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GRAPPLING WITH COMPLACENCY: THE CASE FOR REFORMING NEW ZEALAND'S CONSTITUTIONAL SAFEGAURDS OF MINISTERIAL ACCOUNTABILITY.

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Abstract:

In recent years other Westminster systems, specifically the United Kingdom, Canada and Australia, have been wrestling with how to deal with high profile ministerial integrity scandals. The same could potentially happen here, as there are major vulnerabilities in our constitutional system that mean we cannot be complacent on the issue of ministerial accountability. While New Zealand has not yet experienced major scandal because of its vulnerabilities nor does not it look likely to in the immediate future, this is largely because of luck rather than design. This paper seeks to explore these vulnerability and advocates for more engagement with the question of how we may improve our constitutional mechanisms for promoting ministerial accountability. These mechanisms are primarily: accountability to the prime minister, parliamentary oversight and the criminal law. The vulnerabilities in our current systems can be analysed through the application of Bovens' accountability perspectives, which reveals the key accountability deficits in our system. These are particularly: a shortage of true independence given the reliance on self-policing and the interference of political factors, a lack of accountability bodies with educational and learning functions and the limitations of the criminal law due to its narrow remit and cumbersome processes. We should therefore think about how we can reform the current system. In doing so, there are lessons to be learned from how other Westminster jurisdictions have gone about trying to increase accountability for ministers, particularly the Independent Advisor on Minister's Interests in the UK, the Canadian Conflict of Interest and Ethics Commissioner and Australia's range of Anti-Corruption Agencies. The result of the analysis in this paper is a range of broad principles to guide any future development in this area, for instance: the importance of truly independent bodies, the need for widespread public and political buy-in and the benefits of accountability bodies with wide remits. It is therefore important New Zealand starts on the journey of reform, to better equip us to face potential future scandals.

Keywords:

"Ministerial Accountability", "New Zealand Constitutional Law", "Westminster System".

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises 14,510 words.

Contents:

I: Introduction:

Issues of ministerial conduct and ethics are an increasingly hot-button issue across Westminster democracies, and formally obscure and unknown institutions tasked with holding the executive accountable are coming into increasing prominence in the public discourse and under increasing scrutiny. The UK has been rocked by successive ministerial scandals ranging from bullying, to conflicts of interest and even law breaking by the prime minister, all resulting in few constitutional consequences and seeming impotence from oversight bodies.[1] Meanwhile in Australia the spectre of the ICAC has been hovering over the political environment, with the prospect of a federal Independent Commission Against Corruption now in the pipeline following Labor's victory in the 2022 election.[2] This is set against the backdrop of the powerful New South Wales ICAC having sparked the resignation of the Premier Gladys Berejiklian with its investigation into conflict of interest allegations against her.[3] Finally, in Canada the Prime Minister Justin Trudeau came under investigation from Parliament's Conflict of Interest and Ethics Commissioner resulting in a critical report and much political controversy.[4]

While New Zealand has broadly been spared such public spectacles, it is perhaps worth using this backdrop of the experiences of our constitutional cousins as an opportunity to review our own accountability mechanisms for ministers. We share the same vulnerabilities and should avoid slipping into complacency with the idea we could not possibly have the same problems. These concerns are strengthened by recent warning signs around falling trust in government, including alarming statistics around trust in public institutions and politicians and disturbing manifestations of this in events like the 2022 protests at Parliament. This suggests we should look at our systems for holding ministers accountable for misconduct with fresh eyes.

New Zealand has inherited and broadly left unchanged and unchallenged the traditional Westminster model and assumptions on ministerial accountability. This is primarily based on a "good chaps" theory of government: that those at the top are generally upstanding and trustworthy people and that any rare instance of misconduct can be handled by the prime

[1] Catherine Haddon "Lord Geidt's resignation must lead to a stronger standards system" (17 June 2022) Institute for Government https://www.instituteforgovernment.org.uk/blog/lord-geidt-resignation.
[2] Australian Labor Party "Fighting Corruption National Anti-Corruption Commission" (accessed 1/7/22) Australian Labor Party https://www.alp.org.au/policies/national-anti-corruption-commission.
[3] ABC News "Gladys Berejiklian resigns as NSW Premier after ICAC probe into her relationship with Daryl Maguire announced" (1 October 2021) ABC News https://www.abc.net.au/news/2021-10-01/icac-investigating-gladys-berejiklian-daryl-maguire/100506956.
[4] Mario Dion *Trudeau II Report* (Office of the Conflict of Interest and Ethics Commissioner, Report under the Conflict of Interests Act, August 2019).

minister, the ultimate arbiter of the rules.[5] They do this by applying unwritten convention and discretionary punishments to incidents of misconduct. Parliament also has a role to play, with strong powers to investigate and question ministers. They can also exert pressure on the executive to act against particular individuals and hold the ultimate sanction of being able to remove governments. Above all of this sits the criminal law, which provides means to investigate and punish the most serious forms of corruption and misconduct.

Each of these mechanisms attempt in their own way to build accountability into our system of cabinet government. This raises the question of how effectively they do this. To answer, we must apply an analytical framework for assessing the strength of accountability mechanisms. We will use one developed by Mark Bovens who posits three perspectives through which to analyse and assess accountability mechanisms: democratic, constitutional and learning.[6] These perspectives of accountability often clash, and the constitutional questions this raises are a common theme in the rhetoric surrounding these institutions. This exercise reveals that there are major accountability deficits in our systems of ministerial accountability. For example, although there has been some attempt at codifying internal cabinet processes in the Cabinet Manual, this remains a highly opaque system that is essentially self-policing.[7] Parliament also has major weaknesses as an accountability body because of its politically subordinate relationship with the executive and the deference and political complications that flow from this. Meanwhile the criminal law is too narrowly focussed and inflexible in its processes to be an effective accountability tool.

These vulnerabilities demand attention. Although they have not yet manifested in the form of the kinds of major misconduct scandals seen overseas, that is clearly more a result of luck and external factors of political culture, than because the current system is fit for purpose. If that luck were to turn and political culture were to evolve in a less scrupulous direction, current accountability systems would be unlikely to be able to adequately cope. Action is therefore required now, to head off such issues before they occur.

To consider how New Zealand may go about addressing these problems, it is worth considering how other Westminster systems, more versed in scandal, have gone about attempting to create

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[5] Andrew Blick and Peter Hennessy *Good Chaps No More? Safeguarding the Constitution in Stressful Times* (The Constitution Society, Report, November 2019) at 5-6.
[6] Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13:(4) ELLJ 447 at 462-464.
[7] Grant Duncan "New Zealand's Cabinet Manual: How Does It Shape Constitutional Conventions?" (2015) 68 Parliamentary Affairs at 737-738.

mechanisms to promote accountability for ministerial conduct and assessing their strengths and weaknesses from the different accountability perspectives.

The United Kingdom has taken a very broad approach to ministerial misconduct in its comprehensive Ministerial Code.[8] Compliance with the Code is overseen by the Independent Advisor on Minister's Interests, a notionally independent officer, who has responsibility for providing advice on minister's interests and investigating potential breaches of the Code. The Independent Advisor is however not truly independent, being appointed directly by the prime minister and only being able to undertake investigations at their direction.[9]

Canada presents an interesting contrast to the UK, with its Conflict of Interest and Ethics Commissioner having a much narrower remit than the Independent Advisor, limited mainly to conflict-of-interest issues, but with the Commissioner having far greater independence and statutory authority. It does this by being responsible to Parliament and having its existence, powers and remit set down in legislation, rather than being a purely executive creation like in the UK.[10]

Finally, Australia gives us a range of iterations on the anti-corruption agency (ACA) model across its states (but not currently the federal government). These broadly act as standing Royal Commissions, with similarly wide-ranging investigative powers and with significant independence in launching investigations.[11] The major differences between the states are the scope of misconduct the commissions can investigate[12] and whether hearings are in public or behind closed doors.[13]

From this analysis we can draw a number of lessons about the strengths and weaknesses; what works and does not work about different accountability mechanisms and draw up a set of principles that could guide the design of such bodies in New Zealand in the future. This includes the fact that any oversight body must be truly independent of the executive, with a

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[8] United Kingdom Cabinet Office, Ministerial Code.
[9] Independent Adviser on Ministers' Interests *Terms of Reference* (Independent Adviser on Ministers' Interests, Policy Paper, 27 May 2022).
[10] Parliament of Canada Act RSC 1985 c. P-1, ss 81-90.
[11] Adam Masters and Katherine Hall "Corruption in Australia and New Zealand" in Melchior Powell, Dina Wafa, and Tim A. Mau (eds) *Corruption in a Global Context : Restoring Public Trust, Integrity, and Accountability* (Taylor & Francis Group, Abington-on-Thames, 2019) 155 at 157.
[12] Andrew Goldsmith and A J Brown "As a NSW premier falls and SA guts its anti-corruption commission, what are the lessons for integrity bodies in Australia?" (1 October 2021) The Conversation https://theconversation.com/as-a-nsw-premier-falls-and-sa-guts-its-anti-corruption-commission-what-are-the-lessons-for-integrity-bodies-in-australia-168932.
[13] Masters and Hall, above n 11, at 173.

broad scope of jurisdiction and that it must have widespread political buy-in. It is also important they have an educational function. Sanctions, however, should be left to voters, parliament and in extreme cases the courts. Perhaps most important is to recognise that developing accountability mechanisms is an iterative process of constant review and improvement. This is why it is so important to start these conversations now, so we are better equipped in the future when the need for ministerial accountability mechanisms may arise.

However, it is important to bear in mind that regardless of the system of oversight used, accountability mechanisms will be limited in their effectiveness by the current political climate prevailing in a country. This is something largely beyond the control of the law to influence, although I argue that strong accountability bodies can help to protect a responsible and rule abiding climate better than weaker ones.

