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TOO MUCH, TOO LITTLE OR JUST RIGHT? AN ACCOUNTABILITY STRATEGY TO IMPROVE COMPLIANCE WITH THE OFFICIAL INFORMATION ACT 1982

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Abstract

The Official Information Act 1982 (OIA) significantly opened up New Zealand government. It established that official information should be made available to the public unless there is a good reason to withhold it. Nevertheless, the OIA regime has been criticised, even labelled "broken", due to the way in which government agencies administer the Act. In particular, it is said that agencies do not always comply with the letter of the law when responding to requests. This paper examines one proposal for improving compliance with the OIA: that government should be held more accountable when they break the law. In doing so, this paper first sets out how the government is currently held accountable for OIA compliance. Then, it evaluates that accountability regime, finding that it is inadequate because it fails to (1) assist the government in learning how to improve its performance under the OIA; and (2) promote government legitimacy. Finally, it submits that the work of the Ombudsman has the capacity to address this accountability gap in due course. Other suggestions for enhancing accountability are also advanced, such as establishing a permanent compliance monitoring mechanism. Given the accountability deficit identified, this paper hopes that if the OIA is ultimately rewritten (as proposed by the Sixth Labour Government), reconfiguring or bolstering accountability is considered by its drafters as one strategy, among others, to improve OIA compliance and to "fix" the OIA.

Key words*:* Official Information Act 1982 – accountability – compliance – Office of the Ombudsman.

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I Introduction

Nearly 40 years ago, the Official Information Act 1982 (OIA) was enacted, signifying a shift towards more open government in New Zealand.[1] Reversing the previous position of government secrecy, the law now presumes that official information is available to the public unless there is good reason to withhold it.[2] In addition to enabling more effective civic participation in public decision-making, an integral purpose of the OIA is to promote government accountability.[3] That is, by allowing the public to request and obtain official information, citizens can "scrutinise the actions of government".[4] In doing so, the "good government of New Zealand" is advanced.[5]

In recent decades, the OIA has been subject of increasing controversy and criticism, with complaints of routine delays, excessive fees and redactions and political interference in government agencies' OIA processes.[6] Such problems are a far cry from the spirit of disclosure, transparency and openness enshrined in the Act,[7] hinting at the position before the enactment of the OIA: where government secrecy enabled those in power to withhold

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[1] Committee on Official Information *Towards Open Government: General Report* (19 December 1980) [Danks Report] at [135]; and Beverley Wakem *Not a game of hide and seek: Report on an investigation into the practices adopted by central government agencies for the purpose of compliance with the Official Information Act 1982* (Office of the Ombudsman, December 2015) at 20.

[2] Official Information Act 1982 [OIA], s 5.

[3] OIA, s 4.

[4] Danks Report, above n 1, at [23].

[5] OIA, s 4.

[6] See generally Steven Price "The Official Information Act: does it work" [2006] NZLJ 276; Steven Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?* (New Zealand Centre for Public Law, Victoria University of Wellington, Occasional Paper 17, November 2005) at 11–18; Nicola White *Free and Frank: Making the Official Information Act 1982 work better* (Milne Printers, Wellington, 2007) at 97 and following; Wakem, above n 1, at 7–10; Nikki Macdonald "Redacted – how information the public should know about disappears from view" (15 March 2019) Stuff <www.stuff.co.nz>; Andrew Vance and Nikki Macdonald "Redacted – our official information problems and how to fix them" (18 April 2019) Stuff <www.stuff.co.nz>; and Nikki Macdonald "Government ignores plea to outlaw ministerial interference in OIA responses" (19 May 2019) Stuff <www.stuff.co.nz>.

[7] OIA, ss 4 and 5.

damaging information to maintain political control.[8] It is therefore unsurprising that the OIA has been labelled as "broken".[9]

Numerous efforts have been made to address the issues with the OIA's operation. One attempt, commenced by the Office of the Ombudsman in 2016, has been to lift agency OIA practices and compliance. Key initiatives include publishing OIA statistics, providing guidance and training to agencies and conducting OIA practice investigations.[10] More recently, focus has been drawn to the drafting of the Act itself, with the Labour Party promising to rewrite the OIA if re-elected in 2020.[11] Nevertheless, OIA stakeholders, such as the international Open Government Partnership, have suggested that "transformative change" to the OIA regime lies with holding government agencies more accountable when they break the law.[12]

Does enhancing accountability offer an opportunity to "transform" OIA practices? This paper interrogates an accountability strategy to the issue of non-compliance. Just as promoting public accountability is a function of the OIA to foster good governance, can promoting accountability for compliance with the OIA likewise improve government performance, in terms of its adherence to the Act?

Part II of this paper lays the theoretical foundations for examining accountability and the OIA. It provides some context to the Act, including its legislative history and the legal framework it establishes before summarising the problems with the OIA's operation, including the different theories advanced about what is contributing to non-compliance. It then discusses different proposals for addressing poor OIA practices, including suggestions to increase accountability for non-compliance.

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[8] Ann Rees "Sustaining Secrecy: Executive Branch Resistance to Access to Information in Canada in Mike Larsen and Kevin Walby (eds) *Brokering Access: Power, Politics, and Freedom of Information Process in Canada* (University of Columbia British Press, Vancouver, 2013) 35 at 43. See also Andrew Ecclestone "An updated Official Information Act must strengthen our right to know" (14 July 2020) Stuff <www.stuff.co.nz>.

[9] Shane Cowlishaw "Shane Cowlishaw: The OIA is broken, can it be fixed" (14 November 2017) Newsroom <www.newsroom.co.nz>.

[10] Office of the Ombudsman *Annual Report 2016/17* (June 2017) at 22; and Office of the Ombudsman *Improving the operation of the OIA: Strategic Priorities for 2016-2020*. See also States Services Commission "Joint work to improve OIA responsiveness" (press release, 20 October 2016).

[11] Nikki Macdonald "Government to rewrite Official Information Act" (7 July 2020) Stuff <www.stuff.co.nz>.

[12] Keitha Booth *Independent Reporting Mechanism (IRM): New Zealand Design Report 2018-2020* (Open Government Partnership, 2020) [IRM *Design Report 2018-2020*] at 7 and 37.

With the connection between OIA compliance and accountability in mind, the remainder of Part II outlines a theoretical framework for analysing accountability. First, it defines "accountability" in its narrow sense as a social relation whereby an actor feels obligated to explain and justify their conduct to a forum.[13] Next, it summarises Mark Bovens' identification of the different "types" of accountability.[14] Finally, it discusses the notion of "webs" of accountability, whereby government actors are held accountable by a number of different forums.

Part III argues that the OIA regime has an accountability deficit. A number of different arrangements hold government actors accountable for their compliance with the Act, in summation creating an "accountability regime". These mechanisms range from the Ombudsman's power to investigate OIA complaints (administrative accountability) to the performance reviews of government officials (political accountability). Nevertheless, the inadequacy of this accountability regime is revealed when assessed against four key "effects" of accountability – (1) democratic control; (2) constitutional assurance; (3) governmental learning; and (4) government legitimacy.[15] Critical to this finding is the normative judgement advanced that an accountability system will be most effective at lifting OIA compliance if it principally promotes government learning and government legitimacy.

Given the deficiency of the OIA accountability regime, Part IV suggests possible avenues for addressing the gap. In particular, how the regime could better enhance government learning and the legitimacy of government. First, it submits that encouraging developments, such as the Ombudsman's practice investigations, may, with time, slowly reduce the accountability deficit. However other amendments to the regime which may more squarely and immediately address the gap are also suggested, such as creating a more permanent monitoring mechanism for OIA compliance. Finally, the relevance of non-legal considerations to both an accountability strategy, but also the wider issue of OIA compliance, is noted.

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[13] Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 ELJ 447 at 450.

[14] At 454 and following.

[15] Mark Bovens, Thomas Schillemans and Paul 't Hart "Does Public Accountability Work? An Assessment Tool" (2008) 86 Pub Admin 225; and Bovens, above n 13, at 465.

This paper does not argue that addressing the accountability gap is a silver bullet to the issues plaguing the OIA's operation. Rather, it attempts to provide a starting point for understanding how accountability fits into the problem of non-compliance, *in addition to* other factors beyond the scope of this paper, such as agency training and capacity, the drafting of the Act and the media landscape. If the OIA is in fact rewritten, it is hoped that its drafters include an accountability strategy in their wider toolbox for addressing non-compliance. Reconfiguring or bolstering accountability to enhance government learning and legitimacy – and thereby address the accountability deficit – represents an important piece of the puzzle.

II Theory

A The Official Information Act 1982 (OIA)

1 History and significance of the Act

In the 1970s and 1980s, New Zealand adopted a series of "constitutional innovations"[16] that represented a shift away from government secrecy towards open government.[17] The passage of the OIA was a significant step towards achieving that aim. Establishing a presumption that official information should be made available to the public unless there is a good reason for withholding it, the OIA reversed the position under the Official Secrets Act 1951 that generally equated disclosure with criminality.[18] In doing so, the OIA enshrined the principle that the public has a democratic right to access official information.[19]

Changes in attitudes towards government secrecy, however, were emerging as early as the 1960s. In its 1962 report, the Royal Commission on the State Services proposed a departure from the traditional approach to official information,[20] stating: "Government administration is the public's business, and the people are entitled to know more than they

[16] (23 July 1981) 439 NZPD 1908.

[17] Danks Report, above n 1, at 5; KJ Keith "Open government in New Zealand" (1987) 17 VUWLR 333 at 337; and John Dunn *A History of Democracy* (Penguin Canada, Toronto, 2005) at 185–186, as cited in Rees, above n 8, at 48.

[18] Danks Report, above n 1, at 5; and Wakem, above n 1, at 2.

[19] Danks Report, above n 1, at 5. See also the Local Government Official Information and Meetings Act 1987 which applies to official information held by local government.

[20] Keith, above n 17, at 333.

do of what is being done, and why."[21] This proposal to open up government reflected an increasing awareness that the state was adopting a more active role in the lives of its citizens – for example undertaking major economic projects and expanding the regulatory and administrative state[22] – and that public demand was growing for greater transparency in government activities.[23]

In response to growing pressure, both bureaucratic and public, the Government in 1978 established the Committee on Official Information, now known as the Danks Committee, to officially re-examine the practice of government secrecy.[24] The Committee recommended that the Official Secrets Act be replaced with a new official information law predicated on the principle of disclosure.[25] Importantly, the Committee did not propose a law requiring complete openness in New Zealand. As the Committee argued, and most would accept, good reasons exist for withholding information from the public,[26] such as national security or individual privacy.[27] The compromise enshrined in s 5 of the OIA is a presumption of availability: official information shall be made publicly available *unless* there is good reason to withhold it.[28]

In recommending the passage of the Official Information Bill, the Danks Committee was persuaded by four reasons for openness.[29] First, a well-informed public can better participate in a democracy.[30] Secondly, open government fosters accountability because it allows the public to scrutinise government activities.[31] Thirdly, a government can more effectively govern if the public understands and accepts policy decisions.[32] Finally, individuals have an interest in knowing the existence of, and having access to, their personal information that is held by government agencies.[33]

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[21] *The State Services in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1962), as cited in Keith, above n 17, at 336 and 334.

[22] Danks Report, above n 1, at [21]; and Keith, above n 17, at 336 and 338.

[23] Danks Report, above n 1, at [21].

[24] Nicola White "Freedom of official information – From secrets to availability" Te Ara - the Encyclopedia of New Zealand <https://teara.govt.nz/>; Keith, above n 17, at 337; and White, above n 6, at 21.

[25] Danks Report, above n 1, at 5.

[26] At [33].

[27] At 5.

[28] OIA, s 5.

[29] Danks Report, above n 1, at 39.

[30] Danks Report, above n 1, at [22]. See further Rees, above n 8, at 48.

[31] Danks Report, above n 1, at [23]; and Rees, above n 8, at 49.

[32] Danks Report, above n 1, at [26] and [27].

[33] At [28] and following.

2 *Legal framework*

At the heart of the OIA's legal framework is the principle of availability enshrined in s 5. A significant portion of the Act deals with how this presumption of disclosure works in practice and in particular, the ways in which it can be rebutted.

Under s 12, any person can make a request to an agency for official information. "Official information" is defined broadly;[34] unlike other jurisdictions, the subject matter of access is not restricted to "documents",[35] nor are certain classes of information, such as Cabinet papers, excluded.[36] Moreover, "official information" means any information held by all government departments, ministers of the Crown and most Crown entities.[37]

Once a request is made, s 15 is triggered, requiring the government agency to determine whether or not to grant the request as soon as reasonably practicable, and not later than 20 working days after the request was received.[38] The recipient may transfer a request if the information is not held by that agency and the recipient believes that the information is held by another entity.[39] For requests involving substantial collation or research, the recipient may fix a charge[40] or extend the time limit.[41]

Section 18 sets out the grounds for when an agency can refuse a request. Sections 6 and 7 outline a range of conclusive reasons for withholding information, such as prejudicing

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[34] OIA, s 2(1) definition of "official information"; Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?*, above n 6, at 8; and Rick Snell "The Kiwi Paradox: A Comparison of Freedom of Information in Australia and New Zealand" (2000) FLR 575 at 584.

