1959) at 136.
[60] Standing Orders Committee (1995), above n 16, at 62.
[61] McGee, above n 6, at 517.
[62] Harold J. Laski *Parliamentary Government in England* (George Allen & Unwin, London, 1938) at 65.

conventions breaks down. On the pure black letter law, use of the veto beyond its intended purpose is entirely possible, and risks essentially turning the financial veto into an almost all-encompassing executive veto.

The long and tortured passage of the various Bills associated with Brexit in the UK House of Commons provides an example of how quickly conventions can be challenged and abandoned in a politically fraught atmosphere. Both sides sought to challenge long-standing conventions in an attempt to gain a political edge.[63] Perhaps the most dramatic example was the government's decision to prorogue Parliament against its wishes, in defiance of convention, which ended up being overturned by the UK Supreme Court.[64] Indeed, at one point it seemed there was a real risk that the British equivalent of our financial veto, the Crown's financial initiative would be put to the test. If Parliament had succeeded in a vote to extend or cancel Brexit without the support of the Government, the issue would have arisen as to whether the Financial Initiative provided the Government legitimate grounds to advise against the granting of Royal Assent.[65] This followed the Speaker's ruling that such a Bill did not require a notice, as this was not a money Bill.[66] These are not direct examples of what could happen in New Zealand, given the different constitutional context, but they illustrate the ways in which an altered political environment can quickly give rise to significant constitutional conflict and the breakdown of conventions.

A direct example related to the misuse of the financial veto is provided by Ireland. Partly due to its Westminster heritage, Article 17.2 of the Irish Constitution which holds that the *Dáil Éireann*:[67]

> shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the appropriation shall have been recommended to *Dáil Éireann* by a message from the Government signed by the Taoiseach

Further, the Standing Orders of the *Dáil* give the definition of an appropriation as "including incidental expenses", a definition that essentially extends it infinitely, given that virtually any law change proposed by the legislature will have some level of incidental expenditure, even if

[63] Laws, above n 45, at 5.
[64] *R (on the application of Miller) v The Prime Minister* and *Cherry and others v Advocate General for Scotland* [2019] UKSC 41.
[65] Laws, above n 45, at 7-8.
[66] Twomey above n 21, at 111.
[67] Irish Constitution, Article 17.2.

it is miniscule,[68] for example the cost of a stamp to send a letter to Brussels.[69] Between 2016 and 2020, the *Dáil* was under a minority Government, and the legislature put forward a number of pieces of legislation to which the Executive was hostile. This resulted in as many as 50 opposition Bills being vetoed over the term. This included many Bills not significantly related to expenditure, causing significant controversy and constitutional conflict.[70] It was argued this amounted to abuse of the veto because it "is not entirely discretionary; it must be exercised responsibly for a purpose related to finances and not for any other purpose, such as purely political opposition to a Bill."[71] Given the common origin of the mechanisms, this same logic should apply to the use of our financial veto. Yet with no checks on its exercise, there is a risk that in the future New Zealand ends up in a similar situation to Ireland, with the Executive wielding the financial veto as an unlimited executive veto.

New Zealand should not allow constitutional complacency to set in, and think it is immune from the same constitutional crises that have been experienced overseas. It is a significant risk to leave such obvious ambiguities and avenues for abuse in the Standing Orders. Future scope for reform has always been envisioned for the veto, the 1995 House Standing Orders committee stating that:

C: Potential Reforms to Solve the Issues Caused by the Ambiguity of "More Than Minor Impact":

Scope for reform has been built into the veto since its inception, the 1995 Standing Orders Select Committee stating that:

> "The committee is in no doubt that if the procedure is devalued by being used for filibustering purposes, particularly during the Committee of the whole House stage of a bill, the House will revisit the procedure within a relatively short time."[72]

The following section will consider what form such reform should take.

1: Specifically defining what is a "more than minor impact":

An obvious solution to the issue of defining "more than minor impact" would be to add a specific financial definition.

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[68] Standing Orders of the Dáil Éireann 2020 SO 212(2).
[69] Evans, above n 23 at 35.
[70] Evans, above n 23, at 36.
[71] David Kenny and Conor Casey *Opinion on the Constitutional Limits of the Money Message Procedure Under Article 17.2 of the Constitution of Ireland* published on academia.edu, 2019, at 1.
[72] Standing Orders Committee (1995), above n 16, at 62.

