Accountability: a core public law value?

Ellen Rock*

Abstract: *Accountability is a core public law, if not constitutional, value, with close ties to rule of law and separation of powers. Despite this status, the Australian public law system presents only a thin reflection of accountability. This is because it provides control of public power, but not restoration or punishment in cases of abuse of power. This article uses the concept of accountability as a lens through which to view the limitations of existing public law remedies, and briefly outlines two of the potential explanations for these limitations: constitutional barriers and the availability of alternative remedies.*

INTRODUCTION

Accountability is a concept that is often raised in the context of public governance, a catch-cry to denote values of equity, democracy and justice. What such descriptions lack in detail, they more than make up for in rhetorical appeal. But on winding back the rhetoric, what do we discover about the real meaning of accountability, and its value in public law? Is it a foundational concept that underpins our public law system, or something less? This article uses the concept of accountability as a "lens" through which to better understand the structure and objectives of our public law system. When viewed through this lens, it is clear that public law makes a number of important contributions to government accountability. However, it is equally clear that our public law system exhibits a number of shortcomings that prevent us from thinking about it as a comprehensive accountability regime. We may ultimately conclude that there are good reasons for these shortcomings. But if we maintain that accountability is a

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core public law value, it is critical that we face these shortcomings head on, and fully explore the reasons why they might exist.

This article commences with a discussion about the place of accountability as a core value in Australian public law. Though we tend to think about public law proceedings as a way to hold the government to account, a review of relevant case law demonstrates that the courts do not to use the language of "accountability" when describing their role in adjudicating these cases. Instead, it is argued, the concept of accountability is manifest in two of our fundamental constitutional principles: the rule of law and the separation of powers. This tells us that accountability is indeed an important public law value. However, it doesn't tell us anything much about how we are to achieve it. This challenge is taken up in the second and third sections of this article, which respectively explore the meaning of "accountability", and how this meaning is reflected in our public law principles and remedies.

As understood in this article, accountability consists of four objectives: to expose an official's activities to public scrutiny (transparency), to confine an official's exercise of power within set limits (control), to punish abuse of power (punishment), and to restore interests affected as a result (restoration). In a practical sense, accountability regimes contain mechanisms that contribute to these objectives. For example, transparency may be supported by processes that compel the provision of information (eg freedom of information regimes); control may be supported by processes that limit one's ability to contravene norms going forward (eg revoking power to act); punishment may be supported by sanctions that penalise wrongdoing (eg fines); and restoration may be supported by processes that require one to make amends (eg orders to repair).

When we use this understanding of accountability as a lens through which to view our public law system, it is clear that public law supports only some of the objectives of accountability. To adopt an example, imagine a local government official is in charge of determining applications for development consent. On reviewing one application, the official realises that the developer is her neighbour, with whom she is involved in an ongoing boundary dispute. The official decides to reject the application out of spite. This abuse of public power is undoubtedly an occasion in which we would call for the official to be "held accountable". But what does this entail? If the developer were to commence

public law proceedings to challenge the decision, court procedures might provide the opportunity to uncover the official's misuse of public power, thereby providing transparency. However, irrespective of what is discovered as a result of that court process, the available public law remedies are essentially regulatory in nature, contributing only to the accountability objective of control. Public law makes no meaningful contribution towards the accountability objectives of punishment and restoration, and therefore presents only a thin reflection of accountability.

Assuming that accountability is indeed a core public law value, what might this tell us? The closing section of this article discusses two possible explanations for the "thinness" of public law as an accountability tool. The first is to the effect that thickening public law is not possible as it would interfere with the separation of powers. The second is to the effect that thickening public law is unnecessary, as the punitive and restorative objectives of accountability are adequately served by alternate legal and non-legal accountability mechanisms. It is not possible in the space available here to reach a concluded view as to whether either of these arguments adequately explains the limitations of our current public law regime. However, this discussion demonstrates that viewing public law through the lens of accountability encourages us to better appreciate the structure of public law and its place within our system of governance.

I ACCOUNTABILITY AS A CORE VALUE IN AUSTRALIAN PUBLIC LAW

Though many regard accountability as a core public law value,[1] the literature addressing the place of accountability within the public law framework is rather light. One reason for this lack of focus may be that "accountability" is not usually the language adopted by the courts in discussing judicial review.[2] Instead, it is argued that the concept of accountability is reflected in two of our core

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[1] See eg Administrative Review Council, *Federal judicial review in Australia* (2012) 41; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial review of Administrative Action and Government Liability* (6th ed, 2017) 4-5; Peter Cane and Leighton McDonald, *Principles of administrative law: legal regulation of governance* (2nd ed, 2012) 308.

[2] Notable exceptions include comments by Gaudron J in *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 156-157, and by Kirby J in *Carmody, Re; Ex parte Glennan* (2000) 173 ALR 145, 147 and *Minister for Immigration & Multicultural Affairs v Jia* (2001) 205 CLR 507, 545. See also comments by Gleeson CJ and Gummow J in the latter case at 528.

constitutional principles: the rule of law and the separation of powers.[3] In fact, the three concepts overlap and are interdependent with one another in a number of ways. The rule of law requires that government officials be bound by the law, accountability is the machinery for enforcement of that principle, and the separation of powers provides the framework through which that enforcement can take place.

A generally accepted definition of the rule of law, offered by Tamanaha, is the requirement that "government officials and citizens are bound by and abide by the law", embodying the following essential features:

> *...there must be a system of laws... set forth in advance that are stated in general terms... The law must be generally known and understood. The requirements imposed by the law cannot be impossible for people to meet. The laws must be applied equally to everyone according to their terms. There must be mechanisms or institutions that enforce the legal rules when they are breached.*[4]

Even within this "minimum content" definition of the rule of law, it is clear that accountability has a role to play, as the rule of law "cannot exist" without a mechanism to enforce it.[5] In Australian constitutional theory, the rule of law is seen as an "assumption" on which the Constitution is framed,[6] and "reflects values concerned in general terms with abuse of power by the executive and legislative branches of government".[7] In *Corporation of the City of Enfield v Development Assessment Commission*, Gaudron J linked the concepts of accountability and the rule of law in the following terms:

> *"[A]ccountability" can be taken to refer to the need for the executive government and administrative bodies to comply with the law and, in particular, to observe relevant limitations on the exercise of their powers. Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of*

