Inquiry into Parliament's legislative response to future national emergencies

To the Regulations Review Committee:

This submission is from the Equal Justice Project.

Contact:
Joy Guo Maree Cassaidy
oncampus@equaljusticeproject.co.nz

Members who have worked on this submission include:
Keegan Browne, Rachel Hale
Liam Johannesson, Anna Stevens
Lucy Smith, Bryce Turner, Min Kyu Jung, Francy Sulikosky

The Equal Justice Project is an independent student-run pro-bono initiative at the University of Auckland Law School. The objective of EJP is to promote equal access to justice by encouraging, organising and engaging in voluntary legal work in partnership with community groups, practitioners and academics. EJP has submitted on terms of reference 1, 3, 4 and 6 below.

I (1) Consider the overarching principles governing the delegation of Parliament's law-making powers in the context of recovery from a national emergency

A Introduction

Delegation of Parliament's law-making powers in the context of recovery from a national emergency involves several competing principles. It is important to uphold and conform to these principles in order to prudentially legislate such power-conferring statutes.

B Advantages

The delegation of Parliament's law-making powers has several positive factors that should be considered when assessing its necessity in the context of recovery from a national emergency. In particular, we can look to the powers delegated after the 2011 Christchurch Earthquake for a recent New Zealand example of the implications of such delegation.

1 Speed and Efficiency

The primary advantage that comes with delegating Parliament's law-making powers is speed and efficiency. In theory, speed is critical in emergencies; during the Christchurch earthquakes, there was a need to provide fast and decisive action unhindered by bureaucratic process. In the short term, there are many people who are in need of immediate help, and in the long term, a recovery strategy needs to be implemented to ensure sustainable development. The Canterbury Earthquake Response and Recovery Act 2010 was passed in order to address these issues, and indeed, according to s 3, the **Purpose of the Act** was to, amongst other things:[1]

> (c) Enable the relaxation or suspension of provisions in enactments that—
>
> (i)may divert resources away from the effort to—
>
> (A)efficiently respond to the damage caused by the Canterbury earthquake:
>
> (B)minimise further damage; or

[1] Canterbury Earthquake Response and Recovery Act 2010, s 3.

(ii)may not be reasonably capable of being complied with, or complied with fully, owing to the circumstances resulting from the Canterbury earthquake.

Critical to the purpose was the suggestion that existing legislation needed to be relaxed as they would hinder the ability to "efficiently" respond to the damage caused. S 3(c)(ii) went further, suggesting that some legislation would not only hinder efficiency, it simply would not be possible to comply with it at all due to the circumstances. The 2011 Act changes its focus somewhat, instead talking about the need to "enable a focused, timely, and expedited recovery" under s 3(d).[2] Both statutes focus on the overarching principle that there is need for fast and decisive action in an emergency. The suspension of some constitutional safeguards seems appropriate when considering this.

2 Scope of authority delegated

When considering the scope of powers Parliament has delegated to CERA, it is useful to consider exactly what authority has been granted. Odlin's analysis summary and analysis[3] of the Canterbury Earthquake Recovery Act 2011 identifies the following powers granted to the chief executive of CERA:

- Require councils to act as directed, and or to provide information on request
- Amend or revoke RMA documents and city plans
- Close or otherwise restrict access to roads and other geographical areas
- Demolish buildings, or otherwise enter and deal with people's land and property (with notice, in the case of Marae and dwellinghouses)
- Require compliance of any person with a direction made under the Act.

These powers are quite significant; and there is a clear broad focus on having CERA act as a central decision-making authority that is able to implement its recovery strategy unhindered by restrictions. Having a single decision body ensures consistency in application, and allows for the implementation of a single, holistic strategy. It would seem, then, that the effectiveness of delegating such broad powers to a decision-making body for the purposes of disaster recovery would depend on the competence of the decision-making body in question.

While this may seem obvious, it is an indication that the question as to whether it is appropriate for Parliament to delegate far reaching powers in the context of a national emergency is largely

[2] Canterbury Earthquake Recovery Act 2011, s 3(d).
[3] Mark Oldin "Summary and analysis of the Canterbury Earthquake Recovery Act 2011" (4 May 2011) Buddle Findlay <http://www.buddlefindlay.com/article/2011/05/04/summary-and-analysis-of-the-canterbury-earthquake-recovery-act-2011>

dependent on whether the delegated body has formulated an effective recovery strategy. Alternatively, the removal of bureaucratic blocks make it easier for the recovery plan to be implemented, and whether this is will result in a good outcome necessarily depends on the effectiveness of the recovery plan itself.

3 Closing thoughts on advantages

It is clear that in emergency situations, there are some positives from the delegation of Parliament's law-making powers. Most notably, it is being able to provide immediate relief for people suffering from the disaster. Furthermore allowing the implementation of a streamlined recovery plan through a single decision making body allows for efficiency.

C Disadvantages

Delegation may cause problems due to both moving the decision-making power to another body, and (consequently) removing processes attached to normal decision-making seeking to ensure good decisions.

1 Compromise of principles of good law-making

Geiringer, Higbee, and McLeay propose ten principles of good law-making:[4]

1. Legislatures should allow time and opportunity for informed and open policy deliberation
2. The legislative process should allow sufficient time and opportunity for the adequate scrutiny of bills
3. Citizens should be able to participate in the legislative process
4. Parliament should operate in a transparent manner
5. The House should strive to produce high quality legislation
6. Legislation should not jeopardise fundamental constitutional rights and principles
7. Parliament should follow stable procedural rules
8. Parliament should foster, not erode, respect for itself as an institution
9. The government has a right to govern, so long as it commands a majority in the House
10. Parliament should be able to enact legislation quickly in (actual) emergency situations

If there is a genuine need to pass legislation quickly, the first, second, and third principles may legitimately be undermined. The fifth principle may indirectly be undermined by removing

[4] Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry?: Urgency in the New Zealand Legislative Process 1987-2010* (Victoria University Press, Wellington, 2011).

quality-control processes that would likely lead to better decision-making. The reduced quality may be reflected in unjustified breaches of constitutional rights and principles, implicating the sixth principle. This will in turn undermine the eighth principle.

The decision-maker under delegated laws is not Parliament, but another body. If the purpose of the seventh principle is to encourage stability of procedural rules, delegating arguably undermines the stability of these rules. Rules governing delegated powers will probably have fewer requirements (so as to encourage speedy decisions), leading to reduced information about how decisions are being made, affecting the fourth principle.

Only the ninth principle seems unaffected.

2 Principles of democracy and democratic input

This is to not allowing participation from all members of parliament, representing voters' views. Thus, there may be political bias behind the delegated legislation created. Additionally, views which would have been heard in Parliament and may have been considered relevant by the decision-maker, will not be heard.

3 Separation of powers

This is an issue when one entity takes on more than one function, such as here when the executive takes on legislative functions. It is a constitutional principle, although we do not in practice have full separation of powers.[5] Separation of powers seeks to avoid an autocratic government. This concern was implied by various academics in an open letter regarding the Canterbury Earthquake Response and Recovery Act 2010.[6] It was noted that "unconstrained power is subject to misuse, and […] even well-intentioned measures can result in unintended consequences if there are not clear, formal measures of oversight".

Subverting the legislative process reduces predictability, certainty, and transparency, which are all important for the rule of law.

4 The rule of law

[5] Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Wellington, 2004) at 8.

[6] Stuart Anderson et al "Legal Scholars: Deep Canterbury Quake Law Concerns" (press release, 28 September 2010) <http://www.scoop.co.nz/stories/PO1009/S00343/legal-scholars-deep-canterbury-quake-law-concerns.htm.>.

The rule of law does not have an agreed meaning, but according to Bingham LJ, writing extra-judicially, involves eight sub-rules.[7] The relevant ones are as follows:

a. The law must be accessible and so far as possible intelligible, clear and predictable
b. Issues of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion
c. Laws apply equally to all, except for objective differences justifying differentiation
d. Law must afford adequate protection of human rights
e. Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers
f. The rule of law requires compliance by the state with its obligations in international law as in national law

This implies that powers should be delegated narrowly to maximise predictability, and minimise use of discretion. Delegated power should be subject to certain ordinary concerns for Parliamentary rule-making, such as the New Zealand Bill of Rights Act 1990 and other constitutional legislation, to ensure protection of human rights, including freedom from discrimination. Restraints should be placed on power to prevent ministers acting without a good-faith basis or contrary to obligations under international law.

5 Transparency, predictability, and certainty

The degree of transparency depends on the process the decision-maker must follow when passing delegated legislation. However, since the process stipulated will probably have fewer requirements than the normal legislative process, transparency is likely to be harmed. Similarly, the lack of debate on the delegated law passed may reduced understanding of how the law is intended to be applied, thus reducing predictability and certainty.

6 Accountability

This is an important principle ensuring democracy can function. Public authorities may be politically or legally liable (for example, in tort liability) for the consequences of their actions. This helps to incentivise good decision-making, and provides remedies for those injured by wrongful conduct. It may be concerning that one of the purposes listed in the Canterbury Earthquake Response and Recovery Act 2010 was to "provide protection from liability for certain acts or omissions":[8] this is contrary to the principle of accountability.