II: The Current New Zealand System of Ministerial Accountability:

The traditional expectations of ministerial accountability in Westminster systems are based on the assumption that the political executive would be led by good faith actors. New Zealand's systems of ministerial accountability still broadly fall on these classic Westminster lines. In the words of former British Prime Minister William Gladstone, the British constitution "presumes more boldly than any other the good sense and good faith of those who work it."[14] Ministers could be trusted to act with integrity, to take personal responsibility and do the decent thing and resign if they failed to uphold the high standards of behaviour expected of public office holders, an approach that has been described as the 'good chaps' theory of government.[15] However, in more modern times in New Zealand the self-responsibility aspect of ministerial responsibility has become confused and uncertain. Whether Ministers resign in the face of allegations of wrongdoing is the result of a complex series of calculations which are in reality more political than constitutional. Therefore, it cannot be truly considered a constitutional convention in any real sense.[16] Other methods of self-censure are too subjective to be a reliable source of accountability. While ministers can apologise and claim to be willing to learn from mistakes, there is no tangible way to assess whether this is genuine or sufficient without some form of outside authority scrutinising ministerial behaviour. We cannot then expect ministers to reliably hold themselves accountable.

[14] W. E. Gladstone *Gleanings of Past Years* (Vol. 1, John Murray, London, 1879) at 243.
[15] Blick and Hennesey, above n 5, at 5-6.
[16] Mathew Palmer and Dean Knight *The Constitution of New Zealand : A Contextual Analysis* (Oxford, Bloomsbury Publishing, 2022) at 99-100.

However there is an underlying expectation that if a minister failed to resign, the prime minister has the power to sack them, as it is the prime minister alone who has the right to accept the resignation of or dismiss ministers.[17] Unlike the UK Ministerial Code, the New Zealand Cabinet Manual does not mandate punishment or grounds for resignation for ministers if they misbehave, therefore explicitly leaving these matters entirely at the discretion of the prime minister.[18] The prime minister also has a wide range of options available at their discretion to investigate the conduct of ministers; such as through the Cabinet Office or commissioning an independent investigator like a KC. We are therefore very reliant on the discretion of the prime minister to hold their ministers to account.

In theory parliament should also be able to provide oversight of ministers, through bodies like the privileges committee and its powers to compel ministers to explain their actions before the House. The House then in turn has the ability to exercise pressure on the culpable minister and the prime minister to take action through calls for resignation. However, the nature of parliamentary democracy in New Zealand means the effectiveness of parliament as an oversight body may be doubted, as will be discussed below.

There are also a range of existing independent accountability bodies in New Zealand, but they only tangentially cover the wide potential scope of ministerial misconduct. The Ombudsman cannot investigate complaints against government ministers except in the context of Official Information Act requests and advice provided to them by their departments.[19] The legislation also allows the prime minister to refer any matter they see fit to the Ombudsman for investigation, which does in theory provide scope for addressing ministerial accountability, but in practise this is just another guise of the wide range of discretionary options open to the prime minister to investigate ministers if they see fit. The power is also rarely used.[20]

Other bodies such as the Auditor-General and Public Service Commissioner do have strong independent investigatory powers.[21] However, they are directed more at the conduct of government departments rather than the ministers who head them, even if such cases may

[17] Cabinet Office *Cabinet Manual 2017* at [2.6].
[18] United Kingdom Cabinet Office, Ministerial Code at (1.3).
[19] Ombudsman Act 1975 s 13.
[20] Mai Chen "New Zealand's Ombudsmen Legislation: The Need for Amendments After Almost 50 Years" (2010) 41 VUWLR 723 at 752.
[21] Public Audit Act 2001, Public Service Act 2020.

indirectly relate to individual ministers, as for example in the recent controversies around the award of contracts by government departments to the husband of Nanaia Mahuta.[22]

The criminal law can also hold ministers to account, and do so through the aid of specialised bodies like the Serious Fraud Office. The criminal law is a potentially powerful tool through which to hold ministers to account through a wide range of relevant provisions. The most specific to ministerial misconduct are ss 102 and 103 of the Crimes Act 1961, which covers corruption by and bribery of a Minister of the Crown and MP respectively. The criminal law is rarely engaged though, with these sections having only been used once, against former Mangere MP and Associate Minister Taito Phillip Field, and there have been no other convictions of ministers for actions taken while in office.[23] The bounds of criminality are also narrow, so much behaviour we may consider unacceptable for public officials to partake in may not be covered by it. It is also fairly slow moving, so potentially not suited to the more expedited needs of government administration. Therefore, there are grounds to argue that current systems of independent oversight applicable to ministers in New Zealand are lacking.

III: Causes for Concern in the Current System:

There is scope to question whether any reflection as to the adequacy of current ministerial accountability systems is really needed in New Zealand. The country has, after all, consistently topped international anti-corruption surveys and has not been beset by anything like the kind of recent scandals of its Westminster cousins.[24] Yet perhaps it is precisely this seeming security which poses a risk. Strong accountability systems require constant vigilance and a critical eye being cast over them to ensure they remain up to standard. In this context, there are grounds for concern as to whether New Zealand's accountability mechanisms for government ministers are adequate.

There are concerning signs of complacency when it comes to accountability issues in New Zealand. Transparency International have warned of a risk that "New Zealand's very good record on corruption may reduce its alertness to emerging risks."[25] They also raise the specific issue of the lack of concern of successive governments in further development of their own

[22] Max Rashbrooke "The curse of cosyism in public life is hurting us all" (24 September 2022) Stuff NZ https://www.stuff.co.nz/national/politics/opinion/129973670/the-curse-of-cosyism-in-public-life-is-hurting-us-all.
[23] *R v Phillip Hans Field* HC Auckland CRI 2007-092-18132 9 October 2009.
[24] Transparency International "Corruption Perceptions Index" (25/1/22) Transparency International https://www.transparency.org/en/cpi/2021.
[25] Transparency International New Zealand *New Zealand National Integrity System Assessment - 2018 update* (Transparency International, Integrity System Assessment, May 2019) at 108.

integrity frameworks and a general lack of interest in transparency issues, particularly in comparison to comparable developed countries who have made major strides in this area in recent years.[26] Transparency is not prominent in the political agenda or prominent in high public discourse. This creates an environment of complacency that increases the risk of a future deterioration of ministerial integrity standards.

Even the very cleanest of systems must maintain a rigorous attention to integrity issues and identify areas where future problems might arise. Often, this observation may reveal rather more misconduct lurking below the surface than was originally accounted for. A good illustration of this comes from the introduction of ACAs in Australian states like New South Wales and Tasmania, where despite objections prior to their implementation that they were unnecessary, significant examples of corruption were uncovered.[27] These worries are exacerbated by several other factors which point to a potential systemic weakness on ministerial accountability issues in New Zealand.

Firstly, New Zealand shares many of the same risk factors associated with other Westminster systems which have suffered from more serious cases of ministerial misconduct in recent years. Ministers occupy a unique place in Westminster systems, sitting between the executive and legislature. Generally, it is expected that it is the legislature, acting on their popular mandate, who are responsible for holding the executive to account with rigorous scrutiny. However, in the context of modern partisan party politics and increasingly presidential styles of executive leadership, the ability for the legislature to play that role may be on the decline across Westminster systems.[28] This, combined with the lack of clear separation the between executive and legislature in New Zealand's constitutional system, raises concerns of whether the traditional Westminster separation of powers idea of accountability is still fit for purpose. There is also the unresolved question of what happens if the prime minister themselves are the subject of scrutiny and calls for investigation. This problem was described by the former British Prime Minister John Major as "the elephant in the room" in traditional Westminster systems in terms of ministerial accountability.[29] At present the New Zealand's systems are underdeveloped in this area.

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[26] At 108.
[27] Masters and Hall, above n 11, at 173.
[28] Alex Walker "Upholding standards in public life: the presidential and 'pragmatic populist' challenges" (20/6/22) The Constitution Society https://consoc.org.uk/upholding-standards-in-public-life-the-presidential-and-pragmatic-populist-challenges/.
[29] John Major "Oral Evidence to the Public Administration and Constitutional Affairs Committee on 'Propriety of governance in light of Greensill', HC 212" at Q 641.

We have also seen a worrying rise in corruption scandals and allegations of impropriety in government which are becoming an increasing part of public discourse.[30] This is also perhaps an area in which the introduction of MMP has done more harm than good. The need to maintain delicate coalition and confidence and supply arrangements may cloud the judgement of prime ministers when deciding on how to hold ministers to account for misconduct. An illustration of this can be found in two different cases involving Winston Peters and investigations by the Serious Fraud Office into donations to his party New Zealand First. In 2008 Peters stood down as a Minister following a discussion with the Prime Minister Helen Clark amidst such an investigation. Over a decade later, he stayed on in similar circumstances in which the Prime Minister Jacinda Ardern refused to step in and suspend him.[31] While it is impossible to know the exact reasoning behind the decisions made by the constitutional actors involved, an obvious difference between 2008 and 2020 is that Peters enjoyed significantly more influence and power in the 2020 government than the 2008 one, potentially significantly weighing on the political calculus for Ardern when considering disciplining him. This represents the kind of corrosion of the policing of ministerial conduct that has been seen in the UK for example and raises questions of whether similar situations could arise in New Zealand.

Another cause for concern is the clear trend in New Zealand of falling public trust in government and politicians. Governance and Policy Studies public trust surveys between 2016 and 2020 have shown an average of just 11.8% of New Zealanders indicating they have 'complete trust' or 'lots of trust' in government ministers.[32] There is a clear disconnect between the complacent and self-congratulatory attitude to integrity issues within government with the perceptions of the people they work to serve. The power of this lack of trust amongst large sections of society was demonstrated dramatically in the 2022 protests at Parliament, which showed the serious consequences that can result from such perceptions. Regardless of whether these views of ministers are accurate or justified, they demonstrate a need to bolster confidence in our political system and a powerful way to achieve this could be to strengthen accountability mechanisms surrounding government ministers. It is worth noting that the Nolan Report, which signalled the UK's shift to a more developed system of ministerial accountability, stated that it

[30] Patrick Barrett and Daniel Zirker "Corruption scandals, scandal clusters and contemporary politics in New Zealand" (2016) 66 *International Social Science Journal* 229 at 237-238.
[31] Toby Manhire "As SFO probes NZ First donations, Ardern is visited by the ghost of scandals past" (10/2/20) The Spinoff https://thespinoff.co.nz/politics/10-02-2020/as-sfo-probes-nz-first-donations-ardern-is-visited-by-the-ghost-of-scandals-past/.
[32] Doan Nguyen, Kate Prickett and Simon Chapple *Results from the IGPS March 2020 Trust Survey* (Victoria University of Wellington Institute for Government and Policy Studies, Working Paper 20/04, November 2020) at 5.

could not conclusively prove whether there had in fact been a decline in standards in public life but what was clear was there had clearly been an increase in the rigour of scrutinising of those in public life and a corresponding decline in public perceptions of integrity in government.[33] That itself was seen as sufficient grounds for intervention, and the same logic could apply to New Zealand today.