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[3] The status of accountability as a constitutional value may also be implicit in other constitutional principles, including those of responsible government (see eg *Egan v Willis* (1998) 195 CLR 424, 451-452 per Gaudron, Gummow and Hayne JJ; *Williams v Commonwealth* (2012) 248 CLR 156, 349-352 per Crennan J; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 467 per Kirby J; *Wetzel v District Court of New South Wales and ors* (1998) 43 NSWLR 687, 688 per Mason P; *Re Telstra Corp Ltd and Dept of Broadband, Communications and the Digital Economy* (2010) 113 ALD 623, 647), and representative government (*Williams v Commonwealth* (2012) 248 CLR 156, 349-352 per Crennan J; *McCloy and ors v New South Wales* (2015) 325 ALR 15, 45-46 per Gageler J; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 138-139 per Mason CJ). The focus of this article is on the accountability role played by the judiciary, and so emphasis is placed on those constitutional principles supporting this judicial role, namely the rule of law and separation of powers.

[4] Brian Tamanaha, 'The History and Elements of the Rule of Law' (2012) *Singapore Journal of Legal Studies* 232, 233, emphasis in original.

[5] Tamanaha, above n 4, 233. For the link between accountability and rule of law principles, see also Carol Harlow, 'Accountability and Constitutional Law' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (2014) 195, 198.

[6] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

[7] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1, 23 (per McHugh and Gummow JJ).

> *their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.*[8]

In practical terms, these broader ideals are contained within the availability of judicial review under s75(v). This provision "secures a basic element of the rule of law" by conferring jurisdiction on the High Court to "require officers of the Commonwealth to act within the law".[9] It is in this sense that the courts operate as an accountability mechanism in the Australian public law context. Mulgan goes so far as to describe independent judicial review as a "fundamental prerequisite for effective executive accountability".[10] In other words, by engaging in judicial review, the courts play a key role in securing the accountability of government officials to the law, thereby reinforcing the rule of law itself.[11]

Alongside the rule of law, the separation of powers is a key principle underpinning Australian constitutional law. It embodies the ideal that public powers be dispersed along institutional lines, accompanied by systems that enable an external check on the exercise of powers. Here again we see an overlay with the concept of accountability, as the separation of powers provides the judiciary with a mandate to hold the other branches of government accountable. In this respect, the separation of powers overcomes the difficulty noted by Tamanaha, of asking the government to "bind and coerce itself".[12] By dividing powers along institutional lines and providing for an independent judiciary, the government can be bound by the law. The courts are able to function as an accountability mechanism (and thereby satisfy the rule of law) because of their role within the separation of powers framework. As put by Harlow, while the separation of powers is not truly an "accountability principle" in its own right, it "provides a framework in which accountability can flourish".[13]

Accountability is a core value in Australian public law. While the courts do not generally use the language of accountability when discussing the judicial review function, the above analysis demonstrates accountability's interrelationship with

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[8] *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 157.
[9] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482.
[10] Richard Mulgan, *Holding power to account: accountability in modern democracies* (2003) 75-76.
[11] See eg *Carmody, Re; Ex parte Glennan* (2000) 173 ALR 145, 147 (Kirby J).
[12] Brian Tamanaha, 'A concise guide to the rule of law' in Gianluigi Palombella and Neil Walker (eds), *Relocating the rule of law* (2009) 3, 4.
[13] Harlow, above n 5, 199.

the rule of law and the separation of powers. The rule of law demands the availability of adequate enforcement mechanisms for breaches of public law norms, and the separation of powers establishes the framework within which the courts can play the role of enforcer.

II WHAT IS ACCOUNTABILITY?

The foregoing analysis tells us why we are interested in accountability as a public law value, but it doesn't tell us very much about what accountability *is*. It is commonplace to start an accountability analysis by noting that it is a desirable feature of democratic societies. It is a "golden concept that no one can be against";[14] a "hurrah-word"[15] that "[n]obody argues" with.[16] One of the more widely accepted definitions of accountability is that offered by Bovens, who defines accountability as:

> *a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences.*[17]

While the literature on accountability is dense, it is possible to distil a number of key matters on which authors agree. One point of agreement (though it offers little comfort to readers) is that accountability is an *elusive and illusive concept* that is capable of performing various theoretical tasks; it is a "chameleon",[18] a "will-o-the-wisp",[19] and an "ever-expanding concept".[20] A second area of consensus is that accountability is a *relational concept*. It describes the dynamics of a relationship between two parties in which one is entitled to hold the other accountable for their actions.[21] Thirdly, there is general agreement that accountability is *coercive*, in the sense that it does not describe voluntary

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[14] Mark Bovens, 'Analysing and assessing accountability: a conceptual framework' (2007) 13(4) *European Law Journal* 447, 448.
[15] Mark Bovens, 'Public Accountability' in Ewan Ferlie, Laurence Lynn Jr. and Christopher Pollitt (eds), *The Oxford Handbook of Public Management* (2007) 182, 182.
[16] Amanda Sinclair, 'The chameleon of accountability: Forms and discourses' (1995) 20(2,3) *Accounting, Organizations and Society* 219, 219.
[17] Bovens, 'Analysing and assessing accountability', above n 14, 450.
[18] Sinclair, above n 16, 219.
[19] Frederick C. Mosher, 'The Changing Responsibilities and Tactics of the Federal Government' (1980) 40(6) *Public Administration Review* 541, 546.
[20] Richard Mulgan, ''Accountability': An ever-expanding concept?' (2000) 78(3) *Public Administration* 555.
[21] Some see it as an incident of the delegation of power from one party to another: Kaare Strom, 'Parliamentary Democracy and Delegation' in Kaare Strom, Wolfgang Muller and Torbjorn Bergman (eds), *Delegation and Accountability in Parliamentary Democracies* (2003) 55), while others see it as a legal or moral duty stemming from the fact that one party is affected by another's exercise of power: Mulgan, *Holding power to account,* above n 10, 13.

activities.[22] Fourthly, a minimum defining feature of an accountability relationship is that it requires the *provision of an account or justification* for a chosen course of conduct.[23] Fifthly, accountability relationships can arise in a wide *variety of contexts*, not only within the area of public governance, but also in the private sector and social arena.[24] Perhaps the most fundamental area of agreement is that accountability is a *mechanism*. Many define this mechanism by mapping out the answers to a series of questions such as: *who* is to be accountable *to whom*, about *what*, *how* and *why*?[25] Where the accountability literature tends to diverge is at the point of addressing this final "why" question. This is because there remains some confusion between theorists as to whether accountability merely describes a mechanism, or whether it reflects a broader social ideal.[26]