[7] Lord Bingham "The Rule of Law" (2007) 66 LJ 67 at 78.
[8] Canterbury Earthquake Response and Recovery Act 2010, s 3.

7 Rebutting justifications for emergency powers

Lack of time is frequently offered as a justification for delegating law-making powers. However, it is questionable what circumstances would require new legislation; secondly what circumstances would make temporal constraints such an issue; thirdly why these would be so significant, Parliament would need to delegate powers at all. Regarding the first point, while the actual occurrence of a civil emergency may be unpredictable, there are already laws in place to deal with various emergencies.[9] On the second point, the idea of time constraints being significant is contested in literature.[10] Addressing the third issue, Parliament faces alternatives, such as simply passing laws under urgency, or even through the normal legislative process (which is faster in New Zealand than in other countries due to its unicameral system).[11] Mueller even considers "the regular use of urgency in New Zealand […] a tradition".[12]

Finally, even if circumstances warrant a legislative process different to normal, it should be considered whether Rosenfeld's categories of conditions of emergency, stress, and normalcy.[13] Rosenfeld concludes that in conditions of stress, such as in response to terrorism, "the reinforcement of fundamental rights rather than their restriction I the pursuit of greater security may be best poised in many instances to safeguard and reinforce constitutional democracy".

D Conclusion

The main advantage of delegated legislation is thought to be expediency. However, literature debates the need for speed, and shows that delegated legislation may be contrary to a variety of constitutional principles. Thus, delegated legislation in times of emergency appears to have at best weak benefits, and fairly considerable potential costs. Whether delegated powers to legislate should ever exist must be carefully considered by Parliament before passing such an Act.

---

[9] See, for example, the Civil Defence Emergency Management Act 2002; the Defence Force Act 1990; the Health (Quarantine Inspection Notice) 2014. Other Acts regarding New Zealand's border health legislation can be found at http://www.health.govt.nz/our-work/border-health/border-health-legislation-policy-and-planning/new-zealand-border-health-legislation.

[10] Leonard Feldman "The Banality of Emergency: On the Time and Space of "Political Necessity"" in Austin Sarat (ed) *Sovereignty, Emergency, Legality* (Cambridge University Press, New York, 2010) 136 at 137.

[11] Geiringer, Higbee and McLeay, above n 4, at 1.

[12] Sascha Mueller "Where's the Fire? The use and abuse of urgency in the legislative process" (2011) 17 Cant L Rev 316 at 316.

[13] Michel Rosenfeld "Should Constitutional Democracies Redefine Emergencies and the Legal Regimes Suitable for Them?" in Austin Sarat (ed) *Sovereignty, Emergency, Legality* (Cambridge University Press, New York, 2010) 240 at 240.

II (3) Which constitutional and other legislation (or provisions in legislations) should not be changed by delegated legislation?

In relation to the question of which constitutional and other legislation should not be changed by delegated legislation, this paper will consider and recommend to the House and other appropriate bodies which constitutional and other enactments (or provisions in enactments) should expressly not be modified by delegated legislation, in the context of a national emergency.

This paper purports to be apolitical in its contentions, but adopts the stance that the cornerstones of the New Zealand constitutional landscape including democratic government, the rule of law, and the rights and interests of individuals must be recognised and promoted where possible when the state is interacting with individuals and other groups.

A How the principles of delegated legislation are relevant in the context of a recovery from a national emergency

This section of the paper will address the principles of delegated legislation, justifying its use and effectiveness within the context of a national emergency.

1 Delegated Legislation

Delegated legislation is where Parliament legislates to give the executive "specific powers of legislation".[14] This can stipulate that the executive can amend or adjust legislation, and implement regulations without resorting to parliamentary enactment procedure.[15]

2 Principles

Philip A. Joseph has identified that the broad principle behind delegated legislation is that in certain contexts it is necessary to give effect to government policies in a more administratively efficient manner than how parliament would implement them.[16] It is contended that this is especially relevant in the context of an emergency, and the following discussion, derived from

[14] Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, Brookers, Wellington, 2001) at 1007.
[15] At 1007.
[16] At 1013.

the British Committee on Minister's Powers, will list why each principle supports this contention.[17]

(a) Delegated legislation is to preserve time by avoiding the parliamentary process:[18]

As delegated legislation provides the executive body with powers to amend legislation and make regulations, it is effectively carrying out a parliamentary function without involving the House of Representatives.[19] As such, the typical process for a bill, which involves scrutiny and a series of readings before it is enacted, is not relevant.[20] This is useful in the context of an emergency, the nature of which involves many unforeseen developments requiring immediate and effective responses. Delegated legislation thus has its advantages by bypassing the prolonged process of enacting and repealing Acts in Parliament.

(b) To utilise its flexibility for administrative efficiency:[21]

Another key principle of delegated legislation is that it should be flexible to cover situations and occurrences as they arise. As mentioned above, delegated legislation enables the executive to carry out this function by bypassing the comparatively lengthy process of parliamentary enactment or repeal.[22] This is particularly essential in the context of an emergency, where the state will need to rely on a small body of concentrated power to flexibly adjust to every development which arising in quick succession and in unpredicted ways during an emergency and its immediate aftermath.

(c) To adequately address the technicality of a situation's subject-matter:[23]

It can been contended that Parliament can be relieved of the detail of legislation and what it addresses.[24] This is particularly important in this context, as the subject matter and details of emergencies will be unique to each situation and any response or recovery measure will have to be tailored appropriately. As delegated legislation allows a smaller body to command a relief effort, it would thus be more efficient and effective to leave the details for them to address as a "subordinate instrument".[25]

---

[17] At 1013.
[18] At 1013.
[19] At 1013.
[20] At 305-310.
[21] At 1013.
[22] At 305-310.
[23] At 1013.
[24] At 1013.
[25] *Laws of New Zealand* Constitutional Law (online ed) at [32].

3 *Delegated legislation within the rule of law, the doctrine of Parliamentary Supremacy, and the doctrine of the Separation of Powers*

This submission will accept these justifications for delegated legislation in the context of an emergency. Though it has been criticised for encroaching upon Parliament's supremacy and is not adequately scrutinised by either Parliament or the public,[26] this submission will not recommend against it in light of the rationale provided.

However, as its function does tip the balance of the separation of powers and leaves the possibility open for abuses of power, this submission will address how the extent to which delegated power repeals or amends legislation fundamental to the constitution or to individual rights and interests should be minimised.[27] As such, with reference to constitutional principles and good legislative practice, this submission will identify a series of legislation and provisions to suggest limits on delegated powers during times of emergencies.

B *Which constitutional principles and legislative practices must remain relevant to appropriately enabling and facilitating a recovery from national emergencies.*

This section of this paper will contend a series of constitutional principles and legislative practices that should be considered when facilitating a recovery in the context of a national emergency.

1 *Rule of Law*

It is contended that the rule of law is the most fundamental principle of New Zealand's constitution.[28] The rule stipulates that the law shall govern all branches of government and people of New Zealand, protecting individual rights and interests while guarding against arbitrary use of power.[29] Whilst as such it is this submission's contention that this must remain relevant in the context of an emergency, as arguably unbridled power can be delegated to the executive, there are other principles which themselves give rise to the rule of law and shall each be discussed in turn.

2 *Separation of Powers*

[26] Joseph, above n 14, at 1012-1013.
[27] *Laws of New Zealand* Constitutional Law (online ed) at [32].
[28] Legislation Advisory Committee, "Basic constitutional principles and values of New Zealand law" (23 December 2014) Legislation Advisory Committee <www.lac.org.nz/guidelines/lac-revised-guidelines/chapter-3/>.
[29] Legislation Advisory Committee, above n 28.

The separation of powers is a well-founded cornerstone of the New Zealand Constitution, whereby each branch of government should counterbalance the other to avoid a concentration of power.[30] It is widely accepted that this doctrine upholds the key tenet to our constitution, the rule of law.[31] As such, a well-founded characteristic of our constitution is that no office holder, authority, or political party should wield a "monopoly of power" to an extent that renders public scrutiny ineffective or ignored.[32]

However, it is widely accepted that this cornerstone to our Constitution becomes ambiguous during times of emergency.[33] The need for expedient and effective recovery from emergencies is accepted, and so too is Parliament's power as the supreme law-making body to delegate its capacities.[34] What is of primary concern is when the body to which power is delegated modifies a host of legislation potentially enacted when the separation of powers presumed a more equitable balance.

With this in mind, it is this submission's contention that the executive under delegated power should remain wary of modifying legislation that is either of constitutional importance or protects individual rights and interests. Individuals and groups will unavoidably and inevitably be affected during times of emergency, thus it is likely that any executive undertakings will implicate these statutes. As this legislation would have been enacted by a parliamentary majority where public submissions were welcome and an extensive debate was held in House, it would be to encroach upon the separation of powers and consequently the rule of law to amend or repeal the Acts notwithstanding the legal power to do so.[35] Thus, to protect this legislation, it is this submission's contention that the executive must have in mind this constitutional principle.

