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**THE POWER TO PROPOSE: AN ANALYSIS OF THE
GOVERNMENT'S FINANCIAL VETO**

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Abstract

This paper explores the financial veto procedure established in the Standing Orders of the House of Representatives of New Zealand. The paper historically situates the financial veto by considering the traditional division of authorising power in public finance. It then sketches an outline of the financial veto, while noting that the scope of the financial veto is not entirely clear. The paper finds that the financial veto runs contrary to democratic principles; a proportionality analysis is used to determine that the procedure is an unjustified limitation on those principles. The abolition of the financial veto procedure is recommended, but alternative options for reform are also briefly considered.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 14,980 words.

Subjects and Topics

Constitutional Law – Parliamentary Procedure – Financial Initiative of the Crown

Constitutional Law – Parliamentary Procedure – Government's Financial Veto
Public Finance – Fiscal Responsibility

I Introduction

The New Zealand Parliament has full power to make law;¹ popularly, it is supreme or sovereign. The House of Representatives, a constituent part of Parliament, has the freedom to make Standing Orders, procedural rules which Govern the operation and business of the House. Standing Orders 326-330 provide for a counter-majoritarian **financial veto procedure** that allows the Government of the day to prevent a bill from being voted on if that bill would materially affect the Government's broad fiscal programme.

This paper will first put the financial veto in a historical context by considering the traditional division of authorising power in public finance and the shift in authorising power from the Executive to the House.

It will then examine the scope of the Government's power to exercise a financial veto and conclude that, while the financial veto is more democratic than the scheme that preceded it, the financial veto procedure remains broadly undemocratic.

Having established that the financial veto undermines democratic principles, this paper will then assess whether the need for clear lines of accountability, Government stability and fiscal responsibility justify overriding the majority rule principle. Finally, several suggestions for reform will be set out.

II Background: The Division of Authorising Power in Public Finance

A The Development of the Financial Initiative of the Crown

A basic constitutional principle in New Zealand is that the Government rules so long as it has the support of the House of Representatives.² In respect of revenue and expenditure, this principle is reflected in the requirement for Parliament to pass laws authorising the Government to tax, borrow or spend – otherwise known as the requirement to obtain 'supply'.³ Since the Bill of Rights 1688, the levying of money for the use of the Crown has been illegal without the grant of Parliament.⁴ Although it is a longstanding principle that the House of Representatives consents to the Government's fiscal plans, the House has not traditionally made its own proposals for taxation and spending. This practice is commonly referred to as the 'financial initiative of the Crown'.

¹ Constitution Act 1986, s 15.

² Cabinet Office *Cabinet Manual 2008* at 7.

³ Constitution Act 1986, s 22.

⁴ Bill of Rights 1688.

In the United Kingdom, the financial initiative of the Crown is contained in Standing Order 48 of the Standing Orders of the House of Commons, which provides that:⁵

This House will receive no petition for any sum relating to public service or proceed upon any motion for a grant or charge upon the public revenue...or for releasing or compounding any sum of money owing to the Crown, unless recommended from the Crown.

What is now Standing Order 48 can be traced back to a standing order made in 1713 and, prior to that, to a resolution passed by the House of Commons in 1706.⁶ Although the 1706 resolution has historical significance, it does not appear to have established a new framework for Parliamentary control of public finance.⁷ Rather, the financial initiative of the Crown appears to have developed from a time:⁸

when the King enjoyed a non-parliamentary revenue which was expected to provide for the ordinary needs of Government, and when no legal sanction fettered his discretion in disposing of the supplementary revenue granted by Parliament.

At this point, there would be little incentive for Parliament to offer money to the Crown as a matter of initiative. As a matter of practice, the King was required to request money before Parliament would consider granting it.

In the New Zealand context, s 54 of the New Zealand Constitution Act 1852 (UK) prohibited the newly created General Assembly from passing any bill appropriating public money except on the recommendation of the Governor on behalf of the Sovereign. The position that it is the right of the Government to exercise the financial initiative was continued using substantially similar wording in s 21 of the Constitution Act 1986:

The House of Representatives shall not pass any Bill providing for the appropriation of public money or for the imposition of any charge upon the public revenue unless the making of that appropriation or the imposition of that charge has been recommended to the House of Representatives by the Crown.

The financial initiative of the Crown was also secured by the 1985 Standing Orders of the House of Representatives, which provided that the House would not proceed on any

⁵ Standing Orders of the House of Commons 2016, SO 48.

⁶ Gilbert Campion and others (eds) *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (14 ed, Butterworth & Co, London, 1946) at 654.

⁷ Malcolm Jack and others (eds) *Erskine May's treatise on the law, privileges, proceedings, and usage of Parliament* (24th ed, LexisNexis, London, 2011) at 717.

⁸ Gilbert Campion and others (eds), above n 7, at 652.

motion for a grant or charge upon the public revenue unless recommended from the Crown.⁹ The 1985 Standing Orders also protected the Government's position in relation to tax; Standing Order 309 provided that a proposal for the imposition or for the increase of a tax or duty, or the alteration of the incidence of such a charge, could only be made by a Minister.¹⁰

B Government Accountability for Prudent Fiscal Management

The Government is accountable to the House of Representatives for the prudent use and management of public funds. The Public Finance Act 1989, among other things, describes the framework through which Parliament scrutinises the Government's expenditure proposals and its management of Crown assets and liabilities, and establishes "for effective and efficient management of public financial resources".¹¹ Under the Public Finance Act 1989 and the Crown Entities Act 2004, "responsible Ministers" are responsible to Parliament for the financial performance of the departments and Crown entities within their portfolios.¹²

The Government's right to exercise the financial initiative is consistent with this scheme of Ministerial accountability to Parliament. It would be improper for the House to compel the Government to make certain financial decisions while also insisting it remains accountable for the Crown's financial position. Accountability to the House and the financial initiative must necessarily go hand in hand. David McGee notes that the House's alternative, if it wishes to alter the Government's fiscal policy without the support of the Government, is to change the Government rather than forcing incumbent Ministers to implement fiscal policies with which they do not agree.¹³ The traditional role of the House of Representatives is to act as a binary check on Government expenditure, either granting the ways and means or denying supply.

C Reform of the Appropriation Rule

The 1995 Report of the Standing Orders Committee's *Review of Standing Orders* concluded that the Appropriation Rule did not strike a satisfactory balance between the need to protect the Crown's financial position, and members' desire to influence policy.¹⁴ Firstly, the rule prevented a member who is not a Minister "from moving any proposal that, even incidentally, involves the smallest amount of expenditure requiring

⁹ Standing Orders of the House of Representatives 1985, SO 307-308.

¹⁰ Standing Orders of the House of Representatives 1985, SO 309.

¹¹ Public Finance Act 1989, s 1A.

¹² Cabinet Office *Cabinet Manual 2008* at [2.24].

¹³ David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Limited, Wellington, 2005) at 446.

¹⁴ Standing Orders Committee *Review of Standing Orders* (1995) at 61.

an appropriation unless the Government agrees to the expenditure".¹⁵ The Standing Orders committee noted that members were generally frustrated by their inability to "promote worthwhile proposals incidentally involving small amounts of expenditure".¹⁶

Secondly, the Appropriation Rule was not able to protect the Government's financial position as a whole. The Appropriation Rule only prevented the House appropriating Crown funds without the involvement of the Government; it was not a broad prohibition on the House interfering with fiscal policy. The House was free to "reduce taxation or to reverse a proposed reduction in taxation".¹⁷ The House, if the political will existed, would be free to make major changes to taxation policy settings, including tax rates and tax bases. The House was also able to pass "proposals giving rise to increased expenditure by Crown entities (as such expenditure [did] not require an appropriation)".¹⁸

Thirdly, the procedure applying to select committees was almost entirely reversed:¹⁹

In their consideration of bills, select committees can recommend amendments which would give rise to additional expenditure, even though, if moved in the House by a private member, such amendments would be out of order unless recommended in a message from the Governor-General. In contrast, a committee considering a taxation proposal cannot, without the concurrence of the Minister of Finance, recommend any amendment which would or might alter the revenue raised by any tax or duty."

The Standing Orders Committee recommended that Members of the House of Representatives should be able to propose (at all stages of the Parliamentary process, including in select committees) measures that would alter the Crown's financial position, subject to the Government being able to exercise a veto over any proposals that would have a material impact on Government finances.²⁰

¹⁵ At 61.

¹⁶ At 61.

¹⁷ At 61.

¹⁸ At 61.

¹⁹ At 61.

²⁰ At 61-63.

III The Financial Veto Procedure

A The Financial Veto Procedure

Standing Orders 326-330 provide for the financial veto procedure. Where a bill, amendment or motion (proposals) not introduced by the Government would have, in the government's view, a more than minor impact on the Crown's 'fiscal aggregates', the Government may 'veto' the proposal by providing the Clerk of the House with a financial veto certificate.²¹ Once a financial veto certificate has been issued, the matter cannot be voted on.²² Although a vote may not take place, both the financial veto and the proposal in respect of which it was issued may be debated.²³

The standing orders protecting the financial initiative of the Crown were revoked at the same time as the financial veto procedure was established,²⁴ giving effect to the financial veto procedure by allowing Members to make appropriation or taxation proposals.

B Timing of Exercise of the Financial Veto

The Government may only exercise its financial veto in respect of a bill when the bill is awaiting its third reading because, as McGee notes, it is only at this stage that the bill is in its final form.²⁵ A financial veto certificate must not necessarily relate to a whole bill; the Government may veto a particular provision or provisions that it considers would unduly affect the fiscal aggregates.²⁶ If the Government vetoes specific provisions of a bill, the bill may not be read a third time until those provisions are removed.²⁷

A financial veto certificate relating to amendment recommended by a select committee may be issued before the House agrees to the amendment.²⁸ Where a Member intends to propose an amendment during the Committee of the Whole House that would affect the Crown's fiscal aggregates, or to move a change to a Vote, the Member must give the House at least 24 hours notice of the amendment or change by lodging it with the

²¹ Standing Orders of the House of Representatives 2014, SO 327.

²² Standing Orders of the House of Representatives 2014, SO 328(3)-(4); SO 329(2).

²³ Standing Orders of the House of Representatives 2014, SO 327(4).

²⁴ Standing Orders of the House of Representatives 1985, SO 307-309.

²⁵ McGee, above n 5, at 448.

²⁶ Standing Orders of the House of Representatives 2014, SO 328(2).

²⁷ Standing Orders of the House of Representatives 2014, SO 328(3).

²⁸ Standing Orders of the House of Representatives 2014, SO 329(1).