[35] Snell, above n 34, at 584 and 585. See also *Commissioner of Police v Ombudsman* [1988] 1 NZLR 578 (CA) at 586.

[36] For the Australian position see Snell, above n 34, at 592 and for the Canadian position see Rees, above n 8, at 38. See also Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?*, above n 6, at 8.

[37] OIA, s 2(1) definition of "official information"; Law Commission *The Public's Right to Know: Review of the Official Information Legislation* (NZLC R125, 2012), at ch 14; and Geoffrey Palmer *A Hard Look at the New Zealand Experience with the Official Information Act After 25 Years* (address to the International Conference of Information Commissioners, Wellington, 27 November 2007) at [10].

[38] Section 15(1).

[39] Section 14.

[40] Section 18A.

[41] Section 15A

national security.[42] Section 9 sets out further, more common interests that may provide grounds for withholding information,[43] such as protecting the privacy of natural persons,[44] protecting the provision of free and frank advice to ministers[45] and avoiding harm to the government's commercial activities.[46] However, s 9's withholding grounds can be overridden where the public interest in making that information available outweighs the protected interest.[47]

If a requester is unhappy with the agency response to their official information request, they can complain to the Ombudsman.[48] The Ombudsman has the power to investigate and review particular decisions regarding requests, including decisions to refuse to make information available.[49] Following an investigation, the Ombudsman's powers include recommending the release of some or all of the information requested.[50] The Ombudsman's recommendations are binding unless the Governor-General, by Order in Council, "otherwise directs".[51]

On paper, the OIA's legal framework suggests that obtaining official information is a relatively straightforward exercise. A request is made. Information is then disclosed by the government unless a withholding ground applies. A response is required no later than 20 working days after the request is received. However, in practice, complaints of government non-compliance indicate that official information requests are not always processed with strict adherence to the letter of the law.

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[42] Section 6(a).

[43] Palmer, above n 37, at [13].

[44] Section (2)(a).

[45] Section (2)(g)(i).

[46] Section (2)(k).

[47] Section 9(1); and Law Commission, above n 37, at [1.9].

[48] Section 28(1) and (3).

[49] Section 28(1)(a).

[50] Section 30(1); Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?*, above n 6, at 10; and Law Commission, above n 37, at [1.11].

[51] Section 32. Such a direction has never been given by the Governor-General before: see Palmer, above n 37, at [1].

3 Problems with compliance

The OIA substantially opened up government.[52] Every year, vast amounts of official information are released into the public domain.[53] However, while few would want to return to the position of government secrecy before the Act was enacted,[54] the OIA regime has nevertheless been riddled with controversy and often criticism.

At the heart of these criticisms is poor agency practices in dealing with OIA requests. Such problematic practices have been well-researched and documented elsewhere,[55] but include (1) delays in responding to requests;[56] (2) discrepancies in how the withholding grounds are administered;[57] (3) the imposition of excessive charges for requests;[58] (4) a lack of explicit consideration of the withholding grounds in the Act; [59] and (5) failures to inform requesters of their right to complain to the Ombudsman.[60] Government OIA practices of this kind contradict the Act's purpose of progressively increasing the availability of information. Even more concerning is that in some cases, such conduct amounts to a breach of the OIA.

A number of diagnoses have been advanced for what is plaguing the OIA's operation. One theory, held by some requesters, is that the vast majority of poor OIA practices represent

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[52] Law Commission, above n 37, at [1.13]; and White, above n 6, at 91.

[53] The OIA does not require government agencies to proactively release information, but this has become standard agency practice for certain types of information. See Public Service Commission "Proactive release" (13 December 2017) <https://ssc.govt.nz/resources>; and Law Commission, above n 37, at [12.4] and [12.17].

[54] Price "The Official Information Act: does it work", above n 6, at 277.

[55] See generally Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?*, above n 6; Price "The Official Information Act: does it work", above n 6; White, above n 6; Wakem, above n 1; Carl Billington "New Zealand's Official Information Act: Still fit for purpose?" (2015) 38(1) Public Sector 18; Snell, above n 34; Palmer, above n 37; Keitha Booth *Independent Reporting Mechanism (IRM) Progress Report: New Zealand 2016-2018* (Open Government Partnership) [IRM *Progress Report 2016-2018*] at 31; Vance and Macdonald, above n 6; and Cowlishaw, above n 9.

[56] Price "The Official Information Act: does it work", above n 6, at 277.

[57] At 277.

[58] See OIA, s 15(1)(a) and (2) for charges fixed for requests. See also Price "The Official Information Act: does it work", above n 6, at 277.

[59] At 277.

[60] At 277.

tactical responses to requests for politically sensitive information.[61] By stalling the release of official information, imposing excessive charges for requests or refusing requests on dubious grounds, government agencies ensure that information is less newsworthy and therefore less damaging to the government when it is finally released, if released at all.[62] In comparison, requests for *non-sensitive* official information tend to be processed smoothly and in compliance with the Act.[63] As Steven Price puts it, this has led to there being in effect not one OIA, but two, with different rules applying depending on the kind of information requested.[64]

Another perspective, held by some officials, is that problematic OIA practices are in most cases attributable to a lack of agency training and resources, as opposed to bad faith.[65] One factor is a lack of OIA capability across the public service, with not only an inadequate level of training provided in how to respond to requests,[66] but also a lack of leadership from ministers, chief executives and senior managers in promoting a "'pro-disclosure' attitude".[67] Further issues arise from broad and vague information requests received by agencies – often labelled as "fishing expeditions" – which create administrative burdens and lead to delays.[68] Finally, fears of embarrassing the department or minister may lead to officials taking an overly cautious approach to sensitive requests, contributing to poor practices.[69]

A broader perspective, bridging both requesters' and officials' views, sees the uncertainty and subjectivity embedded in the Act's construction as the cause of poor OIA practices.[70] The Act is flexible and "principle-based", as opposed to being a "static framework" of

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[61] Price "The Official Information Act: does it work", above n 6, at 277; Wakem, above n 1, at 113–114; and White, above n 6, at 211. See also Craig McCulloch "PM admits Govt uses delaying tactics" (16 October 2014) Radio New Zealand <www.rnz.co.nz>.

[62] Price "The Official Information Act: does it work", above n 6, at 277; and Wakem, above n 1, at 114.

[63] White, above n 6, at 91.

[64] See Price "The Official Information Act: does it work", above n 6, at 276. See also Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?*, above n 6, at 3.

[65] Price "The Official Information Act: does it work", above n 6, at 277; White, above n 6, at 107–108; and Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?*, above n 6, at 11 and following.

[66] Wakem, above n 1, at 5.

[67] Wakem, above n 1, at 3; and White, above n 6, at 212.

[68] Price "The Official Information Act: does it work", above n 6, at 278; White, above n 6, at 212; and NBR "Key shows 'disregard for the law' over OIA, Chief Ombudsman says" (17 October 2015) <www.nbr.co.nz>.

[69] Price "The Official Information Act: does it work", above n 6, at 278; and White, above n 6, at 212.

[70] White, above n 6, at 247.

defined rules.[71] Thus in interpreting the OIA's operative provisions, such as the withholding grounds, officials are required to make "fine judgments" based on "vague and open-ended standards".[72] Nicola White argues that inconsistent approaches to requests are therefore inevitable,[73] with the problem exacerbated by inadequate training.[74]

OIA non-compliance cannot be diagnosed as being caused by one issue in isolation. Rather it is likely that a combination of these three sets of issues, inter alia, are causing the problems with the OIA's operation. However, it is worth noting that deliberate interference with the Act does not appear to be widespread; rather, it is likely that only a handful of agencies and ministers deliberately violate the OIA's requirements. As the Law Commission submitted in its 2012 review of the Act: "[w]e note that the majority of breaches arise from misunderstandings of the legislation or genuine mistakes, rather than from intentional acts designed to circumvent the requirements of the legislation."[75] That government agencies are inadequately trained and resourced thus appears to be a dominant issue. As discussed, this is exacerbated by the Act's flexibility, which leaves substantial discretion to officials in interpreting the Act's competing criteria.[76]

Notwithstanding this diagnosis, it is of great concern that the Act is not working as it should be. Issues regarding compliance led to a drop in New Zealand's ranking in the World Press Freedom Index in 2017.[77] A hashtag #fixtheoia has emerged on social media, decrying the Act as "broken" and calling for reform.[78] Such negative perceptions damage public trust and confidence in the OIA, diminishing its standard as a key instrument of New Zealand's democracy.[79]

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[71] Danks Report, above n 1, at [65]; Snell, above n 34, at 591; and Palmer, above n 37, at [100].

[72] Price "The Official Information Act: does it work", above n 6, at 278; and White, above n 6, at 241.

[73] White, above n 6, at 225. See also Palmer, above n 37, at [59] and following for a summary of White's research. See further Snell, above n 34, at 590 and following for a discussion of the design of the exemptions in the OIA.

[74] White, above n 6, at 247.

[75] Law Commission, above n 37, at [11.94].

[76] Snell, above n 34, at 591.

[77] Letter from Peter Boshier (Chief Ombudsman) to Andrew Kibblewhite (Secretary for Justice and Chief Executive Ministry of Justice) regarding consultation on the Official Information Act (10 April 2019); and Susan Edmunds "Press freedoms stifled by cynical use of Official Information Act: Report" (2 May 2017) Stuff <www.stuff.co.nz>.

[78] Letter from Peter Boshier, above n 77.

[79] Wakem, above n 1, at 22.

4 Accountability as a solution to non-compliance?

What can be done, then, to "fix" the OIA? Two of the most substantial reviews of the Act, one by the Law Commission in 2012[80] and one by the then Chief Ombudsman Beverly Wakem in 2015,[81] reached different conclusions on whether amending the Act provided the answer. In its 2012 review, the Law Commission accepted that the fundamental principles and purposes of the Act remained sound 30 years on.[82] However, in its view, legislative amendment was required to clarify certain provisions of the Act[83] and to address particular "deficiencies", for instance in the Act's scope.[84] Nevertheless, the Commission's recommendations for amending the Act were largely rejected by the Government in 2013.[85]

Comparatively, Wakem's review in 2015 emphasised that attention should be given to improving official information practices by agencies, as opposed to amending the Act.[86] The five areas of "weakness" in the application of the Act were identified by Wakem as: (1) leadership and culture; (2) organisational structure, staffing and capability; (3) internal policies, procedures and resources; (4) current practices; and (5) performance monitoring and learning.[87]

Since the publication of the 2015 Wakem report, the Office of the Ombudsman has sought to give effect to the review's recommendations to improve OIA compliance.[88] Like the initial review by Wakem, this work programme reflects a strategy of addressing non-compliance through improving OIA practices within the existing statutory framework, as opposed to redrafting the Act.

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[80] Law Commission, above n 37. The Law Commission also reviewed the OIA in 1997 and suggested legislative amendment: see xi and [E21] and following; and Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997).

[81] Wakem, above n 1.

[82] Law Commission, above n 37, at [8].

[83] At [16.7]. For instance the extension of time provisions.

[84] At [16.2].

[85] See *Government Response to Law Commission Report on the Public's Right to Know: Review of the Official Information Legislation* (4 February 2013).

[86] Wakem, above n 1, at 3. See also her comments to Carl Billington, above n 55, at 20: "Wakem feels it remains a fundamentally sound piece of legislation".

[87] Wakem, above n 1, at [summary of recommendations].

[88] Office of the Ombudsman *Annual Report 2016/17*, above n 10, at 22.

At a similar time, the Government made a Commitment in its *National Action Plan 2016-2018* under the Open Government Partnership (OGP) to "improve government agency practices around requests for official information".[89] The OGP is an international initiative where governments make an "action plan" every two years with a number of commitments to promote open government.[90] The Independent Reporting Mechanism (IRM) of the OGP monitors the extent to which governments implement their commitments.[91] In order to deliver on this Commitment, key aspects of the Ombudsman's work programme, to be undertaken with the State Services Commission (now the Public Service Commission), were pledged.[92] Key initiatives or "milestones" included publishing OIA compliance statistics biannually (such as the number of requests received by an agency and the number of OIA complaints made to the Ombudsman), increasing the proactive release of official information and making guidance about how to make requests more accessible.[93]

More recently the Government has changed tack, announcing in July 2020 that it will rewrite the OIA if re-elected in 2020.[94] The decision followed an initial Commitment by the Government in its *National Action Plan 2018-2020* under the OGP to determine whether the OIA should be formally reviewed.[95] Following public consultation by the Ministry of Justice in 2019, it was recommended that the Government "take another look at the legislation".[96] Critically, such a review of the Act suggests that the Government believes that more is needed to address non-compliance than the Ombudsman's existing work programme.[97]

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[89] Open Government Partnership *National Action Plan 2016-2018* (New Zealand Government, October 2016) [OGP *National Action Plan 2016-2018*] at 11; and Open Government Partnership "Open Government Partnership" <https://ogp.org.nz>.