2 Judicial Independence

It is widely accepted that judicial independence is a fundamental constitutional principle.[36] As such, the jurisdiction of the Courts should not be ousted by any modification to legislation, especially during emergency circumstances when the livelihood and status of many people are affected. In a similar fashion to the separation of powers, this principle is a prerequisite of the rule of law, as the Courts can check the powers of the executive by providing effective remedies against potential abuses of power.[37]

---

[30] *Laws of New Zealand* Constitutional Law (online ed) at [31].
[31] Joseph, above n 14, at 256.
[32] *Laws of New Zealand* Constitutional Law (online ed) at [4].
[33] At [32].
[34] Joseph, above n 14, at 1007.
[35] At 305-310.
[36] *Laws of New Zealand* Constitutional Law (online ed) at [92].
[37] At [92].

The Courts have been seen upholding the rights and interests of parties and individuals against actions undertaken by state entities.[38] In the context of an emergency where delegated legislation enables the delegated power-holder to make quick decisions as to aid and recovery without much hesitation or screening process, legislation of constitutional importance or those protecting individual rights and interests may be compromised notwithstanding there was no intention to do so.[39] The provision of the Canterbury Earthquake legislation which restricted access to the courts was widely criticised.[40] Though this attempt to oust the courts' jurisdiction was subject to limits, and was questioned as to its effectiveness, the Act was held to be of significant constitutional concern as access to the courts is important in checking on executive action.[41]

Therefore, that the judiciary is able to examine claims for the protection of such rights and interests, and of matters of constitutional importance, the principle of judicial independence occupies a cornerstone place in the constitution.[42] It is thus this submission's contention that should be borne in mind when altering legislation under delegated powers.

It is accepted that power-holding bodies can rely on the doctrine of necessity, when the nation is in a state of civil emergency.[43] Though this doctrine cannot overthrow the constitution and its principles,[44] the Courts' jurisdiction could be jeopardised. The Courts may adopt the presumption against depriving citizens of access to the Courts, and may require express wording before this is given effect, but delegated legislation and regulation can in theory prohibit the right of access.[45]

As outlined above, during a civil emergency it is easy for the rights and interests of New Zealanders to be adversely affected by hurried decisions and undertakings. It is therefore our contention that the constitutional principle of judicial independence is taken into account, and with it the rule of law.

3 *Undertaking actions in good faith*

Actions taken in good faith by state entities and bodies to whom power has been delegated, though not expressly cited as a constitutional principle, occupies a key position in our constitution.

---

[38] At [90].
[39] Joseph, above n 14, at 1007.
[40] Jonathan Orpin and Daniel Pannett, "Constitutional Aftershocks" [2010] NZLJ 386 at 389-390.
[41] At 389-390.
[42] *Laws of New Zealand* Constitutional Law (online ed) at [90].
[43] At [16].
[44] *Ministry of Transport v Payn* [1977] 2 NZLR 50 (CA) at 62.
[45] *Laws of New Zealand* Constitutional Law (online ed) at [16].

For instance, Matthew McKillop has noted that when the state is acting under urgency to limit the extent of a disaster or to preserve life, interference with individuals and their property is inevitable.[46] However, he contends, responders would not realistically have to carefully assess their decisions when short of time provided there is good faith behind it.[47] Furthermore, the Cabinet Manual holds that all consultations relevant to a minister or ministers' portfolio must be taken in good faith.[48] Additionally, in the context of relations between Maori and the state, the Court in *New Zealand Māori Council v Attorney-General* held that the Crown had a duty to act in good faith when dealing with Maori entities.[49] It so stands that undertaking actions in good faith occupies a fundamental position in the constitution as it governs the relationship between the state and the individual.

Therefore, it is our contention, as McKillop has outlined above, that in the context of an emergency where decisions amending legislation are made to mitigate the impact of an emergency, the executive under delegated power acts in good faith.[50] This would expectedly prevent to a large extent any abuse of legislation to the detriment of an individual or group of individuals, better protecting their rights and interests. It follows that this would further uphold the broader, more fundamental constitutional principle of the rule of law.[51]

4 Legislative practice

(a) Legislate limits to delegation legislation

It is accepted that when Parliament delegates power to the executive, the executive's power is less restricted by checks on their decisions and undertakings than the democratically-elected House of Representatives is.[52]

Despite these differences in accountability, delegated legislation is essentially a method by which Parliament is able to extend its law-making abilities.[53] It is thus this submission's contention that it would be good practice to expressly confine delegated powers to within the legislative scope which Parliament has bestowed onto the executive.

Such confinements could include prohibiting the executive from modifying certain legislation which are either deemed fundamental to New Zealand's constitution or are generally worthy of protection. As this legislation went through proper processes in House, involving submissions

[46] Matthew J McKillop *Emergency Powers of the New Zealand Government* (Dunedin, 2010) at 30.
[47] At 30.
[48] Cabinet Office *Cabinet Manual 2008* at [5.17].
[49] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (SC) at 705.
[50] McKillop, above n 46, at 30.
[51] Legislation Advisory Committee, above n 28.
[52] Joseph, above n 14, at 305-310, 1007.
[53] At 1007.

from members of the public or other advisory panels, and reviews by select committees, their importance should take priority.[54] This stands even in emergency situations where the unpredictability of crises and the measures require the capacity to amend laws as the regulation-making body sees fit. It has been contended that despite the unpredictability of emergencies, such uncertainty should not justify the "proposition that any Act may be amended".[55] Instead, what has been suggested is that the starting presumption in an emergency is that the power is not needed unless carefully justified.[56] An example is the Canterbury Earthquake Response and Recovery Act ("CERRA") 2010, which was criticised for its effective "wholesale empowering" of the executive to modify Acts, presenting the danger of encroaching upon legislation which was fundamentally important to the constitution and to individual rights and interests.[57]

As such, this submission contends that the power to amend legislation to undertake measures of recovery is something which should have express and finite parameters provided by Parliament, which should be followed by the executive when making Orders in Council.

(b) Allowing for public consultation

As it has been mentioned, the nature of powers delegated to the executive or any other body is that Orders in Council can be made without involving parliamentary procedure.[58] As such, Orders are made in a short timeframe, and do not leave the opportunity for public submissions or consultations.[59]

Though delegated legislation is justified for it sanctions administrative efficiency and increases the speed and effectiveness of recovery, this should not overlook New Zealand's status as a democracy. Because of the state's involvement in emergency recovery and rebuilding is required to be intensive for effect, people's rights and interests will almost always be affected by responses and undertakings.[60] As such, good practice on behalf of the body to whom power is delegated should allow for public consultation and submissions to be made when particularly important and largescale Orders in Council are being proposed.

It is accepted that circumstance will exist where legislation must be amended or responses should be made as a matter of dire urgency. However, large scale decisions which regulation-making bodies have a lot of time to plan for should be open for public submissions and consultations.

[54] At 305-310.
[55] Orpin and Pannett, above n 40, at 388.
[56] At 388.
[57] At 387.
[58] Joseph, above n 14, at 1007.
[59] Orpin and Pannett, above n 40, at 387-388.
[60] At 387-388.

This upholds democratic participation and promotes the rule of law in a time when powerholders are otherwise able to surpass the parliamentary process.

C Legislation (or provisions of legislation) which are fundamental to New Zealand's constitutional framework.

New Zealand has an unwritten constitution which encompasses all the means by which the 'system of central government of New Zealand' is established.[61] Legislation is as a whole an important part of the constitutional framework, but certain statutes are particularly fundamental as sources of New Zealand's constitution. This may be because they are central to the functioning of democracy and the institutions of government, or because they protect fundamental rights.

1 Legislation fundamental for the functioning of democracy

There are important enactments which are fundamental to the democratic system of government in New Zealand because they provide for the electoral process. Central to this process is the Electoral Act 1993, which initiated the mixed member proportional system and established the Electoral Commission.[62] Also important to New Zealand's principles of democracy is the Citizens Initiated Referenda Act 1993, which allows citizens to request a referendum be held.[63] Although the results of the referenda are not binding on the Government, they carry important expressions of the views from the people of New Zealand on certain matters. The Local Electoral Act 2001 is also relevant as while it is not concerning central government, it covers a fundamental area of electoral process.[64]

2 Legislation concerning the Governmental system and institutions

Legislation fundamental to our constitutional framework traces back to early English enactments which set up the relationship between the people and the Crown, in the Magna Carta 1297, and the relationship between the legislature and the executive, with Parliamentary Supremacy 'partially identified' in the Bill of Rights 1688.[65] These also had a key role in enshrining the rule of law and rights of the people.