Clerk of the House.²⁹ The Government may then exercise its financial veto at the time that the amendment or change is proposed.³⁰ Any other motion that would have the force of law if passed by the House may be vetoed before the motion is moved.³¹

Although the Government may only veto a proposal at specific points in the legislative process, the Government may attempt to forestall a proposal with which it does not agree by indicating that it will issue a financial veto certificate at the appropriate time.³²

C Content of Financial Veto Certificate

Although not specified in Standing Order 327, a financial veto certificate issued by the Government must necessarily identify the proposal (or proposals) with which the Government does not agree. It must state 'with some particularity' the way in which the proposal would affect the Government's fiscal aggregates or the composition of a vote and the reason why the Government does not agree.³³

The Speaker must be satisfied that a financial veto certificate states that the Government does not agree with the proposal and that it specifies with some particularity the impact of the proposal on the Government's fiscal aggregates or the composition of a vote.³⁴ It would be open to the Speaker to refuse to accept a financial veto certificate that did not meet both of these requirements as it would not comply with Standing Order 327(1) or (2). Unless a Minister issued a new certificate specifying the impact of the proposal on the fiscal aggregates or the composition of a vote and stating the reason why the Government does not agree, it would not be out of order for the proposal to be put to a vote.

In determining whether a financial veto certificate has been issued validly, the Speaker may not test the Government's view as to the likelihood of a proposal on the fiscal aggregates.³⁵ All that is required is that the Minister has stated particular details of the proposal's impact on the Government's fiscal aggregates, and that the Minister has noted that the Government does not agree with the proposal.

²⁹ Standing Orders of the House of Representatives 2014, SO 330(1).

³⁰ Standing Orders of the House of Representatives 2014, SO 329(2).

³¹ Standing Orders of the House of Representatives 2014, SO 328(4).

³² McGee, above n 5, at 448.

³³ Standing Orders of the House of Representatives 2014, SO 327(1)-(2).

³⁴ McGee, above n 5, at 450.

³⁵ McGee, above n 5, at 450.

D The Use of the Financial Veto Procedure

Outside of the budget process, the Government has exercised the financial veto on 45 occasions since 1996 (the data provided does not appear to include the exercise of the veto in respect of amendments to Votes).³⁶ With the exception of the veto of the Parental Leave and Employment Protection (6 Months' Paid Leave) Amendment Bill in 2016,³⁷ every instance of the financial veto has been in respect of an amendment to an existing bill.³⁸

Matthew Louwrens, who is a member of the Parliamentary Service, examined the use of the financial veto procedure in respect of amendments to Votes. In the 15 years from 1996 to 2011, Members only moved a change in a vote in three of those years.³⁹ He notes:

During the debate on the 2000/01 Estimates, eight changes were moved, all by members of the same party. Some sought to increase spending in certain votes, others to decrease spending, and one sought to transfer money from one output class to another. None of these changes were recommended in the pertinent select committee reports. Seven of the changes were ruled out of order because the government exercised its power of financial veto, and the eighth for failure to meet notice requirements.

IV Consistency with the Constitution Act 1986

Although the Appropriation Rule was no longer provided for in the 1996 Standing Orders, s 21 of the Constitution Act, which prevented the house from passing a bill that would appropriate public funds except on the recommendation of the Crown, remained in force. Two important constitutional documents – both describing the power of Parliament – were at loggerheads.

The Standing Orders Committee clearly understood this inconsistency when it proposed replacing the Appropriation Rule with the financial veto procedure. The Committee noted that it would not be sufficient for the Government simply not to veto a bill providing for the appropriation of public money as a positive recommendation from the Crown was required.⁴⁰ The Committee suggested that the Government should promote

³⁶ Parliamentary Service spreadsheet “Financial Veto Used 1996-“ (Obtained by request to the Parliamentary Library).

³⁷ The Parental Leave and Employment Protection (6 Months' Paid Leave) Amendment Bill is also referred to in this paper as the Paid Parental Leave bill.

³⁸ Parliamentary Service, above n 37.

³⁹ Matthew Louwrens "The Financial Initiative of the Crown: Improving the Government's Financial Veto in New Zealand" (paper published by Australia and New Zealand Association of Clerks-at-the-Table, 2011) at 11.

⁴⁰ Standing Orders Committee, above n 15, at 64.

an amendment to the Constitution Act to repeal or modify the section to read consistently with Standing Orders.⁴¹

The Committee also suggested that, before this took place, the House should adopt a sessional order to require a Minister to recommend the making of an appropriation before a Member's bill involving an appropriation was put to a third reading in the event that the Government opted not to exercise the financial veto.⁴²

The Appropriation Rule continued in statute until s 21 of the Constitution Act was repealed by the Constitution Amendment Act 2005, almost ten years after the House removed the Appropriation Rule from its Standing Orders. It appears that the House never took steps to reconcile its procedure with s 21 of the Constitution Act. The House did not follow through on the Standing Orders Committee's recommendation for a sessional order during any of the 45th, 46th or 47th Parliaments.⁴³ Parliament appears to have simply ignored s 21 of the Constitution Act between 1996 to 2005.

The Constitution Amendment Act 2005 was split out of the Statutes Amendment Bill (No 4) 2003. The Government Administration Select Committee recommended that a provision be introduced into that bill to provide "that the House of Representatives must not pass a Bill providing for the appropriation of public money or for the imposition of a charge on the public revenue if" a financial veto certificate had been delivered to the Clerk⁴⁴. This would have failed to resolve the inconsistency with Standing Orders, and would have applied even where the appropriation or charge was not more than minor. A Supplementary Order Paper was introduced to repeal, rather than replace, section 21 of the Constitution Act.⁴⁵

V Scope of the Financial Veto

Standing Order 326 states that:⁴⁶

The House will not pass a bill, amendment, or motion that the Government certifies it does not concur in because, in its view, the bill, amendment, or motion would have more than a minor impact on the Government's fiscal aggregates if it became law

⁴¹ At 64.

⁴² At 65.

⁴³ Email from Parliamentary Library Research Client Services Librarian to Tyrone Barugh regarding information held by the library regarding the financial veto (10 February 2017).

⁴⁴ John McSorley *Statutes Amendment Bill (No 4) 2003* (Parliamentary Library, Bills Digest 1143, August 2004) at 2.

⁴⁵ Supplementary Order Paper (349) Statutes Amendment Bill (No 4) 2003.

⁴⁶ Standing Orders of the House of Representatives 2014, SO 326.

This section considers the potential scope of the Government's financial veto by considering the meaning of the terms "fiscal aggregates" and "more than minor impact".

A The Government's Fiscal Aggregates

When the financial veto was introduced, the Standing Orders did not define what was meant by "fiscal aggregates". Timothy Power suggested, based on explanatory material including the 1995 report of the Standing Orders Committee, that "fiscal aggregates" referred to five variables taken from s 6(2) of the Fiscal Responsibility Act 1994:⁴⁷

- a. the Crown's total operating expenses;
- b. the Crown's total operating revenues;
- c. the balance between the Crown's total operating expenses and the Crown's total operating revenues;
- d. the level of the Crown's total debt; and
- e. the level of the Crown's net worth.

Variable A prevents the appropriation of public money with which the Government does not agree, and is similar in scope (but not effect) to the appropriation rule. Variables A, B and D together reflect the broader scope of Parliament's control of public finance; that Parliament must authorise all taxation, borrowing and spending. Variables B and D prevent the House requiring the Government to borrow or impose taxation if the Government does not agree.

While the financial veto eroded the traditional rule that the Government controlled all expenditure, it also afforded the Government the option to control fiscal proposals that did not violate the appropriation rule. Section 21 of the Constitution Act 1986 and the 1985 Standing Orders did not prevent the House from passing a proposal that would require borrowing or adjusting tax policy settings. The financial veto procedure enables the Government to veto proposals that more broadly impact the Government's fiscal position.

The five variables are not an exhaustive definition of the Government's fiscal aggregates. A definition was later inserted into Standing Order 3 which states that "fiscal aggregates" means the Government's intentions for fiscal policy, including the five variables above.⁴⁸ The Government's power to veto a proposal that would have a more than minor impact on its fiscal aggregates appears to extend to any impact on its broad fiscal programme. It is not possible to describe the precise bounds of a power to

⁴⁷ Timothy Power "The Financial Veto: Changing the Rules of the Game?" (LLM Research Paper, Victoria University of Wellington, 1996) at 20.

⁴⁸ Standing Orders of the House of Representatives 2014, SO 3.

veto any proposal that would have a more than minor impact on the Government implementing its broad fiscal programme. However, in practice, it is likely that most proposals that would affect the Government's fiscal programme could be described with some particularity in terms of one of the five listed variables in Standing Order 3.

B The Level of the Crown's Net Worth

Variable E means that the Government's ability to exercise the financial veto extends to any proposal that would have a more than minor impact on the level of the Crown's net worth. The Government's net worth can be calculated as 'comprehensive net worth', which includes the value of the Crown's assets and liabilities and the present value of the Government's expected future operating expenses and revenues.⁴⁹ Such a calculation accounts for the future stream of benefits that is likely to flow from the Government's assets. The Government's 'net worth' can also refer to 'accounting net worth', which is simply the Government's current total assets less its current total liabilities.⁵⁰

Comprehensive net worth takes into account "resources and obligations that do not meet accounting recognition criteria" such as "the power to tax and the implicit obligation to provide social services".⁵¹ Comprehensive net worth is considered to be "the ideal measure of fiscal sustainability" and is an indicator used by rating agencies to consider the riskiness of sovereign balance sheets.⁵² Unfortunately, it is difficult to precisely measure comprehensive net worth.⁵³

A further measurement issue is that many of the Government's assets do not generate revenue and, politically or otherwise, cannot be sold.⁵⁴ Treasury uses the example of a national park which is unlikely to be sold or used to generate revenue.⁵⁵ Although the book value of these assets will affect the total value of its assets less the total value of its liabilities and, therefore, its net worth, the relevance of these assets to the Government's true fiscal position is questionable. A proposal that would affect the value of a national park is unlikely to have any real impact on the Government's ability to deliver its fiscal programme, although the impact on the book value of the Government's assets may constitute a more than minor impact on the Government's

⁴⁹ Timothy Irwin and Oscar Parkyn *Improving the Management of the Crown's Exposure to Risk* (New Zealand Treasury, Working Paper 09/06, December 2009) at 2.

⁵⁰ At 2.

⁵¹ At 10.

⁵² At 10.

⁵³ At 10.

⁵⁴ At 10.