[90] Open Government Partnership "About Our Process" <www.opengovpartnership.org>.

[91] Open Government Partnership "About the IRM" <www.opengovpartnership.org>.

[92] States Services Commission, above n 10.

[93] OGP *National Action Plan 2016-2018*, above n 89, at 11; and States Services Commission, above n 10. See also Keitha Booth *Independent Reporting Mechanism (IRM): New Zealand End-of-Term Report 2016-2018* (Open Government Partnership, 2019) [OGP *End-of-Term Report 2016-2018*] at 14.

[94] Macdonald, above n 11.

[95] Open Government Partnership *National Action Plan 2018-2020* (New Zealand Government, December 2018) [OGP *National Action Plan 2018-2020*] at 30.

[96] OGP *National Action Plan 2018*-2020, above n 95, at 30. See also Nikki Macdonald "Ministry to analyse public OIA submissions and report back to Justice Minister Andrew Little" (12 August 2019) Stuff <www.stuff.co.nz>.

[97] OGP *National Action Plan 2018*-2020, above n 95, at 30.

Perhaps, then, solving OIA non-compliance can be thought about in two ways: by improving OIA practices or by rewriting the Act. However, a different strategy, advocated for by the IRM of the OGP, is to focus instead on enhancing public accountability for compliance. Reflecting on the Government's 2016-2018 Commitment to improve agency OIA practices, the IRM concluded:[98]

> … [while] agencies now offer … more consistent OIA request advice and … response rates for meeting routine OIA requests [have improved] … *there remains a lack of public accountability when the law is not being met*.

Thus even as agencies' OIA practices have improved, concerns remain among stakeholders that "there is no penalty for those who do not meet the requirements of the law".[99] In the IRM's view, "transformational change" to official information practices hinge on what reforms to the OIA are achieved, in particular whether accountability is enhanced, for instance by setting non-compliance penalties.[100]

This paper examines the IRM's proposed strategy to address non-compliance: that accountability ought to be increased for agencies who fail to comply with the Act.[101] As opposed to focusing on broader strategies to "rewrite the Act" or "improve OIA practices", it narrows in on whether a lack of accountability for non-compliance is part of the OIA's problem. Ultimately, this paper finds that there is an accountability deficit in the OIA system, corroborating the IRM's concern. Nevertheless, it rejects the IRM's argument that this deficit results from a lack of penalties for non-compliance, instead submitting that promoting government learning and legitimacy is the answer to addressing the accountability deficit.

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[98] IRM *Design Report 2018-2020*, above n 12, at 7 (emphasis added).

[99] OGP *End-of-Term Report 2016-2018*, above n 93, at 16.

[100] IRM *Design Report 2018-2020*, above n 12, at 37.

[101] OGP *End-of-Term Report 2016-2018*, above n 93, at 16; and IRM *Progress Report 2016-2018*, above n 55, at 34.

B Accountability

1 Defining "accountability"

"Accountability" is a buzzword widely adopted in political discourse,[102] from attacks on the government by opposition Members of Parliament (MPs)[103] to the packaging of policy documents.[104] Most would agree that accountability is a cornerstone of democratic governance; [105] that it is a "Good Thing".[106] It is surprising, therefore, that there is no agreed definition of the term in academic literature.[107] Like the concepts of "justice" or "responsibility", "accountability" has many meanings, depending on the context.[108] This has led some to describe the concept as "murky", even "elusive".[109]

In its most straightforward sense, accountability entails a process of "account giving", whereby an actor is held to account for their actions.[110] An archetypal example of an accountability relationship is that between citizens and politicians, whereby politicians are held to account for their actions at the ballot box.[111] Put another way, Barbara Romzek describes accountability as "answerability for performance".[112]

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[102] Bovens, above n 13, at 450.

[103] See for example Radio New Zealand "Budget 2020 lacks accountability and effect, opposition says" (14 May 2020) <www.rnz.co.nz>; and Jo Moir "Covid-19: National Party demands answers on Covid-19 testing in isolation" (23 June 2020) Radio New Zealand <www.rnz.co.nz>.

[104] See for example The Treasury *The Wellbeing Budget* (Budget 2019, 30 May 2019) at 21.

[105] Mark Bovens "New Forms of Accountability and EU-Governance" (2007) 5 CEP 104 at 104; and Mark Bovens "Public accountability" in Ewan Ferlie, Laurence E Lynn Jr and Christopher Pollitt (eds) *The Oxford Handbook of Public Management* (Oxford University Press, New York, 2005) 182 at 184.

[106] Bovens "Public accountability", above n 105, at 184; and Mark H Moore and Margaret Jane Gates *Inspectors-General: Junkyard Dogs or Man's Best Friend?* (Russell Sage Foundation, New York, 1986) at 2, as quoted in Robert D Behn "What Do We Mean by Accountability, Anyway?" in *Rethinking democratic accountability* (Brookings Institution Press, Washington DC, 2001) 1 at 2.

[107] Mark Bovens, Thomas Schillemans and Robert E Goodin "Public accountability" in *The Oxford Handbook of Public Accountability* (Oxford University Press, Oxford, 2014) 1 at 2; and Thomas Schillemans "Redundant Accountability: The Joint Impact of Horizontal and Vertical Accountability on Autonomous Agencies" (2010) 34 PAQ 300 at 303.

[108] Hon S Chen and David H Rosenbloom "Four Challenges to Accountability in Contemporary Public Administration: Lessons From the United States and China" (2010) 42 AAS 11S at 12S.

[109] Behn, above n 106, at 4; and Bovens, above n 13, at 448.

[110] Richard Mulgan "'Accountability': An Ever-Expanding Concept?" (2000) 78 Pub Admin 555 at 555

[111] Behn, above n 106, at 6.

[112] Barbara S Romzek "Dynamics of public sector accountability in an era of reform" (2000) 66 Int'l Rev Admin Sci 21 at 22.

However, the term "accountability" is often afforded a much broader meaning, particularly in contemporary political and academic discourse.[113] Bovens describes the term as resembling a "dustbin" or "conceptual umbrella" for other notions of good governance, such as transparency and responsiveness.[114] For this reason, the term is often by the government of the day to evoke a sense of legitimacy and trustworthiness.[115] Richard Mulgan argues that this usage of "accountability" beyond its "core sense" has introduced the complexity surrounding its definition and led it to become an "ever-expanding concept".[116]

Notwithstanding the many conceptions of accountability, most researchers employ similar notions of accountability's "core", being "an institutional relation or arrangement in which an agent can be held to account by another agent or institution".[117] According to Bovens, a distinction therefore emerges between: (1) accountability as a virtue of good democratic governance (the "broader" sense); and (2) accountability as an institutional mechanism for account giving (the "core" or "narrow" sense).[118]

This paper adopts the narrow definition of accountability. This is because this paper's focus is analytical – whether and how public actors are held to account for the operation of the OIA (the narrow conception), as opposed to evaluative – whether public actors have behaved in an accountable way for the operation of the OIA (the broader conception).[119] "Accountability" will hereon be defined as a social relationship whereby an actor is obligated to explain and justify their conduct to the forum.[120]

2 Types of accountability

The foundation of any accountability mechanism is a relationship between the actor and the forum.[121] The actor is the accountor, the one being held to account, while the forum is

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[113] Bovens "New Forms of Accountability and EU-Governance", above n 105, at 106.

[114] Bovens, above n 13, at 449.

[115] Mark Bovens "Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism" (2010) 33 W Eur Pol 946 at 948.

[116] Mulgan, above n 110, at 555.

[117] Bovens, Schillemans and Goodin, above n 107, at 9.

[118] Bovens, above n 115, at 948.

[119] Bovens, above n 115, at 948; and Bovens, Schillemans and Goodin, above n 107, at 10.

[120] Bovens, above n 115, at 951. See also Mulgan, above n 110, at 555.

[121] Bovens "Public accountability", above n 105, at 185.

the accountee, the one doing the account holding.[122] Three phases comprise the accountability process:[123]

(1) **The information phase**: the actor feels obliged (formally or informally) to explain and justify their conduct to the forum.[124]
(2) **The debating phase**: the forum can ask the actor questions and interrogate the explanations given.[125]
(3) **The consequences phase**: the forum forms its final judgment on the actor's conduct.[126] This may be through the imposition of (formal or informal) sanctions.[127]

According to Bovens, the nature of any given accountability relation can be captured across four "dimensions" or "types".[128] These dimensions are: (1) the nature of the forum; (2) the nature of the actor; (3) the nature of the actor's conduct at issue; and (4) the nature of the obligation felt by the actor to render account.[129] Individual ministerial responsibility, for example, can be conceptualised as a type of political accountability under dimension (1), but also as a type of vertical accountability under dimension (4). The first dimension – the nature of the forum – is particularly salient for the purposes of this paper because it provides the framework for mapping the accountability arrangements for OIA compliance in Part III.

The first dimension is the "to whom" question: the nature of the forum to whom the actor renders account to.[130] A well-known type of accountability is political accountability, under which civil servants are ultimately accountable to their responsible minister, who is in turn accountable to Parliament, which is in turn accountable to voters at election time.[131] In contrast, legal accountability is based on the courts as the forum, while administrative accountability is based on "quasi-legal forums" such as auditors, inspectors and

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[122] Bovens, above n 13, at 450.

[123] Bovens, above n 13, at 185. See also Thomas Schillemans "Does Horizontal Accountability Work? Evaluating Potential Remedies for the Accountability Deficit of Agencies" (2011) 43 AAS 387 at 389.

[124] Bovens, above n 13, at 452; and Bovens "Public accountability", above n 105, at 185.

[125] Bovens "Public accountability", above n 105, at 185; and Bovens, above n 13, at 452.

[126] Bovens "Public accountability", above n 105, at 185; and Bovens, above n 13, at 452.

[127] Bovens, above n 13, at 452; and Schillemans, above n 123, at 389.

[128] Bovens, above n 13, at 461.

[129] At 454.

[130] At 454–455.

[131] At 455.

ombudsmen.[132] Professional accountability is based on professional bodies or associations as the forum.[133] Finally, social accountability is based on non-governmental organisations as the forum, for example, interest groups, the media and other non-governmental stakeholders.[134]

The "who" question constitutes the second dimension of accountability: the nature of the actor who renders account.[135] In any organisation, a number of people at different hierarchical levels will often consider a decision before it is made.[136] The question therefore becomes: who should be "singled out" to take accountability for it?[137] Corporate accountability occurs when the organisation is the actor who renders account.[138] Hierarchical accountability occurs when one person, typically the most senior official, renders account for all.[139] Comparatively, collective accountability arises when a member of an organisation is held accountable for the conduct of the organisation as a whole by virtue of their membership in the collective.[140]

Accountability's third dimension is the "about what" question: the nature of the conduct that the actor must explain and justify to the forum.[141] Typically, the nature of the forum will determine what conduct is at issue. For instance, the legality of an actor's conduct will be pertinent in a legal accountability forum, whereas whether an actor's conduct meets certain professional standards is relevant in a professional accountability forum.[142]

Accountability's fourth dimension is the nature of the actor's obligation to render account: the "why" question.[143] Traditionally, accountability arrangements have been vertical,[144] under which the actor's obligation to render account derives from the fact that the forum

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[132] At 456.
[133] At 456.
[134] At 457.
[135] At 454.
[136] At 458.
[137] At 458.
[138] At 458.
[139] At 458.
[140] At 458.
[141] At 454.
[142] At 459. See further Behn, above n 106, at 6.
[143] Bovens, above n 13, at 455.
[144] Ank Michels and Albert Meijer "Safeguarding public accountability in horizontal government" (2008) 10 Public Management Review 165 at 168; and Schillemans, above n 123, at 390.

possesses superiority and authority over them.[145] For instance, a minister holds power over a public servant by virtue of their principal-agent relationship.[146] However, traditional vertical relationships have been eroded by the establishment of arms-length executive bodies outside direct departmental and ministerial oversight and control.[147] Administrative forums such as ombudsmen, audit offices and independent inspectors have emerged to fill resulting accountability gaps, giving rise to "diagonal accountability" arrangements.[148] While such forums lack a traditional principal-agent relationship with actors, they often report to Parliament, thus acquiring residual authority over actors to hold them to account.[149] Finally, horizontal accountability is an emerging type of accountability where no vertical relationship exists between actor and forum[150] and the obligation to account is voluntary and often moral in nature.[151]

3 "Webs" of accountability

Most actors, particularly if that actor is a public organisation, must render account to a number of different forums for a range of conduct.[152] Often additional accountability arrangements are introduced when a call for greater accountability is made or an accountability gap is unearthed, while older mechanisms continue to operate.[153] This practice of "layering" accountability relationships creates a "thick web of multiple, overlapping accountability relationships within which public administrators work".[154] Indeed, in its 2016 report on public sector accountability, the Controller and Auditor-General noted the complexity of the layers of public sector accountability in New Zealand and how they operate in practice.[155] Common practice to provide for public sector accountability, it therefore seems, is to "employ multiple accountability strategies".[156]

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[145] Schillemans, above n 123, at 390.