The position taken here is that while accountability is certainly a mechanism, it does not exist inside a vacuum. By the time we come to ask whether a particular arrangement is an accountability mechanism, and whether it is functioning appropriately, we have already made the implicit judgment that there are underlying values that warrant reinforcement.[27] As Fisher notes, arguments in favour of increasing accountability are essentially:

> *about wanting to align governance regimes to a particular normative vision. The process of holding a decision-maker to account is a process of debating what the standards should be.*[28]

Ultimately, attempts to reduce accountability to a simple description of a mechanism are unsuccessful because they seek to avoid referring to the values that underpin the concept. In order to understand accountability, it is necessary to appreciate why it is relevant in the first place. We impose an accountability relationship to achieve an end goal of "accountability" through the enforcement

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[22] Mulgan, *Holding power to account,* above n 10, 11; Mark Philp, 'Delimiting Democratic Accountability' (2009) 57(1) *Political Studies* 28, 33.
[23] See eg Mulgan, ''Accountability': An ever-expanding concept?', above n 20, 555; Melvin Dubnick, 'Seeking salvation for accountability' (Paper presented at the Annual Meeting of the American Political Science Association, Boston, 29 August to 1 September 2002) 7.
[24] See eg J Mashaw, 'Accountability and institutional design: Some thoughts on the grammar of governance' in M Dowdle (ed), *Public Accountability: designs, dilemmas and experiences* (2006) 118; Dawn Oliver, *Government in the United Kingdom: the search for accountability, effectiveness, and citizenship* (1991).
[25] Bovens, 'Analysing and assessing accountability', above n 14, 454-455; Mulgan, *Holding power to account,* above n 10, 22-23; Mashaw, above n 24, 118; Philp, above n 22, 42.
[26] See eg Mark Bovens, 'Two concepts of accountability: accountability as a virtue and as a mechanism' (2010) 33(5) *West European Politics* 946.
[27] See eg Carol Harlow, 'Accountability as a value in global governance and for global administrative law' in Gordon Anthony et al (eds), *Values in Global Administrative Law* (2011) 173, 173.
[28] Elizabeth Fisher, 'The European Union in the Age of Accountability' (2004) 24(3) *Oxford Journal of Legal Studies* 495, 513.

of prescribed norms. In so doing, accountability takes on a normative quality in its own right. In Dubnick's words, it has "been transfigured from an instrument of governing to … a 'virtuous practice'".[29]

So what, then, are the values that underpin accountability? In the abstract sense, there are a range of values and ideals that we might point to. One of the more compelling arguments is that accountability is linked with the concept of legitimacy. On this view, we hold officials accountable to maintain and increase public confidence in our system of government.[30] While effective accountability mechanisms are capable of fostering citizens' faith in a system of governance, substandard mechanisms may produce the inverse effect of eroding public confidence in the government.[31] Beyond supporting legitimacy, there are a range of other abstract values that have been linked with the concept of accountability, including democracy,[32] dialogue,[33] equity,[34] justice,[35] liability,[36] responsibility[37] and responsiveness.[38] Whether some or all of these values assist to explain the purpose of accountability is a matter that can be left for another day, however. The task undertaken here is to look beyond the abstract and to focus on the more concrete question of how accountability contributes to these more lofty goals. This article aims to show that accountability can be understood in terms of a set of objectives, and also as a set of mechanisms that support those objectives.

A The objectives of accountability

If we accept that accountability is underpinned by lofty ideals such as supporting legitimacy, democracy, equity and justice, what are the means by which accountability furthers these ends? This article explores four objectives that give shape to the concept of accountability. The first objective, transparency, can be

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[29] Melvin Dubnick, 'Accountability as a cultural keyword' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (2014) 23, 34, referring to A C MacIntyre, *After Virtue: a study in moral theory* (2nd ed, 1984).
[30] Frederick Barnard, *McGill-Queen's Studies in the History of Ideas: Democratic Legitimacy: Plural Values and Political Power* (2001), xi.
[31] Mark Bovens, Thomas Schillemans and Paul 'T Hart, 'Does public accountability work? An assessment tool' (2008) 86(1) *Public Administration* 225, 239.
[32] See eg Strom, above n 21, 55.
[33] See eg Mulgan, ''Accountability': An ever-expanding concept?', above n 20, 569-570.
[34] See eg Bovens, Schillemans and 'T Hart, above n 31, 227.
[35] See eg Bovens, Schillemans and 'T Hart, above n 31, 380.
[36] See eg Bovens, 'Public Accountability', above n 15, 189.
[37] See eg Mulgan, ''Accountability': An ever-expanding concept?', above n 20, 557-558.
[38] See eg Mulgan, ''Accountability': An ever-expanding concept?', above n 20, 566-569.

viewed as a preliminary objective. It plays a critical role in exposing the inner workings of government for public scrutiny. Depending on the information produced via this function, the remaining three results-focussed objectives may then be engaged: control, punishment and restoration.

Looking first at the transparency objective, it was noted above that theorists generally agree that a minimum defining feature of accountability is that it demands the provision of an account.[39] In other words, accountability lays bare the machinations of government for public inspection, allowing open discussion about the adequacy of procedures adopted in government decision-making, as well as substantive outcomes. However, the reason why this article describes transparency as "preliminary objective" is that it is only the starting point in achieving the end goal of accountability. To take an example, a concerned citizen may use an accountability mechanism to compel an official to explain how they reached a particular decision. The official might provide reasons that completely allay the citizen's concerns. In such a case, we would likely be satisfied that the transparency achieved by this particular accountability mechanism has maintained and furthered government accountability. But what if the reasons revealed some critical flaw in the official's reasoning process? What if the reasons revealed that the official had acted in bad faith? In those circumstances, transparency alone cannot be said to have provided accountability. Instead, we must turn to the three results-focussed objectives of accountability in order to develop a complete picture. The first of these objectives is to exercise *control* by providing limits on the use of power. The second is to *punish*, which is concerned with reinforcing those limits by condemning their excess. The third objective is to *restore*, which looks to provide redress in circumstances where excess of power has resulted in loss. Working together with transparency, these three results-focussed objectives give concrete shape to the concept of accountability.