There are therefore reasonable grounds to believe that vulnerabilities exist in New Zealand's systems for promoting Ministerial accountability. It is then important to avoid complacency about these vulnerabilities and this provides strong grounds to justify a rigorous examination of where the main accountability deficits exist in the current ministerial accountability mechanisms and to investigate potential ways for reform to address these. It is also important to note that constitutional reform in this area is likely to be an iterative process. This paper will later look at the experiences other Westminster jurisdictions have had in implementing reforms around ministerial accountability and perhaps the most important of these is that no accountability system springs up fully formed and perfect when it is needed. They are inevitably a result of a certain degree of trial and error and learning over many years. Creating strong institutions takes time. With little substantive experience of ministerial corruption scandals and the neglect this subject has suffered in the discourse, if we were faced with a major scandal New Zealand may find itself underequipped to deal with it. Therefore, the more action we take now in examining the shortcomings of our systems of ministerial accountability and exploring reform of them, the better equipped we will be to react to problems when they arise.

IV: Evaluating Accountability Systems:

Now we have outlined the current New Zealand system for creating Ministerial accountability we must assess in more detail where the accountability deficits lie, as these deficits are what suggest the need for serious thought about reforming New Zealand's approach to ministerial integrity. Accountability is a key public law principle often alluded to by politicians, lawyers and public officials alike as being a gold standard of administration. Yet to work out how to measure and evaluate how accountable something is or how effective something is at creating accountability we need an analytical framework. Bovens sets out three perspectives for assessing accountability which we will use:[34]

[33] Committee on Standards in Public Life *First Report of the Committee on Standards in Public Life* (Committee on Standards in Public Life, First Report, May 1995) at 3.
[34] Bovens, above n 6, at 462-464.

- Democratic perspective: This perspective values accountability as a democratic means to monitor and control government conduct. It can be characterised in terms of a principal-agent relationship, with the people as the agent who delegate control of government to elected representatives. Therefore, key to this model is the ability for the public to have access to information that allows them to adequately judge the propriety of their agents, and to be able to take action if necessary.
- Constitutional perspective: The focus here is based in classical conceptions of constitutionalism and the separation of powers. Therefore, the key factors are preventing the concentration of executive power and ensuring adequate independent checks and balances. These checks and balances must be powerful enough to have a tangible impact on behaviour.
- Learning perspective: This perspective is focused on promoting the effective operation of government, ensuring the executive is constantly striving for improvement in delivering effective administration. Good accountability mechanisms are therefore those that create incentives to do this and provide effective feedback to ministers.

This model has been chosen because it allows us to explore strengths and weaknesses of accountability mechanisms through several different lenses, reflecting the multifaceted and sometimes contradictory goals and expectations we look for in governance and the different accountability deficits of each model. These perspectives reveal some of the key tensions at the heart of accountability mechanisms and the problems many of them have encountered in their design and function.

V: Assessing New Zealand's Current Accountability Systems:

In our earlier discussion we identified the main pillars of ministerial accountability in our current system. These can be boiled down to: the convention based discretionary system of prime ministerial enforcement, parliamentary oversight of government ministers and the criminal law. Applying the Bovens accountability perspectives to each of these can help to expose the accountability deficits that exist within each of them. This in turn reveals the shortcomings of New Zealand's system of ministerial accountability as a holistic whole, namely the lack of truly effective independent oversight in the system, a lack of transparency and a poor focus on learning.

A: New Zealand's Current Convention Based Discretionary System:

Ministers first point of accountability is to the prime minister who appoints them. Therefore, the first accountability mechanism to consider is the application of convention-based oversight by the prime minister. This may be guided by the cabinet manual and well-established constitutional conventions but is ultimately a highly opaque and discretionary process with clear accountability shortcomings under all perspectives.

1: The Democratic Perspective:

Discretionary convention is a weak accountability mechanism from a democratic perspective because it lacks transparency in content and enforcement. There is democratic accountability in the sense that conventions are created and enforced by ministers who are accountable to the public by a democratic chain of delegation passing through the prime minister and Parliament. However, conventions are obtuse and hard for voters to understand and assess. They are inherently uncertain and changeable, with only those who they apply to being able to define them with certainty. They can never be definitively captured because they are capable of such fluid evolution.

One notable advantage that has emerged as a result of codification of conventions in documents like the Cabinet Manual is the provision of a framework for the public to judge ministers conduct against; something they themselves designed and signed up to. This enables voters or their representatives in parliament to hold ministers to account more effectively. However, enforcement decisions will still be made by the prime minister behind closed doors with no outside scrutiny, which means these accountability mechanisms fail to be visible to Parliament or the public if there is no objective oversight. This breaks a crucial link in the principal-agent relationship chain.

It is also important to remember that codification of conventions in a document like the cabinet manual is not codification in a strict legal sense, rather a written description of conventions that exist outside of the document.[35] Conventions can therefore evolve separately to their framing in a codified document, and indeed they can be abandoned entirely.

Therefore, while citizens have the theoretical means to directly hold Ministers to account for breaching convention, their practical ability to do so effectively is severely limited when the

[35] Duncan, above n 7, at 740.

ministers conduct is only policed by convention applied in an opaque manner and enforced at the discretion of the prime minister.

2: The Constitutional Perspective:

From a constitutional perspective a convention based system is problematic as a means of promoting accountability because of the lack of strong checks and balances. Government is largely rendered self-policing. The prime minister in effect acts as judge, jury and executioner for the conduct of the ministers who they themselves have appointed and therefore who's political fate is closely tied to that of their boss. Therefore, a major issue is that the prime minister's role as umpire and caretaker of Cabinet conventions and standards can come into conflict with their role as partisan political head of a government. This can lead to situations like the Winston Peters example discussed above where it may appear to outside observers that different prime ministers are applying different standards to similar circumstances based on political calculus, rather than established conventions. The problem with self-policing is summed up in the words of fiction's greatest embodiment of the Westminster system Sir Humphrey Appleby: "Minister, two basic rules of government: Never look into anything you don't have to, and never set up an enquiry unless you know in advance what its findings will be."

In such systems there is no objective outside check to ensure conventions are applied appropriately. The legislature cannot effectively act as an independent check because there is no guarantee that conventions will be applied openly and transparently, they can be as blind as the public. While the prime minister may commission independent input into the process, such as a QC or the ombudsman, the fact this option is only available at the prime minister's discretion means it adds no substantive constitutional independence to the process.

There is also the issue with holding the prime minister themselves accountable. While the prime minister could commission an investigation into themselves, from a constitutional perspective it will not be sufficiently independent to provide effective accountability. The issue is that there will be a subordinate power dynamic involved, as well as the fact there are problems with letting someone accused of wrongdoing pick who investigates them, setting their terms of reference and controlling the release of their findings. Convention therefore fails to create a system of adequate checks and balances for ministerial oversight, thereby furthering the centralisation of power and being a poor accountability mechanism from a constitutional perspective.

3: The Learning Perspective:

From a learning perspective, a reliance on constitutional conventions and discretion is a weak accountability mechanism. As discussed with the democratic perspective, there is a lack of transparency and certainty about the definition and application of conventions. Having decisions on ministerial misconduct being made behind closed doors based on unwritten norms, and through ad-hoc investigative approaches makes it extremely hard for the executive branch to learn and improve its operations over time, as there will inevitably be discontinuity and inconsistency across different governments as conventions and processes evolve and change. This makes it hard to build up a consistent level of feedback and consequences for ministerial behaviour. There is a serious risk that political considerations will trump administering convention in a manner that results in institutional learning in government. That involves applying convention both inadequately but also overzealously, in situations where it may be better to reprimand ministers but allow them to stay on and learn from mistakes rather than cave to political pressure and remove them.

While codification has greatly improved continuity and transparency of conventions, this system remains opaque and discretionary in the hands of the prime minister, with a lack of strong incentives to learn and improve. Convention is therefore not a strong accountability mechanism from a learning perspective.

B: Direct Parliamentary Oversight:

Parliament in theory provides the strongest accountability check on ministerial conduct, with its unique powers to scrutinise government action through things like committees and questions in the House and enforcement powers to out pressure on and even potentially remove governments. However, in practise the operation of parliamentary oversight is distorted by politics and is therefore deeply flawed from the constitutional accountability perspective in particular.

1: The Democratic Perspective:

Direct parliamentary oversight is very strong from a democratic perspective. There is a very close and responsive relationship between parliament and the public through elections, which underpins a strong principle-agent relationship that can be applied to scrutinising the actions of ministers. Lines of accountability are clear and well established, and MPs are usually very well attuned to public opinion because they need to be to keep their jobs. Parliamentary oversight is perhaps inherently the strongest accountability mechanism from this perspective

because it lacks the intervening steps of accountability that exist in the other mechanisms- with both the judiciary and executive answering to parliament and then in turn the people. Issues stem from whether Parliament is sufficiently constitutionally independent to give effect to this democratic accountability.

2: The Constitutional Perspective:

In theory Parliamentary oversight is a very strong accountability mechanism from a constitutional perspective, because having one branch of government provide scrutiny over another is clearly preventing the concentration of power in the executive. However, as discussed earlier, in a Westminster system like New Zealand's there is a major issue in the lack of true distinction between the legislature and executive, given ministers sit in the house as the heads of the ruling party or parties. They therefore carry great influence over the decisions of the house, which is exacerbated by the defensive attitude's governments take to potential scandals. The frequent combat between oppositions and governments over allegations of ministerial impropriety dilutes the ability for parliament to give detached objective analysis and critique of behaviour and creates an environment in which a powerful majority government will have the inclination and ability to protect ministers under pressure.[36] This limits the investigative power of parliament significantly and undermines its effectiveness from a constitutional perspective.