[146] Bovens, above n 13, at 460.

[147] Michels and Meijer, above n 144, at 168; and Bovens, Schillemans and Goodin, above n 107, at 16.

[148] Schillemans, above n 123, at 388 and 393.

[149] Bovens, above n 13, at 460. See further Bovens "Public accountability", above n 105, at 196; and Bovens "New Forms of Accountability and EU-Governance", above n 105, at 116.

[150] Schillemans, above n 123, at 390.

[151] Bovens, above n 13, at 460.

[152] Romzek, above n 112, at 23.

[153] Schillemans, above n 107, at 306; and Romzek, above n 112, at 23.

[154] Romzek, above n 112, at 23.

[155] Controller and Auditor-General *Public sector accountability through raising concerns* (March 2016) at [1.3].

[156] Romzek, above n 112, at 23.

The next Part applies this accountability theory to the OIA regime and maps the "web of accountability" for OIA compliance. Given that the accountee is not just one public organisation, but a variety of different government actors who are subject to the Act, this web of accountability is especially dense. Nevertheless, Part III concludes that this accountability regime is still inadequate and that an accountability deficit exists.

III Accountability and the OIA

When faced with the issue of non-compliance troubling the operation of the OIA, some, like the IRM of the OGP, suggest that increasing accountability is the answer. Penalising officials who break the law[157] or establishing a statutory office holder to oversee the system[158] have been floated as possible amendments to the OIA regime to enhance accountability. In order to interrogate whether there is in fact "too little" accountability, this Part evaluates the adequacy of the accountability arrangements for OIA compliance. In finding that an accountability deficit exists, it concludes that the regime fails to sufficiently promote government learning and legitimacy.

A Mapping OIA accountability arrangements

There are a number of accountability mechanisms for OIA compliance, creating a "web" of accountability. Importantly, this paper is not solely concerned with the accountability of mid-tier officials for decisions made under the Act. As noted by the Law Commission, the official information function is a "complex whole-of-government operation".[159] Simply put, it asks: what are arrangements by which government actors, including public servants, chief executives and ministers, are obliged to explain and justify compliance with the OIA to a forum?[160] This paper identifies these accountability mechanisms and in doing so, details exactly how the executive is held accountable for compliance with the Act.

As discussed earlier, any accountability arrangement can be classified across four different dimensions based on: (1) the nature of the forum; (2) the nature of the actor; (3) the nature of the conduct at issue; and (4) the nature of the actor's obligation to render account.[161] For

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[157] OGP *End-of-Term Report 2016-2018*, above n 93, at 16; and IRM *Design Report 2018-2020*, above n 12, at 37.

[158] Letter from Peter Boshier, above n 77, at 5.

[159] Law Commission, above n 37, at [13.3].

[160] Bovens, above n 13, at 450.

[161] At 454.

this paper, the first dimension – the "accountable to whom?" question – is the focal point and provides the framework for untangling the accountability web for OIA compliance. Given that the nature of the conduct at issue (compliance with the OIA) and the nature of the actor (government actors) are constants,[162] accountability mechanisms are distinguished based on the nature of the forum which public sector bodies, officials and ministers must render account to. These different forums give rise to administrative accountability, political accountability, social accountability and to a limited extent, legal accountability.[163]

1 Administrative accountability

(a) Ombudsman's investigation of OIA complaints

When one talks of accountability under the OIA, the Ombudsman is often the first mechanism that comes to mind. Operating as a "watchdog" for the OIA system,[164] the Ombudsman's Office is the "recipient body" for complaints about official information requests.[165] Upon receiving a complaint, an Ombudsman determines whether or not to conduct a formal investigation, or whether the dispute can be resolved informally.[166] During an investigation, an Ombudsman balances (1) the views of the agency as to why the particular decision under the OIA was made; (2) any submissions of the requester; and (3) the information at issue.[167] Thus a government agency's conduct under the OIA is closely scrutinised, and it must justify the decision under review. These are the information and debating phases of the accountability mechanism.

If the dispute is not resolved during the course of the investigation, an Ombudsman will form a view on the complaint's merits – in other words, they will reach a verdict on whether the OIA was complied with. If it finds against the agency, the Ombudsman is empowered to make a recommendation, for instance that the information should be released to the

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[162] Similarly, the nature of the actor's obligation to render account, whether this be vertical, diagonal or horizontal, is a less important distinguishing factor. This "dimension" is also implicitly raised in any discussion of the nature of a forum.

[163] Bovens "Public accountability", above n 105, at 186.

[164] Mai Chen "New Zealand's Ombudsmen Legislation: The Need For Amendment After Almost 50 Years' (2010) 41 VUWLR 723 at 726.

[165] Office of the Ombudsman *Annual Report 2018/19* (June 2019) at 29; Law Commission, above n 37, at [11.93].

[166] Office of the Ombudsman *Part 4A: Role of an Ombudsman On Review*.

[167] Office of the Ombudsman, above n 166.

complainant.[168] A department or organisation who receives such a recommendation is under a "public duty" to observe it unless the Governor-General, by Order in Council, "otherwise directs".[169] This is the consequences phase of the accountability mechanism.

(b) Ombudsman's investigation of official information practices

In addition to investigating complaints about information requests, the Ombudsman is also empowered to conduct proactive investigations into public sector bodies' "official information compliance and practices".[170] In the 2018/19 period, the incumbent Chief Ombudsman, Peter Boshier, conducted investigations into six government agencies, including the Treasury, the Ministry for the Environment and the Department of Conservation.[171] Boshier has committed to completing a further eight investigations each year.[172]

At the information and debating phases, the Ombudsman surveys agency leadership, staff and stakeholders on five key areas of OIA compliance and practice, including culture, internal procedures and performance monitoring.[173] Follow up interviews with key staff may occur.[174] The Ombudsman then passes judgment on the organisation's overall performance and compliance under the Act. For instance, the Ombudsman's 2019 review of the Treasury did not identify any conduct by the agency that was contrary to the Act (meaning formal recommendations were unnecessary), but highlighted areas of good practice and possible opportunities for improvement.[175] Moreover, the Ombudsman also reports their findings to the House of Representatives, which can give rise to further political accountability.[176]

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[168] OIA, s 30; and Law Commission, above n 37, at [11.93].

[169] Section 32. Such a direction has never been given by the Governor-General before: see Palmer, above n 37, at [1]. White, above n 6, at 57; and Law Commission, above n 37, at [11.104].

[170] Ombudsmen Act 1975, s 13; Office of the Ombudsman "Improving official information practice" (14 March 2019) <www.ombudsman.parliament.nz/what-we-can-help>; and Office of the Ombudsman *2018/19 Annual Report*, above n 165, at 32.

[171] Office of the Ombudsman *2018/19 Annual Report*, above n 165, at 32.

[172] At 32.

[173] Office of the Ombudsman *2018/19 Annual Report*, above n 165, at 32; and Office of the Ombudsman *OIA compliance and practice at the Treasury* (July 2019) [*Treasury practice report*] at 7.

[174] *Treasury practice report*, above n 173.

[175] At 6

[176] See for example the investigation into the Treasury: *Treasury practice report*, above n 173; and Finance and Expenditure Committee *Report of the Office of the Ombudsman, Official Information Act compliance and practice: The Treasury – Report of the Finance and Expenditure Committee* (November 2019).

(c) Publication of OIA statistics by the Ombudsman and the Public Service Commission

Finally, the Ombudsman publishes statistics biannually on the number of OIA complaints received against government agencies and ministers.[177] Collected data includes the number of complaints received against each department or organisation for the six month period, the nature of the complaint and the outcome of the review. The Ombudsman's annual report provides an analysis of these statistics, including a table ranking agencies based on the number of OIA complaints received in the 12 month period.[178]

The assumption behind the statistics is that agencies with poor OIA compliance will be "named and shamed" through the publication of the results,[179] thereby incentivising those agencies to improve OIA practices.[180] Such an approach accords with performance reporting, the practice of making organisations account for their performance by making performance information publicly available.[181] Nevertheless, Alora Johnson concluded in 2016 that this statistical strategy was not an accountability mechanism because it was not an effective performance-based model.[182] While her paper was written before the work programme commenced, Johnson pointed to obstacles such as ambiguous performance criteria, inconsistent data collection which precluded comparative analysis and a lack of agency support.[183]

Reaching a definitive conclusion on whether, four years on, the statistics programme overcomes these obstacles is beyond this paper's scope. However, it appears that many public sector bodies supply statistics for the programme and that collected data is

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[177] See Office of the Ombudsman "Resources and publications: complaints data" <www.ombudsman.parliament.nz/resources>.

[178] Office of the Ombudsman *2018/19 Annual Report*, above n 165, at 90 and following.

[179] "Editorial: Will a new plan to rescue freedom of information really work" *The Dominion Post* (online ed, Wellington, 21 October 2016).

[180] Public Services Commission "OIA statistics" (4 March 2020) <https://ssc.govt.nz/resources>.

[181] Steven Van de Walle and Floor Cornelissen "Performance Reporting" in *The Oxford Handbook of Public Accountability* (Oxford University Press, Oxford, 2014) 441 at 441.

[182] Alora Johnson "On the Precipice? The Operation of the Official Information Act within Government Agencies and Assessing the Efficacy of Results-Based Accountability Regimes" (LLB (Hons) Dissertation, 2016).

[183] Johnson, above n 182, at 30–35.

comparable enough to create league tables for particular data points.[184] By providing these statistics, agencies are detailing OIA compliance quantitatively to the Ombudsman. While the Ombudsman does not necessarily pass judgment through publishing these statistics, it likely supports the passing of judgment by others in other accountability mechanisms, for instance officials' performance feedback from their superiors.[185] Thus the publication of statistics can be loosely described as an accountability mechanism.

In conjunction with the Ombudsman's complaints statistics programme, the Public Service Commission (PSC) publishes its own OIA data.[186] Distinct from complaints, the PSC publishes biannual statistics on other aspects of compliance, such as the number of OIA requests completed by agencies, the number of requests completed within the statutory timeframe and the number of requests published on the agency's website.[187] Admittedly, classifying the PSC as an administrative forum may be a stretch given that, unlike the Ombudsman, it is not an independent body, but rather *the* core public sector agency. However, in the realm of its OIA statistics programme, the PSC is effectively administratively scrutinising public sector bodies based on the Act, just as the Ombudsman does.[188] Thus, for this paper's purposes, the PSC's statistics programme can also be categorised as an administrative accountability mechanism.

2 Political accountability

Government actors are also accountable to political accountability forums for OIA compliance. As a representative democracy, New Zealand government features a chain of "delegated authority and accountability" which connects voters, elected representatives and civil servants.[189] Voters delegate authority to MPs through elections, MPs delegate authority to Cabinet, Cabinet ministers delegate authority to chief executives of

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[184] See table headed "OIA complaints received – greater than or equal to 15 complaints" in Office of the Ombudsman *2018/19 Annual Report*, above n 165, at 91.

[185] See Bovens, above n 13, at 452 for a discussion of the indirect consequences of administrative accountability forums.

[186] Public Service Commission, above n 180.

[187] Public Service Commission, above n 180.

[188] Bovens, above n 13, at 456. The Public Service Commission (PSC) also exercises a degree of external control over the public sector in the enforcement of the State Services' Standards of Integrity and Conduct.

[189] Kaare Strøm "Delegation and accountability in parliamentary democracies" (2000) 37 European Journal of Political Research 261 at 267; Mark D Jarvis "The Black Box of Bureaucracy: Interrogating Accountability in the Public Service" (2015) 73 AJPA 450 at 450; and Bovens, above n 13, at 455.

government departments, and chief executives delegate authority to civil servants.[190] Accountability relationships operate in the opposite direction; officials are accountable to their chief executive, who is accountable to their minister, and so on. This string of principal-agent relationships creates political accountability arrangements that are vertical, compared with, for example, the Ombudsman's administrative accountability functions which operate diagonally from government actors.[191]

(a) Performance review of public servants

At the bottom of the chain, it is expected that officials, specifically those working in the official information division of their agency, would be accountable to their administrative superiors for OIA compliance. Government agencies are required to comply with certain standards in responding to requests under the OIA, for instance they must respond to requests no later than 20 working days after receiving them.[192] Presumably then, for officials that play a role in responding to OIA requests, an essential part of their job description is to comply with the requirements of the Act to ensure that the agency adheres to the law.[193]

In Wakem's 2015 report, which reviewed the official information practices of 12 government agencies, she conversely found that OIA compliance did not feature highly in key performance indicators for staff, nor in any staff performance reviews.[194] As a result, she recommended that OIA compliance be included in all officials' job descriptions and that agencies ensure compliance is included as a key performance indicator for staff to be monitored and reviewed in annual performance reviews.[195] It is not clear whether any of the 12 agencies have implemented this recommendation, or perhaps whether some

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[190] Strøm, above n 189, at 267; Jarvis, above 189, n 450; Thomas Saalfeld "The United Kingdom: Still a Single 'Chain of Command'? The Hollowing Out of the 'Westminster Mode l'" in Kaare Strøm, Wolfgang C Müller and Torbjörn Bergman (eds) *Delegation and Accountability in Parliamentary Democracies* (Oxford University Press, Oxford, 2003) 620 at 620; B Guy Peters "Accountability in Public Administration" in Mark Bovens, Thomas Schillemans and Robert E Goodin (eds) *The Oxford Handbook of Public Accountability* (Oxford University Press, Oxford, 2014) 211 at 217; and Mark D Jarvis "Hierarchy" in Mark Bovens, Thomas Schillemans and Robert E Goodin (eds) *The Oxford Handbook of Public Accountability* (Oxford University Press, Oxford, 2014) 405 at 411-412.