---

[61] Duncan Webb, Katharine Sanders and Paul Scott *The New Zealand Legal System: Structures and Processes* (5th ed, LexisNexis, Wellington, 2010) at 116.
[62] Electoral Act 1993.
[63] Webb, Sanders and Scott, above n 61, at 153.
[64] Local Electoral Act 2001, ss 20-26.
[65] Webb, Sanders and Scott, above n 61, at 141-142.

The most important enactment in defining the different branches which make up the New Zealand Government is the Constitution Act 1986. This consolidates the roles and functions of the legislature, executive and judiciary branches into one enactment along with other provisions of constitutional significance, as well as providing that enactments of the United Kingdom cease to apply to New Zealand.[66] Also notable are the Judicature Act 1908, which details the function of the Judiciary, though much repealed, and the Judicature Amendment Act 1972 which covers the right to judicial review of the use of statutory powers.[67] Also identifiable as fundamental to the constitutional system for setting out governmental functions include the Ombudsmen Act 1975, the Official Information Act 1982,the State Sector Act 1988, and the Public Finance Act 1989.[68]

Also of importance constitutionally is the Treaty of Waitangi Act 1975, which aimed to confirm principles of the Treaty of Waitangi, recognising them in legislation for the first time.[69] This Act created the Waitangi Tribunal, which gave Maori the right to make claims of inconsistency with the Treaty of Waitangi in the actions of the Crown.[70] EJP recommends adopting a statutorily similar provision to section 8 of the Resource Management Act 1991, which requires people exercising powers under the Act to "take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."[71]

3 Legislation protecting rights

Although not supreme or entrenched law, the New Zealand Bill of Rights Act 1990 protects the fundamental rights and freedoms of the individual against the state.[72] It is therefore fundamental to the constitutional relationship between the citizens and branches of government. Other more specific rights are established or protected by other enactments. The Human Rights Act 1993 protects the right to freedom from discrimination and also sets out the Human Rights Commission and the Human Rights Review Tribunal.[73] The Privacy Act 1993 protects the privacy of the individual in the context of collection of personal information, a right which grows in relevance continually with modern technological advancements.[74]

[66] Constitution Act 1986, s 26.
[67] Judicature Amendment Act 1972, s 4.
[68] Kenneth Keith "On the Constitution of New Zealand; An Introduction to the Foundations of the Current Form of Government" in Cabinet Office *Cabinet Office Manual 2008* at 2.
[69] Treaty of Waitangi Act 1975.
[70] Section 6.
[71] Resource Management Act 1991, s 8.
[72] New Zealand Bill of Rights Act 1990, s 3.
[73] Human Rights Act 1993.
[74] Webb, Sanders and Scott, above n 61, at 178-179.

D Recommendation of specific legislation that should never be changed by delegated legislation, even in the context of a national emergency.

This section of the paper will outline the specific legislation that should never be changed by delegated legislation, even in the context of a national emergncy response and recovery effort. The protection of this legislation is justified on the basis that this legislation enshrines fundamental rights, constitutional principles, and good legislative practices.

Though in an emergency situation there may be pressing concerns on executive powers to act quickly and efficiently, it is this submission's contention that there are certain inalienable rights and principles recognised in New Zealand legislation which should never be abandoned even for facilitating response or recovery. There is a fundamental level of civility that core tenets of civil society uphold even in an emergency, and would bring questions of whether society is indeed moving *towards* recovery and normalcy to the fore if they were modified. These are principles and rights that are inalienable from a free and democratic society, which by definition would hold them in place even in an emergency. In fact it may be said that it is "precisely" for the sake of times when there is a "demand to solve some immediate problem by dispensing with certain rights" that such rights and principles are enshrined in legislation in the first place.[75] As expressed by Lord Hoffman in the House of Lords case *A v Secretary of State for the Home Department*, although the government has a duty to protect the lives and property of its citizens, this is a duty "which it must discharge without destroying our constitutional freedoms".[76]

1 Legislation identified as untouchable by the legislation dealing with the Canterbury earthquakes

The Canterbury Earthquake Response and Recovery Act 2010 and the Canterbury Earthquake Recovery Act 2011 both allowed the Governor-General, on recommendation of the Minister, to make Orders in Council which can modify provisions of any enactment.[77] However within these Acts the Orders in Council were expressly exempted from modifying or repealing the Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicature Amendment Act 1972 and the New Zealand Bill of Rights Act 1990.[78] These were therefore recognized as core

[75] Jerome B Elkind "International obligations and the Bill of Rights" [1986] NZLJ 205 at 206.
[76] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 at [95] per Lord Hoffmann.
[77] Canterbury Earthquake Response and Recovery Act 2010, s 6(4); Canterbury Earthquake Recovery Act 2011, s 71(2).
[78] Canterbury Earthquake Response and Recovery Act 2010, s 6(6); Canterbury Earthquake Recovery Act 2011, s 71(6)(c).

legislation of elevated importance. They enshrine fundamental principles of the New Zealand Constitution, and this submission will not purport to neglect their importance with regard to future emergencies. The Constitution Act 1986, as it outlines the branches of government, is essential for guarding the constitutional principle of the separation of powers, thereby upholding the rule of law against any arbitrary use of power.[79] The Judicature Amendment Act 1972, as has been mentioned, upholds the availability of judicial review of executive action.[80] This complements both the constitutional principle of judicial independence and consequently the rule of law by providing means of remedies against misuses of power, stressing its importance.[81] The Electoral Act 1993 enables the people of New Zealand to elect members of the House of Representatives, promoting the rule of law as it provides checks on the power of government, and accordingly the accountability of the executive acting under any delegated legislation.[82] The New Zealand Bill of Rights Act 1990 enshrines rights deemed fundamental to human existence in a free and democratic society, and as such, will be discussed in greater depth below.

Section 71(6)(c) of the Canterbury Earthquake Recovery Act 2011 was amended in 2014 by the Parliamentary Privilege Act 2014 to add this Act to the list, thereby further protecting the principle of absolute freedom of speech in Parliament from the Bill of Rights 1688.[83] Maintaining these statutes as they have already been expressly protected by Parliament is in line with the previously discussed legislative practice of expressly confining the scope of delegated power. This submission would thus recommend they remain under protection in the event of future emergencies. Nonetheless, this list is not exhaustive, as there are numerous other Acts considered constitutional and which protect fundamental rights and principles.

2 Other legislation or provisions which should be recognized as untouchable in emergency situations

(a) Legislation or Provisions dealing with constitutional institutions and the functioning of democracy

There should be consistency in how legislation fundamental to our constitutional framework is dealt with in times of emergency. By having such a restricted list in the Canterbury Earthquake Response and Recovery Act 2010 and the Canterbury Earthquake Recovery Act 2011, many important enactments were still potentially open for modification even if they enshrined similar constitutional principles as the protected enactments. Thus it has been contended that if the

[79] Sections 6-24.
[80] Sections 2-16.
[81] *Laws of New Zealand* Constitutional Law (online ed) at [90], [92].
[82] Section 27; Legislation Advisory Committee, above n 28.
[83] Canterbury Earthquake Recovery Act 2011, s 71(6)(c); Bill of Rights 1688, s 1.

Electoral Act 1993 is 'deemed worthy' then so should the Local Electoral Act 2001 in order to consistently protect the democratic process.[84] Here, the rule of law which maintains that there should be checks on government power is just as necessary at a local level as it is a national one.[85] There should be solidarity in how a principle is treated, to the extent that even the Citizens Initiated Referenda Act 1993 deserves the same protection also, in order to have a cohesive position on the importance of democracy and the voice of the people. This also gives weight to the suggested legislative practice of allowing for public consultation; the Citizens Initiated Referenda Act 1993 could allow for proposed executive regulations to be scrutinized, notwithstanding that the executive would be under no obligation to do so.[86] The Judicature Act 1908 should be also untouchable alongside the Judicature Amendment Act 1972 to uphold the constitutional principle of judicial independence, which gives effect to the constitutional principle of judicial independence, providing a means by which executive accountability can further be achieved.[87]

(b) Legislation or Provisions dealing with the accountability and transparency of the government

Times of emergency present a substantial danger for instances where executive power is misused, so legislation providing functions to hold the executive accountable to the public or affected individuals should be unable to be touched in an emergency. For this reason, as mentioned, it is stressed that the Judicature Act 1908 and the Judicature Amendment Act 1972 be untouched to allow judicial review. There are additional avenues by which the public can seek transparency of information, accountability or redress from the government, such as the Official Information Act 2982, the Ombudsmen Act 1975. It is important that these remain untouchable for the sake of any redress required for instances which may arise during the recovery process. Furthermore, the Treaty of Waitangi Act 1975 provides accountability in respect of the Waitangi Tribunal, binding the Crown to the principles of the Treaty.[88] These were later defined as involving good faith,[89] meaning the constitutional principle of undertaking actions in good faith would be promoted by the Act's protection.