⁵⁵ At 10.

fiscal aggregates. Treasury proposes two additional measures of net worth: variants of accounting and comprehensive net worth both excluding social assets, which are defined as “the non-financial assets of the core Crown [and] Crown Entities”.⁵⁶

Standing orders do not provide any guidance as to the intended interpretation of “net worth”. The approach taken elsewhere during Parliament’s scrutiny of public finance suggests that, while comprehensive net worth may have theoretical advantages, accounting net worth is generally referred to. Budget Policy Statements published by the Treasury in accordance with s 6 of the Fiscal Responsibility Act 1994 between 1994 and 2004 and, since 2005, in accordance with s 26M of the Public Finance Act 1989 discuss “net worth” in terms of the Government’s current net position.⁵⁷

Section 26G of the Public Finance Act 1989 (which substantially continued s 4 of the Fiscal Responsibility Act 1994) directs the Government to pursue its policy objectives in accordance with the principles of responsible fiscal management, and provides that one of those principles is “achieving and maintaining levels of Crown net worth that provide a buffer against factors that may impact adversely on the Crown's net worth in the future.” This use of the term “net worth” explicitly contemplates an asset-focussed, accounting conception of net worth. Firstly, future expectations of operating revenues cannot provide a buffer against future adverse economic impacts. Secondly, the drafting differentiates between the Crown’s current net worth and its “net worth in the future”, suggesting that net worth should not be interpreted as referring to the net present value of a future stream of benefits.

The Statement of Financial Position is one of the key financial statements prepared by Treasury shortly after the end of each fiscal year. The Statement of Financial Position is commonly known as the Government’s balance sheet. It sets out the Government’s assets and liabilities as well as its net worth, which is defined in terms of those assets and liabilities.⁵⁸

Although an accounting net worth interpretation is more restrictive than comprehensive net worth, variable E nevertheless extends the scope of the Government’s financial veto beyond the historical position that the Government’s right to exercise the financial initiative is limited to expenditure proposals. A list of factors that could, in theory, have a more than minor impact on the net worth of the Crown is practically inexhaustible. In

⁵⁶ At 11.

⁵⁷ See, for example: Hon Bill English *2017 Budget Policy Statement* 8 December 2016 at 4.

⁵⁸ *Fiscal Indicators and the Financial Statements: A Guide to How Fiscal Indicators Are Compiled from the Financial Statements* (New Zealand Treasury, February 2014) at 3.

particular, markets with complex dynamics determine much of the value of the Crown's assets and liabilities, and therefore the Crown's net worth.

C Timing of Impact on Fiscal Aggregates

Although the "Crown's net worth" refers to the difference between the Crown's assets and its liabilities (and not to a forward-looking present value calculation), this does not suggest that the Government may not veto proposals that would materially affect its fiscal aggregates in the long term. The Government may veto proposals that affect fiscal aggregates beyond the immediate future; the financial veto certificate issued in respect of the Parental Leave and Employment Protection (6 Months' Paid Leave) Amendment Bill described increased operating expenses during a four year forecast period through to the 2019/20 financial year.⁵⁹ Standing Orders also do not require the fiscal impact to occur within a given period of time and the House appears reticent to more explicitly define the scope of the financial veto – in particular, the House has avoided specifically defining a "more than minor impact" (see below).

D When is a Fiscal Impact 'More than Minor'?

Although Standing Orders define what the Crown's fiscal aggregates are, they do not state what constitutes a "more than minor impact" on those fiscal aggregates. This was an explicit choice by the Standing Orders Committee, who noted that it should fall to the Government of the day to determine what constitutes a more than minor impact "in light of the circumstances of the time." The House rejected a proposal to amend standing orders to define a "more than minor impact" as 0.01% of the Government's operating expenditure.⁶⁰

Although there is no explicit threshold for a proposal to constitute a more than minor impact on fiscal aggregates, Timothy Power suggests that some guidance may be drawn from the 1995 Review of Standing Orders.⁶¹ The Standing Orders Committee signalled an expectation that bills only incidentally involving some expenditure or a small fiscally neutral transfer between appropriations within a Vote should be able to proceed even where the Government does not agree.⁶² One possible inference from the 1995 Review of Standing Orders is that a more than minor impact arises out of a proposal that requires more than incidental expenditure (or incidental borrowing, or taxation). This definition

⁵⁹ Hon Bill English *Certification Under Standing Order 327 Relating to a Bill* 16 June 2016.

⁶⁰ (19 December 1995) 552 NZPD 10833.

⁶¹ Power, above n 47, at 19.

⁶² Standing Orders Committee, above n 15, at 62.

is of limited assistance as defining what constitutes 'expenditure that is not incidental' is equally difficult as defining a more than minor impact.

By refusing to define a "more than minor impact" or set the threshold for the financial veto in other terms, the House has demonstrated a preference that the Government has an imprecisely defined financial veto power. An imprecise definition of more than minor impact widens the scope for the Government to veto proposals that would have a comparatively minor impact on its intentions for fiscal policy. Standing Order 2 provides that the Speaker is "responsible for ruling whenever any question arises as to the interpretation or application of a Standing Order". The threshold may be therefore ultimately up to the Speaker; in practice, the interpretation of a more than minor impact may vary from proposal to proposal and from Parliament to Parliament.

Because of the difficulty (and inevitable inconsistency) in establishing what constitutes a more than minor impact, the Speaker might interpret "more than minor" as a guideline for the exercise of the veto rather than as establishing a specific threshold beyond which a proposal may be vetoed. It is relevant that Standing Order 326 does not require the Speaker to be satisfied that the proposal would have a more than minor impact on fiscal aggregates; the test for the Speaker is whether the Government has certified that it does not agree with the proposal because, *in its view*, the proposal would have a more than minor impact on fiscal aggregates if it became law. This language suggests that the Minister issuing the financial veto certificate has a very wide discretion to determine what constitutes a more than minor impact.

In administrative law, courts generally have the power to review a decision of the executive where that decision is "so outrageous in its defiance of logic... that no sensible person who had applied his mind to the question to be decided could have arrived at it."⁶³ In the Parliamentary context, the courts have no authority.⁶⁴ The Speaker (and, ultimately, the House) is the final arbiter. Is some standard of reasonableness required of a Minister who issues a financial veto certificate and delivers it to the Clerk of the House? For example, could a cynical minority Government issue a financial veto certificate in respect of a proposal that would involve a plainly minor amount of expenditure (such as \$1000) because, in its view, that expenditure would have a more than minor impact on its fiscal aggregates?

The 1995 Review of Standing Orders does contemplate doubt regarding the extent of the impact of a proposal on the Government's fiscal aggregates, although this is in the

⁶³ *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935

⁶⁴ Parliamentary Privilege Act 2008, s 8.

context of a Member's duty to give 24 hours notice before moving an amendment to a proposal if there is any possibility that the amendment may have an impact on the fiscal aggregates. The Standing Orders Committee wrote that:⁶⁵

If there is doubt about whether a proposed amendment may have more than a minor impact ... and 24 hours' notice has not been given, the proposed amendment or change should be ruled out.

A Speaker's ruling by Hon. Sir Douglas Kidd in 1998 confirmed this position, and was referred to by presiding officers on two occasions in 2000:⁶⁶

If a member fails to give 24 hours' notice and there is any doubt or possibility that it has a fiscal impact, the amendment is out of order. The onus is on the member proposing such an amendment to give 24 hours' notice.

This ruling confirms that an assertion that a proposal will have a more than minor impact if passed into law can be the subject of contention, suggesting that the Speaker may refuse to accept a financial veto certificate at face value where the claimed fiscal impact is very minor. On the other hand, the statement explicitly says that the Speaker should rule a proposed amendment out of order even if there is doubt as to whether the amendment would have a more than minor impact on fiscal aggregates – although this is only in the context where a Member has failed to give the appropriate notice to the House and the Government.

The Government has not, to date, issued a financial veto certificate in respect of a proposal that could not have an arguably more than minor impact on its fiscal aggregates, so no Speaker's ruling has arisen in respect of the validity of such a certificate.

Because there is no clearly defined threshold for a more than minor impact on fiscal aggregates, the power of the Government to issue a financial veto certificate depends on the political environment it faces as well as the Standing Orders. Standing Orders are the rules that the House sets for its own governance; if a majority of Members feel that the Government is abusing its power to issue a financial veto certificate, the House might amend or suspend standing orders. This could render a Government's financial

⁶⁵ Standing Orders Committee, above n 15, at 64.

⁶⁶ (1998) 574 NZPD 14166.

veto certificate in respect of a specific proposal ineffectual, or it could constrain or remove the Government's financial veto power altogether.

In addition to political consequences within the House, there may be electoral consequences if a Government is perceived by the voting public to have used its financial veto power in a spurious way. The political cost involved in misusing the veto may have contributed to its relatively infrequent use, with Governments generally attempting to muster the numbers to vote proposals down instead of exercising the financial veto.

VI The Durability of the Financial Veto Procedure

A The Nature of Standing Orders

The financial veto procedure does not have a statutory basis; is provided for solely in the Standing Orders of the House of Representatives. The Standing Orders are the procedural rules the House sets for the conduct of its own business. The sole source of the Government's power to exercise the financial veto against a majority of the House is the House itself.

Standing Orders are not absolute. Standing Order 1 states that the Standing Orders "are not intended to diminish or restrict the House's rights, privileges, immunities, and powers."⁶⁷ To that effect, Standing Orders can be suspended or amended by the House. The Speaker can also grant leave to disregard the standing orders, provided that that no Member objects.⁶⁸ It is not likely that leave would be granted to disregard the standing orders relating to the financial veto if the Government had chosen to exercise this power.

B Suspension of Standing Orders

The House may suspend a Standing Order in whole or in part.⁶⁹ A suspension motion may be moved with or without notice, but if a motion is moved without notice there must be a quorum of at least 60 Members present.⁷⁰ A Member who is not a Minister may only move a motion to suspend a standing order if the suspension is required to enable a proposal in that Member's name to proceed.⁷¹ Generally, the suspension of a

⁶⁷ Standing Orders of the House of Representatives 2014, SO 1.

⁶⁸ McGee, above n 5, at 117 - 118.

⁶⁹ Standing Orders of the House of Representatives 2014, SO 4(1).

⁷⁰ Standing Orders of the House of Representatives 2014, SO4(1)-(2).

⁷¹ Standing Orders of the House of Representatives 2014, SO 5

Standing Order “may be for an indefinite period (in which case it lasts until the end of the Parliamentary session), for a limited period, or only in respect of a particular item of business.”⁷²

A Member who is not a Minister may only propose the suspension of the standing orders relating to the financial veto in respect of a particular proposal in that Member's name. It would not be in order for a non-Ministerial Member to propose the suspension of the financial veto procedure for a specified period of time or for the remainder of the Parliamentary session; an amendment to Standing Orders would instead be required.