This can manifest in a failure to employ traditional parliamentary sanctions against the government in circumstances where there has been a demonstrable failure to comply with the rules. This problem is particularly prevalent if the prime minister themselves were to be the subject of allegations of misconduct, as they wield enormous power and influence over their own MPs, who are therefore likely to protect their leader from scrutiny. Parliamentary oversight of the executive is therefore a deeply flawed accountability mechanism from a constitutional perspective.

3: The Learning Perspective:

From a learning perspective parliamentary oversight of the executive is not a terribly good accountability mechanism. The problem is that any capacity for Parliament to provide feedback and incentives to the executive to improve the delivery of effective administration will be massively coloured by politics. Government MPs are in a subordinate position to the executive,

[36] David Hine and Gillian Peele *The Regulation of Standards in British Public Life: Doing the Right Thing?* (Manchester University Press, Manchester, 2016) at 154.

and therefore may be too deferential to provide effective oversight. They also have a vested interest in the conduct of government that focuses on their own re-election, and the interests of that will often diverge from good administration. Because of this, commentators have noted that clusters of integrity scandals in New Zealand tend to trigger "a defensive response from governments, as opposed to credible and rational policies".[37] On the other hand, opposition MPs may be too critical and unwilling to engage constructively with the government in providing feedback because they are more interested in political point scoring and unable to provide incentives without the support of government MPs. There will of course be exceptions, where parliament can work together and provide constructive feedback, for example in select committees, but generally, parliament has major weaknesses as an accountability mechanism from a learning perspective.

C: Criminal Law:

The criminal law provides a potentially powerful tool for creating ministerial accountability in New Zealand, with robust independence and the ability to levy strong punishments. It is however a system that is relatively procedurally cumbersome and focussed on a fairly high standard of misbehaviour Therefore it may not be ideally suited the ministerial accountability context.

1: The Democratic Perspective:

The use of the criminal law against elected officials could be seen as problematic from a democratic perspective. There is a great distance in democratic delegation between the courts and the people, and no direct means of accountability in a Westminster system.

If a minister is convicted and prevented from running for public office this obviously removes the ability for the public to exercise their own judgement in the matter, undermining direct accountability. This creates a risk of the decisions of the courts coming into conflict with the will of the people if they still support a minister remaining in power. There are a number of non-Westminster examples of conflict between the popular will and the law happening in this way, such with former Brazilian President Luiz Inácio Lula da Silva. Scenarios such as these are obviously far divorced from what we see currently in our system of government, but they should give pause to consider the potential risks of relying too much on the criminal law as a constitutional safeguard.

[37] Barrett and Zirker, above n 30, at 238.

On the other hand, the criminal law is largely made by parliament so there is a clear chain of delegation between the courts and the voters, and they can ultimately influence this process over time, albeit not in individual cases. The strength of accountability will therefore depend on the reasonable and good faith application of commonly accepted laws. Criminal charges themselves being brought can also serve to inform the public in exercising their judgement on politicians. For example, between charges being brought against Taito Phillip Field and his eventual conviction, he lost re-election to his Mangere seat, reflecting a judgement voters had clearly made about his conduct. The criminal law is therefore a mixed bag from a democratic perspective. While often uncontroversial and a reflection of the public will, there is potential for misuse and a clash with democratic demands.

2: The Constitutional Perspective:

From a constitutional perspective the criminal law is a powerful accountability mechanism because of the clear distance between the judiciary and the executive, given New Zealand is widely recognised as being blessed with a strong and independent judiciary who can and will stand up to the executive. In New Zealand the requirement in ss 102 and 103 of the Crimes Act for any prosecution of a MP of Minister for misconduct in public office to seek the leave of a High Court judge means the Judiciary has wide oversight of the process.

However, the narrow scope of the criminal law may be an issue, given the capacity for misconduct and dishonest practises which may be outside its remit and therefore go unaddressed. An illustration of this is the far wider scope of conflict-of-interest provisions contained in the cabinet compared to a criminal section like s 102. This represents a kind of corruption and misconduct that would not be considered sufficient to elicit a criminal sanction, but nonetheless may be unacceptable for holders of high public office to be engaging in. The criminal law in New Zealand in its current state does not and indeed probably cannot address these issues, and therefore leaves them up to other accountability mechanisms discussed above. The criminal law is therefore a powerful accountability mechanism for ministers, but one that applies too narrowly to have the necessarily wide impact on all forms of behaviour requiring accountability checks.

3: The Learning Perspective:

From a learning perspective the utility of the criminal law as an accountability mechanism is limited. Legal decisions take a long time to take effect compared to other accountability mechanisms. For example, in the Taito Phillip Field case over four years passed between

allegations of corrupt practises emerging and his conviction.[38] This means that their ability to have an immediate effect on behaviour of other actors is limited, and the learning potential of cases that do emerge can be devalued by a long and drawn-out criminal process- news cycles and public attention move on quickly.

The criminal law does exercise strong negative incentives on Ministers to act ethically, and the rare convictions that do occur will have a strong normative impact on behaviour because of the serious punishments they deliver. There is also strong learning value in the fact that Judicial decisions are published with in depth reasoning and therefore provide fairly strong feedback for ministers to act on. That said, the narrow bounds of criminality may not be entirely effective at focusing public actors on delivering on their public duties but rather only to not act beyond the definition of criminality. Much misconduct can still occur beneath the threshold of criminality.

D: Summary of Accountability Deficits in the Current System:

The above analysis points to some worrying conclusions. The two main tools for upholding ministerial accountability in New Zealand, discretionary convention and Parliamentary oversight, have major accountability deficits, particularly from a constitutional perspective. This is due to a lack of true independence in the oversight they provide as a result of New Zealand's constitutional structure, leading to a system of oversight run mainly by politicians and based on political considerations. This creates an uncertainty around the enforcement of ministerial standards, which undermines the fairly robust and well-developed rules that do exist as a result of convention and codification in the Cabinet Manual.

The criminal law remains a powerful tool for holding ministerial misconduct to account, with almost impeccable independence. But its processes are slow, and its scope is too narrow and arguable constitutionally unsuited to more nuanced and grey cases of misconduct that arise at the top of government.

All the mechanisms considered are weak from a learning perspective. There is a lack of independent bodies to provide advice to ministers and shape debates and policy on accountability bodies with existing feedback and incentives too blunt and narrowly focused in the case of the criminal law and too politically influenced in the other examples. This is perhaps

[38] *R v Field,* above n 23, at [31].

both a symptom and a cause of the longstanding lack of attention paid to integrity issues in government discussed above.

Overall, there are strong reasons to shake this culture of complacency and engage with the question of how existing systems of ministerial accountability could be strengthened to safeguard from future integrity crises. While for the most part these shortcomings have not yet resulted in major incidents of corruption and misconduct, they nevertheless represent significant vulnerabilities that mean we cannot afford to be complacent and assume this will remain the case in the future. It is important to start having these conversations now, in an environment where questions of ministerial accountability remain mostly academic, than to risk having to address these problems amidst the heat of public scandal and the inevitable political fractiousness that comes with it. As will be shown in the discussion below on reform processes in other Westminster systems, creating robust safeguards is a complex long-term process that requires learning from previous experiences and is rarely straightforward. This is another reason to begin on the reform journey sooner rather than later.

VI: Examples of Other Westminster Accountability Mechanisms:

Given the shortcomings in New Zealand's current system identified above, it is worth analysing how other Westminster systems have gone about attempting to create accountability for ministerial conduct, to see what lessons we can draw from them. It is worth noting that all the other countries considered will share broadly the same accountability systems currently existing in New Zealand. Our focus will therefore be on the unique innovations each of these countries have implemented in their political systems for ministerial accountability, as points of divergence from the generic Westminster approach which New Zealand still more or less adheres to. After describing each of these in context, we will apply the same accountability perspectives used above (democratic, constitutional and learning) to assess their strengths and weaknesses as accountability mechanisms.

A: The United Kingdom:

The UK operated on a system very similar to that of New Zealand for decades before a series of scandals in the 1990s sparked major change. This prompted a wide-ranging and ambitious programme of reform that resulted in a range of different mechanisms, most importantly the Independent Advisor on Minister's Interests. Over recent years however the UK reforms have increasingly been found wanting in promoting effective ministerial accountability.

By the 1990s longstanding assumptions of the conventional Westminster model around ministerial accountability were no longer sustainable as heightened public awareness of integrity standards combined with a number of major scandals involving ministers and MPs had shaken public faith in existing mechanisms. These incidents prompted the then Prime Minister John Major to establish the Committee on Standards in Public Life, with the goal of investigating and making recommendations to the prime minister for improving accountability and transparency in government, both in the short term and as a permanent body going forward. This culminated in the Nolan Report, which made a wide range of recommendations to strengthen accountability systems in government.[39] The Committee continues to be an important feature of the UK constitutional landscape, providing authoritative observation and analysis on public integrity issues in regular reports.[40]

From the initial Nolan Report and its successors, a series of integrity bodies and mechanisms emerged. The system of accountability and integrity bodies that emerged from this environment is a strange one. A wide range of institutions were created with sweeping remits and lofty ambitions, yet with a distinct lack of concrete powers and robust independence common across the system. This all stems from a tacit acceptance of the fundamental premise of the British system; that the prime minister must remain the ultimate arbiter of ministerial conduct, and therefore the purpose of accountability bodies and mechanisms was to aid them, rather than exercise their own authority and judgement.[41]

The most interesting change was the establishment of the office of the Independent Advisor on Minister's Interests. This office was created in 2006 and its existence was incorporated into the Ministerial Code, making it an, until recently, permanent feature of the constitutional landscape.[42] The Independent Advisor has responsibility for overseeing a register of minister's interests and providing ministers with advice on this subject. They also have the role of investigating potential breaches of the Ministerial Code, a non-binding codification of conventions similar to our Cabinet Manual.[43] This potentially provides a powerful accountability tool against ministers, adding truly independent oversight to the process of

[39] Hine and Peele, above n 36**Error! Bookmark not defined.**, at 52-53.
[40] The Committee on Standards in Public Life *Upholding Standards in Public Life* (Committee on Standards in Public Life, Final report of the Standards Matter 2 review, November 2021).
[41] Cabinet Office *Revisions to the Ministerial Code and the role of the Independent Adviser on Ministers' Interests* (Cabinet Office, Statement of Government Policy: Standards in Public Life, May 2022) at [2]-[6].
[42] Tim Durrant, Jack Pannell and Catherine Haddon *Updating the ministerial code* (Institute for Government, IfG Analysis, July 2021) at 10.
[43] Independent Adviser on Ministers' Interests, above n 9.

investigating their conduct, alleviating the self-policing aspects of ministerial accountability under the default Westminster approach. The scope is also wider than many of the other accountability bodies covered in this paper because of the breadth of the Ministerial Code, which includes, for example, personal conduct matters like bullying.[44] It should in theory therefore greatly enhance accountability for ministers.