(c) The New Zealand Bill of Rights Act 1990

The inclusion of the New Zealand Bill of Rights Act 1990 in the earthquake recovery legislation indicates that the government is likely to consider it untouchable in the event of future

[84] Orpin and Pannett, above n 40, at 388.
[85] Legislation Advisory Committee, above n 28.
[86] Joseph, above n 14, at 1007.
[87] *Laws of New Zealand*, Constitutional Law (online ed) at [90], [92].
[88] Section 6(1).
[89] *New Zealand Maori Council v Attorney-General,* above n 49 at 705.

emergencies. This is promising as the Act already has a mechanism which allows limitations to rights and freedoms so long as they are 'demonstrably justified in a free and democratic society'.[90] It is thus contended that there is no need for it to be modified further, for fear of tipping the balance within the Act protecting fundamental rights unfavourably.

It is worth stressing, however, that there are certain provisions within the New Zealand Bill of Rights Act that, in keeping with our International Law obligations, should not be touched at all. This is because New Zealand ratified the International Covenant on Civil and Political Rights in 1978, with commitment to it affirmed in the New Zealand Bill of Rights Act.[91] Article 4 of the Covenant concerns the derogation from rights in times of public emergency.[92] Exceptions are made in some articles (6, 7, 8, 11, 15, 16 and 18) which may not be derogated from in such circumstances.[93] These articles contain rights which have parallel provisions in the New Zealand Bill of Rights Act 1990. The right to not be deprived of life,[94] the right not to be subjected to torture or cruel treatment,[95] the right not to be subjected to medical or scientific experimentation,[96] and freedom from retroactive penalties[97], should all be especially protected. It should furthermore be deemed unjustifiable to modify them even in times of emergency to keep with our international obligation to recognise the "inherent dignity of the human person".[98] The right to justice, moreover, is also something to be protected, which is in line with the constitutional principle that the judiciary's independence and jurisdiction should be upheld to hold the executive accountable for potential misuse of delegated power during times of emergency.[99]

(d) Human Rights Act 1993

The Human Rights Act 1993 should also be untouchable in emergencies. It is inextricably linked to the New Zealand Bill of Rights Act 1990 through the amendment made to s 19 of that Act. Section 19 stipulates that everyone has a right to freedom from discrimination based on the grounds of discrimination in the Human Rights Act 1993.[100] The two Acts should be seen

[90] Section 5.
[91] New Zealand Bill of Rights Act 1990, long title.
[92] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).
[93] International Covenant on Civil and Political Rights, above n 92.
[94] New Zealand Bill of Rights Act 1990, s 8.
[95] Section 9.
[96] Section 10.
[97] Section 27.
[98] International Covenant on Civil and Political Rights, above n 92, preamble.
[99] New Zealand Bill of Rights Act 1990, s 27; *Laws of New Zealand* Constitutional Law (online ed) at [90], [92].
[100] New Zealand Bill of Rights Act 1990, s 19(1).

together as expressly untouchable in emergencies, especially since the right to freedom from discrimination is also given specific attention in Article 4 of the International Convention on Civil and Political Rights, which holds against discrimination on the grounds of 'race, colour, sex, language, religion or social origin.'[101] Thomas J provides a compelling argument for considering freedom from discrimination as a fundamental and inalienable right in his dissenting judgment in *Quilter v Attorney-General*.[102] He explains that it is a fundamental right because it is a part of striving for the "ideal that everyone is equal before the law".[103] This upholds the rule of law by way of ensuring equality and protecting against any arbitrary use of power to an individual's detriment.[104] It is this submission's contention that this principle is not neglected for the sake of expediency in an emergency.

(e) Treaty of Waitangi Act 1975

The Treaty of Waitangi Act 1975 acknowledged the provisions of the Treaty of Waitangi 1840 and attempted to incorporate its principles into New Zealand codified law. The Act created the Waitangi Tribunal, which gave Maori the right to make claims of inconsistency with the Treaty of Waitangi in the actions of the Crown.[105] EJP recommends adopting a statutorily similar provision to section 8 of the Resource Management Act 1991, which requires people exercising powers under the Act to "take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."[106]

The Treaty of Waitangi Act 1975 and its predecessor are fundamental documents to the New Zealand constitutional background and therefore it is imperative they are not touched by any national emergency legislation. While not expressly likely to be dealt with under such legislation it is important to recognise its centrality to our constitution and hence something that should never be changed.

Section 6 gives Maori the right to bring a claim with inconsistency with the Treaty. This is highly relevant given the potential land affected by national emergencies. In considering any land matters it is important to confine decisions to that consistent with the Treaty in keeping with Crown obligations to Maori.

3 Recommendation

[101] International Covenant on Civil and Political Rights, above n 92, art 4.
[102] *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 531 per Thomas J.
[103] At 531 per Thomas J.
[104] Legislation Advisory Committee, above n 28.
[105] Section 6.
[106] Resource Management Act 1991, s 8.

As has been mentioned, provided Parliament adopts the legislative practice of expressly outlining the scope of delegated powers to exclude any modifications to the legislation listed, it is this submission's recommendation that the above legislation is included for the reasons provided.

III (4) Establish guiding principles for the expiry of recovery legislation, and of modifications to enactments under associated delegated legislation.

A Guiding Principles for the Expiry of Recovery Legislation

Recovery legislation by its nature goes against the grain of democracy. New Zealand democracy has a few key tenets that need to be considered when looking at the duration of recovery legislation and the executive modifications to existing legislation that come with it. It is accepted that recovery legislation may be an exception to the democratic norm. The point of limiting it through sunset clauses is to make sure that the emergency response does not become normalised.[107] Sunset clauses guarantee that recovery legislation which bypasses our normal democratic process will only be in place as long as necessary.

In determining how long recovery legislation should be enforced it is important to look at the effect it has when in place. Henry VIII provisions, like those used in the CERRA 2010, usurp the role of the legislature by giving the executive the power to make law outside of parliament. This is often necessary to give government the speed and efficiency to handle crises, yet this comes at the price of our regular law making process.[108] We argue that flawed and less-democratic recovery legislation and the laws it produces should expire as soon as possible.

An essential principle of democracy is that it is for the people, by the people.[109] The ideal is that the New Zealand public has a say in what laws they are governed by. Members of Parliament are chosen by the public to act as our representatives in government, and to act on our behalf when passing legislation. Therefore, legislation that is successfully passed through parliament is supposed to have at least gained the consent of the majority of the public, and allowed them to have some sort of say, even if indirect.[110] This gives the law legitimacy.[111] Henry VIII clauses escape this public scrutiny and participation, and therefore are less likely to be regarded as having the consent of the public. Legislation made as Orders in Council also bypasses the New Zealand Bill of Rights Act 1990 (NZBORA), which is in place to protect the fundamental civil rights of New Zealanders. Under s7 of the NZBORA the Attorney General is under an obligation to notify parliament of any inconsistencies between a new piece of legislation and the NZBORA, which encourages awareness and debate about breaches of personal rights in a way that an Order in Council will never match.[112] Recovery legislation is often needed to authorise breaches of rights that may slow down response efforts, however it is essential that executive modifications

[107] Andrej Zwitter *The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in a Liberal Democracy* (2013) 10 Univeristy of Gronigen Faculty of Law Research Paper Series 1 at 30.
[108] Caroline Morris and Ryan Malone *Regulations Review in the New Zealand Parliament* (2004) 4 Macquarie Law Journal 7 at 9.
[109] Zwitter, above n 107, at 20.
[110] Louis L. Jaffe *An Essay on Delegation of Legislative Power: I* (1947) 47:3 Columbia Law review 359 at 359.
[111] Zwitter, above n 107, at 24.
[112] Morris and Malone, above n 108, at 10.

to existing legislation that bypasses public scrutiny and checks only lasts for as long as is really necessary. We do not want breaches of human rights slipping into our law through the back door.

The rule of law is another tenet of democracy that may be violated by Henry VIII clauses. The rule of law being that "all authorities, persons and other entities within the state and the state itself are subject to and act only on basis of law".[113] States of emergency often result in the passing of legislation, like CERA, that come at the expense of the rule of law in the sense that Orders in Council are immune to various avenues of review, including judical review processes, and are deemed to possess the full force of law.[114]

Giving the Executive such power to make legislation also violates the concept of the separation of powers. The separation of powers doctrine results in three branches of government that each have specific and separate roles, and provide checks and balances for each other.[115] Although the line is sometimes murky, and there must be allowances for practicality, the key concept behind this doctrine is that the Legislature makes the law and the Executive executes it. In situations of national emergency, the State expands its powers and the legislative power is shifted away from the Legislature to the Executive. However, in order to prevent a concentration of power in the Executive, it is necessary to limit the duration of recovery legislation to redistribute the power back to the Legislature.