Suspension of a Standing Order is rare; David McGee considers that it is a procedure that is generally only adopted “in exceptional circumstances or as a precursor to an amendment of the Standing Orders”.⁷³ While Members from a party which has agreed to provide confidence and supply to the Government may be willing to vote for a proposal initiated by a non-Ministerial Member, they are likely less willing to vote for such a proposal when it involves suspending the Standing Orders. Parties which have agreed to provide the Government with confidence and supply are less likely to support a proposal where the Government has certified that the proposal would materially impact its fiscal position. Cooperation agreements between the Government and support parties broadly involve supporting the Government and carrying on a constructive relationship; the 2014 *Relationship Accord and Confidence and Supply Agreement with the Maori Party* is described as building “on the stable and constructive relationship developed between the two parties” and as “based on good faith and no surprises.”⁷⁴ A cooperation agreement would be expected to provide some latitude for support party Members to decline support for some measures that do not relate to confidence or supply; each of the Confidence and Supply agreements between the National Party and the United Future, Act and Maori parties allows Members from the support party to determine their positions on the Government's legislative programme on a case-by-case basis.⁷⁵ Support party Members voting to suspend Standing Orders in order to thwart the Government's exercise of the financial veto would involve significant embarrassment to the Government and could amount to a rejection by the support partner of the Government's fiscal programme. Such a vote would risk frustrating the relationship between the Government and the support party.

⁷² McGee, above n 5, at 116.

⁷³ McGee, above n 5, at 117.

⁷⁴ John Key, Tariana Turia and Te Ururoa Flavell *2014 Relationship Accord and Confidence and Supply Agreement with the Māori Party* (New Zealand Parliament, 5 October 2014) at 1.

⁷⁵ John Key and David Seymour *2014 Confidence and Supply Agreement with Act New Zealand* (New Zealand Parliament, 29 September 2014) at 3; John Key and Peter Dunne *2014 Confidence and Supply Agreement with United Future New Zealand* (New Zealand Parliament, 29 September 2014) at 3.

C Revocation or Amendment of Standing Orders

A Standing Order may only be amended or revoked with notice.⁷⁶ McGee notes that, in practice, the House does not amend Standing Orders without the Standing Orders Committee first considering the proposed amendment.⁷⁷ Major changes to standing orders are typically considered by the Standing Orders Committee and the committee of the whole House, after which the House formally adopts them.⁷⁸ Otherwise, less extensive amendment may take place by a resolution of the House.⁷⁹

As previously noted, the ability of the House to amend Standing Orders may operate as a safeguard against Government abuse of the financial veto procedure. The Standing Orders Committee indicated in the 1995 Review of Standing Orders that the financial veto:⁸⁰

will be used only for serious initiatives and amendments. The committee is in no doubt that if the procedure is devalued by being used for filibustering purposes... the House will revisit the procedure within a relatively short time.

If Members are generally concerned that the Government has misused its financial veto powers (whether by threat or by issuing a financial veto certificate), the Government risks a majority of Members coming together and curbing those powers. Although it appears that standing orders are generally made by consensus, this is not itself formally required by the standing orders. This may involve removing the financial veto altogether, although removal appears to be unlikely given that opposition parties may ordinarily expect to form a Government at some future time (and therefore benefit from the right to exercise the financial initiative). An alternative approach might involve more clearly defining the scope of the veto and, in particular, the meaning of a “more than minor impact” on the Government’s fiscal aggregates.

VII The Literature on Democracy

A The Financial Veto and Democracy at First Glance

The financial veto procedure is sometimes criticised on the ground that it is undemocratic. Prior to the use of the financial veto procedure to prevent the Parental Leave and Employment Protection (6 Months' Paid Leave) Amendment Bill (Paid

⁷⁶ Standing Orders of the House of Representatives 2014, SO 6.

⁷⁷ McGee, above n 5, at 119.

⁷⁸ At 119.

⁷⁹ At 119.

⁸⁰ Standing Orders Committee, above n 15, at 62.

Parental Leave bill) from being read a third time, criticism had not been widespread. Its use to prevent an entire bill from being read appears to have focussed some level of attention on the financial veto procedure; some commentators have criticised the procedure itself, while others have extended that criticism to the Government for using a procedure that is open to it under Standing Orders.⁸¹

To the extent that New Zealand society understands democracy in terms of proportional Parliamentary representation and rule by the majority in Parliament, the financial veto procedure is undemocratic at first glance. A Government which exercises the financial veto of course does so to prevent the will (or expected will) of a majority of the House from being carried out.

The etymology of democracy is the ancient Greek δῆμος” (demos) meaning the “common people” and the suffix κρατία (cracy) meaning “rule”.⁸² Democracy, at least etymologically, equates to rule by the people. But democracy is a complex and contested ideal.⁸³ Theorists who start from the etymological axiom quickly diverge. Various models of group decision-making can be described as rule by the people. This section canvasses three particularly relevant perspectives on democracy. It then assesses whether the prima facie position that the financial veto is undemocratic is justified.

B Monistic Democracy (or, Majoritarianism)

In *We the People*, a study of the constitutional landscape of the United States of America, Bruce Ackerman develops a theoretical framework of constitutional models.⁸⁴ One of these models, monistic democracy, necessarily involves the plenary delegation of decision-making authority to the winners of the last general election.⁸⁵ The test for democracy revolves around electoral process; all that is required for legitimacy is that the decision makers were elected freely and fairly, and that they do not attempt to prevent future elections.⁸⁶ Georgia Lockie identifies that this

⁸¹ See for example: Isaac Davison "Govt 'ignoring democracy'" *The New Zealand Herald* (online ed, Auckland, 17 June 2016).

⁸² *Oxford English Dictionary* (3rd ed, Oxford University Press, Oxford, 2014) at “democracy, n.”.

⁸³ Frank Cunningham *Theories of Democracy: A Critical Introduction* (Routledge, London, 2002) at 3.

⁸⁴ Bruce Ackerman *We the People* (Harvard University Press, Cambridge (Mass), 1993) vol 1.

⁸⁵ Ackerman, above n 84, at 8.

⁸⁶ At 8.

understanding of monistic democracy is largely equivalent to New Zealand's understanding of Parliamentary sovereignty.⁸⁷

The implication of monistic democracy is that "all institutional checks upon the electoral victors are presumptively antidemocratic".⁸⁸ In the context of the United States of America, which has a supreme, written constitution, Ackerman argues that, from a monist perspective:⁸⁹

when the Supreme Court, or anybody else, invalidates a statute, it suffers from a "countermajoritarian difficulty" which must be overcome before a good democrat can profess satisfaction with this extraordinary action.

C Deliberative Democracy

In contrast to monistic democracy, deliberative democracy rejects the idea that a decision-making system is democratic simply because it has aggregated the preferences of all of the individuals who constitute the voting public. Amy Gutmann and Dennis Thompson define their conception of democracy as a "form of government in which free and equal citizens (and their representatives) justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible".⁹⁰

Proponents of deliberative democracy believe that a deliberative decision-making process yields "rational collective outcomes" or, in other words, the best possible decision for the voting public as a whole.⁹¹

D Guardianship

Robert Dahl argues for a democratic process that gives equal consideration to each individual's interests. Dahl's starting point is that all people are inherently equal, implying that every person's interests should be given equal weight in group decision-making.⁹² Dahl also assumes that every member of the voting public is the best arbiter

⁸⁷ Georgie Lockie "We the people? - Theorising constitutional democratic legitimacy to reflect on and enrich New Zealand's constitution" (LLB (Hons) Dissertation, Victoria University of Wellington, 2014) at 10.

⁸⁸ Ackerman, above n 84, at 8

⁸⁹ At 8.

⁹⁰ Amy Gutmann and Dennis Thompson *Why Deliberative Democracy* (Princeton University Press, Princeton, 2004) at 7.

⁹¹ Juan Perote-Peña and Ashley Piggins "A Model of Deliberative and Aggregative Democracy" (Working Paper No. 170, National University of Ireland at Galway, 2011) at 3.

⁹² Robert Dahl *Democracy and Its Critics* (Yale University Press, New Haven, 1989) at 85-88.

of their own best interests and that, in any case, individuals are not well incentivised to defend others' interests in group decision-making.⁹³

Dahl criticises the 'guardianship' that arises when an unelected decision-maker usurps the role of group decision-making.⁹⁴ Although he concedes that the judiciary (as an example of an unelected decision-maker) can legitimately act to protect rights that are central to the democratic process (such as freedom of expression or freedom of association), he considers that unelected decision-makers must not become involved in policy decisions.⁹⁵

VIII Evaluating the Financial Veto Against the Appropriation Rule

The typical criticism of the financial veto – that a minority should not be able to overrule a majority in a democratic decision-making process – should also apply to the appropriation rule that preceded it. The tension with democracy may have been less glaring when expenditure proposals were simply out of order from the start; a deliberate and specific choice by the Government to veto a bill which has proceeded through the House until third reading may attract more attention than the Speaker applying the Appropriation Rule, which ruled a generalised class of proposal out at the point of introduction.

Although exercising the financial veto in respect of an entire bill has attracted significant criticism, the financial veto procedure can be understood as a shift towards democracy in the public finance procedures of the House.

A Members' Proposals are More Commonly Allowed to Proceed

Although Opposition Members and the Government can be expected to have different legislative priorities and aspirations, the Government will not always oppose Members' proposals. The Government may agree with some proposals, and may treat others as a conscience issue for individual Government Members to vote on as they think appropriate. Even where the Government does disagree with a Member's proposal and cannot muster sufficient support to vote it down, the Government will not necessarily exercise the financial veto. The financial veto has a potentially significant political cost, both in the House and with the public.

⁹³ At 100-104.

⁹⁴ At 188-191.

⁹⁵ At 190-191.

Under the Appropriation Rule, any proposal by a non-Ministerial Member was out of order if it involved even a minor appropriation of Government funds. Replacing the Appropriation Rule with the financial veto procedure has allowed Members to make proposals that would involve both minor and more than minor expenditure. Many, if not most, of these proposals will be voted down by the Government and its support partner. Comparatively few will be vetoed. Under the current Standing Orders, those that survive will become law. Under the Appropriation Rule, none of the Bills would have been introduced.

B A Shift in Power to Parliament

In his early study of the financial veto, Timothy Power noted that there is a significant conflict between effective government and effective Parliament.⁹⁶ The Royal Commission on the Electoral System, which carried out an in depth study of First Past the Post, discussed both of these concepts. It took effective government to mean “the ability to act decisively when that is appropriate” and effective Parliament to mean a House capable of:⁹⁷

“the promotion of alternative Governments and policies, enacting legislation, authorising the raising of taxes and the expenditure of public money, scrutinising the actions and policies of the executive and supplying a focus for individual and group aspirations and grievances.”

The shift from the appropriation rule to the financial veto was, at least to some extent, a shift from ‘effective government’ to ‘effective Parliament’.⁹⁸ Crucially, the House is now able to propose changes to taxation and spending, and may even pass these proposals into law – to the extent that the Government is willing to accept the loss when it does not have the numbers.