[191] Jarvis, above n 190, at 405.

[192] OIA, s 15.

[193] Wakem, above n 1, at 64.

[194] At 64–65.

[195] At 68.

agencies, outside the ambit of Wakem's review, do in fact consider OIA compliance in officials' performance reviews. Although in a 2018 practice investigation of the Ministry for Culture and Heritage, the Ministry's leadership team advised the Ombudsman that it was considering including OIA compliance in staff job descriptions.[196]

Notwithstanding how *commonplace* it is for officials to be assessed on OIA compliance in their performance reviews, when this does practice occurs, it gives rise to an accountability mechanism. Officials report to their superiors on their performance under the Act and their superiors then pass judgement on officials' conduct as reflected in performance ratings.[197] Another aspect, perhaps not picked up in Wakem's review, may be where officials report to their superiors on an informal basis on OIA compliance, for instance at team meetings or in hallway conversations.[198] Subsequent informal feedback to officials from their superiors would likewise give rise to an accountability mechanism.

(b) Performance review of chief executives

By virtue of the "democratic chain of delegation",[199] accountability for OIA practices does not stop with middle managers. As the people at the top of the organisational hierarchy, chief executives are directly accountable to their superiors – ministers – for their department's performance. This remains the same under the new Public Service Act 2020.[200] While ultimately the State Services Commissioner conducts chief executives' performance reviews,[201] the Commissioner will inevitably consult the minister on their view of the official's performance. Performance expectations for the department's core business include the effective management of information, privacy and security matters.[202]

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[196] Office of the Ombudsman *Official Information Act compliance and practice: Manatū Taonga Ministry for Culture & Heritage* (September 2018) at 46.

[197] Jarvis, above n 190, at 413.

[198] Jarvis, above n 190, at 412; and Jarvis, above 189, at 461.

[199] Bovens, Schillemans and 't Hart, above n 15, at 225.

[200] Section 52. Compare State Sector Act 1988, s 32 (repealed). Given that the Act was not in force at the time of writing, the map of existing accountability arrangements in this Part is limited to the accountability structures established by the State Sector Act.

[201] Public Service Act 2020, s 44.

[202] Public Service Commission *Guidance on 2014/15 Chief Executive Performance Expectations* (May 2015). See further Billington, above n 55, at 20.

Thus, whether taking the form of informal feedback between chief executives and ministers or through formal feedback for the officials' performance review, top civil servants may have to render account to their minister for their agency's OIA practices.

(c) Appearance of ministers and officials before parliamentary select committees

At the next level, ministers are accountable to Parliament for the conduct of their department, including for OIA compliance, constituting the final link in the political accountability chain.[203] A relevant component of this accountability is select committee hearings where ministers are scrutinised about the financial and non-financial performance of their department for the past year.[204] Senior officials also attend to "support ministerial accountability".[205] As part of this annual review as mandated by the Public Finance Act 1989,[206] the responsible minister must present an annual report to the House of Representatives on the department's financial and service performance.

Importantly, indicators on an agency's performance under the OIA – constituting "non-financial performance" – are often published in annual reports.[207] This is the information phase. In the debating phase, the minister and officials might also be asked written or oral questions about the agency's OIA practices. In the Treasury's 2018/19 annual review before the Finance and Expenditure Select Committee for example, the agency was asked eight written questions about OIA compliance and practices over the 12 month period, including questions about the number of requests responded to within 20 working days, the average response time to requests and the number of complaints received.[208] The select committee

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[203] Saalfeld, above n 190, at 633; and Scott Brenton "Ministerial Accountability for Departmental Actions Across Westminster Parliamentary Democracies" (2015) 73 AJPA 467 at 468.

[204] Office of the Clerk of the House of Representatives *Government Accountability to the House* (March 2014); and Ministry of Social Development "Annual Report" <www.msd.govt.nz/about-msd-and-our-work>.

[205] Cabinet Office *Cabinet Manual 2008* at [3.74].

[206] Section 44(1).

[207] See for example Ministry of Social Development Pū*rongo ā-tau Annual Report 2018/19: Presented to the House of Representatives pursuant to section 44(1) of the Public Finance Act 1989* (2019); The Treasury *Annual Report 2018/19 presented to the House of Representatives pursuant to section 44 of the Public Finance Act 1989* (2019); and Ministry of Education *Annual Report For the year ended 30 June 2019: Presented to the House of Representatives pursuant to section 44(1) of the Public Finance Act 1989* (2019). See also Wakem, above n 1, at 130: "[m]ost of the 12 selected agencies had performance measures for some of their OIA work, which they made public via their annual report."

[208] Finance and Expenditure Committee *2018/19 annual review of the Treasury - Treasury (2018/19 annual review questionnaire response)*. See also Finance and Expenditure Committee *2018/19 Annual Review of the Treasury* (March 2020).

can then pass judgement in its annual review, for instance by raising concerns about a particular aspect of compliance.[209]

3 Social accountability

In addition to political and administrative forums, government actors are also held to account by social forums. Social accountability situates non-governmental organisations as the accountees, connecting agencies with citizens and civil society.[210] While these bodies, such as interest groups, charities and the media generally lack the hierarchical relationship with actors to formally require them to render account, actors tend to account for themselves out of a moral obligation: that it is the "right thing" to do.[211] Moreover, the increasing use of the internet to publicise their "inspections, assessments and benchmarks" means actors are likely to take these accountability forums seriously.[212]

(a) IRM of the OGP

The OGP, an international partnership in which countries commit to opening up government, is one social accountability forum for the OIA's operation. As discussed in Part II, New Zealand has made a number of commitments under the OGP, including to improve the government's OIA practices.[213] Accountability is a core component of the partnership; governments are required to create two year action plans and produce periodic self-assessment reports on their progress to achieving OGP commitments.[214] Moreover, an Independent Reporting Mechanism (IRM) completes a progress and end-of-term report for each two year period, assessing the extent to which the commitments have been

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[209] While not strictly concerning OIA compliance, see for example the concerns raised by the Governance and Administration Committee on the retention of official information and records by the Department of Internal Affairs in the agency's 2017/18 annual review: Governance and Administration Committee *2017/18 Annual Review of the Department of Internal Affairs* (April 2019).

[210] Bovens, above n 13, at 457.

[211] Bovens, above n 13, at 460; and Bovens "New Forms of Accountability and EU-Governance", above n 105, at 112.

[212] Bovens, above n 13, at 457.

[213] OGP *National Action Plan 2016-2018*, above n 89, at 11; and Open Government Partnership "Open Government Partnership", above n 89.

[214] Open Government Partnership "Accountability" <www.opengovpartnership.org>.

implemented, as well as the extent to which commitments reflect OGP values of transparency, civic participation and accountability.[215]

In the context of the OIA, the IRM is an important mechanism for the government to be held accountable for its OIA performance as a whole. While the commitments to open up government change every two years, access to information remains a central component. For instance, in 2016, the government committed to improving OIA practices[216] and in 2018 it further committed to determining whether to formally review the OIA.[217] Thus the IRM operates as an accountability forum in which the government must explain and justify its performance under the OIA, particularly in relation to the commitments it has made, which is then judged by the IRM in its progress and end-of-term reports.[218]

(b) Media queries

A further accountability mechanism for the operation of the OIA is the media – a forum which resides in civil society – which gives rise to social accountability. Questions have been raised in the literature as to whether the media in fact constitutes an accountability arrangement;[219] it is often argued that the media merely enhances transparency by reporting on the activities of politicians and civil servants and that it lacks the power to require explanation or justification from government actors.[220] However, the stronger argument is that most government agencies feel an obligation to explain and justify their conduct to the media. This derives from a democratic understanding that public sector bodies should be accountable to civil society.[221]

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[215] Open Government Partnership "About the IRM", above n 91. If reviews conducted by the IRM are classified as a social accountability mechanism, by analogy it could be argued that other reports into the OIA system similarly function as accountability relationships, for instance the two Law Commission reviews, see above nn 37 and 80, or the more recent Beverley Wakem review, see above n 1. However, those reviews concerned the performance of the OIA system as a whole, whereas the IRM reports respond to specific commitments made by the government on the more narrow issue of compliance.

[216] OGP *National Action Plan 2016-2018*, above n 89.

[217] OGP *National Action Plan 2016-2018*, above n 89.

[218] Bovens, above n 13, at 450.

[219] See Pippa Norris "Watchdog Journalism" in Mark Bovens, Thomas Schillemans and Robert E Goodin (eds) *The Oxford Handbook of Public Accountability* (Oxford University Press, Oxford, 2014) 525.

[220] Martino Maggetti "The media accountability of independent regulatory agencies" (2012) 4 Eur Political Sci Rev 385 at 387.

[221] Bovens, above n 13, at 460; and Bovens "New Forms of Accountability and EU-Governance", above n 105, at 112.

How this works in operation is that government agencies are held accountable when first, they respond to media queries about their OIA practices or compliance and secondly, when that story is subsequently published. A recent example is a story published by Stuff detailing a dispute with the Ministry of Social Development (MSD) about the release of wage subsidy information under the OIA.[222] The story details MSD's explanation for why the request was refused, and concludes with: "to refuse to provide even a redacted list of recipients falls well short of the insight taxpayers deserve".[223] Here, a government agency explained and justified its conduct under the OIA to a media outlet and the journalist subsequently passed judgment.

4 Legal accountability

For the sake of completeness, the final type of forum which the government may have to render account to for compliance with the OIA is the courts, giving rise to legal accountability. In practice, the courts play little to no role in holding the government to account for OIA practices. This is largely attributable to the drafting of the OIA where recourse to the courts was intentionally limited.[224]

The first limitation on legal accountability is that while a person may bring judicial review proceedings to review particular decisions made under the Act, such as a refusal to make official information available, that ability is restricted until that decision has first been determined by the Ombudsman.[225] Thus, if a person has a complaint about how an agency's decision in response to a request, their remedy first resides with the Ombudsman, not the courts.[226] Another avenue is to judicially review a decision made by the Ombudsman, for instance, to not uphold a complaint made against an agency's decision under the OIA, however such cases are rarely brought.[227] Moreover, while an Order in Council veto of a recommendation made by the Ombudsman could be amenable to review, no veto has ever been issued.[228]

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[222] Katie Kenny "The vague and confusing reasons we'll never know exactly where the wage subsidy is going" (11 June 2020) Stuff <www.stuff.co.nz>.

[223] Kenny, above n 222.

[224] White, above n 6, at 65.

[225] OIA, s 34; and Law Commission, above n 37, at [1.12].

[226] White, above n 6, at 65; and OIA, s 28.

[227] White, above n 6, at 65.

[228] White, above n 6, at 65; and Law Commission, above n 37, at [11.79].

Ultimately, the OIA's drafting by and large precludes any legal accountability for the government's performance under the Act. The minimal number of cases brought before the courts concerning the operation of the Act reflects this.[229] Such an approach accords with a green light theory of control, whereby the exercise of government power is controlled with internal and prospective controls, such as through administrative and political accountability.[230] This position can be contrasted with red light theory which prefers external and reactive controls of executive power, such as the courts.[231]

B Assessing accountability

As can be seen, government actors must render account to a raft of different accountability forums for their compliance with the OIA. However, just because an actor is subject to accountability arrangements, it does not mean that those arrangements are adequate in holding that actor accountable.[232] Rather, it may be that on closer scrutiny, an accountability "deficit" or accountability "overload" exists.[233]

In order to evaluate whether the OIA accountability regime is adequate, this paper adopts Mark Bovens, Thomas Schillemans and Paul 't Hart's assessment framework.[234] Four "effects" or purposes of accountability provide assessment criteria for the regime – a democratic perspective, a constitutional perspective, a learning perspective and a legitimacy perspective.[235] Ultimately, this paper concludes that while the OIA accountability system is somewhat adequate from a learning perspective, it is inadequate from a democratic, constitutional and overall legitimacy perspective. It fails on all four

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[229] Law Commission, above n 37, at [11.1].

[230] Carol Harlow and Richard Rawlings *Law and Administration* (3rd ed, Cambridge University Press, Cambridge, 2012) at 38.