Control can be regarded as a key objective of accountability. Mulgan and Uhr go so far as to describe this as its "core purpose", reflecting the idea that accountability is a process through which the accountable party can be compelled to pursue the interests of the account-holder, rather than their own personal interests.[40] However, while control is a core objective of accountability, we cannot

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[39] See footnote 23 and accompanying text. See also Bovens, 'Analysing and assessing accountability', above n 14, 453; Carol Harlow, *Accountability in the European Union* (2002) 12.
[40] Richard Mulgan and John Uhr, 'Accountability and governance' in Glyn Davis and Patrick Weller (eds),

say that all expressions of control are accountability mechanisms.[41] For example, legislation may effect control by demanding conformity to particular standards, but legislation is not itself an accountability mechanism. This is not to say, however, that standard-setting is not relevant to achieving accountability. Standards are the critical foundation on which accountability regimes rest, and without legitimate standards to govern conduct, there would be nothing for which to hold someone accountable. This is a view shared by Harlow, who argues that "standard-setting is a vital element in the process of securing accountability".[42]

The second results-focussed objective of accountability is to punish excess of power. Not all authors agree that punishment is a necessary component of accountability.[43] However, there is something rather hollow about the idea that an accountability mechanism might expose a flagrant abuse of power, but be unable to punish that abuse. Amongst the various authors who share this view,[44] one of the most emphatic is Mulgan. He sees an accountability process as "seriously incomplete" without the possibility of imposing punishment, this being one of the factors that distinguishes being "called" to account from being "held" to account.[45] There is significant force in this argument. The implicit question in any accountability process is whether or not the account-giver has complied with relevant standards. If, as was argued above, accountability is bound up in the notion of reinforcing standards of conduct, it seems to require something beyond mere transparency. In appropriate cases, accountability demands punishment.

While a number of accountability theorists proclaim that punishment is an essential incident of accountability, many tend to gloss over the details of what that entails. Authors use "punishment"[46] interchangeably with the language of

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Are you being served? State citizens and governance (2000) 152, 153.

[41] Bovens, 'Analysing and assessing accountability', above n 14, 454.

[42] Harlow, *Accountability in the European Union*, above n 39, 10.

[43] See eg Philp, above n 22, 30 and Carol Harlow and Richard Rawlings, 'Promoting accountability in multilevel governance: a network approach' (2007) 13(4) *European Law Journal* 542, 545.

[44] See eg Jonathan Koppell, 'Pathologies of Accountability: ICANN and the challenge of the "multiple accountabilities disorder"' (2005) 65(1) *Public Administration Review* 94, 96-97; Oliver, above n 24, 22; Robert D. Behn, *Rethinking Democratic Accountability* (2001) 3; Ruth Grant and Robert Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99(1) *American Political Science Review* 29, 29-30.

[45] Mulgan, *Holding power to account,* above n 10, 10.

[46] Mulgan, *Holding power to account,* above n 10, 9; Behn, above n 44, 3.

"retribution",[47] "penalty",[48] "sanction",[49] "liability",[50] and "suffering"[51] or "facing"[52] consequences. Of those who move beyond labels to look at the content of punishment, a number refer to traditional remedies (such as fines, civil penalties and jail terms),[53] in addition to less formal sanctions (such as embarrassment and humiliation,[54] withholding of political support,[55] and even the "painful" nature of submitting to the accountability process itself).[56] However, this article is concerned with *legal* accountability. From a legal perspective, there are two key features of punishment, being to condemn and to deter. The condemnatory character of punishment is one of its defining features. For Feinberg, this is what distinguishes punishment from "mere penalties".[57] Unlike a penalty, punishment symbolically stands for an expression of "resentment", "indignation" and "reprobation" about a wrongdoer's conduct.[58] It is this expressive function of punishment that is often used to justify its use in the public sphere.[59] Punishment is the vehicle through which society is able to voice its disapproval of wrongdoing, and its judgment that the underlying conduct is in some way reprehensible. While the condemnation of wrongdoing serves its own intrinsic purposes, it can also be viewed as serving a deterrent function. In other words, the norms that are reinforced through accountability mechanisms "cast their shadows ahead",[60] deterring against undesirable conduct and encouraging improved performance. Not everyone agrees that accountability has a deterrent function,[61] however it is unnecessary to resolve this issue for present purposes. The punitive function of accountability serves an important symbolic function in its own right, whether or not it also leads more broadly to improved public governance.

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[47] Mulgan, *Holding power to account,* above n 10, 9.
[48] Mulgan, *Holding power to account,* above n 10, 9; Strom, above n 21, 62.
[49] Mulgan, *Holding power to account,* above n 10, 9; Grant and Keohane, above n 44, 29; Strom, above n 21, 62.
[50] Koppell, above n 44, 96-97.
[51] Oliver, above n 24, 22.
[52] Mark Bovens, *The quest for responsibility: accountability and citizenship in complex organisations* (1998) 39.
[53] Behn, above n 44, 3.
[54] Oliver, above n 24, 27; Behn, above n 44, 3; Bovens, 'Analysing and assessing accountability', above n 14, 452.
[55] Oliver, above n 24, 26.
[56] Bovens, *The quest for responsibility*, above n 52, 39-40. See also Behn, above n 44, 3.
[57] Joel Feinberg, 'The expressive function of punishment' (1965) 49(3) *The Monist* 397, 398.
[58] Feinberg, above n 57, 400.
[59] Miriam H Baer, 'Choosing punishment' (2012) 92(2) *Boston University Law Review* 577, 603.
[60] Bovens, *The quest for responsibility,* above n 52, 39.
[61] See eg Philp, above n 22, 38; Melvin Dubnick, 'Accountability and ethics: Reconsidering the relationships' (2003) 6(3) *International Journal of Organization Theory and Behavior* 405, 406.