This approach was in fact suggested at the origin of the veto, with United Future advancing an amendment to try and define "more than minor impact" as 0.01% of total government expenditure. They argued that having a specified level was more in line with the approach taken in corporate law, and would provide certainty, while also protecting the Government's fiscal position and giving Parliament the power to make small and reasonable fiscal policy of its own. This argument was however rejected by both the Government and Opposition. Michael Cullen pointed out that it would be very difficult to apply in practice, because Government estimates on revenue and spending are often simply not able to be accurate to such a degree, which would make it impractical as a hard test for a Standing Order. Further, Government Ministers argued that a 0.01% limit may prove too inflexible, given changing economic conditions and differing context across Government spending areas, meaning even 0.01% could sometimes prove "more than minor." For example, that sum could be close to the entire budget of a small department. This led the House to reject the amendment.[73]

These objections still essentially apply today. The same logic applies to any specific definition of 'more than minor', even one smaller than 0.01%, as what can reasonably be called "more than minor" will be highly variable and context specific. For example, the reasonable definition will be very different during an era of austerity than in an era of fiscal surplus. Therefore, a concrete standard is unlikely to be a particularly useful tool for controlling the use of the veto, given the practicalities involved.

2: Speaker control of the veto:

In the past the Speaker very clearly had the constitutional role of policing use of the veto, with discretion to hear arguments on the validity of an exercise of the veto and prevent blatant abuse, as in the above example of the Homosexual Law Reform Act. The Speaker's ability to play this role was, however, removed by the 1995 reforms. Re-establishing this role for the Speaker could be the solution to defining what amounts to "more than minor", with them acting as an independent arbiter and a check against abuse.

However, there are issues with the Speaker exercising this role. The Speaker is still almost always a Government MP, and often at the centre of controversy and conflict with opposition MPs. For the most part they do still fulfil their role as an independent constitutional actor, but there will perhaps always be a tendency to favour the position of the Government, and there is a danger that, in the future, conventions that act as constitutional safeguards could break down.

[73] (19 December 1995) 552 NZPD 10833-10840.

For example, recent Speakers have been more lax in enforcing requirements for the Government to justify the use of urgency in the House than their predecessors in the 70s and 80s.[74] The Speaker is also not necessarily an expert in fiscal matters, and probably lacks the time and resources to become so. They do have access to independent advice through the Clerk, but not on the same level as the Government gets. This means they will be naturally deferential to the position of the Government as the only source of authoritative fiscal advice open to them. Overall, returning the power to interrogate and limit the use of the veto to the Speaker would be a positive reform to prevent abuse, although perhaps an imperfect one.

3: Allowing an independent Fiscal Institution to make judgements on the legitimate use of the veto:

An alternative to the Speaker playing the role of independent referee of the use of the veto, would be to have a different institution play this role. Parliament would probably need to set such an institution some specific guidelines for what "more than a minor impact" might mean, or it may be preferable to abandon this terminology altogether. Setting a hard limit for this test (e.g. 0.1% of Government expenditure) would be a mistake, however, for the reasons given above. The standard would though need to give the Institution some idea as to what degree of impact on aggregates would be enough to make the invocation of the veto justifiable. This should be a flexible standard perhaps based on a broad series of indicators. The benefit of the doubt should certainly go to the position of the Government, given they are the ones responsible for public finances. The main aim should be to ensure accurate reporting of the impact on fiscal aggregates, and ensuring that no flagrant abuses of the veto occur, not second-guessing Government fiscal policy.

The introduction of an independent fiscal institution has been suggested in a number of other contexts. The Treasury in 2018 published a Report recommending the establishment of such an Institution and illustrating roles it could play including: costing political parties policies during elections, assessing the Government's compliance with fiscal targets and providing other general commentary on fiscal matters.[75] Such an Office would be well suited to act as an independent arbiter on the exercise of the Veto as well. The fact that the Office was envisioned to be constituted as an Officer of Parliament also means it is well placed to act in this role.[76]

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[74] Geiringer, Higbee and McLeay, above n 49, at 156.
[75] Treasury *New Zealand's Fiscal Policy Framework: Establishing an Independent Fiscal Institution* (New Zealand Treasury, Discussion Document September 2018) at 26.
[76] Grant Robertson, James Shaw "Independent election policy costing unit a step closer" (20 August 2019) Beehive.Govt.NZ < https://www.beehive.govt.nz/release/independent-election-policy-costing-unit-step-closer>.

The Report culminated in the Government announcing the establishment of an independent Parliamentary Budget Office in 2019, to be operational by mid-2021. At present though, the only role the Office has been announced to play is independently costing political parties' election platforms at their own request during elections.[77] It will be disappointing if this does prove to be the only role for the Office, because it has potential to play a far wider role in New Zealand politics as indicated by the Treasury Report, as well as regulating the use of the Veto. While most of these other uses exceed the scope of this paper, the lack of independent budgetary resources and information available to MPs is a weakness in our political system.[78] Providing this support through the Parliamentary Budget Office would therefore help achieve one of the original goals of the veto described in the 1995 Report, to enhance Parliament's role in making fiscal policy.[79]

Alternatively, the Office could have the role of giving independent advice to the speaker on fiscal matters related to the veto, solving one of the major issues with the speaker policing the use of the veto. This solution would on the one hand perhaps have more constitutional legitimacy, given the Speaker has a more established constitutional role, but on the other it would not solve all the potential issues discussed above.