[231] At 38.

[232] Bovens, above n 13, at 462.

[233] See Arie Halachmi "Accountability Overloads" in Mark Bovens, Thomas Schillemans and Robert E Goodin (eds) *The Oxford Handbook of Public Accountability* (Oxford University Press, Oxford, 2014) 560; Mark D Jarvis and Paul G Thomas "The Limits of Accountability: What Can and Cannot Be Accomplished in the Dialectics of Accountability?" in Herman Bakvis and Mark D Jarvis (eds) *From New Public Management to New Political Governance: Essays in Honour of Peter C Aucoin* (McGill-Queen's University Press, Montreal, 2012) 271 at 290 and 291; Richard Mulgan "Accountability Deficits" in Mark Bovens, Thomas Schillemans and Robert E Goodin (eds) *The Oxford Handbook of Public Accountability* (Oxford University Press, Oxford, 2014) 545; and Bovens, above n 13, at 462.

[234] See Bovens, Schillemans and 't Hart, above n 15.

[235] Bovens, Schillemans and 't Hart, above n 15, at 230; and Bovens, above n 13, at 465.

counts. Given the normative primacy of the learning and legitimacy purposes to the OIA accountability regime under scrutiny, an accountability deficit exists.

1 Purposes or "effects" of accountability

"Accountability" is a term often adopted in public administration to protest circumstances where there is *too much* accountability ("accountability overloads") or *too little* ("accountability deficits"). An accountability assessment tool responds to this trend, recognising that:[236]

> … before we can say whether there is too much, too little, or just the correct amount of the "right" forms of accountability, we need to identify the purposes of different mechanisms of accountability, the dynamics of how they are presumed to work, and how they are actually applied in practice …

Building on prior research by Bovens,[237] three "answers" for why accountability is important form the basis of Bovens, Schillemans and 't Hart's framework: a democratic rationale, a constitutional rationale and a learning rationale.[238] Applying the framework, a given accountability arrangement or accountability regime – such as the accountability regime for OIA compliance outlined in the previous section – can be assessed against the three rationales and their associated criteria. Importantly however, this paper will also consider a fourth criteria: a legitimacy rationale. These four factors compromise the "systematic" framework for assessing whether the OIA accountability regime is adequate.[239]

The first evaluative perspective is democratic, which sees the function of accountability as supporting popular control over those in power.[240] In assessing accountability, this perspective's primary evaluation criterion is the extent to which an arrangement enables "democratically legitimised bodies" to monitor and be answerable for the execution of

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[236] Jarvis and Thomas, above n 233, at 294.

[237] Bovens, above n 13.

[238] Bovens, Schillemans and 't Hart, above n 15, at 230. See also Peter Aucoin and Ralph Heintzman "The dialectics of accountability for performance in public management reform" (2000) 66 IIAS 45 who conceptualise the three perspectives as accountability as control, accountability as assurance and accountability as continuous improvement.

[239] Bovens, Schillemans and 't Hart, above n 15, at 233.

[240] Bovens, above n 13, at 463.

delegated tasks by executive agents.[241] That accountability arrangements legitimise the conduct of actors by linking it to the democratic chain of delegation is the central purpose of accountability according to this perspective.[242]

The second perspective is constitutional: accountability is important for safeguarding against abuses of power.[243] Of critical importance is therefore the extent to which an accountability arrangement provides sufficient incentives to deter actors from abusing public authority.[244] Thus according to the constitutional rationale, that accountability forums possess "credible sanctions" is essential to preventing corrupt, overbearing and ultimately tyrannous governments.[245]

Under the third perspective, accountability's third function is learning: to enhance government performance and effectiveness.[246] When an actor is held publicly accountable, this provides feedback about the acceptability of their conduct, fostering institutional learning.[247] Thus, the degree to which accountability arrangements stimulate ongoing dialogue with actors on their performance in a "safe" learning context is the central evaluative criterion.[248]

The final perspective is that accountability is important because it can protect and enhance the government's legitimacy.[249] This is based on the notion that if the executive branch is seen by voters, interest groups and the media as being willing to front, explain and justify its conduct, this can help to bolster trust and confidence in government and ultimately acceptance of its authority.[250] Notably, this rationale for accountability functions as a "meta-effect" or a "secondary effect"; how well a particular accountability regime performs according to the other perspectives or effects of accountability influences the degree to

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[241] Bovens, Schillemans and 't Hart, above n 15, at 231.

[242] Bovens, Schillemans and 't Hart, above n 15, at 231; and Bovens, above n 13, at 465.

[243] Bovens, above n 13, at 463; and Bovens "Public accountability", above n 105, at 192.

[244] Bovens, above n 13, at 465.

[245] Bovens, Schillemans and 't Hart, above n 15, at 231; and Bovens, above n 13 at 463.

[246] Bovens, above n 13, at 463; and Bovens, Schillemans and 't Hart, above n 15, at 232.

[247] Bovens "Public accountability", above n 105, at 193; and Bovens, Schillemans and 't Hart, above n 15, at233.

[248] Bovens, Schillemans and 't Hart, above n 15, at233.

[249] Bovens, above n 13, at 464.

[250] Bovens, above n 13, at 464; and Controller and Auditor-General, above n 155, at 3. See also John Ryan "Does public accountability even matter if the public sector is performing well?" (2019) 15(4) Policy Quarterly 8 at 12.

which that regime enhances the legitimacy of "the political system at large".[251] This paper will accordingly consider this fourth perspective or "meta-perspective" last in the assessment.

2 Limitations of the assessment

Three important limitations to this accountability assessment must be acknowledged. First, the assessment is more theoretical than empirical; unlike other research, which has applied Bovens, Schillemans and 't Hart's framework, this OIA accountability regime evaluation is not based on interviews with the actor (or the forum).[252] However, despite this study's empirical limitations, it still offers a preliminary view on whether the OIA's accountability arrangements are sufficient that is more systematic than impressionistic.[253] Adopting a framework is helpful to this end. This assessment therefore is still an important contribution to the debate about what can be done about OIA non-compliance and how accountability factors into it.

Secondly, as emphasised by the architects of the assessment framework, the evaluation of accountability arrangements is a "somewhat equivocal exercise".[254] This is because while a given accountability relationship may score well based on one perspective, it may score poorly on another. Bovens uses the example of judicial review to elucidate this point: while this accountability mechanism would rate favourably from a constitutional perspective because it operates as a check on executive power, it would rate badly from a democratic perspective because it curtails the "exercise of popular sovereignty through the legislative branch".[255]

Finally, as a corollary of the second limitation, the final judgement on whether an accountability deficit or overload exists will inevitability be rooted in the assessor's normative view of what values and criteria matter most for the accountability regime under analysis.[256] Returning to the judicial review example, that the mechanism rated poorly from a democratic perspective would not lead one to find that a deficit existed because it

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[251] Bovens, Schillemans and 't Hart, above n 15, at 239.

[252] See for example Jarvis, above 189; and Bovens, Schillemans and 't Hart, above n 15.

[253] Bovens, Schillemans and 't Hart, above n 15, at 294.

[254] Bovens, above n 13, at 466.

[255] Bovens, Schillemans and 't Hart, above n 15, at 233–234.

[256] Bovens, Schillemans and 't Hart, above n 15, at 237; and Bovens, above n 13, at 467.

would be "inappropriate" for judicial review to produce the effect of democratic control.[257] Short of resolving this "normative riddle", the framework simply offers a "coherent structure" to investigate accountability.[258]

3 Assessment of the accountability regime for OIA compliance

With these three limitations in mind, this section assesses the accountability "regime" for OIA compliance and finds that an accountability deficit exists. In concluding that the "accountability regime" is inadequate, this paper refers to the *sum* of all the different accountability arrangements outlined in Part III(A), from the publication of OIA statistics to select committee scrutiny.[259]

(a) Democratic perspective

The OIA accountability regime is inadequate from a democratic perspective.[260] The key inquiry under this rationale is whether accountability arrangements control and legitimise conduct under the OIA by linking it to the democratic chain of delegation.[261] More specifically:[262]

(1) whether democratic legitimised principals, such as ministers and Parliament, are *informed* of their agents' OIA non-compliance;
(2) whether the *debate* between the democratic principal and forum concentrates on the actor's performance under the OIA; and
(3) whether the *consequences* which follow incentivise democratic principals to be concerned about the performance of their agents under the OIA.

Of relevance to this perspective are the political accountability arrangements for OIA compliance. First and foremost, these arrangements provide democratic principals with information about government actors' compliance with the OIA. For instance, it is government practice for departments to supply select committees with OIA compliance statistics in their annual reports with the understanding that they may be asked follow up

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[257] Bovens, Schillemans and 't Hart, above n 15, at 234.

[258] At 237.

[259] Bovens, above n 13, at 226.

[260] Bovens, Schillemans and 't Hart, above n 15, at 231.

[261] At 231.

[262] Adapted from Bovens, Schillemans and 't Hart, above n 15, at 230–231.

questions about them.[263] Performance reviews and informal feedback mechanisms similarly keep middle managers up to date with the performance of officials responding to requests, aided by the publication of OIA statistics by the Ombudsman.

Nevertheless, a democratic effect is not produced by these accountability arrangements because although democratic principals are informed of their agents' OIA compliance, they do not generally face consequences for non-compliance in the democratic realm. Ministers are rarely rebuked for their department's OIA compliance in Question Time or before a parliamentary select committee. For instance, while information about compliance is generally supplied to select committees, criticism for non-compliance does not appear to have ever been raised in an annual review.[264]

Rather, by and large it appears that criticism for non-compliance is levelled at actors outside of the parliamentary sphere, for instance at officials or government agencies in Ombudsman investigations or in media stories. Such a division may be attributable to the fact that compliance is seen as an operational matter that is beyond the minister's responsibility. Either way, democratic principals are generally able to insulate themselves from the performance of officials under the OIA, the effect being that compliance is not linked to the democratic chain of delegation. The OIA accountability regime therefore does not satisfy the criteria provided by the democratic perspective.

(b) Constitutional perspective

The OIA accountability regime is also inadequate from a constitutional perspective. Here, the central idea is whether the accountability arrangements curtail the abuse of executive authority.[265] What is required under this rationale is that:[266]

(1) the forum possesses sufficient *information* on the actor's OIA compliance to evaluate whether executive action conforms with the requirements of the law;
(2) that the *debating* phase is focused on the actor's conformity with the OIA; and

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[263] See for example Finance and Expenditure Committee *2018/19 annual review of the Treasury - Treasury (2018/19 annual review questionnaire response)*, above n 208.

[264] Compare Finance and Expenditure Committee *2018/19 annual review of the Treasury - Treasury (2018/19 annual review questionnaire response)*, above n 208 with Finance and Expenditure Committee *2018/19 Annual Review of the Treasury*, above n 208.

[265] Bovens, Schillemans and 't Hart, above n 15, at 231.

[266] Adapted from Bovens, Schillemans and 't Hart, above n 15, at 231–232.

(3) that the forum has the capacity to credibly *sanction* the actor to deter future non-compliance.[267]

At first glance, a number of accountability arrangements appear to squarely meet the criteria of the constitutional perspective, including the Ombudsman's investigations, select committee scrutiny by Parliament and media requests. Importantly, at the information and debating phases of these arrangements, the forum gains an insight into whether government actors are operating in accordance with the law (ie the OIA). This equally occurs when a government agency provides their rationale behind a particular OIA decision in response to an Ombudsman's investigation, or when an agency responds to a media request about why a particular decision was made under the Act. In both cases, the forum is concerned with evaluating executive behaviour to uncover non-compliance with the law.

Nevertheless, these arrangements do not satisfy the final criteria for the constitutional perspective: that the forum has the power to impose adequate sanctions on the actor for non-compliance in order to deter future abuses of executive power.[268] Crucially, neither the Ombudsman, Parliament or the media has the power to formally sanction government actors for non-compliance with the OIA. Rather, consequences are informal; a public body may be shamed by an adverse Ombudsman recommendation or a media story about non-compliance, but they will not be penalised for it. Such consequences are not sufficiently "strong enough to send shock waves throughout the system, mak[ing] potential transgressors think twice before acting",[269] as required by the constitutional perspective. Indeed, the Ombudsman made an average of 48 recommendations against government actors per year over the 2016–2019 period where non-compliance was identified,[270] suggesting that while accountability forums reveal the abuse of executive power, this is a far cry from rooting out non-compliance altogether.[271]

(c) Learning perspective

Third, the OIA accountability regime is somewhat adequate from a learning perspective. Of primary importance under this rationale is whether the accountability mechanisms

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[267] At 231.

[268] At 231.

[269] At 233.

[270] Office of the Ombudsman *2018/19 Annual Report*, above n 165, at 93; and Office of the Ombudsman *Annual Report 2017/18* (June 2018) at 102.