The third results-focussed objective that we can ascribe to accountability is the restoration of affected interests. There are many authors who see restoration as an essential feature of an accountability regime. Oliver sees accountability as an inherently "amendatory" process, requiring matters to be "put… right if it should appear that errors have been made".[62] Mulgan and Uhr agree, describing an accountability process as being of "little value" in absence of "redress".[63] For Harlow and Rawlings, "reparation and effective redress" are "key factors" in establishing legitimacy through accountability.[64] As with punishment, there is a risk that if wrongs are left unremedied, the value of accountability in reinforcing the legitimacy of government may be undermined. In this way, the obligation to restore can be seen as an important way in which accountability reinforces underlying norms.

B Mechanisms of accountability

Accepting that the objectives of accountability include transparency, control, punishment and restoration, these objectives are then pursued in a practical sense via mechanisms within accountability regimes. In the context of public governance, there are a range of different arrangements that we might consider to be "accountability regimes", each containing mechanisms that contribute to accountability objectives: political accountability via electoral processes; intra-governmental arrangements through which more senior officers supervise and manage more junior officers; inter-governmental arrangements through which one branch of government provides a check on another; and external supervisory arrangements, such as ombudsmen regimes.[65] The legal system consists of a number of accountability regimes, as proceedings can be commenced against government officials within the context of constitutional, administrative and criminal law, as well as in tort, contract and equity. When we think about the legal system in general terms, it is possible to identify a number of mechanisms that contribute to the objectives of accountability.

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[62] Oliver, above n 24, 22, adopting the views of Colin Turpin, *British government and the constitution: text, cases and materials* (1990) 421-422.
[63] Note that the authors also see "improved performance" as another factor that can add value to an otherwise bare reporting obligation: Mulgan and Uhr, above n 40, 153.
[64] Harlow and Rawlings, above n 43, 546.
[65] Authors adopt a variety of terminology in classifying and describing these various types of regimes. For useful discussion see Oliver, above n 24, 22-28 and Mashaw, above n 24, 120-122.

The accountability objective of transparency may be served in a number of ways through court processes. Depending on the nature of the proceedings, procedural mechanisms may be used to compel officials to provide information, for example through discovery, subpoenas and interrogatories. Again, depending on the type of proceedings, pleadings and evidence may further define the boundaries of the dispute between the parties, and at trial, there may be an opportunity to cross-examine and test the stories of officials involved in the dispute. Court processes and rules also support transparency in a less direct sense. Model litigant rules oblige government defendants to act honestly and fairly in the context of litigation,[66] and the fact that court proceedings are generally open to the public serves its own transparency purposes. In line with what was argued above, however, transparency is only sufficient to provide accountability in cases where legal proceedings establish that the government has *complied* with its obligations (in which case, the court will find in favour of the government defendant or respondent). In circumstances where legal proceedings expose a *breach* of obligations, transparency must give way to the results-focussed accountability objectives of control, restoration and punishment, which are served through the court's issue of regulatory orders, punitive sanctions and reparative remedies.[67]

The control objective of accountability is supported through regulatory orders, such as preventive detention orders and injunctions.[68] These place limits on an individual's activities, restricting or requiring conduct so as to ensure that it stays within legal bounds. Strom sees control-based sanctions as essential in an accountability relationship. He defines accountability as an agency-based relationship in which the principal should have a "veto power" (a power to quash or amend the agent's decisions) as well as a power to "deauthorise" the agent by removing them from office or restricting their authority to act.[69] Sanctions of this nature clearly reinforce the control-based character of accountability relationships, in which a key goal is to place limits on the exercise of power by defining and reinforcing the boundaries within which the agent can act.

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[66] See *Legal Services Directions 2017* (Cth) Appendix B, cl 2.
[67] These categories of remedies are adapted from Cane's tripartite classification: Peter Cane, *Responsibility in law and morality* (2002) 43. "Regulatory" is used here in the place of "preventive" to better depict the role of these remedies in an accountability regime.
[68] Cane, above n 67, 44.
[69] Strom, above n 21, 62.

Punitive sanctions (such as imprisonment and fines)[70] are less concerned with a wrongdoer's future activities than with what they have done in the past.[71] Writing in the criminal context, Hart's "standard case" of punishment involves the infliction of "pain", or "unpleasant consequences".[72] Other authors do not go this far, arguing that that there must be something, if not painful, then intrinsically negative about a punishment in order for it to meet the definition. To this end, authors adopt the language of loss,[73] "hard treatment",[74] and the like. But not every negative outcome is necessarily viewed as a punishment. Here, we may return to Feinberg's distinction between punishments and "mere penalties".[75] In the latter category, he places such outcomes as "parking tickets, offside penalties, sackings, flunkings, and disqualifications". The heart of the distinction between penalties and punishments, for Feinberg, is the *condemnatory* character of the latter.[76] On this view, there is substantial overlap between the rationales for the award of punitive sanctions and the punitive function of accountability. As was noted above, condemnation is one of the defining features of the punitive function of accountability; punishments serve an expressive purpose in marking public disapproval of reprehensible conduct.

Reparative remedies (such as orders for the payment of damages or remedial action)[77] are relational in nature, imposing an obligation to repair or restore damage done to another. As was noted above, there is a strong body of support for the notion that accountability imports an obligation to repair damage arising out of a breach of relevant norms, and reparative remedies are a clear means to satisfy this function of accountability. This is a point picked up by Oliver, who notes that accountability imposes an obligation to "make amends for … fault or error", including through the payment of compensation or unwinding the impugned decision.[78]

[70] Cane, above n 67, 43.
[71] Peter Cane, *An Anatomy of Tort Law* (1997) 100.
[72] HLA Hart, *Punishment and responsibility: essays in the philosophy of law* (2nd ed, 2008) 4-5.
[73] See eg Thom Brooks, *Punishment* (2012) 5.
[74] Feinberg, above n 57, 397.
[75] Feinberg, above n 57, 398.
[76] Feinberg, above n 57, 400.
[77] Cane, *Responsibility in law and morality*, above n 67, 43.
[78] Dawn Oliver, 'Law, Politics and Public Accountability. The Search for a New Equilibrium' (1994) *Public Law* 238, 246, relying on the definition adopted by Marshall: Geoffrey Marshall, *Constitutional Conventions* (1994).

C Summary

Accountability can be understood both as a set of objectives, and as a set of mechanisms that contribute to those objectives. When we look at the legal system in general terms, we can treat various procedural mechanisms as contributing to the preliminary accountability objective of transparency. Depending on what is revealed through this process, it may then be necessary to turn to the three results-focussed objectives of accountability: control via regulatory orders, punishment via punitive sanctions and restoration via reparative remedies. Of course, available procedures and remedies differ as between jurisdictions and areas of law. The following section of this article explores in greater detail the extent to which the mechanisms in *public law* fulfil the various objectives of accountability.