A key part of being a credible Opposition is presenting an alternative fiscal policy to the House and to the public; opposition parties are now able to propose different spending priorities in the House as well as in a manifesto. The price of non-Ministerial Members’ ability to propose new spending, however, was their reduced latitude to run roughshod over the Government’s taxation policy settings, as well as to pass proposals that would affect the Government’s net worth in other ways.

⁹⁶ Power, above n 47, at 26.

⁹⁷ *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (1986) 9 AJHR H.3 58 as cited in Power, above n 47 at 26-27.

⁹⁸ Power, above n 47, at 29.

Non-Ministerial Members should consider this a good trade; Members would rarely muster the numbers to materially change the Government's taxation settings (or the Government would cease to have the support of the majority of the House) or to affect its net worth in a more than minor way, so losing the ability to force these types of proposals through is a relatively low price to pay. On the whole, the financial veto has contributed to 'effective Parliament' as opposition parties are now better placed to present an alternative vision to the House and the public, as well as to secure occasional legislative wins.

C Enhancing the House's Financial Scrutiny Function

Under the Appropriation Rule, the Government's fiscal policy could only be criticised in negative terms, by responding to the proposals that the Government had placed on the table. The House had numerous opportunities to debate and scrutinise the Government's proposals for expenditure: the high-level Appropriation Bill (the Budget), the more detailed Estimates and Supplementary Estimates, any Imprest Supply Bills and the end-of-year Appropriation (Financial Review) Bill. However, non-Ministerial Members lacked the ability to make *positive* contributions to the debate by proposing amendments or alternative expenditure.

Because Members could not propose expenditure during the House's scrutiny of the Budget, the House was required to either accept or reject each Vote as specified. During the Estimates debate, the committee of the whole House votes on the question "That Vote ... stand part of the schedule".⁹⁹ If a Member was dissatisfied with certain items within a Vote but generally supportive of the Vote, she was faced with the unsavoury choice of having to approve an appropriation that she did not agree with or to refuse to approve appropriations with which she agreed.

The financial veto enhances the House's ability to scrutinise the budget. Members can now propose an amendment to a Vote; even though an amendment to a Vote is likely to be voted down or vetoed, being able to make a positive contribution to the debate compels the House or the Government (depending on whether the veto is exercised) to publicly make explicit policy decisions and provides an opportunity for Opposition parties to promote alternative policies.

D Opening the Floor to Financial Discourse

The Appropriation Rule prevented Members from making proposals that would involve even incidental amounts of expenditure. This was a significant restraint on the latitude

⁹⁹ McGee, above n 5, at 485.

of Members to promote alternative policies in the House. The financial veto enables Members to introduce proposals regardless of their fiscal impacts, subject to the right of the Government to veto those proposals at the appropriate time.

Allowing Member's proposals involving an appropriation to be introduced provides an opportunity for extensive debate in the House. This is particularly so in respect of a whole bill, which may only be vetoed while the bill is awaiting its third reading. Whereas a Member's bill requiring any new spending would previously have been ruled out of order before it was even introduced, the bill may now be debated and considered at the first reading and – if there is majority support for the bill – during the select committee process, at the second reading and during the committee of the whole House. It is only while the Bill is awaiting its third reading that the Government may exercise the financial veto.

E Analysis in terms of Democratic Principles

1 Monism/Majoritarianism

In a narrow, theoretical sense, the financial veto procedure restricts the freedom of the House more than the Appropriation Rule that preceded it. Majoritarians might consider that the wider scope of the financial veto means that it constitutes a more significant check on the ability of electoral victors to implement the will of the people.

Although the *scope* of the financial veto is wider than the Appropriation Rule, it is less harsh in *effect*. The practical reality is that Members are freer to carry out their legislative roles now than they were when the Appropriation Rule was in place. Although the House has lost the unfettered right to alter the Government's operating revenue in a more than minor way, it has gained the ability to propose, and sometimes change, the Government's broader fiscal policy.

The Appropriation Rule was an automatic check on the electoral victors, whereas the financial veto is discretionary and, importantly, it is rarely used.

2 Deliberative Democracy

As the Appropriation Rule was non-discretionary, any Parliamentary discussion of spending proposals was automatically out of order. Not only did the Appropriation Rule prevent the aggregation of Members' political preferences (and Members' constituents' preferences by proxy), it also prevented the House from engaging in collective deliberation. If a Member's proposal required an appropriation, it would not be able to

proceed to first reading, let alone the more deliberative Select Committee and committee of the whole House stages.

Members sometimes expressly state that they will vote for a bill at first reading to enable a Select Committee to examine and report on the bill. In some cases, a Member voting for a bill at first reading does not support or is undecided about the bill. The Select Committee process, including detailed consideration of the bill and public submissions can reveal important insights about the problem the bill is intended to solve. The Select Committee will often suggest changes – either to moderate political concerns or to incorporate the views of experts and the wider public.

The financial veto procedure enables Members to make proposals that would affect the fiscal aggregates, subject to the Government's right to exercise a veto. Standing Orders provide that the veto may only be exercised at certain stages, generally after a Member has had the opportunity to introduce the proposal and the House has had an opportunity to debate it. For example, an entire bill may only be vetoed at the third reading,¹⁰⁰ and an amendment proposed by a Select Committee may be vetoed before the House agrees to those amendments.¹⁰¹

Allowing the Government to exercise its financial veto only after the House or a Select Committee has had a chance to discuss the proposal balances the interest of Members in proposing and discussing alternative fiscal policy with the Government's interest in protecting its fiscal aggregates. An extended period of deliberation provides the House and the Government with an opportunity to negotiate, and potentially to amend the proposal to enable a compromise. Increased deliberation time is believed by deliberative democrats to lead to more rational collective outcomes, as actors trade off their own interests to reach the optimal legislative solution to the problem at hand.

The financial veto may act as a form of safety net for the Government when deciding whether to provide initial support for Members' proposals. Because the Government may exercise the financial veto, it may be less cautious when deciding whether or not to vote for a Member's bill at first reading in order to send it to a Select Committee. This is likely to have contributed to the common practice of supporting a 'potentially worthwhile' Member's bill at first reading.

¹⁰⁰ Standing Orders of the House of Representatives 2014, SO 328(1).

¹⁰¹ Standing Orders of the House of Representatives 2014, SO 329(1).

3 *Guardianship*

Like the Appropriation Rule, the financial veto procedure prioritises the preferences represented by a minority Government over those of the voting public as a whole. However, while the appropriation rule is universally applicable, the financial veto involves the Government making a deliberate decision to continue with the fiscal programme that it considers is in the national interest rather than to implement the preferences of the majority. In this sense, the financial veto can be seen as a minority decision-maker taking a guardianship role by substituting its judgement as to fiscal policy for the judgement of the voting public as a whole.

F Is the Financial Veto More Democratic than the Appropriation Rule?

The financial veto involves a lesser restriction than the appropriation rule on the ability of the House to consider fiscal proposals. Although the House's jurisdiction to change taxation policy has been limited, its overall ability to discuss and affect fiscal policy has increased. Although it is wider in scope than the appropriation rule, the financial veto represents a shift to democracy for several reasons.

Firstly, the financial veto is a discretionary restriction on the House's jurisdiction, rather than an automatic rule that the House may not propose expenditure. This enables the House to consider, and sometimes pass, alternative fiscal policies. A monist perspective is that the financial veto improves democracy because it gives greater latitude to the House to determine fiscal policy, as well as to critically analyse the Government's proposals.

Secondly, entire bills and amendments proposed by Select Committees may only be vetoed after the House or the Select Committee has had a chance to discuss them. Proponents of bills or amendments that would significantly change the Government's fiscal policy and spending priorities are not silenced before a proposal is even introduced.

IX What Incentives Is the Financial Veto Likely to Have Created?

An analysis of the impact of the financial veto on Member behavior is, of course, somewhat speculative. It is difficult to assess how the financial veto procedure (and the appropriation rule before it) has influenced Members' behavior – or, perhaps more relevantly, how relaxing it might play out. This section attempts to determine the incentives that Members are likely to have faced as a result of the financial veto procedure.

A Moderation as a Response to Scarcity

A Government that exercises the financial veto does so to prevent the will (or the expected will) of a majority of the House from being carried out. The financial veto is designed to allow a minority Government to overrule a Parliamentary majority. The financial veto is *prima facie* undemocratic but, as discussed earlier, there is more to democracy in New Zealand than the rule by a majority of the House.

The impact of the financial veto procedure may extend beyond the exercise of the veto in respect of any given proposal. The standing orders that provide for a financial veto may create an incentive for Members to more frequently propose non-financial bills while they are not in Government. Members from parties outside of the Government have limited opportunities to influence the legislative agenda. The scarcity of opportunity to effect change may act as an incentive for Members to make proposals which are likely to attract broad enough support to survive the legislative process and which are unlikely to be vetoed by the Government.

B Political Positioning

On the other hand, Members may use the financial veto to demonstrate a political position. Parliament is arguably the highest profile forum for policy debate in New Zealand; society largely understands the premise that the Government rules subject to the approval of Parliament, or at least that 'a majority of Parliament is in charge'. A Government which issues a financial veto certificate in respect of a proposal that has attracted the support of a majority of the House takes advantage of a situation where parliamentary procedure deviates from this norm. This deviation from the norm is likely to attract the attention of the media and society at large. A Member proposing a bill that is vetoed by the Government can force the Government to take responsibility for the failure of a particular policy to become law.

In this way, a Member with the backing of a majority of the House can pressure the Government to address areas of policy that did not form part of the Government's legislative agenda.

The financial veto can also be used where a Member wishes to distance themselves (and their support bloc) from a Government that has not gone far enough in respect of a particular policy. In response to an extended campaign by Labour Member Sue Moroney, the fifth (and incumbent) National Government increased the minimum entitlement to parental leave from employment from 14 to 18 weeks over a period of

several years.¹⁰² Moroney proposed extending this entitlement to 26 weeks,¹⁰³ resulting in the Finance Minister issuing a financial veto certificate under Standing Order 327. Although the Government had increased new parents' parental leave entitlements, Moroney was able to use a Member's bill to make a political point, notwithstanding the fact that the Bill was subject to the Government's financial veto. For the avoidance of doubt, this paper does not suggest that Moroney solely sought to make a political point in proposing the Paid Parental Leave bill.