However, there have been major criticisms of this system. These include the fact that the Independent Adviser is not truly independent in practise, that the existence of the Advisor is not mandated in statute and that the appointment process is entirely at the discretion of the prime minister. [45] They also cannot instigate their own investigations and must get the blessing of the prime minister to do so. There is little settled convention on when the prime minister will ask the Independent Adviser to undertake and investigation, and prime ministers have been reluctant to trigger investigations in cases where the reported facts appear to merit investigation because of worries about political considerations.[46] These problems have come to a head in recent years due to the Boris Johnson led government's lax attitude to constitutional standards and convention. The last two Independent Advisers have resigned, and the Ministerial Code has been increasingly side-lined by a government playing increasingly by its own rules.[47] This has raised serious questions about whether the UK system for ministerial accountability is fit for purpose as an accountability mechanism, which we will assess through the application of Bovens accountability perspectives.

1: The Democratic Perspective:

The Independent Adviser can be seen as a fairly strong accountability mechanism from a democratic perspective. The ultimate decision-making power still rests with the prime minister, with the Adviser acting to bolster their ability to hold other ministers to account by providing investigative capacity and advice. The prime minister being ultimately in charge of the Independent Advisor prevents this unelected actor from being able to unilaterally act against democratically accountable ministers.

On the other hand, the lack of transparency surrounding investigations by the Independent Advisor can also mean that the prime minister, a non-directly elected office, can disguise and

[44] Catherine Haddon "The handling of the Priti Patel bullying inquiry has fatally undermined the Ministerial Code" (20 November 2020) Institute for Government https://www.instituteforgovernment.org.uk/blog/priti-patel-bullying-inquiry-undermined-ministerial-code.
[45] The Committee on Standards in Public Life, above n 40, at [3.29].
[46] The Committee on Standards in Public Life, above n 40, at [2.11].
[47] The Constitution Society *The Constitution in Review* (The Constitution Society, Second Report from the United Kingdom Constitution Monitoring Group: For period 1 July -31 December 2021, February 2022) at 6.

obscure from parliament accountability processes applied to ministers. This can leave us in a position essentially the same as if there was no advisor at all. If an Independent Advisor is not truly independent, then parliament and the public cannot trust its findings and it therefore fails to enhance democratic accountability. This is what has occurred in the UK in recent years with the resignation of successive Advisers following interference with their functions from the Prime Minister's office.

2: The Constitutional Perspective:

In theory the Independent Adviser is stronger from a constitutional perspective than a system like New Zealand's. An Independent Adviser has a number of advantages over the diverse range of ad-hoc investigative bodies available to a prime minister to investigate their ministerial colleagues the UK prior to reform and New Zealand (e.g. the Cabinet Office, Ombudsman, commissioning a KC etc.) Having a well-defined, established and independent adviser avoids the potential problems of a prime minister being able to pick and choose who investigates what and the problems that emerge when they commission an investigation from a subordinate officer, like the Cabinet Secretary. It creates a cleaner system that allows absolute frankness from the Independent Adviser when investigating ministers and therefore a degree of constitutional separation.[48]

However, the lack of true constitutional independence renders this largely, moot. With the position not mandated in statute and the prime minister entirely in charge of appointments, it is entirely up to their discretion who if anyone should hold the office. This combined with the fact the Independent Adviser cannot instigate their own investigations means that they are effectively operating under the dictation of the prime minister. A prime minister acting in bad faith can prevent investigations or ignore the results of them to such an extent that the office is rendered impotent, which is what prompted the resignations of the last two Independent Advisers and left the position unoccupied at time of writing. Therefore, the fact that the Independent Adviser is entirely subject to the authority of the executive means it is of little value from a constitutional perspective. It fails to add a true check on this branch of government, and is therefore only another self-regulatory mechanism, dependent on the compliant behaviour of those in power.

[48] Major, above n 29 at Q 643.

3: The Learning Perspective:

From a learning perspective the Independent Advisor has some strengths as an accountability mechanism. It allows ministers to seek independent and objective advice on their conduct and any potential issues with the rules they may encounter, and accordingly learn and adjust their behaviour based on this. This can serve to ensure there is some degree of pre-emptive action to prevent misconduct by working with ministers on issues that could potentially cause issues before they happen. If the Independent Adviser is seen as authoritative and trustworthy then this can serve to enhance accountability at the top of government.

If effectively utilised, the reports of the Independent Adviser into allegations against ministers can also provide suitable disincentives against misbehaviour if ministers feel they will be acted on. However, the fact the Adviser is so dependent on the discretion of the Prime Minister, means much depends on the good faith engagement of the prime minister in the process. The learning aspect is weakened if ministers are not persuaded consequences will follow misconduct, as they will have less incentive to improve their behaviour. Overall, therefore, the Independent Adviser has some strengths from a learning perspective but is very dependent on circumstances.

In all, the UK model shows superficial and ineffective reform of the default Westminster approach to ministerial accountability New Zealand still broadly adheres to. For all the efforts that went into reform in the 90s and the years following, the major safeguard of the Independent Advisor has been hamstring by a lack of true independence. The one major advantage the UK has over New Zealand is that it has at least began on the reform journey, even if it has ultimately not come to a successful resolution. The UK has institutional experience of reform in this area and institutions equipped to work on it, particularly the Committee on Standards in Public Life, which continues to bang the drum for improvement.[49] This raises hope it may learn from its recent experiences and build stronger accountability mechanisms in the future.

B: Canada:

Canada's innovations in the area of ministerial accountability followed a similar trajectory to that of the UK. However, Canada has proved far more amenable to creating institutions truly independent of the executive than the UK did. This has resulted in a far more robust accountability framework, albeit one that is quite constrained in its scope by legislation.

[49] The Committee on Standards in Public Life, above n 40

The development of Canada's ethics system like that of the UK was spurred by high profile corruption scandals and declining public trust in their elected officials.[50] This culminated in the creation of the Conflict of Interest and Ethics Commissioner through an amendment to the Parliament of Canada Act, making it a permanent feature and its existence unimpeachable by the executive. The Commissioner is also appointed following consultation with the leader of every recognized party in the House of Commons and a vote in the House, ensuring a high degree of political neutrality and trust across parliament for the office.[51]

Like with the UK Independent Adviser, the Commissioner oversees a register of minister's interests and reports on this, but to parliament rather than the prime minister. The Commissioner also has an important confidential advisory function, providing informal advice to ministers on any potential conflicts of interest. Unlike in the UK, ministers are protected from liability if the Commissioner gives them an all clear on any potential conflicts.[52] The Canadian system goes even further in setting the standards the Commissioner assesses ministerial behaviour against in hard law through the Conflict of Interest Act 2006, which mandates the conflict of interest rules that apply to a wide range of public office holders.[53] This means that, unlike in the UK and New Zealand, there are explicit hard law standards for conflict of interest breaches applicable to ministers, which cannot be changed by the executive itself. The Commissioner can also independently launch their own investigations, unlike the UK Independent Adviser. In keeping with the other systems considered in this paper, the Commissioner has no direct enforcement mechanisms to punish this themselves, beyond minor fines for administrative breaches like reporting deadlines.[54] They merely have a reporting function to parliament and the public. It is ultimately still up to the prime minister to make judgements about punishments for breaches of the act, with them in turn having to answer to parliament and voters. They also lack the ability to compel third-party witnesses to be interviewed or to produce documents something that significantly hamstrings their investigative powers.[55]

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[50] Ian Stedman "Resisting Obsolescence: A Comprehensive Study of Canada's Conflict of Interest and Ethics Commissioner and the Office's Efforts to Innovate while Strategically Asserting Greater Independence" (PHD Dissertation, York University Ontario, 2019) at 173-174.
[51] Parliament of Canada Act RSC 1985 c. P-1, ss 81-90.
[52] Mario Dion, Conflict of Interest and Ethics Commissioner of Canadian Parliament "Online Evidence Session with CSPL" (Online submission of evidence to the Committee on Standards in Public Life, 21 June 2021).
[53] Conflict of Interest Act SC 2006, c. 9.
[54] Above n 53.
[55] Gwyneth Bergman and Emmett Macfarlane "The impact and role of officers of Parliament: Canada's conflict of interest and ethics commissioner" (2018) 61:1 *Canadian Public Administration* 5 at 20.

Canada's system is also interesting for the fact that, despite the broader title of 'Conflict of Interest and Ethics Commissioner,' the jurisdiction of the office is almost entirely limited to the former topic of conflict of interests, rather than broader ethics questions.[56] That leaves it with a rather narrow remit compared to the breadth of misconduct other bodies, like for example the UK Independent Adviser and NSW ICAC can investigate. As will be discussed below in the Australian examples, there are merits to a narrower remit for accountability bodies, in that this prevents controversy about overreach and interference with matters more properly addressed in other constitutional spheres. However, the Commissioner's narrow remit has been the subject of some criticism, and a source of frustration for the media and opposition MPs.[57] Overall though the Commissioner comes out strongly from the application of the Bovens accountability framework that follows.

1: The Democratic Perspective:

The Commissioner is a very strong accountability body from a democratic perspective. The Commissioner applies rules set down in legislation rather than an informal code and is appointed pursuant to statute and the approval of MPs, as opposed to at the discretion of the prime minister.[58] This strengthens the chain of accountability to voters and improves transparency of the process of holding ministers to account by ensuring reports are published to Parliament and the public, allowing each to draw their own conclusions. The only potential issue occurs when Parliament fails to properly inform the public by obscuring the accountability process. An example of this happening occurred in 2019, when the Liberal Party majority on the Justice Committee voted to shut down an investigation that implicated Prime Minister Justin Trudeau in a furore over his alleged political interference with a criminal investigation.[59] Politics interfering with accountability processes remains an inherent risk when parliament is involved. That said, an independent oversight entity responsible and reporting to parliament is overall a powerful accountability mechanism from a democratic perspective.