III PUBLIC LAW: A THIN ACCOUNTABILITY REGIME

This article suggests that one way of thinking about accountability regimes, and distinguishing between them, is to consider the extent to which a regime contributes to the objectives of transparency, control, punishment and restoration. If a regime contains mechanisms that support only some of these objectives, we might describe it as a "thin" accountability regime. Conversely, if a regime comprehensively contributes to each of the objectives of accountability, we might describe it as a "thick" regime. What do we discover about public law when we examine its contribution to the various objectives of accountability? Is it a "thin" or a "thick" accountability regime? Putting to one side questions of standing, jurisdictional error, judicial discretion and the like, an applicant who establishes a breach of a public law norm may be entitled to the writs of prohibition, mandamus or certiorari, as well as injunctive and declaratory relief. In what ways do the mechanisms comprising this public law model support the objectives of accountability? It is concluded that while public law supports the accountability objectives of transparency and control, it fails to provide any meaningful contribution to the objectives of restoration or punishment. Accordingly, we can classify it only as a thin accountability regime.

Looking first at the preliminary objective of transparency, many of the observations made above about transparency mechanisms in the legal system are

also relevant in the context of public law proceedings. For example, proceedings are open to the public and, model litigant rules encourage government defendants to act honestly and fairly in conducting proceedings. There are, however, a number of transparency limitations of public law by comparison to other types of proceedings. For example, when compared with a claim in negligence, investigatory and evidentiary procedures in public law cases are significantly limited.[79] On the other hand, there are procedural aspects of public law proceedings that make important contributions to the accountability objective of transparency. For example, civil procedure rules enable an applicant to seek from an official a statement of reasons for their decision.[80] On the whole, we can say that public law proceedings embody a number of mechanisms that contribute to the accountability objective of transparency.

Turning to the results-focussed objectives of accountability, control is very well-catered for within Australia's public law remedial framework. It was noted above that in the legal system, control is furthered by regulatory orders, which target the future behaviour of an individual, restricting or mandating a course of conduct so as to confine it within legal bounds. The public law remedies of prohibition, mandamus, and injunction can be seen as falling clearly within this category. The writ of prohibition and prohibitory injunctions each prevent an official from acting in reliance on an impugned decision or instrument, or (less frequently), from making the decision or instrument in the first place. A writ of mandamus or mandatory injunction also perform a forward-looking role. In cases where an official is obliged to act in a particular way, the court can compel the official to do so. In this way, both mandatory and prohibitory orders are used to control the future conduct of an official so as to confine it within legal bounds. In less direct terms, the writ of certiorari and declaratory relief can also be seen as falling within the regulatory category of remedial responses. Each of these remedies operates so as to define and police the legal limits within which power can be exercised, and thereby provides a measure of control over the conduct of officials. The writ of certiorari does this by nullifying decisions and instruments that step outside legal boundaries, and depriving them of future effect. Similarly, a declaration has the effect of defining the legal limits of an official's power.

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[79] See eg *Uniform Civil Procedure Rules 2005* (NSW) r 59.7; NSW Supreme Court, Practice Note SC CL 3 – Administrative and Industrial Law List, 8 December 2016, paras 13-18.
[80] See eg *Uniform Civil Procedure Rules 2005* (NSW) r 59.9.

Though a declaration is non-coercive, it is issued by the courts in anticipation that government officials will act in conformity with its content.[81] In combination with the prohibitory and mandatory orders above, this suite of remedies can clearly be seen to serve the accountability objective of control. Where then does this leave the other accountability objectives of punishment and restoration?

The public law remedies have very limited capacity to restore the interests of those who are affected by breach of public law norms. Public law remedies are not focussed in any meaningful way on the interests of the affected individual, being concerned only with policing the legality of the respondent's exercise of powers. To the extent that the award of public law remedies has the effect of assisting an individual, this can be thought of as a matter of coincidence rather than design. For instance, compare the position of an applicant whose entitlement has been *refused*, with that of an applicant whose entitlement has been *revoked*. In both cases the decision may be quashed, but with what effect? Putting to one side the question of whether the official can remake the decision, the former applicant will still be left without the entitlement, while the latter's will be reinstated. In this way, the extent to which an applicant is restored is a product of coincidence rather than a reflection of the remedy's character.

Even more tellingly, even if the award of the public law remedies achieves a result that restores the applicant going forward, none of the public law remedies enable the courts to restore interests that have been affected in the interim. To take a fairly benign example, the holder of a liquor licence may have their licence revoked pursuant to an invalid decision. Though urgent interlocutory relief may theoretically be available, applications for such relief are by no means dealt with lightly by the courts. Unless able to overcome the necessary procedural hurdles, an applicant may wait months for the determination of their claim. It is reasonable to assume that in many cases, the loss and damage sustained during this period might be significant. The court may ultimately quash the invalid decision with the effect of restoring the licence going forward, but none of the public law remedies provide restoration in respect of the damage suffered by the applicant in the interim. These observations demonstrate that the public law remedies fall short of the accountability objective of restoration in a number of

[81] See eg *M61/2010E v Commonwealth* (2010) 243 CLR 319, 358-360 and authorities cited in Aronson, Groves and Weeks, above n 1, 981 at fn 236.

respects. However, this is not to say that restoration is appropriate in all circumstances. This is particularly so in cases where the nature of the illegality is of a procedural character, with the effect that an official may have reached precisely the same decision legally. In such cases, there may be no relevant loss requiring restoration. However, the point is that even in cases where the ultimate decision could *not* be made within power, losses sustained by an applicant cannot be restored by public law remedies.

The public law remedies also fail to perform any punitive function. This is so even taking an extremely broad view of the concept of punishment. Taken at its highest, the remedies of certiorari and declaration may potentially be seen as representing a judicial pronouncement that an official has exceeded the limits of their powers. However this is not symbolically condemnatory in the sense required to satisfy the legal notion of punishment, or to perform the retributive function relevant to the punitive objective of accountability.