A Member who wishes to differentiate her support bloc from the Government may find it easier to introduce a bill which takes a strong stand on a controversial issue, and which is unlikely to make it past first reading or select committee, rather than compromising with other Members on a 'watered-down' bill which might have the numbers to pass. This does not suggest that the financial veto is an unattractive option for political posturing, rather that it is more likely to be used in a situation where there is majority support in the House for an uncompromised proposal. The 'worst-case scenario' for a Member proposing in this context is that the Government must explicitly reject the policy, while there is the remote chance that the desired policy may actually become law. However, it could be expected that, generally, Members from the Government's wider support bloc would side with the Government. On a typical Members' day, then, opposition Members can be expected to attempt bold proposals that are unlikely to attract sufficiently broad support to make the financial veto relevant.

C Political Compromise

Although the financial veto is unlikely to factor into the political calculus of a Member who is demonstrating a political position, it may influence the behaviour of a pragmatic Member who is willing to work across the political spectrum to achieve majority support for a bill she considers worthwhile. If a pragmatic Member is willing to submit a moderate bill in order to attract majority support, she can be expected to respond to the threat of the financial veto in a similarly pragmatic matter – through a preference for non-financial bills while not in Government.

It is difficult to carry out an evidence-based assessment of the extent to which the financial veto prevents the House from debating and deciding on proposals that would involve a more than minor impact on fiscal aggregates. Member's bills only infrequently survive the legislative process, so the sample size of successful Members' bills is low. The financial veto has been even more rarely used – and only once in respect of an entire bill. Crucially, such an assessment would require a counterfactual

¹⁰² Simon Bridges "Government to boost parental leave provisions" (press release, 15 May 2014).

¹⁰³ Parental Leave and Employment Protection (6 Months' Paid Leave) Amendment Bill 2015.

analysis of Members' political strategy – such an assessment would only be reliable after an in-depth study of Members' incentives and political goals. Although the impact of the financial veto is difficult to quantify, it is reasonably likely that the behaviour of Members who seek political compromise to further their policy aims is more affected by the financial veto than the behaviour of Members who are more interested in demonstrating a particular political position.

D Engagement of Members with the Financial Scrutiny Function

Louwrens suggests that the financial initiative of the Crown, including the Government's financial veto, is a major constraint on the House's financial scrutiny function. In spite of the theory that the House holds the Government to account over the minutiae of its budget, it is unlikely that the House would refuse to authorise the Government's overall package of spending as the Government should always command the support of a majority of the House. Louwrens argues that "consideration of the budget has...tended to become in effect a piece of political theatre, rather than reflecting the constitutionally-essential role of this parliamentary process."¹⁰⁴

If the will of the House can be overridden by veto, the authority of the House is diminished. Members may also become disengaged with the financial scrutiny process, either because they consider themselves to be disenfranchised or because they face a lesser incentive to fully engage with the financial scrutiny process.

Louwrens cites interviews with Members of the 49th Parliament carried out by the Office of the Clerk of the House of Representatives. Comments that budget debates are "just a moment for some people to get up and give a five minute speech. It's not a genuine debate. I can't even be bothered doing it" or that Members do not "see a lot of robust financial scrutiny going on" suggest that Members are disengaged from the financial scrutiny function for broader reasons than the financial initiative of the Crown.¹⁰⁵

Louwren's concerns relate as much to the dynamics of a whipped, unicameral Parliament as they relate to the financial initiative of the Crown. It is a well-understood feature (and common criticism) of the New Zealand Parliament that the lines between the executive and the House are blurred. These causes of disengagement are harder to remedy than simply allowing Members free rein to make proposals that would involve a more than minor impact on the Government's fiscal aggregates. While the financial

¹⁰⁴ Louwrens, above n 39, at 3.

¹⁰⁵ At 3-4.

veto may well influence Members' behaviour, Members' proposals (or amendments) are voted down much more frequently than they are vetoed.

X Is the Financial Veto Democratic?

A The Financial Veto as a Tool to Give Effect to the Policy 'Bundle'

New Zealand electors vote for competing lists of candidates put forward by political parties rather than selecting specific policies. Each list of candidates can be thought of as a fixed bundle of policies and other attributes, or as "a complex intangible product which the voter cannot unbundle".¹⁰⁶ In theory, voters optimise by voting for the bundle that is closest to their own political preferences. In the MMP environment, a minority Government represents a compromise between actors seeking to give effect to their respective bundles.

Allowing Members to propose expenditure that would have a more than minor impact on the Government's fiscal aggregates could prevent Government from advancing the bundle (or bundles) of policies that gained the support of the electorate. In this respect, allowing Members to propose novel expenditure can be compared to allowing Members a conscience vote on social issues.

Some opponents of conscience voting by Members argue that a free vote breaks the contract that Members have with the voting public to advance their party's election manifesto.¹⁰⁷ Richard Prebble argued that he lacked a mandate to cast a conscience vote in respect of the Contraception, Sterilisation, and Abortion Bill:¹⁰⁸

"Parliament consists of 87 men and women who were selected, not because of their views on abortion [for example], but because the political parties concerned thought they would make good members of Parliament. We have no mandate to make a decision."

Although social issues might be expected to provoke a principled response from some Members, voters face the same bundling dynamic in respect of social and financial policy. A bloc of Members from Government support parties may lack the mandate to vote for a proposal that would significantly alter the fiscal aggregates if they undermine the Government's fiscal programme in doing so. The financial veto may be seen as a mechanism to limit the ability of Members to undermine the bundle of policies that

¹⁰⁶ Andrew Lock and Phil Harris "Political marketing - vive la difference!" (1996) 30(10-11) EJM 21.

¹⁰⁷ David Lindsey "Conscience Voting in New Zealand" (PhD Thesis, University of Auckland, 2011) at 81.

¹⁰⁸ (31 May 1978) 417 NZPD 490-2, as cited in Lindsey, above n 107, at 81.

attracted the broad support of the electorate, especially where the Member was elected from the list of a party which indicated a preference to work with the party leading the Government.

However, when smaller parties indicate a preference to form a government with one of the larger parties, they typically attempt to present themselves as having broadly compatible but not entirely overlapping values or interests. Richard Prebble's criticism of a Member breaking with party policy on a hitherto unforeseen conscience issue is not comparable to the situation where support party caucus Members oppose the Government in a way that was reasonably foreseeable to voters or consistent with the principles on which that party campaigned.

B Analysis in terms of Democratic Principles

1 Monism/Majoritarianism

At face value, a good Majoritarian should consider that the financial veto procedure is undemocratic; the process involves a subset of the electoral victors using a procedural tool to prevent a majority of the electoral victors from voting on a proposal rather than securing the necessary support in the House (a political, rather than institutional check) to vote the proposal down.

The financial veto can be differentiated from "institutional checks" such as judicial review of legislation as against the United States Constitution or the various proposals for an entrenched bill of rights in New Zealand. Those mechanisms typically involve a body that is not the legislature (or a subset of it) and which is not accountable to the voting public acting as a second decision-maker. In the case of judicial review as to constitutionality, the decision-maker must explicitly determine the issue with reference to an external standard (such as the United States Constitution, or a hypothetical entrenched New Zealand constitution¹⁰⁹) that is often immovable and may not reflect the preferences of the current voting public. Most importantly, the decision maker does not depend on the on-going or future support of the voting public and therefore has very limited public accountability.

In contrast, the financial veto is part of the procedural rules that the House freely and independently sets for its own operation. Although the exercise of the financial veto involves the executive checking the legislature, this privilege is granted to the executive with the House's on-going consent. The financial veto will continue to exist only if it

¹⁰⁹ See, for example: Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016).

continues to have the support of the House; the House may amend the standing orders if Members are able to muster sufficient political will to do so. It is relevant that the Standing Orders Committee regularly conducts a comprehensive review of the Standing Orders; even if a majority of Members are unwilling to suspend the standing orders relating to the financial veto to allow a particular proposal to pass, significant dissatisfaction with their operation can be examined in detail through the review process. As recently as 2014, the Standing Orders Committee reiterated a broad consensus in favour of the financial veto.¹¹⁰ The Standing Orders Committee is currently in the process of reviewing the operation of the standing orders.¹¹¹

Because the financial veto is an internal procedure which only exists while it has the support of the House, a more nuanced Monist might conclude that the House does not face the sort of illegitimate check on the legislature that Monists consider a threat to democracy – either because there is no presumptively undemocratic ‘institutional check’ or because the impermanence of that institutional check enables it to surpass the ‘countermajoritarian difficulty’.

2 *Deliberative Democracy*

Deliberative democrats believe that a decision-making body is more likely to achieve the ‘rational collective outcome’, or the optimal compromise, if its Members are empowered to fully explore an issue and are required to justify their positions to each other and to the voting public. The financial veto procedure appears to challenge this ideal. The Government is not required to explain its financial concerns or negotiate with Members in order to secure a moderated proposal or assurances that support parties will vote against the proposal. Rather than negotiating with Members to reach a compromise that balances the varying interests represented in the House, the Government is able to prevent a proposal from being voted on, and potentially to make a proposal non-viable before this by indicating that the Government would issue a veto certificate at the appropriate time.

Standing order 327 requires that the Government set out the likely impact of a proposal on its fiscal aggregates “with some particularity”. As discussed, the standard is quite low – all that is required is that the certificate describes the expected impact and states that the Government does not concur. The description of the expected impact may be a bare assertion, or it may even be a claim that is clearly contrary to evidence. It is concerning that the Government is not required to go beyond a statement that the

¹¹⁰ Standing Orders Committee *Review of Standing Orders* (July 2014) at 25.

¹¹¹ Standing Orders Committee "Business before committees: Review of Standing Orders 2017" (22 September 2016) New Zealand Parliament <parliament.nz>.

proposal would have a more than minor impact on the fiscal aggregates. This is inconsistent with fiscal responsibility principles, such as those set out in Part 2 of the Public Finance Act 1989, which broadly require the Government to provide the House with detailed reasoning for its financial decisions. Although the House is permitted to debate a financial veto certificate, Members are at a disadvantage in doing so if they have not been presented with the Government's reasoning in full.

3 Guardianship

The exercise of the financial veto involves the derogation of group decision-making by the executive. Because the executive is only likely to exercise the financial veto where it does not have sufficient support in the House to vote a proposal down, the financial veto will always involve reweighting the interests represented by each Member so that those represented by a minority Government take priority over those represented by a majority of the House. Critics of powers of guardianship being allocated to unelected decision-makers, such as Robert Dahl, would likely see the financial veto procedure as a challenge to democracy in need of sound justification.

Although some critics of guardianship concede that unelected decision-makers can intervene to defend rights which are fundamental to the democratic process, the financial veto goes well beyond this by elevating the executive's fiscal priorities (a matter of policy) above those of the House as whole.

Dahl's critique of guardianship focussed on the justification for judicial review, where the moderating decision-maker is typically not accountable to the electorate. In contrast, the exercise of the financial veto effectively involves a minority subset of the House checking the majority of the House. Nevertheless, the financial veto involves either unequal weighting of the interests (or, alternatively, understandings of the collective interest) represented by different Members.