[271] Office of the Ombudsman *2018/19 Annual Report*, above n 165, at 93.

provide government actors with sufficient feedback-based inducements to improve their compliance with the OIA. In particular, that:[272]

(1) the accountability arrangement provides both the actor and the forum with accurate *information* about the actor's performance under the OIA;
(2) at the *debating* phase, there is ongoing dialogue between the actor and forum about the actor's OIA performance feedback; and
(3) the accountability arrangement strikes the right balance between being sufficiently strong so that actors understand the expectation of changes from feedback, but still relatively "safe" to minimise actors being overly defensive, so that the actor learns.[273]

One accountability mechanism in particular appears to produce a learning effect: the Ombudsman's official information practice investigations. With the first investigation taking place in late 2018, the Ombudsman has expressed an intention to proactively review eight agencies per year on their OIA compliance and practices, in particular whether the agency has the leadership, culture, staffing and capability, policies and procedures and performance monitoring in place "to support good official information practices".[274] As opposed to constituting a one-off review where the Ombudsman presents the agency with their findings, an OIA practice investigation involves the Ombudsman following up with the agency under review on a quarterly basis to check in on its progress in implementing suggested actions.[275]

From an information perspective, the practice investigations establish an "information gathering and provision routine" which yields a clear picture of the actor's compliance under the OIA.[276] Both at the initial review stage, and at the follow up stages, the actor informs the forum on all aspects of compliance, including the agency's culture around the OIA, how requests are handled in the organisational structure and performance monitoring.[277] Moreover, the fact that Ombudsman checks back in with the agency on an ongoing basis about how it is implementing performance feedback clearly satisfies the

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[272] Adapted from Bovens, Schillemans and 't Hart, above n 15, at 232.

[273] At 232.

[274] Office of the Ombudsman "Next round of LGOIMA practice investigations underway" (press release, 1 November 2019); and Office of the Ombudsman *2018/19 Annual Report*, above n 165, at 32.

[275] *Treasury practice report*, above n 173, at 4.

[276] Bovens, Schillemans and 't Hart, above n 15, at 232.

[277] *Treasury practice report*, above n 173.

debating phase of the learning perspective; ongoing reflexive dialogue occurs between actor and forum "aimed at policy improvements".[278] Finally, the accountability arrangement also appears to provide a "safe" environment that supports the actor to learn.[279] Given the lack of hierarchy or formal control over agencies, the Ombudsman's proactive investigations are likely perceived by agencies as a mechanism for supporting them to improve, as opposed to an "instrument of control";[280] as argued by Schillemans, learning is best stimulated in the "shadow of hierarchy".[281] Furthermore, agencies are likely to be less defensive in responding to practice investigations, as opposed to complaint investigations, as they are not prompted by the agency doing anything "wrong".

The Ombudsman's practice investigations can be contrasted with two other accountability mechanisms which fall short of producing a learning effect: the publication of OIA statistics and officials' performance feedback from managers. Like the practice investigations, these mechanisms produce information about the actor's performance. Where these arrangements fall down, however, is at the debating and consequences phase. What is required is "ongoing" dialogue between the actor and forum about performance feedback and a "safe" environment that allows the actor to learn.[282] However, the publication of OIA statistics for one is a biannual exercise with ostensibly one-off communication between the agency and the Ombudsman; there is a lack of external feedback for the actor to act upon to improve their performance.[283] Moreover, research suggests that public service accountability mechanisms, like feedback, fail to produce a learning effect because government agencies do not foster work environments where actors feel like they can make mistakes safely, seek help and learn from feedback.[284]

A further accountability mechanism which falls short of producing a learning effect is the IRM of the OGP, which completes a progress report and an end of term report to assess the Government's progress on implementing pledged commitments.[285] Notably, these reports

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[278] Thomas Schillemans "Accountability in the Shadow of Hierarchy: The Horizontal Accountability of Agencies" (2008) 8 Public Organiz Rev 175 at 190; and Bovens, Schillemans and 't Hart, above n 15, at 232.

[279] Bovens, Schillemans and 't Hart, above n 15, at 232.

[280] Schillemans, above n 278, at 190

[281] At 190.

[282] Bovens, Schillemans and 't Hart, above n 15, at 232.

[283] Bovens, Schillemans and 't Hart, above n 15, at 232; and Open Government Partnership "Accountability", above n 214.

[283] Open Government Partnership "About the IRM", above n 91.

[284] See Jarvis, above 189, at 460.

[285] See Open Government Partnership "Accountability", above n 214.

may include recommendations for how the Government could better implement their plans, suggesting that there is ongoing dialogue between actor and forum about the Government's performance under the OIA.[286] Nevertheless, the accountability arrangement does not produce a learning effect because the Government does not appear to generally adopt the IRM's recommendations. For instance, every IRM report has recommended that the Government reform all official information laws in accordance with the Law Commission's 2012 review, but this has never been integrated into a subsequent governmental action plan.[287]

Ultimately, the Ombudsman's practice investigations produce a learning effect. Nevertheless, these investigations form only a small component of the wider accountability regime; the other mechanisms discussed above fall short of producing a learning effect. The Ombudsman's capacity is also restricted to merely eight investigations per year, meaning that it may take a long time for certain agencies to engage in performance dialogue and learn how to better comply with the OIA. Thus, the OIA accountability regime is only somewhat adequate from a learning perspective.

(d) Overall legitimacy perspective

Maintaining and enhancing confidence in government is the final purpose of accountability this assessment considers.[288] Importantly, accountability arrangements cannot alone be judged according to their effect on the legitimacy of government. Rather, it is the effect of the *broader* accountability regime upon government legitimacy that is assessed.[289] Moreover, this perspective "lurks" behind the other three accountability effects; as Bovens argues, the effects of "democratic control, a power equilibrium and responsiveness [will in turn] enhance the legitimacy of the administration".[290]

As discussed in Part II(A), controversy and criticism surrounds the OIA. That citizens, interest groups and journalists can make requests for official information – and government agencies will respond to requests in compliance with the law – is integral to the operation of our democracy. Nevertheless, parts of New Zealand's civil society perceive the Act as "broken", able to be permeated by political and reputational considerations in its operation

[286] Open Government Partnership "About the IRM", above n 91.

[287] IRM *Design Report 2018-2020*, above n 12, at 6.

[288] Jarvis and Thomas, above n 233, at 300; and Bovens, above n 13, at 464.

[289] Bovens, Schillemans and 't Hart, above n 15, at 239.

[290] Bovens, above n 13, at 464.

by the executive, rather than strict adherence to the spirit and letter of the law.[291] Non-compliance with the OIA thus presents a threat to the public's confidence in government.

On the other hand, if the government is perceived to be held accountable for compliance, this could counteract or even overcome legitimacy concerns. "Processes of accountability" where actors are obliged to justify their conduct to a forum can enhance trust and confidence in government because it demonstrates that the executive branch is willing to render account.[292] Based on the number of accountability arrangements for OIA compliance this paper has mapped, in principle the overall regime could be legitimacy-affirming. Nevertheless, as discussed earlier, the mere existence of accountability arrangements does not mean that adequate accountability is really provided for.

Where the accountability regime stands from a legitimacy perspective is a work in progress. As the regime currently operates, the accountability regime for OIA compliance does not fully produce any of the effects articulated by Bovens, Schillemans and 't Hart because:

(1) it largely insulates democratic principals from being answerable for OIA non-compliance (democratic perspective);
(2) it does not "root out" or fully deter OIA non-compliance (constitutional perspective); and
(3) although one accountability arrangement involves continuous and safe dialogue about performance to support the improvement of OIA compliance practices, its capacity is limited (learning perspective).

While non-compliance is brought to light by the OIA accountability regime, accountability exists in a void, removed from any meaningful effect on democratic control, constitutional assurance or governmental learning. As Bovens suggests, such a poor state of affairs may "reinforce that the responsiveness of public officials and agencies is something of a charade", weakening acceptance of government authority and confidence in government administration by demonstrating that there are few consequences for officials breaching the law.[293] The OIA accountability regime as it currently exists thus threatens to undermine government legitimacy, as opposed to maintaining or enhancing it.

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[291] Letter from Peter Boshier, above n 77.

[292] Bovens, above n 13, at 464.

[293] Bovens, Schillemans and 't Hart, above n 15, at 239.

(e) Conclusion

This paper has found that the OIA's accountability regime for compliance falls short from a democratic, constitutional and legitimacy perspective and is only somewhat adequate from a learning perspective. An accountability gap therefore exists. While the regime does not fully satisfy any of the four rationales of accountability, two rationales are of particular concern: the learning and legitimacy perspectives. This is based on the normative view that an accountability regime for OIA compliance will be most effective if it: (1) provides government learning opportunities to improve OIA practices and performance; and (2) protects and enhances the overall legitimacy of government. Although providing constitutional assurance is still important to the regime, this assessment places secondary weight on this rationale given the OIA's operating environment.

First and foremost, that the OIA accountability regime does not satisfy the democratic perspective is not of concern. Based on the literature, problems with non-compliance do not stem from "deeply ingrained agency problems" calling out for greater democratic oversight.[294] Moreover, political interference is a key contributing factor to OIA non-compliance.[295] Thus, it would not necessarily be a good thing if democratic principals, in particular ministers, *were* more informed on the day to day compliance of officials with the OIA. That the OIA accountability regime somewhat insulates ministers from the official information system is therefore relatively unproblematic.

Moving next to the constitutional and learning perspectives, whether the OIA accountability regime promotes government learning is of more concern than whether it provides constitutional checks and balances. These rationales for accountability exist in tension; while the constitutional perspective favours a punitive approach to non-compliance with norms, rules and regulations, the learning perspective recognises errors and slip-ups as inevitable and part of the learning process towards better practice.[296] Divergent views consistent with this tension exist for what approach an accountability regime for OIA non-compliance should take. Some argue that strong sanctions should be imposed on officials who are in breach of the law, such as fines (constitutional effect).[297]

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[294] Bovens, Schillemans and 't Hart, above n 15, at 233.

[295] See Wakem, above n 1, at 45–46.

[296] Jarvis, above 189, at 459; Aucoin and Heintzman, above n 238, at 52–53; and Jarvis and Thomas, above n 233, at 295.

[297] See for example the IRM: IRM *Design Report 2018-2020*, above n 12, at 7; and Andrea Vance and Nikki Macdonald from Stuff: Vance and Macdonald, above n 6.

Others say that non-compliance should be placed in a broader dialogue between forum and actor and inform opportunities for improvement (learning effect).[298]

The problem with a penal approach to OIA compliance is that it is too heavy-handed, particularly given that the government is making a conscious commitment to improve OIA practices.[299] Moreover, as noted in Part II, the Law Commission found in its 2012 review that a majority of non-compliance stems from genuine mistakes or misunderstanding of the legislation, as opposed to intentional acts to circumvent it.[300] An emphasis on improving the OIA practices of officials, as opposed to sanctioning them for errors made, is thus the better approach to improve compliance.

There is still an important place in the OIA regime to hold actors accountable for compliance in the more penal, constitutional sense – that is what the Ombudsman's complaints function is for. However, this is just one piece of the puzzle in the broader operating environment for the OIA. As recognised by the Office of the Ombudsman in its *2019/23 Strategic Intentions*:[301]

> … complaint handling has become just one aspect of the work. The public and agencies are increasingly seeking more information, guidance and formal consultation from me as Chief Ombudsman at the outset, in the areas of good administration and decision making … and robust official information practices. I can intervene and investigate on my own initiative to bring about systemic improvement in the public sector and to improve official information practices.

This reflects a green light approach to government control, where the Ombudsman's focus is increasingly to provide agencies with advice, training and resources to assist with OIA compliance before things go wrong, as opposed to being on penalties and sanctions after the fact.[302] Given the Ombudsman's own recognition that systemic improvement will be brought about through this proactive approach, as opposed to retrospective control, an OIA accountability regime that priorities government learning over constitutional assurance is the more appropriate approach.

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[298] Law Commission, above n 37, at [11.96]–[11.97]; and Office of the Ombudsman *Strategic Intentions: 2019/2023* (June 2019) at 30.

[299] See for example Public Service Commission, above n 10.

[300] Law Commission, above n 37, at [11.94].

[301] Office of the Ombudsman *Strategic Intentions: 2019/2023*, above n 298, at 30.

[302] Office of the Ombudsman *Strategic Intentions: 2018/2022* (June 2018) at 14.

Finally, enhancing the legitimacy of government is also of primary importance to any adequate OIA compliance accountability regime. As discussed earlier, the perceived poor performance of the OIA system constitutes a threat to citizens' confidence in government. To address this threat to legitimacy, it is critical that accountability structures demonstrate that there are meaningful consequences for non-compliance, distinct from the current accountability regime which is more akin to an accountability charade.

In summary, the OIA accountability regime has an accountability deficit, when looked at through an assessment which gives primacy to the learning and legitimacy perspectives and secondary weight to the constitutional perspective. Going forward, this paper will make initial suggestions for addressing this accountability deficit.