[56] Dion, Conflict of Interest and Ethics Commissioner of Canadian Parliament, above n 52.
[57] Bergman and Macfarlane, above n 55.
[58] Parliament of Canada Act RSC 1985 c. P-1, ss 81-90.
[59] Kathleen Harris "'Coverup!': Opposition erupts as Liberals shut down emergency meeting on SNC-Lavalin affair" (13 May 2019) CBC News https://www.cbc.ca/news/politics/justice-committee-wilson-raybould-trudeau-1.5052976.

2: The Constitutional Perspective:

The Commissioner is fairly strong from a constitutional perspective. They have their status protected by parliament and the ability to make free and frank reports for another branch of government to review, meaning their position is secure and actions independent. However, as discussed throughout this paper, there are potential complications with being responsible to parliament when it is so closely entwined with the political executive, as is the case in all Westminster systems. This makes the Commissioner vulnerable to interference via the executive exerting its influence over the legislature, especially as the Commissioner cannot enforce its own sanctions and must rely on Parliament to do so. There are also vulnerabilities surrounding issues like funding or amendments to the legislation enabling the Commissioner undermining their independence. This means that from a strictly classical constitutional perspective parliamentary oversight is problematic. However, in the purely Westminster context it is still a fairly strong accountability mechanism, and the distance between the oversight body and parliament can add an extra level of constitutional independence. This allows one branch of government to effectively oversee another and counter the concentration of power by the executive.

3: The Learning Perspective:

The Commissioner is a very strong accountability mechanism from a learning perspective. This is for many of the same reasons as the UK Independent Adviser, providing a source for honest advice for ministers on their affairs to prevent conflicts-of-interest before they occur and therefore improving integrity in public administration. The fact that the Commissioner is more independent by being accountable to Parliament means that it is more likely to be effective though because it can back up this strong base of feedback with powerful incentives to act in line with good practise through reports to parliament if ministers do misbehave.

One particular strength of the Canadian system is the ability of Ministers to consult the Commissioner on any concerns they may have about any of their potential conflicts of interest. If the Commissioner gives the all-clear on a situation, then the person seeking advice is immune from liability. Such a mechanism builds trust and allows potential issues to be addressed before they become a problem.[60] This contrasts with the UK model, where the Minister remains personally liable for taking action to avoid a conflict or the perception of a conflict, even if they take the advice of the Independent Advisor.[61] The former is the stronger from a learning

[60] Dion, Conflict of Interest and Ethics Commissioner of Canadian Parliament, above n 52.
[61] United Kingdom Cabinet Office, Ministerial Code at (7.2).

perspective because it provides ministers with an incentive to be honest and above board in dealing with their assets, and for advice provided to them to create a culture of good practise. There is a real benefit in the fact that the Commissioner can act to prevent potential issues cropping up rather than just being a mechanism of rooting out and punishing misconduct after it has occurred. There is however a school of thought that questions whether the combination of investigative and educational functions is healthy for accountability bodies. The issue with this stems from placing an accountability body in a situation of needing to decide whether to exercise investigatory powers in relation to a matter about which advice is sought, creating a tension between the two functions.[62] Overall though, the Commissioner still has the potential to be a very strong accountability mechanism from a learning perspective.

In summation, the Canadian Commissioner presents a highly effective innovation in promoting ministerial accountability in a Westminster system. Having an oversight body accountable to parliament cements its independence and creates strong accountability ties from a democratic and constitutional perspective. It is very strong from a learning perspective as well. The Commissioner is also perhaps the most politically established of the accountability models considered in this paper, with its status being relatively uncontroversial and well accepted. Potential issues do exist though, surrounding the fairly narrow scope of its remit and somewhat limited powers. In these regards it presents an interesting contrast to the Australian models to be discussed next.

C: Australia:

Australia's system of anti-corruption agencies (ACAs) are the most interesting and relevant feature of their mechanisms for promoting ministerial accountability, providing robust independent oversight. The primary focus here will be on the original, most developed and most empowered of the State ACAs; the NSW Independent Commission Against Corruption (ICAC), although lessons will be drawn from the other bodies as well. This is perhaps the most powerful, but also the most controversial of the accountability bodies considered.

The NSW ICAC was the result of an increasing public focus on corruption issues in NSW over the course of the 1980s, with a number of high-profile scandals involving senior public servants and politicians. The came to a head in 1988, with the incoming Coalition Government of Nick Greiner promising sweeping action of corruption issues and creating a powerful and

[62] Richard Bingham *Ministerial Propriety in Queensland* (Speech given at Australian Public Sector Anti-Corruption Conference, 17-19 November 2015) at 15-16.

independent institution to counter it.[63] The ICAC, like the other ACAs, is essentially a standing Royal Commission, able to set its own terms of reference within the very broad framework of its legislation. Although it can act on recommendations from Parliament, it has the power to launch its own investigations.[64] This also means that it is not responsible to any government minister for its function, with its only responsibility to a Parliamentary committee and an independent inspector.[65] Other states have subsequently implemented their own ACAs modelled on the NSW ICAC. These vary in the scope of their powers and remit, although none are as powerful as the original. ACAs also have educational functions and purposes, to promote integrity values in public service.[66]

The ACAs vary in their powers, although all have significantly more teeth than any of the other bodies considered in this paper, other than the criminal law. Common to all of them includes the abilities to obtain documents, wiretap, compel witnesses and search and seizure.[67] These powers are extensive and often used to their full extent. For example, the secret taping of the private conversations of Premier Gladys Berejiklian and fellow NSW MP Daryl Maguire, who she was at the time in a relationship with, shows just how dramatically wide reaching the investigative powers of the ICAC can be.

One point of difference between the ACAs is their ability to hold public hearings. While all have the choice to hold hearings in private, many have a severely restricted ability to hold them in public.[68] The SA ICAC for example holds almost no hearings in public, making it one of the most secretive ACAs in the country. The NSW ICAC, as the most robust and powerful by contrast has a wide remit to hold hearings in public.[69] The status of public hearings is controversial. It is widely seen as best practise by independent observers and experts because it clearly bolsters the transparency of ACAs and improves public engagement.[70] However, opponents argue that public hearings create a presumption of guilt and a media circus in high profile cases that does not aid the cause of justice. An oft-cited example are the circumstances surrounding the resignation of former NSW Premier Barry O'Farrell. O'Farrell came under

[63] Angela Gorta 'The NSW independent commission against corruption's experience in minimising corruption' 11:1 *Asian Journal of Political Science* 1 at 2.
[64] Independent Commission Against Corruption Act 1988 (NSW) s 20.
[65] Independent Commission Against Corruption Act 1988 (NSW) Part 7, Part 5a.
[66] Independent Commission Against Corruption Act 1988 (NSW) s 3a.
[67] Masters and Hall, above n 11, at 164-165.
[68] Above n 11, at 164-165.
[69] Goldsmith and Brown, above n 11.
[70] Transparency International Australia and Griffith University *Australia's National Integrity System: The Blueprint for Action* (Transparency International, National Integrity System Assessment, Australia, November 2020) at 3.

immense media scrutiny after he appeared to intentionally mislead the ICAC in a public hearing in which he could not recall receiving a $3000 bottle of wine he had in fact been given. He eventually resigned because of this, despite claiming it was the result of a genuine memory lapse. He was in fact eventually cleared of any wrongdoing by the ICAC. Many commentators argued the public nature of the investigation had created a media frenzy which forced out an innocent man.[71]

ACAs cannot bring prosecution or sanctions against those they investigate. They rely on referrals to the Director of Public Prosecutions in criminal cases and reporting to Parliament and the public for less than criminal misconduct.[72] That said, the normative value of ACA findings is very powerful. As demonstrated by the O'Farrell incident, merely the suggestion of wrongdoing was enough to build sufficient pressure to spark a ministerial resignation.

Another major source of controversy around Australian ACAs has been the question of the scope of the subject matter under their jurisdiction. This debate has been most obviously played out around the NSW ICAC and the issue of its remit to investigate corruption was limited to the criminal standard. This came to a head, when Nick Greiner himself, came under investigation by the ICAC. The ICAC found him guilty of corrupt practises, despite his conduct not meeting the criminal threshold. Grenier famously defended himself on the basis he was only "technically corrupt". This resulted in the issue going to court, where the NSW Court of Appeal ruled that the ICAC had unlawfully exceeded its jurisdiction in interpreting the Premier's actions as corrupt conduct and going beyond the criminal standard.[73] However, in response to this decision, the NSW legislature passed an amendment to the legislation governing ICAC to extend the definition of corruption in the Act to include a substantial breach of code of conduct applicable to a MP or Minister, and conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned into serious disrepute.[74] This is a fascinating development. Firstly, it de-facto codifies the Ministerial Code of Conduct into hard law which can be applied as a rigid standard by the ICAC. Second, it creates the incredibly broad and subjective standard of bringing into serious disrepute, which gives the ICAC enormous scope to make findings against politicians for misconduct.

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[71] AJ Brown "Explainer: what is the proposed Commonwealth Integrity Commission and how would it work?" (2 November 2020) The Conversation https://theconversation.com/explainer-what-is-the-proposed-commonwealth-integrity-commission-and-how-would-it-work-140734.
[72] Independent Commission Against Corruption Act 1988 (NSW) s 53.
[73] *Greiner v ICAC* (1992) 28 NSWLR 125 (NSWCA).
[74] Independent Commission Against Corruption (Amendment) Act 1994 (NSW).

This question of how much ACAs should interfere with questions of less than criminal misconduct has never gone away and continues to be a key point of contention. Some commentators argue that including less than criminal misconduct is not in keeping with the purpose of the ICAC and that these responsibilities cloud its function and create a risk that findings tar all politicians with the same brush of quasi-criminality for breaches that can be of widely differing severity. It also risks encroaching on constitutional judgements for holding ministers to account best left up to the Premier and Parliament.[75] On the other hand, some commentators argue that creating such a division would be arbitrary and handicap the ICACs investigations, given that "in the real world, there are no bright lines between criminal corruption and serious misconduct" and that limiting themselves to criminal matters means they add precious little value to the existing system.[76] The other ACAs diverge on how much they import these non-criminal standards into their jurisdiction, and this continues to be a major source of disagreement.