XI Justifications for the Financial Veto as a Limitation on Majority Rule

A The Proportionality Test

This paper has explored the position that the financial veto procedure is undemocratic. The financial veto is difficult to justify if democracy is an absolute, terminal value and if it is understood solely in terms of majority rule. This paper suggests that democracy is not an absolute value and that there are legitimate competing considerations, including the need to maintain lines of accountability and to ensure that the overall coherence of public finance in New Zealand. This section explores the view that the

financial veto procedure may be a minimal, justified limitation on the principle of majority rule in order to secure other constitutional goods.

A proportionality analysis can be useful to test whether a limitation on broad constitutional principles is justified, both inherently and compared with alternative limitations.

Aharon Barak, the former President of the Supreme Court of Israel has described proportionality as ‘the set of rules determining the necessary and sufficient conditions for a limitation on a constitutionally protected right by a law to be constitutionally protected’.¹¹² In assessing the proportionality of the financial veto procedure, the “constitutionally protected right” is the principle of majority rule in the House. Barak sets out a four-fold test for proportionality:¹¹³

- a limitation of a constitutional right will be constitutionally permissible if*
- (i) it is designated for a proper purpose;*
 - (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose;*
 - (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally*
 - (iv) there needs to be a proper relation (“proportionality stricto sensu” or “balancing”) between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right’*

Kai Möller describes the proportionality test as fundamentally about the resolution of a conflict between competing interests, and that “this conflict is ultimately resolved at the balancing stage.”¹¹⁴ Möller notes that “before engaging in the balancing exercise it is important to establish that there exists a genuine conflict...which cannot be resolved in a less restrictive way.”¹¹⁵ This section will consider whether the limit placed on the House by the financial veto can be justified with reference to Barak’s proportionality criteria. Three potential ‘proper purposes’ are identified: clear lines of accountability, stability of Government and fiscal responsibility.

¹¹² Aharon Barak *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, Cambridge, 2012) at 3.

¹¹³ At 3.

¹¹⁴ Kai Möller "Proportionality: Challenging the Critics" (2012) 10(3) Int J Const Law 709 at 711.

¹¹⁵ At 711.

B Rational Connection to a Proper Purpose

1 Accountability

The financial veto attempts to strike a balance between preventing Members from proposing incidental expenditure and maintaining the Government's accountability for Crown financial performance. Andrew Geddis notes that maintaining "clear lines of accountability come election time" is particularly important.¹¹⁶ It would be problematic if opposition Members (with the support of crossbench or support party Members) were able to foist significant spending or reduction in the tax base on the Government and subsequently criticise the Government for failing to operate within its means. The issue of accountability is even more significant in the context where voters may have poor access to information and, particularly at election time, a poor recollection of the Government's voting record.

Political accountability and informed political engagement are legitimate policy aims. Certainty of responsibility is consistent with the broader aspects of Parliament's financial scrutiny function, such as the need to publish estimates and a budget policy statement, or with the work carried out by organisations such as the Office of the Auditor-General who is statutorily charged with carrying out financial and performance audits of the public sector.¹¹⁷

The financial veto is rationally connected with the purpose of accountability. Möller suggests "if the interference [with the general principle] contributes to the achievement of the goal to some extent, however small, then the suitability test is satisfied because it has been established that there is indeed a clash of the two values".¹¹⁸ Without considering the question of whether or not the financial veto is overall a suitable mechanism to promote accountability, it is clear that it operates in a way that can maintain "clear lines of accountability" by preserving the right of the Government to prevent a fiscally significant bill from passing through the legislative process. The rational connection test is therefore met in respect of the purpose of achieving accountability.

¹¹⁶ Interview with Professor Andrew Geddis (Susie Fergusson, Morning Report, Radio New Zealand National, 12 April 2012) <radionz.co.nz/national/programmes/morningreport/audio/2515507/legal-expert-explains-history-of-the-veto>.

¹¹⁷ Public Audit Act 2001, ss 15-16.

¹¹⁸ Möller, above n 114, at 713.

2 *Stability*

Although civil stability in a broad sense is a worthwhile aim, it is difficult to justify a counter-majoritarian procedure on the basis that, without it, the Government of the day is more likely to fail. Such a justification could, if unqualified, amount to a refutation of democracy entirely. In this sense, stability is unlikely to be a 'proper purpose'.

In any case, it would be difficult to draw a rational connection between the financial veto and the stability of Government. Although it is up to the House to demonstrate a lack of confidence in the Government, it falls to the Governor-General to exercise judgement as to whether the Government possesses the confidence of the House.¹¹⁹ The practice in New Zealand is that the House must expressly demonstrate that it does not have confidence in the Government. McGee notes that:¹²⁰

a motion must be put before the House that raises the issue of the Government's survival in office. It is not enough that the motion raises an important issue. That might lead the Government to treat the motion as a question of confidence but does not inherently make it so.

There is no tradition in the House of opposition Members proposing a motion expressing a lack of confidence in the Government, although it is technically possible.¹²¹ A confidence vote will typically arise either where the Government elects to treat a particular vote as a confidence issue, or by way of an opposition amendment to another motion before the House.¹²²

In general, the exercise of the financial veto procedure is unlikely to directly lead to the conclusion that the Government has lost the confidence of the House, notwithstanding majority opposition in the House to an element of the Government's fiscal priorities. Although a denial of overall supply raises a question of confidence, defeats on individual aspects of a Government's fiscal priorities do not necessarily raise questions of confidence. For example, votes on an individual Minister's estimates of expenditure do not automatically test the confidence of the House.¹²³

Moreover, a debate in the House in respect of a financial veto certificate is unlikely to present an opportunity for the House to demonstrate a lack of confidence. Even if the House explicitly considered a resolution which expressed its disagreement with the financial veto certificate (rather than simply debating the matter), this would be too

¹¹⁹ McGee, above n 5, at 96.

¹²⁰ At 96.

¹²¹ At 97.

¹²² At 97-99.

¹²³ At 98.

narrow a motion for an amendment demonstrating a lack of confidence to be in order. Amendments must be relevant to the motion which they seek to amend, and McGee notes that “there are only a few debates held each year on which the scope of debate is so wide that a motion or an amendment [demonstrating a lack of confidence] is in order.”¹²⁴

3 *Fiscal Responsibility*

The Fiscal Responsibility Act 1994, which was later largely consolidated into the Part 2 of the Public Finance Act 1989, charges (without any apparent legal sanction for breach¹²⁵) the Government to pursue its policy objectives in accordance with certain principles of responsible fiscal management.¹²⁶ These principles include debt reduction, limiting operating expenses to operating revenues, managing fiscal risk and efficiently managing the Crown's resources.

One possible justification for these principles is that taxation involves the appropriation of private property and therefore the Government's policy objectives impose a cost on the voting public; responsible fiscal management involves managing or minimising that burden on those of the voting public who are net taxpayers. Alternatively, principles such as efficiently managing fiscal risk and the Crown's resources can be justified if this efficient management is likely to improve the utility of society overall. Treasury's view of the fiscal authorising environment prior to 1994 was that decision quality was generally poor and that “short-term fiscal thinking, driven by influential groups and electoral politics, was biased against sound economic principles”.¹²⁷ Although the fiscal responsibility principles have been criticised as privileging ‘neo-liberal’ values,¹²⁸ this goes to the wisdom of a particular ideology, and does not suggest that the principles cannot constitute a ‘proper purpose’.

The financial veto is rationally connected with the purposes of debt reduction, limiting expenditure and effectively managing fiscal risk and the Crown's resources. Richard Wagner suggests that recurring deficits are a systematic quality of democratic budgeting.¹²⁹ Wagner suggests that the “severance of choice from cost or liability...

¹²⁴ At 97.

¹²⁵ Chye-Ching Huang "Constitutional Nonsense? The 'Unenforceable' Fiscal Responsibility Act 1994" (2008) 16 *WaikatoLRev* 264 at 269.

¹²⁶ Public Finance Act 1989, s 26G.

¹²⁷ Huang, above n 125, at 266.

¹²⁸ At 264.

¹²⁹ Richard Wagner "Rationality, political economy, and fiscal responsibility: wrestling with tragedy on the fiscal commons" 23(3) *Const Polit Econ* 261 at 262.

can work out in various ways, one of which is persistent deficits and accumulating debt.”¹³⁰

Although Wagner applies the “severance of choice from cost or liability” as an explanation of why Governments regularly spend beyond their operating revenues, the severance is even more pronounced for Members who are not part of the Government. Although Ministers’ decision-making capacity in respect of the commons exceeds their combined personal stakes, they nevertheless collectively face a significant political cost should the electorate believe that they have acted irresponsibly.

The political cost could be expected to be higher for the Government than for Members for two broad reasons. Firstly, in the context of poor information, voters may assume that the Government, rather than Members proposing significant additional expenditure, is responsible for a deficit.

Secondly, the political cost may be lower for Members who individually, rather than collectively, decide whether to support a financially irresponsible proposal. Cabinet will respond to the interests of the Government as a whole, whereas a Member who is confident of re-election may have less of an incentive to vote responsibly.

The financial veto is therefore an arguably rational mechanism to advance financial responsibility by better aligning financial decision-making and political cost.

C Necessity

The principle of necessity is that there must be no alternative, less restrictive measure that may similarly achieve the identified purpose.¹³¹

Two submitters to the Standing Orders Committee’s 2014 Review of Standing Orders proposed abolishing the Government’s financial veto. Both submitters to the 2014 Review of Standing Orders suggested that if the Government was sufficiently concerned about a Member’s proposal then it should make the relevant proposal a matter of confidence. This alternative has enjoyed some prominence since the Government indicated in 2012 that it might exercise the financial veto; Bryce Edwards suggested that “a more honest approach would have been for [the Government] to make

¹³⁰ At 270.

¹³¹ Barak, above n 112, at 3.

the vote one of confidence in the government, forcing their support partners to make the hard call.”¹³²

The Government's exercise of the financial veto does not seem to raise questions of honesty, as Edwards suggests. The contention that it would have been preferable for the Government to declare the third reading on the Paid Parental leave bill to be a confidence vote does, however, raise the question of necessity.

The 'necessity test' requires that there is no alternative that would advance the rule's purpose equally as effectively as the rule would.¹³³ On one hand, it would be open to the Government to declare that a vote on a fiscally significant proposal will test the confidence of the House. This would appear to result in a broadly similar outcome to the financial veto; provided that the House supports the Government overall, it will not pass a proposal where the Government has indicated that the proposal would have a more than minor impact on the fiscal aggregates and that it does not agree. Although this outcome appears to be more qualified than the financial veto (as it depends on the House prioritising its support for the Government over its support of a particular proposal), it is relevant that the financial veto is likewise conditional on the continued support of the House.