IV Suggestions for Addressing the Accountability Gap

Government actors are subject to a complex web of accountability arrangements for their compliance with the OIA. However, this regime suffers from an accountability deficit. Some, such as the IRM of the OGP, have conflated "enhancing accountability" with penalising officials who breach the OIA.[303] Part III instead found that the deficit is attributable to a lack of accountability arrangements which promote continuous improvement in OIA practices, not to a lack of penalties for non-compliance. Accordingly, reconfiguring or bolstering accountability to promote government learning should be the starting point for addressing this gap.

This Part advances initial suggestions for how the accountability deficit could be addressed. First, it will discuss encouraging signs of change with regard to the introduction of the Ombudsman's practice investigations that may, with time, slowly close the accountability gap. Secondly, it will discuss other developments that could more squarely and immediately enhance accountability, such as creating a permanent monitoring mechanism. Finally, it will gesture to other non-legal considerations which cannot be divorced from OIA compliance problems, such as government funding. While this paper's suggestions to address the OIA accountability gap is not a complete solution to the problem of non-compliance, it represents one strategy in a wider toolbox for fixing the issues troubling the Act's operation.

[303] IRM *Design Report 2018-2020*, above n 12, at 7 and 37.

A Encouraging signs of change

At the centre of the positive signs of change to OIA compliance across government is Chief Ombudsman Peter Boshier, who was appointed in late 2015. From the beginning of Boshier's tenure, a key focus of his Office has been to improve compliance with the OIA. In part to give effect to the recommendations made in the 2015 Wakem report by Boshier's predecessor, and in part to meet the commitments made by the government under the OGP,[304] a new work programme was launched by the Office in 2017 to improve government agency OIA practices. Key areas of work included the "quick and effective resolution" of OIA complaints; the publication of OIA statistics, such as complaints data; and the carrying out of proactive investigations into agencies' OIA practices.[305]

Boshier describes the Wakem report as "kicking off a new era of work" in his Office, where work was "intensified" with agencies to "support stronger compliance and practice".[306] Practice investigations form a significant part of that strategy, which Boshier has described as "very effective" in helping agencies to improve their OIA practices.[307] Beginning in 2017, an initial 12 central government agencies were identified for review, including the Ministry of Social Development, the Ministry of Education and the Ministry of Justice, constituting a cross-section of large government departments that receive high volumes of OIA requests.[308] Key areas identified where OIA practices could be improved included better leadership messaging on OIA compliance, providing up-to-date OIA guidance to staff and clarifying the role of ministers in departmental OIA responses.[309] A further six investigations into central government agencies and three investigations into local government agencies were completed in 2019.[310]

Crucially, the Chief Ombudsman has recognised the significance of ongoing dialogue between his office and agencies in order for the practice investigations to effect meaningful change to agencies' OIA practices. While the initial 12 investigations were a one-off, the

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[304] OGP *National Action Plan 2016-2018*, above n 89, at 11.

[305] Office of the Ombudsman *Annual Report 2016/17*, above n 10, at 22; and Office of the Ombudsman *Improving the operation of the OIA*, above n 10.

[306] Office of the Ombudsman "Chief Ombudsman revisits Not a game of hide and seek" (press release, 11 December 2019).

[307] Office of the Ombudsman, above n 306.

[308] Office of the Ombudsman *Annual Report 2016/17*, above n 10, at 23.

[309] At 23.

[310] Office of the Ombudsman *Annual Report 2018/19*, above n 165, at 32.

subsequent nine investigations have a "follow up" component.[311] A follow up investigation into the initial 12 agencies reviewed announced in 2020 reflects this shift in approach.[312]

In concluding that the OIA accountability regime was only somewhat adequate from a learning perspective, this paper considered the Ombudsman's capability to complete only a limited number of investigations a year, meaning that it may take some time before lessons can be learnt across government regarding how to improve OIA compliance. However, it may be that in five or 10 years, the picture is different. As the Ombudsman's Office specialist team for conducting practice investigations expands its channels of dialogue to more and more agencies in the public sector,[313] it may be that a critical mass is reached whereby the government as a whole commits to a programme of continuous improvement, with support from the Ombudsman's Office, to achieve better OIA outcomes. Then it could be said that the accountability regime is sufficiently promoting government learning.

At the point where the Ombudsman's practice investigations reach full operation and a learning effect is promoted, the legitimacy of government will also be enhanced. Critically, these investigations provide a mechanism where government actors face *consequences* for non-compliance (or practices that threaten compliance); areas of poor practice are identified by the investigation, suggestions for improvement are made and the agency is expected to show progress in implementing those changes. Demonstrating that consequences follow from non-compliance is crucial to maintaining trust and overall confidence in government. Moreover, the learning process also conveys to citizens that the government is responsive to suggestions on how to improve the operation of an Act which has been plagued by criticism for so long. These factors point to an improved accountability regime that maintains or even enhances the legitimacy of government.

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[311] See for example *Treasury practice report*, above n 173, at 4.

[312] Office of the Ombudsman, above n 306.

[313] See Office of the *Ombudsman Annual Report 2016/17*, above n 10, at 23.

B Possible further developments

While the Ombudsman's practice investigations in their current form promote the continuous improvement and legitimacy of government, additional suggestions are made here for how the accountability deficit could be more squarely and immediately addressed.

1 Broaden the Ombudsman's practice investigations

One possible amendment to the OIA accountability regime would be to broaden the Ombudsman's practice investigations. As they currently stand, the investigations constitute an initial evaluation of a given actor's OIA practices by the Ombudsman, with subsequent follow ups on how the actor is implementing the Ombudsman's suggestions for improvement. However, it is not clear whether these quarterly check ins will cease after a one or two year period, or are indefinite. If it is the former, the dialogue between the Ombudsman and the government agency about how it is performing under the OIA effectively ceases until a further practice investigation is launched. Given the limited capacity of the Ombudsman's Office to conduct investigations, it may be some time before the feedback loop is restarted and government learning can be fostered.

If the practice investigations were reconfigured to be an ongoing monitoring relationship between actor and forum – as opposed to a finite evaluation exercise – a more robust dialogue would be fostered and continuous improvement thereby sustained. This could be achieved by the Ombudsman's office conducting annual or biannual reviews of all actors subject the OIA, adopting the same good practice indicators developed for the practice investigations. Resource constraints would inevitably present an issue, given there are 32 government departments subject to the Act and [314] over 100 organisations subject to the Act, including a further unknown number of boards of trustees.[315] A starting point could therefore be to form ongoing relationships with select government departments as a pilot exercise, before reconsidering funding constraints.

2 Establish a new oversight body

Establishing a statutory oversight body or office holder for the OIA system could be another avenue for creating a permanent monitoring function. Such a body – the Information Authority – was established in 1982, but ultimately disbanded six years

[314] Ombudsmen Act, sch 1, Pt 1.

[315] Ombudsmen Act, sch 1, Pt 2.

later.[316] The Office of the Ombudsman has since effectively adopted an oversight role for the OIA system.[317]

In its 2012 report, the Law Commission recommended that an oversight function should be re-instated, with functions such as policy advice, operational review statistical oversight and oversight of training and annual reporting.[318] The Chief Ombudsman made the same recommendation in 2019, saying: "there is a definite need for greater oversight, coordination and leadership … in relation to matters other than the investigation of complaints".[319] If an oversight body was established, a function could be created to monitor the OIA practices and compliance of government agencies. Such a review function would enhance the learning effect produced by the OIA accountability regime by providing a continuous stream of dialogue about how a given agency is performing under the OIA and what can be done to improve outcomes. The oversight body would replace the role undertaken by the Ombudsman to undertake practice investigations,[320] but would extend this function to a permanent monitoring relationship. Given the Labour Party's promise to rewrite the OIA if elected, there is a real possibility that a new oversight body will be established,[321] offering a unique opportunity to reconsider how government learning could be better promoted by this new accountability arrangement.

Ultimately, the existing function of the Ombudsman's practice investigations represents an encouraging shift towards helping government agencies learn better OIA practices and achieve better compliance. For every investigation that creates dialogue between the Ombudsman and the agency about improving OIA compliance, the accountability deficit is reduced. However greater strides could also be taken to more squarely address this gap, by establishing a more permanent monitoring function for the Ombudsman or a statutory oversight body. Bolstering accountability for the OIA to reduce the accountability deficit will not fix non-compliance altogether. However, it represents one important strategy, among others, to improving the Act's operation.

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[316] Danks Report, above n 1, at [109]; and Law Commission, above n 37, at [13.12(c)] and [13.13].

[317] Law Commission, above n 37, at [13.99].

[318] At [R107].

[319] Letter from Peter Boshier, above n 77, at 5.

[320] The Law Commission recommended that if an oversight body was established, the Ombudsman's functions would be reduced to investigating complaints and issuing guidance: Law Commission, above n 37, at [13.35] and following.

[321] Macdonald, above n 11.

C Non-legal considerations

Notwithstanding the intentions of an accountability-based strategy for addressing non-compliance with the OIA, it must be acknowledged that any legal approach is inevitably hampered by non-legal constraints, such as resourcing. Indeed, it was only with a "significant injection" of funding for the Office of the Ombudsman in the 2016/17 period that enabled it to clear a backlog of OIA complaints accumulating since before 2015.[322] This demonstrates that whether an accountability forum like the Ombudsman has adequate resourcing can not only determine whether an accountability arrangement has real teeth or not,[323] but also whether public trust in government will be undermined if accountability processes are perceived as not functioning properly.[324]

A similar debate about the cost of OIA compliance was prompted in 2016 following the Reserve Bank's decision to impose a hefty charge to release material under the Act.[325] While the decision sparked outrage on behalf of the public, it revealed a fundamental truth about the OIA system: that promoting government openness and transparency comes at a monetary cost. Moreover, the more requests that are responded to by government – and therefore the more "open" government administration is perceived to be – the higher the cost of compliance.[326] While budgetary constraints may necessitate the imposition of user charges for particular kinds of information requests, and necessarily constrain what the Ombudsman can and cannot do, it is of critical importance that the government keeps in mind that such funding is the "price of democracy".[327]

V Conclusion

The passage of the OIA has had a significant impact on the openness of government in New Zealand.[328] Every year, more and more information about government activities enters the public domain. Nevertheless, experience over almost four decades has demonstrated that OIA requests are not always dealt with in accordance with the spirit and

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[322] Office of the Ombudsman *Strategic Intentions: 2017/2021* (June 2017) at 15.

[323] Shane Cowlishaw "Access to information: a 'fundamental right'" (29 May 2017) Newsroom <www.newsroom.co.nz>.

[324] Vance and Macdonald "Redacted – our official information problems and how to fix them", above n 6.

[325] Bronwyn Howell "Paying the price of democracy" (25 January 2016) Stuff <www.stuff.co.nz>.

[326] Howell, above n 325.

[327] Howell, above n 325.

[328] Law Commission, above n 37, at [1.13].

letter of the law. Non-compliance therefore represents a real risk to public trust and confidence in government transparency and administration more broadly.

What can be done to improve compliance, however, is a complex problem. Factors such as agency resourcing, media incentives and the statutory wording of the Act all contribute to non-compliance. One strategy, advanced by the Office of the Ombudsman and the PSC, is to improve agencies' OIA practices. More recently, the Government has said the OIA should be rewritten. This paper has considered a third strategy – advanced by the IRM of the OGP – that government accountability for compliance should be strengthened.

Government actors are held accountable for OIA compliance through a number of different accountability arrangements, spanning from administrative forums to political forums. Notwithstanding this "web" of accountability relations, on closer analysis government actors are not held adequately accountable by the existing accountability regime for OIA compliance. Certain accountability arrangements serve some functions of accountability, for instance the Ombudsman's practice investigations promote a learning effect. However, the regime by and large falls short of imposing consequences for non-compliance, with the effect of undermining government legitimacy.

In finding an accountability deficit, this paper advanced the normative view that an OIA accountability regime will best address non-compliance if it promotes government learning and legitimacy. As the IRM of the OGP rightly pointed out, there is an issue with accountability for OIA compliance in our system. However, it is incorrect to suggest that penalising officials for breaching the Act is the answer; rather, an accountability strategy that helps agencies to learn from their mistakes, as opposed to punishing them for them, will be most effective at improving OIA compliance.

The Ombudsman's practice investigations represent a bright spot of change in the OIA accountability system. As they expand across government, it may be, with time, that the accountability deficit is closed. Nevertheless, establishing a more permanent monitoring mechanism, either via the Ombudsman or through a new statutory body, is another solution to enhancing the learning and legitimacy effects of accountability.

If the OIA is ultimately re-written, an accountability-based strategy ought to be considered as an important part of any statutory-focused solution to addressing non-compliance. As acknowledged in the last Part, whatever course of action is adopted in the future to address non-compliance will inevitably be constrained by funding constraints, whether this be

funding a statutory oversight body to monitor OIA compliance or funding an increase in agency staffing. It is critical however that the government recognises the value and importance of taking strong and decisive action to "fix" the OIA, not just to the legitimacy of government, but also to the health of our democracy.

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Word count

The text of this paper (excluding abstract, table of contents, footnotes, and bibliography) comprises approximately 13,352 words.