An interesting aspect of the ACA system has been its investigations into so called 'grey corruption.' Grey corruption was defined by the Victoria Independent Broad-based Anti-Corruption Commission as questionable behaviour and decision making that benefits a person's associates or networks without amounting to criminal conduct but the effect of which is still deeply damaging to public confidence in democracy and its institutions.[77] This is the kind of corruption independent bodies like ACAs are uniquely qualified and well placed to investigate and expose, but which the Canadian model for example largely fails to address. The strengths and weaknesses of the approach taken by the ACAs can be further analysed through the application of the Bovens accountability perspectives.

1: The Democratic Perspective:

The democratic legitimacy of ACAs as an accountability mechanism has been one of the most fiercely contested issues across their existence. One major criticism touched on above has been that there is potential for investigative bodies to be overzealous and unfairly impinge the reputations of politicians in the course of their investigations. Critics of the ACAs argue that

[75] Gary Sturgess "A federal ICAC must end the confusion between integrity questions and corruption" (6 October 2021) The Conversation https://theconversation.com/a-federal-icac-must-end-the-confusion-between-integrity-questions-and-corruption-169360.
[76] Goldsmith and Brown, above n 11.
[77] Independent Broad-based Anti-corruption Commission *Operation Watts Investigation into allegations of misuse of electorate office and ministerial office staff and resources for branch stacking and other party-related activities* (Independent Broad-based Anti-corruption Commission, IBAC Special Report, July 2022) at [812]-[813].

the public nature of its operation risks creating a presumption of guilt whenever politicians are investigated or questioned, even if they are later cleared of any wrongdoing. It therefore has the potential to wreck reputations and careers based on little to no substantive basis.[78] This concern about reputation inherently has democratic implications because an unjustified besmirching of an elected representative's reputation is an interference with public democratic decision making, especially given they are unelected bodies and not directly accountable to the public.

However, the ACAs do not actually make formal sanctions against actors, merely reports and makes recommendations.[79] Any consequences that follow from an investigation are the result of factors beyond the ACAs control, usually political pressure leading to sackings and resignations, or the intervention of the criminal law. There is an argument that from a democratic perspective, ACAs actually greatly enhance accountability by better informing the public on the conduct of their elected officials. It is putting more information before the public and therefore improving their ability to hold the government to account. If the public misinterpret this information and presume guilt unfairly, that is hardly the fault of the accountability mechanism. ACAs certainly do this well, proving to be highly effective at exposing corruption in places that had previously assumed themselves immune from it.[80] These bodies are therefore powerful accountability mechanisms from a democratic perspective.

2: The Constitutional Perspective:

From a constitutional perspective ACAs are a very powerful accountability mechanism. They are totally outside the control of the executive, with broad independent powers to launch investigations and compel evidence, making it effectively impossible for the executive to dodge scrutiny. They can bolster the ability for the judiciary and legislature to hold the executive to account by exposing corruption and misconduct and allowing the other branches of government to act on it. For example, a no-confidence vote in the Premiership of Nick Grenier following the NSW ICAC investigation caused him to resign and the same body's investigations has led to criminal charges against multiple ministers.

The one major worry from a constitutional perspective is the lack of independence from the legislature and therefore the indirect influence of the executive over the body given the lack of distinction between those two branches in a Westminster system like Australia's. This can and

[78] Sturgess, above n 75.
[79] Independent Commission Against Corruption Act 1988 (NSW) s 13.
[80] Masters and Hall, above n 11, at 173.

indeed has led to situations where the legislature may cut back on ACAs powers and scope to investigate, arguably for politically motivated reasons stemming from the executive. An example of this has recently happened with the "gutting" of South Australia's ICAC.[81] ACAs lack constitutional entrenchment, which would be the ultimate safeguarding of its status. However overall, ACAs are still a very strong accountability mechanism from a constitutional perspective.

3: The Learning Perspective:

ACAs are fairly strong from a learning perspective, and this is an explicit function of their purpose, to educate the public and public officials.[82] This includes the ability to undertake research and provide advice to government on general anti-corruption matters. This has the potential to be very effective in providing feedback in improving the operation of government.[83] This combines with the negative incentive of investigations into misconduct to provide a powerful combination of learning functions.

However, Australian ACAs combination of education and learning functions with their investigatory role has been doubted by some observers, who point to a lack of rigour in assessing the effectiveness of these functions. While much emphasis is placed on the educational function in the publicity around ACAs, in practise this function can be neglected and taken for granted.[84] These institutions are perhaps less effective than an oversight body like in the UK or Canada though because it is only an investigative, and not also an advisory body for ministers personally. It therefore lacks the ability to head off issues before they occur and build dialogue with ministers that those other bodies have. The sometimes-antagonistic relationship with politicians is also less conducive to it providing positive incentives and feedback to improve the operation of government.[85] These bodies are therefore overall, a fairly strong, if imperfect accountability mechanism from a learning perspective.

Overall, Australian ACAs present a strong example of just how robust and powerful accountability bodies can be. They have great constitutional independence and are also strong from the democratic and learning perspectives. They have also been demonstrably effective given the sheer number of high-profile cases they have intervened in, something no other

[81] Goldsmith and Brown, above n 11.
[82] Independent Commission Against Corruption Act 1988 (NSW) s 2A.
[83] Masters and Hall, above n 11, at 163.
[84] Catherine Cochrane "Teaching integrity in the public sector: Evaluating and reporting anticorruption commissions' education function" (2020) 38(1) *Teaching Public Administration* 78 at 87.
[85] Samuel Siebie Ankamah "Why do "teeth" need "voice"? The case of anti-corruption agencies in three Australian states" (2019) 78 Australian Journal of Public Administration 481 at 490.

mechanisms considered in this paper comes close to. The ACAs also highlight a number of different lessons around the controversy that can surround accountability bodies if they are seen as overstepping their boundaries. Ultimately there may be a trade-off between having accountability bodies with a narrower remit and a less contentious public profile like in Canada, and those with a broader scope and stronger powers that come with greater controversy like the Australian ACAs. It is ultimately an open question which is better.

VII: Designing a Ministerial Accountability System for New Zealand:

With the strength and weaknesses of different systems of ministerial accountability now considered from a range of perspectives, we will move on to considering how these can be applied to a New Zealand context. As discussed above, it is important that New Zealand start having conversations about reform in this area, to shake the complacency that exists despite the major systemic vulnerabilities. At this stage, there is probably more merit and use in simply drawing out broad lessons rather than getting bogged down in the detail of making substantive reform proposals.

A: Any Oversight Body Must be Truly Independent of the Executive:

A major issue that has been highlighted in the above analysis, particularly from a constitutional perspective, was the lack of sufficient independence of accountability bodies from the executive they are tasked with holding to account. The UK example of the Independent Adviser of Ministers Interests demonstrates the importance of true independence for any oversight body, given the extent to which it has been rendered totally impotent. The Canadian Commissioner and the Australian ACAs are useful contrasts demonstrating the benefits of true independence from the executive. The NSW ICAC in particular shows how true independence can embolden an accountability body to even investigate Premiers without fear of reprisal. By being responsible to their parliaments, these bodies have greater freedom to carry out their functions. Being responsible to parliament also makes accountability bodies significantly stronger from a democratic perspective, because parliament can provide oversight and prevent abuses by what is ultimately an unelected body.

A vulnerability all the overseas bodies discussed share, and which would also apply to any system adopted in New Zealand, is the risk of parliamentary interference. Parliament being sovereign, and being so closely entwined with the executive, means it will always be an imperfect safeguard of oversight bodies. New Zealand will have to accept a certain level of vulnerability in that a powerful executive in command of an obedient parliamentary majority

will be able to neuter an accountability body if it wants to. What is important is ensuring clarity and transparency in systems of accountability, so when departures from accepted standards occur this can be highlighted and therefore brought before the ultimate accountability body in this country: the voting public. This could be loosely analogised to the culture of justification underlying the legal status of the New Zealand Bill of Rights Act, where the goal is not creating hard legal barriers to the executive and parliament doing what they want but making sure they are explicit about it and highlighting their actions to the public.

B: There Must be Widespread Political Buy-in:

One crucial feature of designing an effective system of accountability is ensuring any body created has a strong legal foundation and broad political support. This improves an accountability body's democratic legitimacy and better entrenches it status by ensuring that its mission is widely understood and accepted and preventing disagreement and controversy further down the line. These factors create stability and certainty around an organisation, allowing it to get on with its job and attract a committed pool of talent to work for it. Without such certainty it will be hard for an accountability body to attract good quality public servants, who will not commit to an organisation facing an uncertain lifespan and constant political pressures and interferences.[86] A good example of this risk can be seen in the case of the UK Independent Advisor, the last two of which both resigned over frustration of their function, leaving the office in a position where it may be almost impossible to attract credible successor.

Persistent uncertainty and political disagreement over the purpose and functions of accountability bodies is another cause of problems. It is this that rendered Australian ACA bodies much less authoritative and much more vulnerable to partisan attack than they otherwise may have been. The NSW ICAC shows how having these debates on purpose and function further down the line can create damaging controversy and unresolved tensions. The jurisdiction of the ICAC to review major breaches of convention was an issue that had to be resolved in court before being immediately contradicted by parliament amidst a partisan atmosphere. These questions continue to be the basis for disagreement and controversy that crops up again and again, weakening the authority of the ICAC.[87] In neighbouring states similar confusion and controversy has been the basis for actions to disempower ACAs, such as

[86] Hine and Peele, above n 36**Error! Bookmark not defined.**, at 300.
[87] Sturgess, above n 75.

with the SA ICAC, showing the risks of a lack of solid foundation.[88] This shows that uncertainties created at the inception of accountability bodies can turn into persistent problems.