Either way, the independent Parliamentary Budget Office could play a key role in solving the issue of the ambiguous wording of "more than minor impact", by providing a fair and objective check on the power of the veto and an extra layer of scrutiny for the Government when using it, preventing misuse and allowing for more transparent and non-partisan decision making.

V: Other Issues and Potential Reforms:

While the ambiguous wording of "more than minor impact" is probably the biggest issue, there are other areas where reform is needed to improve the veto.

A: Lack of Particularity as to Specific Costs Involved:

A further issue is the lack of precise costing needing to be given by the Government. Standing Order 335 requires the Financial Veto certificate "to state with some particularity the nature of the impact on the fiscal aggregate or aggregates concerned."[80] However, during the first use of the veto in 1996 the Speaker made a ruling that this did not include having to give precise

[77] Robertson, above n 76.
[78] Davey, above n 9, at 80.
[79] Standing Orders Committee (1995), above n 16, at 61.
[80] Standing Orders of the House of Representatives 2020 SO 335.

details on the actual specific cost, only a general statement of where it might fall. This was despite a strong argument by Michael Cullen that more specificity was needed.[81] This precedent has endured and become a binding rule for the application of the veto.

This issue became particularly contentious during the debates on the Paid Parental Leave Bill. The Finance Minister at the time Bill English, who exercised the veto, had given figures to the media on the cost of the extension of the program to defend his position, yet later in Parliament had to admit that he had made a mistake on the figures, giving the cost over four years as the cost per year. In response Sue Maroney, who had introduced the Bill, accused English of misleading the public.[82] The lack of a requirement to give specific costs to back up the Government's decision harms the transparency of using the veto and makes political controversies like this more likely.

The obvious solution to this issue would be to add a new provision to Standing Order 335, which adds that "due particularity" requires the Government to give the costings behind its decision, to the extent this is possible. Obviously in some situations, the Government will not be able to give a specific cost, due to the uncertainties of fiscal policy, but it should have to justify that position in those circumstances. This change will add transparency and clarity to the application of the veto and avoid the situation of the Paid Parental Leave Bill; the Government giving inconsistent and inaccurate figures to Parliament and the public. It may also serve to add an extra mandatory level of scrutiny for the Government, to make them consider whether a veto is really needed, by forcing them to justify their decision to Parliament in unambiguous terms.

B: Procedural Exceptions to Bypass the Veto:

One approach suggested to dilute the counter-majoritarian nature of the veto, is to allow its exercise to be blocked if certain procedural requirements are met, these might include the following:[83]

1. The measure has been scrutinised by a select committee, and
2. The majority of public submissions have been in favour of the measure, and
3. Official costings have been obtained to inform MPs on their vote.

[81] (29 June 1997) 565 NZPD 1165-1166.
[82] (28 June 2016) 715 NZPD (Oral Questions- Questions to Ministers- Paid Parental Leave- Cost to Increase, Sue Maroney).
[83] Sue Maroney "Political Commentary: Building coalitions and establishing fiscal credibility on gender issues: Labour's campaign to increase paid parental leave" (2017) 31 Women's Studies Journal 70, at 72.

Notably, Sue Moroney suggested such reforms following the defeat of her Paid Parental Leave Bill. This would improve the democratic legitimacy of the veto, by giving rigorous legislators a path to avoid its application if they have gone through the above steps. It would also probably serve fairly well to discourage irresponsible proposals, by ensuring MPs pay strict attention to fiscal implications.

On the other hand, it still runs contrary to the underlying purpose of the veto, giving the Government a means to stop outright fiscally irresponsible policies so they do not have to be held responsible for them. Further, these steps provide no guarantee that proposals will be responsible, MPs may simply ignore costings and force the Bill through select committee. Overall, this is a fairly arbitrary solution to issues surrounding the veto that do not really resolve any of the main issues and is more a reaction to the specific case of the Paid Parental Leave Bill.

VI: Conclusion:

The financial veto without doubt occupies an awkward position in New Zealand's constitutional make up. It sits uneasily with principles many see as fundamental to democracy in this country given it allows a majority in Parliament to be overruled by the executive, and will likely continue to spark confusion and controversy among the public on the occasions when it is used. However, the veto is deeply embedded in New Zealand's constitution, has consistently had strong support from MPs and is therefore unlikely to be abolished in the foreseeable future.

If the veto is to be kept however, it should be reformed further. Most importantly, the ambiguity around the definition of a "more than minor impact" must be clarified and the scope it gives a government to abuse the veto must be removed. Additionally, smaller changes could be made to improve the veto by requiring greater particularity when it is presented.

MPs should not shy away from making such bold changes. The creation of the veto out of the old appropriation rule in itself was a fairly radical change and MPs should emulate such boldness and confront the constitutional issues the veto represents.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises 7,999 words.

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