Recovery legislation and Executive law making is necessary and, within reason, acceptable in times of crisis. Although it tests some of our fundamental democratic principles, this is seen as the lesser evil in an emergency. This is on the basis that these breaches of democratic principle stay as the exception. These temporary measures are justified by the needs of the hour but should be guaranteed to expire to ensure they do not become the norm. [116] The longer we allow legislation that does not meet the democratic principles we aim to uphold, the further we will move from a de facto democracy.[117] The Regulations Review Committee has recommended that recovery legislation should last 3 years, which should be sufficient to allow adequate time for addressing any technical difficulties.[118] Any regulations made under an empowering clauses should also include a sunset provision not exceeding 3 years, where it does such a provision should be subject to parliamentary confirmation.[119]

[113] Zwitter, above n 107, at 23.
[114] Dean R. Knight *Shaking our Constitutional Foundations* (2010) 33(4) Public Sector 24 at 24.
[115] Knight, above n 114, at 24.
[116] John E. Finn *Sunset Clauses and Democratic Deliberation: Assessing the Significance of sunset Provisions in Antiterrorism Legislation* (2010) 48 Columbia Journal of Transnational Law 442 at 457.
[117] Knight, above n 114, at 24.
[118] Philip A. Joseph *Delegated Legislation in New Zealand* (1997) 18:2 Statute Law Review 85 at 95.
[119] Regulations Review Committee *Regulation-making Powers That Authorise Transitional Regulations to Override Primary Legislation* (July 2014) at 2.

B CERA 2011 and Modifications to Enactments under Delegated Legislation

It is with great regret that we submit that the Canterbury Earthquake Recovery regime has deteriorated, partly as a result of the extension of the Henry VIII regime and use of Orders in Council for a period of 5 years until expiry in April 2017. There are clearly more democratic and legitimate processes available, which we will discuss hereafter.[120]

Legislation can continue to be suspended and amended for 5 years without the need for Parliament's consent. However, it is clear that the further we advance from 2011, the weaker the argument becomes that use of these Orders in Council is based on "necessity". Ministers may use their powers to achieve goals that do not fall under the categories of "necessity" or "urgency". However, the purpose of the Act, as is the case with its 2010 predecessor, is so wide-ranging that there are easy ways to surpass the normal limitations. Thus, for example, a minister has already considered using the Henry VIII power through an Orders in Council to modify delegated legislation in order to advance clean air initiatives in Canterbury by banning chimneys, which would have been a welcome initiative as serious damage in Christchurch was caused by falling chimneys.[121]

One solution posed by Dean Knight is a speedier, affirmative resolution procedure, likened to the successful scheduling of drugs process under the Misuse of Drugs Act 1975. This solution would establish that Orders could not take effect until approved by resolution of the House of Representatives and scrutinized by the Regulations Review Committee. Such a procedure would provide that Orders would be checked by Parliament and obtain the consent of Parliament through a speedy process without overriding democratic deliberation, vital to New Zealand's constitutional foundation.[122]

However, although the former solution would acknowledge the Rule of Law and uphold Parliamentary sovereignty, the issue of an excessive 5-year period until expiration is not adequately addressed as a means of preventing such a dangerous precedent. Democratic deliberation emphasizes the importance for New Zealanders of exercising their civil and political rights under the New Zealand Bill of Rights Act 1990, for example, the right to freedom of expression. New Zealanders have the right to seek, receive and impart information or opinions of any kind and in any form. [123] Although the Governor-General has the right to make Orders in Council, the New Zealand Bill of Rights Act 1990 is one of few exceptions.[124] Therefore, we stress the importance and constitutional relevance of the New Zealand Bill of Rights 1990 and thus the implied importance of democratic deliberation acknowledged within the CERA itself.

---

[120] Dean Knight " CERA Mark II: Henry VIII Clauses" (13 April 2011) LAWS179 Elephants and the Law <www.laws179.co.nz>.
[121] Knight, above n 114, at 24.
[122] Knight, above n 120.
[123] New Zealand Bill of Rights Act 1990, s 14.
[124] Canterbury Earthquake Recovery Act 2011, s 71.

John Finn recognizes sunset clauses as an important guarantor of good policy-making and protection of civil liberty and stresses his surprise that there is so little academic commentary on the use of proportionate sunset clauses in emergency legislation.[125] However, it is our belief that the lack of academic commentary should not prevent the use of such sunset clauses in New Zealand legislation, as they are a positive solution to the issue of emergency legislation being excessive for its purpose. Sunset clauses improve and advance democratic deliberation in two different ways; firstly, they improve legislation oversight because they compel legislative authorities to reassess public policy on a periodic basis with superior, up-to-date information.[126] Secondly, sunset clauses advance public policy by focusing public attention on important and contentious policy choices that encourage the necessary "public conversation".[127] Thus, an appropriate sunset clause would promote the civil and political rights protected in the New Zealand Bill of Rights Act 1990 and CERA and provide the legislators with superior information and advanced public policy.

Despite the acknowledgement of the importance of the New Zealand Bill of Rights Act 1990, 23 other Acts remain subject to the Governor-General's powers to grant an exemption, to modify or to extend these specific Acts which cannot be challenged through our Court system.[128] Government and legislative response should be "proportionate to the mischief", and the fact that the Governor-General retains this power for 5 years does not demonstrate proportionality in line with basic democratic principles and the rule of law.[129]

It is understandable that the legislators need to act quickly in regard to emergency legislation in circumstances of fear, stress and panic. However, such action may lead to legislation which is poorly drafted or more expansive than is necessary, as has been the case in anti-terrorism legislation.[130] At the very least, a proportionate sunset clause should be established to guarantee a subsequent hearing which can occur in a political environment less overwhelmed by a sense of urgency.[131] Without political bias here, we put forward for initial consideration, the reasonable suggestion of Green MP, Russel Norman that a 6-month sunset clause be written into the Act with the flexibility of a further extension for an additional 6 months in order to cover a period of urgency and necessity.[132]

Overall, a proportionate sunset clause would advance two basic constitutional norms: (i) accountability and (ii) transparency and democratic deliberation. Firstly, accountability requires government action to be subject to review by other political and social actors and it requires the

[125] Finn, above n 116, at 444.
[126] Finn, above n 116, at 449.
[127] Finn, above n 116, at 450.
[128] Canterbury Earthquake Recovery Act 2011, s 71.
[129] Dean Knight "Canterbury Earthquake Response and Recovery Bill: Constitutionally Outrageous" (14 September 2010) LAWS179 Elephants and the Law <www.laws179.co.nz>.
[130] Finn, above n 116, at 450.
[131] Finn, above n 116, at 454.
[132] Russel Norman "Earthquake Bill Passes Tonight" (14 September 2010) Green <www.blog.greens.org.nz>

government to uphold the rule of law by providing justification for such changes which are publicly accessible.[133] Secondly, transparency and democratic deliberation reaffirm that the rule of law should be undertaken publicly and should conform to published public law standards, thus encouraging public involvement and improved information.[134]

It is our clear belief that fundamental democratic principles are negatively impacted by emergency legislation in New Zealand and that emergency legislation should only be considered where urgency and necessity demand. Therefore, it would be reasonable to consider Russel Norman's 12-month plan as an initial consideration. However, the Regulations Review Committee has already recommended that recovery legislation should last for 3 years, which should be sufficient to allow adequate time for addressing any technical difficulties.[135] Any regulations made under an empowering clause should also include a sunset provision not exceeding 3 years and where it does, such a provision should be subject to parliamentary confirmation.[136] We submit that a sunset solution could consist of a 6-month urgency period with a 12-18 month period to address any technical difficulties.

As 27 Constitutional academics have already warned New Zealand and its Parliament, the recovery legislation will set a precedent for future "emergency" situations, which are inevitable in our country.[137] Clearly, the precedent set in 2010 was a dangerous one as the 2011 Act followed with little change to the issue of legal accountability and the extension of an expiry date. In fact, the 2011 Act added another piece of legislation which can be affected by an Order-in-Council without Parliamentary, judicial or public scrutiny. Parliament ought to reconsider its approach to the expiry of emergency legislation so that a constitutionally acceptable precedent can be set for the future.

C Conclusion

It is important to note that we share in the purposes of CERA 2011. However, we do not share the process of forsaking established constitutional values and principles in order to achieve these purposes when it is possible to involve Parliament in the Orders in Council process and attach a proportionate limit to the excessive period of time until expiry. Overall, we hope to have outlined the general principles of our democracy that are negatively affected by emergency legislation due to a lack of proportionality in regard to the expiry date. Orders in Council provided for by an unwelcome Henry VIII regime in a modern democracy escape the Rule of Law, the separation of

[133] Finn, above n 116, at 458.
[134] Finn, above n 116, at 458.
[135] Philip A. Joseph *Delegated Legislation in New Zealand* (1997) 18:2 Statute Law Review 85 at 95.
[136] Regulations Review Committee *Regulation-making Powers That Authorise Transitional Regulations to Override Primary Legislation* (July 2014) at 2.
[137] Andrew Geddis "An open letter to New Zealand's people and their Parliament" (28 September 2010) Pundit <www.pundit.co.nz>.

powers, Parliamentary sovereignty, accountability, transparency and democratic deliberation which is promoted in particular by our New Zealand Bill of Rights Act 1990. Above all, we submit that 23 pieces of legislation should not be subject to a lack of democratic deliberation, transparency and legal accountability for a period of 5 years without serious challenge and re-assessment by legislators. As this submission has maintained, there are legitimate alternatives to expiry which are more consistent with democratic values and could be implemented in the face of a future disaster in New Zealand.