As a final note, it is relevant to bear in mind that damages are not available in public law. The courts have roundly rejected arguments that damages should be available for breach of constitutional norms;[82] by analogy to some notion of "administrative tort";[83] or pursuant to the general power to make orders so as to "do justice" between the parties under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[84] On the private law front, the courts have stifled developments that may have seen a breach of public law norms as establishing a wrong in private law. One of the clearest examples of this approach was the High Court's rejection of the *Beaudesert* tort in *Northern Territory v Mengel*.[85] This approach is also evident in the court's insistence that the tort of misfeasance in public office is limited to cases of intentional or subjectively reckless wrongdoing;[86] that government liability in negligence is to be assessed by reference to private law notions of duty of care rather than public law notions of legality;[87] and that the tort of breach of statutory duty is relevant only where

[82] *James v Commonwealth* (1939) 62 CLR 339, 362; *Kruger v Commonwealth* (1997) 190 CLR 1, 46.
[83] See *Bienke v Minister for Primary Industries and Energy* (1994) 125 ALR 151, 161; *Chan Yee Kin v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 29, 41; *Attorney-General v Quin* (1990) 170 CLR 1, 45; *Macksville & District Hospital v Mayze* (1987) 10 NSWLR 708, 724.
[84] That is, section 16(1)(d): *Park Oh Ho v Minister for Immigration & Ethnic Affairs* (1988) 20 FCR 104, 126-127.
[85] *Northern Territory v Mengel* (1995) 185 CLR 307.
[86] *Northern Territory v Mengel* (1995) 185 CLR 307.
[87] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 555; *Crimmins v Stevedoring Industry Finance Committee* (2000) 200 CLR 1, 35; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 465.

parliament intends to provide a monetary remedy.[88] Arguments in favour of the development of a public law remedy in damages are essentially the province of academic speculation rather than a serious issue for law reform.[89] This article does not propose to address this issue in any detail, beyond noting that an award in damages might potentially be viewed as serving accountability's objectives of restoration and punishment, as well as supporting the control objective comprised in existing remedies.[90]

Absent the (unlikely) development of any public law remedy in damages, these observations all lead to the conclusion that public law's remedial framework performs an essentially controlling function, policing the boundaries within which public power can be exercised, but failing to provide punishment or restoration in cases where those boundaries are transgressed, even in the most egregious cases. An applicant wanting to seek restoration or punishment in relation to government maladministration must turn to the private law, where the fact that the government has breached a public law norm is not determinative of the availability of a remedy. This leads to the conclusion that Australia's public law system represents a rather thin accountability regime.

IV QUESTIONS

This article has argued that accountability is regarded as a core public law, if not constitutional, value. But on closer inspection, it is clear that the current public law framework can only be regarded as a thin accountability regime, as it fails to serve two of the key objectives of accountability: restoration and punishment. The concluding section of this article bears the unsatisfying title of "questions" rather than "conclusions" because this proposition raises rather more questions than it answers, at least in the space available here. It is the aim of this article to progress the dialogue about the place of accountability in our public law system,

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[88] See eg *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 405.

[89] In its 2012 report, the Administrative Review Council made note of the potential relevance of a public law damages remedy in Australia, but deferred expressing any view on the issue: Administrative Review Council, above n 1, 178-181.

[90] As to the punitive function of damages, see eg Carol Harlow, 'A punitive role for tort law?' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (2008), 247. As to the declaratory function of damages in the context of public law wrongs, see eg Jason NE Varuhas, 'The Development of the Damages Remedy under the New Zealand Bill of Rights Act 1990: From Torts to Administrative Law' (2016) *New Zealand Law Review* 213, 238-239.

and in this spirit we might be prompted to ask: if the current public law system is only a "thin" accountability regime, what might we do in order to "thicken" it?

A Thickening public law

Clearly, in thickening our public law regime it would be necessary to move beyond the measure of transparency and control offered by the current system, and to provide for punishment and restoration in appropriate cases. A deceptively simple solution might be to expand the available public law remedies so to perform these missing functions of accountability. For example, one option might be to provide access to punitive and compensatory damages awards in appropriate public law cases. However, such an approach would suffer from two failings. First, it fails to address any of the criticisms that are often levelled against proposals to expand the public law remedial armoury (for example, legitimate questions around how public law might approach causation).[91] Secondly, and more importantly, it is not only the *remedies* that must be coherent with the concept of accountability, but the principles that govern their *availability*. Appeals to the rhetoric of "increased accountability" cannot support the unprincipled expansion of public law remedies, even in the present hypothetical thought exercise. Accordingly, in thinking about whether the concept of accountability might demand expansion of public law remedies, it is also necessary to consider how these changes might be balanced out by appropriate adjustments to other public law principles, so as to ensure the coherence of the regime as a whole.

Picking up the language of the accountability theorists set out above, it would not only be necessary to consider the *consequences* that might attach within the expanded regime, but also *who* would be held accountable, *to whom* they might accountable (both in terms of applicant and forum), by what *standards* they might be judged, and via what *procedures*? In other words, the hypothetical thick public law regime would not simply provide for new remedies on the basis of existing public law rules, but might confine the availability of those new remedies within appropriate limits using standing rules, judicial discretion, limiting the grounds of review that might give rise to the remedies, and so on. The precise nature of the limits that might be relevant is a very large question that must be

[91] See eg Paul Craig, 'Compensation in Public Law' (1980) 96 *Law Quarterly Review* 413, 438-439.

left for another day. All that is possible in the space available here is to raise, at least briefly, two of the potential reasons why we might not wish to "thicken" public law by expanding available remedies. These two obstacles can be summed up in the questions "is it constitutionally possible", and "is it necessary" to thicken public law?

B Is it possible?

The "is it constitutionally possible" question asks whether there might be separation of powers concerns that could prevent the expansion of public law so as to incorporate punitive and/or reparative remedies. For instance, separation of powers concerns are sometimes implicit in arguments against the adoption of a public law remedy in damages.[92] While these questions are often raised without any in-depth analysis of the underlying separation of powers principles, it seems that the apprehension may stem from one of a number of undefined concerns about the appropriate limits of judicial power. One such concern may be tied up in the idea that making decisions about the distribution of public funds is a task appropriately exercised by the legislative and executive branches of government. By awarding damages in cases of maladministration (and thereby requiring the payment of public funds to successful litigants), the courts are usurping this role. But subscribing to this view calls into question the rationale for the availability of various other types of monetary awards against government defendants in private law and equity. After all, these awards are similarly drawn from public funds. Is the validity of monetary awards in tort, contract and restitution explicable on the basis of some fundamental distinction between public and private law? If so, it is necessary to identify and substantiate that claim before relying on it to deny judicial power to award damages in public law cases.