Any accountability body created in New Zealand should therefore come from a place of widespread political approval and with clearly delineated powers and jurisdiction, to avoid disagreement in the future. This presents a strong case for New Zealand to act now, in a relatively uncontested political environment, where consensus on accountability issues may be more easily gained and capitalised on, as opposed to waiting until events force action in a fractious political context. This avoids a situation like the UK is currently in, when questions about improving standards bodies become inevitably caught up in and undermined by the politics of the day.

Buy-in and understanding from the public is even more important than it is from politicians. A big reason for the continuing success and the secure status of the NSW ICAC is its high public profile and trust. This helps create an environment in which it is much harder politically for the executive to take action to neuter accountability bodies, and therefore emboldens them to be more robust in scrutinising the executive, without fears of retribution.[89] By contrast, the UK shows how easy it is to sideline an accountability officer who does not have a high public profile and recognition for their role. It is therefore crucial that the implementation of any accountability body comes from a process of wide consultation and publicity.

C: Accountability Bodies Should Not be Responsible for Sanctions:

None of the overseas models discussed have the power to deliver sanctions for misconduct. This is the correct approach in a Westminster system of government. Ultimately, the appointment, dismissal and disciplining of ministers is a matter for the prime minister's discretion with accountability to parliament and the voting public. While a strict application of the constitutional perspective might support an independent accountability body having punitive powers, any such move severely upend our current system of government. It would also risk severely politicising any accountability body if they were able to impose or even recommend particular sanctions be taken against ministers, as well as being problematic from a democratic perspective of accountability because of the interference with the voting public's decision making.

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[88] Goldsmith and Brown, above n 12.

[89] Jenny Fleming "Conduct Unbecoming: Independent Commissions and Ministerial Adversaries" in Ian Holland and Jenny Fleming (eds) *Motivating Ministers to Morality* (Taylor and Francis Group, Abington, 2001) 142 at 156.

Therefore, the main role of an accountability body must be promoting transparency, rather than punishing misconduct. They can do this by ensuring that allegations of misconduct are investigated and reported to the head of the executive, Parliament and the public openly and objectively. It is then for each of those to pass judgement with direct lines of accountability in between them to ensure responsible conduct and make sure consequences follow as they each see fit. Referral to the criminal law remains an available and effective avenue for the most severe of offences that reach that threshold.

D: The Remit of Accountability Bodies Should be Wide:

A persistent question across the accountability systems studied has been how broadly to define the scope of conduct under the jurisdiction of an accountability body and their powers. On the one hand we have the narrow remit of Canadian Commissioner whose jurisdiction is limited to effectively just narrowly defined conflict of interest issues. On the other we have the controversy surrounding the NSW ICAC and how much it should look into less than criminal "grey corruption", particularly when public hearings risk creating presumptions of guilt. This tension is exacerbated by the significant powers the ICAC has while undertaking these investigations: such as public hearings and wiretapping. This is again in contrast to the Canadian Commissioner who has much more limited coercive investigative powers.

Determining the breadth of misconduct accountability bodies should be able to investigate is a complex issue. The Canadian Ethics Commissioner certainly shows some of the advantages of a body with a narrow focus. This is easier to administer and less controversial given its clear edges. However, they would not be able to investigate issues such as 'Partygate' in the UK for example and the large amounts of grey corruption that have been exposed across Australia. This would leave large amounts of potential misconduct lacking effective oversight, particularly the kinds of grey corruption most likely to be present at the top of government, and indeed this has been a criticism levelled at the Canadian Commissioner. Narrow terms of reference also provide an obvious means by which the executive can control and limit the effect of an accountability body in a manner that is more straightforward than broader, principle-based standards. Similarly, an accountability body with weak powers has less scope to stir controversy as a result of overreach, but will also be far more limited in its ability to effectively carry out its functions, particularly if faced with an uncooperative environment.

As discussed, there are potentially issues from a democratic perspective with publicly turning the harsh lens of an accountability body on elected officials, particularly when this is based on

less than criminal and uncertain kinds of grey corruption. This has been a common criticism of the NSW ICAC for example However, these problems stem from public perception, not the substance of the activities actually carried out by the ICAC. It does not hand down punishments and is generally fair and accurate in its reporting. Incidents like the O'Farrell resignation are the result of a frenzied political and media climate latching onto the activities of the ICAC. This is an issue beyond the scope of the law, and it is not the fault of a body like the ICAC if its actions are misrepresented and misconstrued.

The goal of an accountability body should be bringing matters to the attention of voters and parliament and leaving them to make decisions on what consequences follow, not imposing their own sanctions. This reduces many of the worries around them having too wide a scope. Investigating ministers for misconduct by ministers should not be seen as interfering with democratic decision making or constitutional as long as it is objective and accurate, and its use of coercive powers properly regulated by Parliament. The remit of accountability bodies should therefore be wide, to cover a broad range of misconduct.

E: The Role of the Educational Function:

As discussed under the learning perspective headings above, a vital and oft-overlooked aspect of accountability bodies is their educational role, given it can head off any issues before they emerge, rather than being the ambulance at the bottom of the cliff when punishing misconduct. All the bodies discussed have the ability to provide input to the policymaking process and to liaise with public bodies and actors to encourage the improvement of integrity standards and accountability mechanisms. This is an important role that should be recognised and implemented.

The other educational role is providing private advice to ministers on their obligations. The Canadian Commissioner for example shows the strengths of having a trusted independent adviser ministers can turn to for advice on conflict-of-interest matters. The fact this advice is in confidence and indemnifies those who receive it if they get the all-clear from the Commissioner, provides strong incentives to be open and honest in consultation. By contrast, in the current system in New Zealand, where Ministers get support from the Cabinet Office, they are not indemnified.[90] The Canadian system is overall much stronger, because of the stronger incentives it creates to be open and seek consultation it can therefore act as a good model for New Zealand reform in this area. That said, care should be taken to properly delineate

[90] Cabinet Office, above n 17, at [2.59]-[2.61].

the advisory and investigative roles of an accountability body, as that has sometimes been a source of controversy in Canada and Australia.

F: Developing Accountability Bodies is an Iterative Process:

A common factor to all the overseas jurisdictions considered is that the development of accountability bodies is not a one-off process of reform. Each is the result of decades of experience with integrity crises and series of reforms to address them. Lively debate continues to exist around each of them and will likely continue to do so well into the future. To take the UK example, recent crises which have highlighted the shortcomings of the integrity system have prompted a fascinating range of proposals for reform proposals to address these, coming from a range of sources.[91] These are building on past work and in particular the principles developed by the Committee on Standards in Public life which continue to be widely respected guiding principles for integrity in public office. This demonstrates the benefits of having a body of thought on and experience of reform to fall back on, something broadly lacking in New Zealand on this subject. We should therefore not see any process of reforming New Zealand's accountability standards as a one off, but rather the start of a long journey to creating a more secure system of ministerial accountability. This supports the arguments to start that journey now, to better equip us to handle issues that may arise in the future, rather than being complacent and reactively waiting for their occurrence to force change.

VIII: Conclusion:

Accountability is one of the key principles upon which good government is based. There is increasing recognition that many of the old Westminster assumptions of ministerial accountability are no longer fit for the modern age. We cannot trust that New Zealand's institutions will always be run by 'good chaps' or that parliament will always be an objective and effective scrutineer of executive action. In these times of declining trust in our democratic institutions and those at the top of them more robust accountability systems are needed to solidify that trust and protect from any future backsliding in ministerial standards.

Ensuring there is accountability at the top of government is a difficult challenge within the confines of New Zealand's constitutional system. The overseas systems discussed illustrate attempts to wrestle with this fact. None are perfect, yet all have lessons to teach us in how we might go about improving our own systems. We must build bodies that are independent, widely accepted and understood, and with a broad remit to investigate and educate governments to

[91] See for example: Major, above n 29 at Q 632 and Committee on Standards in Public Life, above n 40.

promote their transparency and therefore accountability to the voting public. These will hopefully contribute to protecting us against future ministerial misconduct and corruption.

Institutional safeguards can however only do so much. It is worth reflecting on the limitations of accountability agencies in improving integrity standards in government. Australia, and in particular NSW, for all the institutional strengths of its ACAs, still has significant problems with soft corruption in its political systems. Many commentors admit that ultimately there are limits to what integrity bodies can do to make the political class persistently act with an ethos of internalised personal integrity.[92] However, while Australia still suffers from a high level of corruption at the top of government, at least when subjected to public scrutiny and criticism this still elicits culpability, shown by the resignations of so many ministers and premiers. The same cannot be said for the United Kingdom, where an increasingly shameless political culture has taken root at the top of government, totally averse to admitting fault or giving in to public pressure for culpability or resignation in the face of misconduct.

By contrast, for all its institutional shortcomings and vulnerabilities discussed, New Zealand has not suffered anywhere near the same scale of scandal and controversy as these other jurisdictions. This highlights the limits of institutional safeguards. The UK and Australia have better ones in place than New Zealand, but do not have higher levels of integrity in government. Institutional accountability is ultimately a complex and unpredictable area. We also cannot know how any new accountability mechanisms would operate in practise. They may or may not prove effective and may cause unforeseen issues of their own, as for example the Australian ACAs have.

It is important to not oversell this point. This does not mean that institutional safeguards are worthless, rather that other factors are very important in influencing the prevailing culture of integrity in government, and that culture is something the law has very little power to effect. We should still do our best in creating the strongest institutional safeguards possible, and hope that those these apply to strive to match their principles in their personal attitudes and conduct. We can also hope that visible and high-profile institutions diligently doing their jobs will better enable the public to make sure this happens.

[92] Michelle Grattan "View from The Hill: The challenge of 'grey' corruption and creating a culture of integrity" (20 July 2022) The Conversation https://theconversation.com/view-from-the-hill-the-challenge-of-grey-corruption-and-creating-a-culture-of-integrity-187375.

While there may well be political resistance to increasing outside scrutiny of ministers, this is a goal worthy of working to overcome any such obstacles. Increased scrutiny over the executive, through systems which people can trust, will strengthen the credibility of government and play some small part in rebuilding trust in our democratic institutions. As stressed throughout this paper, the process of improving accountability in government is an iterative one. The overseas models studied shows that debates around them did not stop when reforms were made and there will always be scope to improve, adapt and evolve accountability standards, on a never-ending quest for improvement at the top. It is time New Zealand started on that journey.

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