IV (6) Determine the extent and nature of the parliamentary scrutiny that would be appropriate in passing a recovery bill

A Introduction

The passing of a recovery bill in times of national emergency or disaster is something that is essential. However, the necessity of passing such legislation does not mean that parliamentary scrutiny of such a legislative response should be deprioritised. The sheer amount of power such legislation seeks to introduce to the Executive should not be undermined.

The Canterbury Earthquake Response and Recovery Act 2010 is an excellent example of poorly drafted and poorly enacted recovery legislation. This Act placed significant power with the Executive and had a high risk of allowing maintenance of the principles of the rule of law to be undermined.

Whilst the Canterbury Earthquake Recovery Act 2011 (which repealed the 2010 Act) was more adequately drafted, it is still not a perfect example of recovery legislation.

As will be demonstrated, it is clear that recovery bills passed in response to national emergencies or disasters must be afforded more parliamentary scrutiny than is currently afforded to them. Thus, it is the position of the Equal Justice Project is that more parliamentary scrutiny must be afforded to recovery bills passed in the future.

An examination of previous emergency power Bill's may give insight into the scrutiny likely to be afforded to a new Bill if it were to pass.

B Legislative History of the Canterbury Earthquake Response and Recovery Act 2010

On September 4 2010, a large earthquake struck the Canterbury region requiring the New Zealand Government to pass emergency legislation to facilitate an effective response to the disaster.

On the 14th of September 2010, leave was given to pass the legislation under urgency and to extend the sitting hours of the House beyond 10pm.[138]

1 First Reading (14 September 2010)

The Bill was introduced by Hon Gerry Brownlee (Minister for Canterbury Earthquake Recovery). It is introduced as a Bill to remove statutory bureaucracy and hence increase the

[138] (14 September 2010) 666 NZPD 13899.

speed in which emergency measures may be passed through Parliament. Phil Goff on behalf of Labour strongly supported and commended the government for introducing the Bill, with little reservations. Green also moves to support this bill, however Dr Kennedy Graham strongly referred to Parliament's continuing obligation to the political process and democracy. Hon John Boscawen for Act similarly fully supported the Bill. Hon Tariana Turia on behalf of the Maori party also fully supported the Bill, however showed reservations as to the avenues of accountability. Hon Ruth Dyson on behalf of Labour outlined the necessary scrutiny to be given to the specific provisions of the legislation, but commended the spirit of the legislation as an emergency response tool by Parliament. On the First Reading the Bill passed with full support.[139]

2 Second Reading (14 September 2010)

The Bill passed a second reading with predominant support from the House. Particular notice of the extremities of the Bill was given by Hon Ruth Dyson on behalf of Labour, with reference to the Orders in Council suspending legislation. Dr Russel Norman on behalf of the Green Party also acknowledged the virtually unlimited aspect of legislation that could be amended by the Bill. The major level of scrutiny appeared to come from the Green Party. The strongest scrutiny of the Bill came from the proposed legislation that could be amended by the Act were it to come into force. The suggestion was to remove the clause "but not limited to" to restrict amendments to specifically listed legislation in the Act. A total of 52 Ayes and 69 Noes were counted, with the amendment being supported by NZ Labour, Green, and Progressive. Many amendments were also suggested by the Green Party, suggesting that the largest amount of scrutiny will come from this party in the future.[140]

3 Third Reading (14 September 2010)

While many amendments were not agreed to in the Second Reading, the Bill passed with majority support of the House.[141]

The Bill was assented to the same day, and came into force the next day.

4 What is Demonstrated by the Legislative History of the Canterbury Earthquake Response and Recovery Act 2010

[139] (14 September 2010) 666 NZPD 13899.
[140] (14 September 2010) 666 NZPD 13934.
[141] (14 September 2010) 666 NZPD 13959.

What is clearly demonstrated by the Parliamentary debates during the passing of this piece of recovery legislation is that whilst it was received majority support across the political spectrum, there were many reservations raised by Members of various different political parties.

The reservations that were raised focussed primarily on the implications that the legislation had on the legislative and democratic process, and the limited avenues for accountability.

However, despite the serious nature of these reservations, the bill was passed and came into force. Given the circumstances of the time, being the first major earthquake in the Canterbury region and the immediate necessity for emergency powers to be granted, it can be seen why this legislation was able to be passed into law. The circumstances of this time allowed for very serious concerns raised by some members to be overlooked, the implications of this is that an extremely powerful, yet poorly drafted and poorly contemplated piece of legislation was able to successfully move through the House and become law within a single day.

C Criticism of the Canterbury Earthquake Response and Recovery Act 2010

The Canterbury Earthquake Response and Recovery Act 2010 has been the subject of extensive criticism.

As is clear from the hasty manner by which the 2010 Act was passed, there was extensive criticism focussed on the lack of public consultation in the legislative process.

One of the significant implications of the 2010 Act was that an 'Order in Council' mechanism was created which had the effect of allowing Government Ministers to relax or suspend almost every other Parliamentary Act. The purpose of this mechanism was to prevent other legislation from diverting resources away from the response effort.[142]

The only statutes that were exempt from this 'Order in Council' mechanism were that of the Bill of Rights Act 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicature Amendment Act 1972, and the New Zealand Bill of Rights Act 1990. This exemption was provided for by s 6(c) of the Act. However, given the limited scope of the exemptions under s 6(c), the 'Order in Council' mechanism provided for under the 2010 Act could potentially be used to relax, alter or suspend legislation that is completely unrelated to the Canterbury Recovery effort. This is a result of the s 6(c) exemption not extending to cover legislation such as the Crimes Act, and tax and revenue legislation.[143]

[142] Adam Bennett "Concerns over power new bill gives ministers" *The New Zealand Herald* (online ed, Auckland, 15 September 2010).
[143] New Zealand Law Society "Law Society comments on Canterbury Earthquake Response and Recovery Act" (press release, 29 September 2010).

As a result of the wide scope of the 'Order in Council' mechanism, the legislation had a very broad reach and conferred significant powers upon the Executive. As such, the 'Order in Council' mechanism was heavily criticised by the New Zealand Law Society as being 'potentially at odds with maintenance of the principles of the rule of law'.[144]

For the New Zealand Law Society to make such a serious accusation demonstrates how poorly drafted the 2010 Act was and how the extent to which it conferred emergency powers upon the Executive was inappropriate even in the circumstances of the Canterbury Earthquake response effort.

As such, the 2010 Act provides a very clear example of exactly what recovery legislation should not be.

D Legislative History of the Canterbury Earthquake Recovery Act 2011

On 22 February 2011, a second major earthquake struck the Canterbury region. This earthquake had devastating effects both in terms of the significant loss of life and the immense damage caused to the Christchurch Central Business District, and the surrounding region.

As a result of this second major earthquake, and its subsequent aftershocks, the Government enacted further recovery legislation to replace the Canterbury Earthquake Recovery and Response Act enacted in 2010 in response to the first earthquake in September.

1 First Reading (12 April 2011)

A party vote was called to shift the matter to one of urgency. This was agreed to by a majority of 68 Ayes to 54 Noes. The Bill was introduced as one "to provide appropriate measures to ensure that greater Christchurch and its communities respond to, and recover from, the impact of the earthquakes." Hon Clayton Cosgrove on behalf of Labour suggested being far more tentative than in the previous Bill, with particular acknowledgement of the checks and balances in place on the vast amount of power the Bill confers. A party vote was called on the First Reading of the Bill. It passed with 111 Ayes by NZ National, NZ Labour, ACT NZ, Maori Party, Progressive and United Future. It had 11 Noes by the Green Party and the Independents - C Carter and Harawira.[145]

[144] New Zealand Law Society, above n 143.
[145] (12 April 2011) 671 NZPD 17898.

2 Second Reading (12 April 2011)

The debates on the Bill resumed after a short Select Committee process. Hon Ruth Dyson on behalf of Labour commended the legislation, but emphasized the need to follow the appropriate Parliamentary process to ensure the legislation was without fault. She emphasized the submission of the New Zealand Law Society which was critical of the ability of Orders in Council to override enactments. The other concern was the lack of community engagement in the process. Dr Kennedy Graham on behalf of Green was largely critical of the sovereign decision-making power throughout the phases of emergency, recovery and rebuilding. Similarly he agreed with Hon Ruth Dyson's approach that the community forum should be more engaging and representative. Finally, scrutiny was given to the extent of powers that the legislation afforded. A vote was called as to the Second Reading of the Bill, with a total of 111 Ayes and 11 Noes, which were from the Green Party and Independents Carter C and Harawira.[146]

3 Select Committee (12 April 2011)

The amendments that received the most criticism regarded community engagement and the period of community consultation. Other criticism generally centred around Orders in Council. An amendment introduced by Hon Lianne Dalziel suggested having the process for judicial review for Orders in Council. This was negatived however.[147]

4 Third Reading (12 April 2011)

Dr Kennedy Graham on behalf of Green critiqued the delegation of power to central government away from local government. Rahui Katene on behalf of the Maori Party commended the legislation, acknowledging however the checks that are in place and how the residual powers under the Act should only be used sparingly. The Bill was passed with a majority of 109 Ayes to 11 Noes. Scrutiny and opposition came from the Green Party and Independents Carter C and Harawira.[148]

5 What is Demonstrated by the Legislative History of the Canterbury Earthquake Recovery Act 2011

The legislative history of the Canterbury Earthquake Recovery Act 2011 demonstrates that whilst some of the issues of the first Act were addressed, many criticisms and issues were

[146] (12 April 2011) 671 NZPD 18129.
[147] (12 April 2011) 671 NZPD 18151.
[148] (12 April 2011) 671 NZPD 18225.

not. The consultative process of the 2011 Act was improved from that of the 2010 Act however it was still left severely lacking.