Another possible underlying separation of powers concern might stem from the idea that where a power has been conferred on an executive officer, a judicial decision to award damages on the basis that the decision was "wrong", is by implication an usurpation of the discretion to decide what was "right". This argument seems closer to the mark than the first, but again warrants greater in-depth analysis. For example, what if the power to award damages was confined to those cases where there was no legal way in which the official could have

[92] See eg Administrative Review Council, above n 1, 180-181.

reached the impugned decision? What if damages were awarded on the basis of the lost chance to have had the matter decided favourably? It is less clear whether the courts would be specifying the "right" decision in those circumstances. Exploring the contours of a thick public law accountability regime provides the opportunity to confront these issues head on, and to gain a better understanding of our separation of powers principles and the nature of judicial power. We may ultimately conclude that there are legitimate constitutional concerns about expanding the public law remedial armoury. However there is much to be gained from getting to the bottom of these concerns rather than adopting a broad-brush rejection of the idea.

C Is it necessary?

The "is it necessary" question asks us to consider whether we need to worry about thickening public law when we already have punitive and reparative mechanisms that support these objectives outside public law. There are punitive sanctions available elsewhere in the legal system, such as fines and imprisonment (criminal law) and punitive damages (tort law). The legal system also provides reparative remedies in the form of compensatory damages (tort law) and restitutionary damages (restitution for unjust enrichment). Outside the legal system, there are a host of other mechanisms that have a punitive or restorative character. For example, non-condemnatory punishments (in the sense of Feinberg's "mere penalties")[93] may arise through disciplinary measures in the employment context, or through political consequences such as being voted out of office, and some may even consider the public humiliation associated with exposing one's wrongdoing as a form of punishment in itself.[94] In furtherance of the restoration objective, there may also be assistance available through ex-gratia and similar compensation schemes.[95]

We might think about the interaction of various mechanisms such as these as forming an "accountability network",[96] through which accountability is achieved

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[93] Feinberg, above n 57, 398.
[94] Oliver, *Government in the United Kingdom: the search for accountability, effectiveness, and citizenship*, above n 24, 27; Behn, above n 44, 3; Bovens, 'Analysing and assessing accountability', above n 14, 452.
[95] For example, payments made under the "Compensation for Detriment caused by Defective Administration" scheme, and act of grace payments provided for under s 65 of the *Public Governance, Performance and Accountability Act 2013* (Cth).
[96] Scott explores this idea in his discussion of the "redundancy" model of extended accountability networks: Colin Scott, 'Accountability in the Regulatory State' (2000) 27(1) *Journal of Law and Society* 38.

on a wholesale basis when the system is viewed in its entirety. In other words, we might think about accountability as stratified, where various "thin" regimes that each support one or more accountability objectives are overlaid with one another in order to form an ultimately "thick" veneer. For instance, we might say that transparency is provided through parliamentary inquiries, investigation by ombudsmen, court proceedings and freedom of information; control is provided through public law remedies, management and reporting within departments and principles of parliamentary responsibility; punishment is provided through criminal law sanctions and punitive damages in tort; and restoration is provided through compensatory damages in tort and contract, restitutionary damages and ex gratia compensation schemes. When these various accountability regimes are layered on top of one another, it is possible to imagine that the various objectives of accountability might be adequately served on a network basis.

This article does not offer a view as to the adequacy of the "network" of mechanisms that might potentially be engaged in response to a breach of public law norms. Certainly, the network would be a complex one, involving multiple layers of governmental and non-governmental individuals and institutions, and encompassing a wide variety of functions and powers. The point being made here is that before we rely on this network to wave away concerns about the remedial limits of public law, there are two principal issues that we must consider. First, in order to meet the demands of accountability as described in this article, it would be necessary to ensure that the network is capable of providing punishment and restoration in relevant cases. In order to confirm whether this is the case, it would be necessary to map out the degree of overlap between the public law norms we are concerned to reinforce, and those alternate mechanisms that we intend to rely on to do so. For instance, if we decide that accountability demands punishment of officials who act in bad faith, it is necessary to confirm that punishment is in fact provided elsewhere within the network where an official acts in this manner. For example, if we intend to rely on punitive damages via the tort of misfeasance in public office to punish such officials, we would need to observe that bad faith alone does not determine liability. In addition to general limitations on the availability of punitive damages, plaintiffs must show that they have suffered recognised loss, and also that the official knew (or was perhaps reckless as to whether) their conduct would cause that loss. Until we engage in a comprehensive mapping exercise to determine whether punitive and reparative

objectives are in fact supported elsewhere within the network, we cannot conclude that it is "not necessary" to thicken public law.

A second, and perhaps more left-of-field, proposition to consider is whether we can really be satisfied with relying on network accountability in the context of breaches of public law norms. If accountability is indeed a core public law or constitutional value, we might perhaps be concerned about leaving its restorative and punitive objectives to be performed by mechanisms that do not have the reinforcement of public law norms as their primary focus. To take the tort of negligence as an example, the fact that public law norms have been contravened is in many respects neither here nor there in determining liability.[97] It would be unsurprising, then, if future legislative or judicial developments of that tort were undertaken without due regard to the knock-on effects for government accountability. Again, if we are to maintain that accountability is a core public law value concerned with the reinforcement of public law norms, we may need to seriously consider the suitability of non-public law mechanisms as tools of accountability.

This discussion is not intended to provide any concrete answers to questions around the possibility or necessity of "thickening" public law. However, it does demonstrate the value of thinking more critically about the content and role of accountability in this context. When we look at our public law system through the lens of accountability, we have the opportunity to improve our understanding of our public law principles and remedies, and of the constitutional structure that supports them. Acknowledging accountability deficiencies in the public law remedial regime prompts us to re-evaluate orthodox views, and to better appreciate the critical role played by mechanisms elsewhere in our system of public governance. For these reasons, there is merit in thinking more closely about the role of accountability as a core public law value.

[97] See eg *Crimmins v Stevedoring Industry Finance Committee* (2000) 200 CLR 1, 35 (McHugh J).