On the other hand, removing the financial veto in favour of such an approach could potentially introduce a further political risk for the Government of the day. Barak writes that “the necessity test is based on the assumption that the only change that should be brought about by the alternative means is that the limitation on the constitutional right would be of a lesser extent. The rest of the conditions as well as the rest of the operational results should not be altered.”¹³⁴ Explicitly testing the confidence of the House in an attempt to prevent the House voting for a financially deleterious proposal may involve a greater political cost than exercising a procedural power such as the financial veto. For this reason, the Government may flex its political muscle in respect of Member's proposals less frequently than it would otherwise exercise the financial veto. This might suggest that a political mechanism would not fulfil the financial veto's purpose to the same extent (Barak suggests “quantitatively, qualitatively and probability-wise”¹³⁵).

¹³² Bryce Edwards "Political round-up: Parental bill veto" *The New Zealand Herald* (online ed, Auckland, April 12 2012).

¹³³ Barak, above n 112, at 323-324.

¹³⁴ At 325

¹³⁵ At 324

In truth, it is doubtful that the Government would incur a substantially greater political cost by declaring that a Member's proposal is a confidence issue than by exercising the financial veto. Both actions have the potential to yield reaction from the House, but either approach could be expected to be successful in the same conditions: provided that the overall course charted by the Government maintains the support of a majority of the House.

If a Government is confident of the support of the House, and if the proposal at hand would truly thwart the Government's fiscal plans, the decision to make the vote a matter of confidence should be just as easy to make as the decision to exercise the financial veto. The necessity test is therefore unlikely to be met.

XII Suggestions for Reform

A Abolish the Financial Veto

As the Government can rely on political rather than procedural power to maintain control over its fiscal aggregates, the financial veto procedure is an unnecessary limitation on the right of Members to propose significant changes to fiscal policy. This paper therefore recommends removing Standing Orders 326 to 329.

Aside from the necessity issue, abolishing the financial veto procedure would also resolve the interpretation of a "more than a minor impact on the Government's fiscal aggregates". The scope of the Government's power to prevent Members' fiscal proposals from passing through the legislative process would become aligned with its overall support in the House.

This paper does not recommend removing Standing Order 330, which provides that:¹³⁶

Any member intending to propose an amendment which may have an impact on the Government's fiscal aggregates, or to move a change to a Vote, must give notice of the amendment or change by lodging it with the Clerk at least 24 hours before the House meets on the day on which the amendment is to be proposed or the change is to be moved.

Standing Order 330 was designed to provide the Government with sufficient time to consider the likely impact on the fiscal aggregates of a proposed amendment.¹³⁷ The House has recognized that it would be undesirable for an amendment to be moved without notice, as this would prevent the Government from having an opportunity to

¹³⁶ Standing Orders of the House of Representatives, SO 330(1).

¹³⁷ McGee, above n 5, at 449.

assess the expected fiscal impact.¹³⁸ If the Government is now expected to use political power (such as using confidence votes) to maintain control over the fiscal aggregates, it should still have the opportunity to exercise this 'effective veto' in an informed manner.

The House may also wish to replace the reference to "fiscal aggregates" in Standing Order 330 with a reference to operating expenses, operating revenues, net worth or total debt. However, as the test in Standing Order 330 is whether the proposal would affect the fiscal aggregates (but not whether that impact would be more than minor), the uncertainty associated with the 24 hour rule is less than that relating to the financial veto procedure.

B Potential Improvements if the Financial Veto is Kept

1 More than Minor Impact on Fiscal Aggregates

As discussed previously, the terms "more than minor impact" and "fiscal aggregates" potentially extend far past a significant impact on what would ordinarily be considered to be fiscal policy.

In respect of the fiscal aggregates, the Standing Orders committee should consider whether it is desirable to afford the Government procedural control over the Crown's net worth as well as its expenditure, revenue and borrowing. Standing Orders 326 and 327 could be amended to refer to "operating expenses, operating revenues and total debt" rather than to "fiscal aggregates".

Net worth can be understood as referring to a variety of measures of the financial position of a nation, both present and projected. If net worth is to be retained in the financial veto procedure, the standing orders should clarify which measure is to be used.

In respect of a "more than minor impact", it may be difficult to achieve total clarity. Even if an objective standard, such as 0.01% of the Government's estimated operating expenditure, is chosen, the assessment of whether a policy is likely to exceed such a threshold is likely to remain contentious. In such a situation, the Speaker is likely to defer to the Government's judgment. This is not to suggest that a line in the sand would not make the scope of the veto clearer – simply that, in the event that the likely fiscal impact of a proposal is doubtful, the applicability of the financial veto will remain a judgment call.

¹³⁸ At 449.

2 *Exempt 'Fiscally Responsible' Proposals from the Veto*

Louwrens explored changing the financial veto to allow the House to consider fiscally-neutral changes to votes.¹³⁹ This would allow the House to 'tweak' the proposals within a Vote without changing the overall estimates.

Louwrens also considered whether the financial veto might be amended so that it could only be exercised where a proposal would result in an increase to an appropriation within a Vote – allowing the House to freely reduce a vote.¹⁴⁰ Louwrens considered that such a change would support Members' financial scrutiny function while still protecting the financial initiative of the Crown.

Mary Harris, the then Clerk of the House, similarly recommended that the Standing Orders Committee consider limiting the financial veto to proposals that would increase a Vote.¹⁴¹ She identified that Members in Australia and the United Kingdom are able to move reductions to appropriations without interference, and that this was effectively the case in New Zealand prior to 1996.

A similar change may be to allow Members to make proposals for novel expenditure (for example, a standalone bill rather than a Members' bill) if that proposal would reduce expenditure or increase revenue. However, given that tax rates and the tax base are a significant lever for the Government to stimulate the economy, it may not be desirable to allow Members to foist large tax increases on the Government.

3 *Procedural Improvements*

In her advice to the Standing Orders Committee, Harris also identified several procedural improvements that could be made to the financial veto. Harris argued that these improvements would "act as practical barriers against the veto being exercised unreasonably by the Government".¹⁴² These improvements included requiring a financial veto certificate to be lodged for a minimum period of time before the House considers the relevant proposal, allowing additional time for debate in the committee of the whole House stage when a financial veto certificate is lodged and requiring financial veto certificates to be made publicly available.

¹³⁹ Louwrens, above n 39, at 14-19.

¹⁴⁰ At 19-23.

¹⁴¹ Mary Harris (Clerk of the House of Representatives) "Advice to the Standing Orders Committee: Review of Standing Orders - Analysis and recommendations—Financial procedures" at 12.

¹⁴² At 12.

These improvements are minor, but would potentially increase the political cost incurred by the Government in exercising the veto. Each change would increase the opportunity for Members to respond and would draw more attention to the procedure's use.

XIII Conclusion

Although the scope of the financial veto is not entirely clear, the financial veto procedure runs contrary to democratic principles. Broadly, 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.

Accountability and fiscal responsibility are important values and constitute a proper purpose that could potentially justify infringing the majority rule principle. However, political power backed by the strategic use of confidence votes provides a sufficient mechanism to maintain these goals, provided that the Government can maintain majority support for its overall policy programme in the House. A procedural tool such as the financial veto) is unnecessary and is therefore an unjustified limitation on democracy in the House.

Although it would be preferable to abolish the financial veto, changes could be made (including allowing fiscally-neutral amendments to a vote and allowing proposals which would reduce operating expenditures) which would increase opportunities for Members to meaningfully participate in setting financial policy without muddying the lines of accountability or risking fiscal irresponsibility.

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APPENDIX 2: STANDING ORDERS RELATING TO THE FINANCIAL VETO

GOVERNMENT'S FINANCIAL VETO

326 Financial veto

- (1) The House will not pass a bill, amendment, or motion that the Government certifies it does not concur in because, in its view, the bill, amendment, or motion would have more than a minor impact on the Government's fiscal aggregates if it became law.
- (2) In addition, the House will not make a change to a Vote that the Government certifies it does not concur in because, in its view, the change would, if made, have more than a minor impact on the composition of the Vote.
- (3) In this Standing Order, and in Standing Orders 327 and 328, **motion** means a motion that, if passed as a resolution of the House of Representatives, would have the force of law.

327 Financial veto certificate

- (1) A certificate by the Government not concurring in a bill, amendment, or motion on the ground that, in its view, the bill, amendment, or motion would have more than a minor impact on the Government's fiscal aggregates must state with some particularity the nature of the impact on the fiscal aggregate or aggregates concerned and the reason why the Government does not concur in the bill, amendment, or motion.
- (2) A certificate by the Government not concurring in a change to a Vote on the ground that, in its view, the change would have more than a minor impact on the composition of the Vote must state with some particularity the nature of the impact on the composition of the Vote and the reason why the Government does not concur in the change.
- (3) A certificate is given by delivering it to the Clerk.
- (4) Any certificate may be debated on the House's next consideration of the bill, amendment, motion, or Vote.
- (5) The Government may withdraw a certificate at any time by notifying the Clerk in writing.

328 Application of financial veto rule to bills and motions

- (1) A certificate relating to a bill may be given only when the bill is awaiting its third reading.
- (2) The certificate may relate to the bill as a whole or to a particular provision or provisions of the bill.
- (3) The Speaker will not put any question for the third reading of a bill to which such a certificate relates unless the House has first amended the bill to remove any provision that the Government has certified that it does not concur in.
- (4) A certificate relating to a motion may be given before the motion is moved. Where a certificate is given, the motion is out of order and no question is put on it.

329 Application of financial veto rule to amendments to bills and changes to Votes

- (1) A certificate relating to any or all of the amendments recommended to a bill by a select committee may be given before the House agrees to those amendments. Where a certificate is given, those amendments are omitted from the bill.
- (2) A certificate relating to an amendment to a bill or a change to a Vote to be proposed by a member in a committee of the whole House may be given before the question on the amendment or change is put. Where a certificate is given, the amendment or change is out of order and no question is put on it.
- (3) A certificate relating to amendments recommended to a bill by a select committee also applies to those amendments if proposed in a committee of the whole House.

330 Notice of amendment to bill or change to Vote

- (1) Any member intending to propose an amendment which may have an impact on the Government's fiscal aggregates, or to move a change to a Vote, must give notice of the amendment or change by lodging it with the Clerk at least 24 hours before the House meets on the day on which the amendment is to be proposed or the change is to be moved. In the case of a motion to change a Vote, 24 hours' notice is not required where the proposed change was recommended in the report of the select committee that examined the Vote.
- (2) If a member seeks to propose an amendment or move a change to a Vote without having given the required notice of it, the amendment or change is out of order and no question is put on it.
- (3) This Standing Order applies in respect of an amendment to a bill only when the bill is set down for consideration in committee on the next sitting day.