Furthermore, there was a lot of critique from Ministers during the legislative process, much of which went unheard as a result of the nature of the Canterbury Earthquake crisis.

Crucially what is demonstrated by the legislative history is that of the hastily drafted nature of the legislation, and the speed by which it was passed through Parliament. This is something that the Equal Justice Project believes needs to be addressed in the future.

E Criticism of the Canterbury Earthquake Recovery Act 2011

The concerns and criticisms of the 2010 Act were unfortunately not addressed during the drafting and enactment of new legislation in 2011.

One major criticism that was made was that the powers conferred by the 2011 Act were more extreme than anything seen since wartime emergency legislation. As such, it has been argued that the 2011 Act confers powers that are far more excessive than what is necessary to address the earthquake recovery effort.[149]

Furthermore, the consultative process during the passing of the 2011 Act was severely lacking. Unlike the 2010 Act, there was in fact a select committee process. However, this process was very limited as the legislation was referred to the Committee on April 12 to be reported back to Parliament on April 14. Furthermore, "the committee was not empowered to recommend amendments, only to hear evidence and report."[150]

Significantly, those wishing to make submissions to the Select Committee were unable to access the draft legislation until 4pm of the day before the Select Committee was due to hear their submissions.[151] As such, those making submissions had their ability to actually comment on the draft legislation severely limited.

To allow such a process to go ahead without giving submitters a reasonable period of time to actually review the legislation before the Select Committee, risks undermining the entire function and purpose of the Select Committee process.

As such, it is clear that consultative process of this particular piece of legislation was far from ideal. Particularly given the

[149] Megan Gall "A Seismic Shift: Public Participation in the Legislative Response to the Canterbury Earthquakes" (2012) 18 Canta LR 232 at 242.
[150] Gall, above n 149, at 241.
[151] Gall, above n 149, at 240.

F What Levels of Scrutiny Ought to be afforded to the Passing of Recovery Legislation in the Future

(a) Effect on other Legislation

One of the key issues that have been highlighted in this paper is that of the broad effect that recovery legislation can have on other statutes. As has been highlighted, the 2010 Act allowed almost every statute on the Government books to be altered, relaxed or suspended. The effect was by manner of and Order in Council and was provided for by s 6(4) of the Act, of crucial importance was the inclusion of the words 'including (but not limited to)' in the provision. Similar wording was also seen in the 2011 Act under s 71 were a list of statutes which may be subject to the order in council mechanism was included however s 71(3) noted that the list was not exhaustive.

As already mentioned, the exceptions to s 6(4) of the 2010 Act were incredibly limited which provided for the potential for many statutes that were entirely unrelated to the Earthquake recovery effort to be altered via s 6(4). Under the 2011 Act, the exceptions to s 71(3) were expanded when compared to the 2010 Act, however this expansion was very minor.

It is the position of Equal Justice Project that when future recovery legislation is passed, the scope of the legislation to effect other Parliamentary statutes should be limited. An exhaustive list of legislation which may be affected should be included rather than a non-exhaustive list with a small number of very limited exclusions as was provided for in the 2010 and 2011 Acts.

(b) Expiration of Recovery Legislation

The 2010 Act had an original expiration of 1 April 2012 (as provided for under ss 17 and 21), however the 2010 Act was ultimately repealed upon the commencement of the 2011 Act on 19 April 2011. Despite this, having an original expiration period of more than a year for a piece of legislation that confers significant and far-reaching power upon the Executive, without first having public consultation and approval, is something that deserves far more attention.

A possible avenue for adding further scrutiny to this area of recovery legislation, is to have an initial period of expiry of approximately 6 months (dependent, of course, on the nature of the relevant emergency). Upon review by Parliament, this period of 6 months could be further extended as deemed necessary by Parliament and upon a successful majority vote.

Having such a procedure would allow recovery legislation to be passed and enacted but would also provide that such legislation is subject to regular and thorough scrutiny and does not remain in force any longer than is absolutely necessary.

An important feature of such a process would allow control to be handed from the Executive back to the Legislature, this would further promote accountability and transparency.

(c) Subsequent Review

As already outlined above, one of the proposals put forward at the committee stage of the passing of the 2011 Act, was to provide for orders in council made by the Governor-General to be subject to judicial review. The effect of this would have been to provide for the power exercised under this legislation to be subject to further scrutiny, allowing for more public confidence in the exercise of power by the Executive and to ensure the appropriate exercise of these powers. However, this proposal was negatived and did not make it into the Act.

It is the position of the Equal Justice Project that judicial review of orders made under this legislation ought to be an avenue for review that is available, and it was a mistake for this proposal to be negatived.

Furthermore, it is the position of the Equal Justice Project that future emergency legislation allows for such a right of review to be available.

Furthermore, s 74(2) of the 2011 Act provides that when a Minister makes a recommendation for an Order in Council to be made, that "recommendation of the relevant Minister may not be challenged, reviewed, quashed, or called into question in any court."

This further demonstrates an absence of any form of recourse against any exercise of power under the legislation and heavily reduces the Government's accountability for decisions made.

In the future, recovery legislation ought to be subject to some form of review to ensure that not only is there scrutiny at the legislative stage of enacting recovery legislation, but also that there is scrutiny throughout the period for which the legislation remains in force.

(d) Actual Scrutiny During Legislative Process

As has already been outlined, the consultative processes during the passing of both the 2010 and 2011 Acts were extremely limited.

Whilst the 2011 Act did provide for some avenue of consultation, in reality the success of this was minimal on the basis of not allowing submitters access to the draft legislation, and not empowering the select committee to propose any amendments to the legislation.

In future, it is recommended that more effort must go to ensuring that an avenue for public consultation is provided for during the passing of emergency recovery legislation, and in doing so it is crucial to allow the Committee to do more than hear evidence and report back to Parliament, the Committee must also be empowered to propose amendments to the legislation.

(e) Section 75 of the Canterbury Earthquake Recovery Act 2011

In relation to Orders in Council made under the Act, s 75(5) of the Act provides that "so far as it is authorised by this Act, an order has the force of law as if it were enacted as a provision of this Act"[152]

This is an example of a *Henry VIII clause*, which allows an amendment of primary legislation using delegated legislation by the Executive branch, with or without further Parliamentary scrutiny. Put simply, as a *Henry VIII clause*, s 75(5) of the 2011 Act allows the Executive to amend legislation passed by Parliament without being required to undertake the usual legislative process.

The use of such *Henry VIII clauses*, should be very restrained in the future. Such clauses should not be included except for in the most extreme of circumstances. The Canterbury Earthquakes and the subsequent emergency did not justify the inclusion and use of such clauses and as such they ought not to have been included in the legislation.

The inclusion of such clauses demonstrates a severe lack of scrutiny and accountability, and is something to be avoided in the future.

[152] Canterbury Earthquake Recovery Act 2011, s 75(5).

G Conclusion

- It has been clearly demonstrated that whilst the Canterbury Earthquake Response and Recovery Act 2010 is a very poor example of emergency recovery legislation, the Canterbury Earthquake Recovery Act 2011 did not make many improvements.
- In the future, unlike the 2010 Act, emergency legislation should not be permitted to grant unbridled and unchecked power to the executive. To allow such unrestrained executive power creates the risk of misuse, and inequitable consequences.
- It is clear that in the future, to prevent an abuse of executive power in the context of facilitating recovery from an emergency, greater checks and balances need to be in place to ensure that such executive power is appropriately prescribed and used in such a manner.
- It is also crucial that legislation and delegated legislation in the context of an emergency should have specific objectives. This promotes accountability in ensuring that decision making accords with the intended objectives.
- There should be clear limitations and narrow grounds in allowing the executive to amend legislation, such as through an Order in Council.
- Furthermore, executive decision-making, including amending parliamentary enactments, should be subject to judicial review.
- Ultimately, the passing of a recovery bill and the subsequent delegation of power to the executive should be subject to clear, formal measures of oversight. Such a requirement in the passing of recovery bills is essential to ensure the mistakes of the 2010 and 2011 Canterbury Earthquake Acts are not repeated again in the future.